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EXPERT GROUP WORKSHOP ON INTERNATIONAL
ENVIRONMENTAL LAW AIMING AT
SUSTAINABLE DEVELOPMENT

Third (final) Meeting
Washington, D.C., 30 September-4 October 1996

FINAL REPORT OF THE EXPERT GROUP WORKSHOP ON INTERNATIONAL ENVIRONMENTAL LAW AIMING AT SUSTAINABLE DEVELOPMENT

1. The Expert Group Workshop on International Environmental Law Aiming at Sustainable Development was convened by the United Nations Environment Programme (UNEP) in collaboration with the Center for International Environmental Law (CIEL) and the American University's Washington College of Law pursuant to UNEP Governing Council decisions 17/25 and 18/9 with the purpose to provide expert advice regarding the mid-term review of the UNEP Programme for the Development and Periodic Review of International Environmental Law for the 1990's (Montevideo Programme II) requested by decision 17/25, and, in the process of preparation for this review, to contribute to the development of a position paper for international environmental law aiming at sustainable development (Position Paper) and of a study on the need for and feasibility of new international environmental instruments aiming at sustainable development (Feasibility Study), both requested by decision 18/9. The Workshop consisted of senior academic and governmental lawyers from different regions acting in their personal capacity.

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2. The First Meeting of the Expert Group Workshop, held in Washington, D.C. from 13-15 November 1995, elected its Bureau (Chairman: Ambassador W. Lang, Vice-Chairman: Ambassador B. Maiorski, Rapporteur: Mr. D. Hunter, and Executive Secretary: Mr. A. Timoshenko). On the basis of a background paper prepared by the Rapporteur the Meeting considered the structure and content of the Position Paper, suggested a focused outline for it and recommended that the work on the Feasibility Study be considered and reviewed during the process of preparation of the Position Paper. It was agreed that in preparation of the Position Paper some key issues related to the review of the Montevideo Programme II envisaged for 1997 should also be addressed.

3. The Second Meeting, held in Washington, D.C. from 22-24 May 1996, discussed the Chairman's first draft Position Paper taking into account the results of the International Expert Workshop on Compliance with International Environmental Agreements convened by UNEP in cooperation with the Georgetown University Law Center in Washington, D.C. on 20 and 21 May 1996 (the report of the Workshop is attached as Annex IV). The first draft Feasibility Study prepared by a UNEP consultant was also reviewed. The Meeting resulted in the first reading of the draft Position Paper and comments on the draft Feasibility Study.

4. The Third (final) Meeting of the Workshop, held in Washington, D.C. from 30 September-4 October 1996, considered the second draft Position Paper presented by the Chairman, revised it, and prepared the final draft attached to this report as Annex I. The Meeting also considered the revised draft Feasibility Study and provided substantive comments to it. It was suggested that immediately upon completion of its deliberation by the Third Meeting the UNEP secretariat, in cooperation with the Rapporteur, should finalize the draft Feasibility Study in light of the above comments (the final Draft Feasibility Study is attached as Annex II).

5. The Meeting further considered the text of the Montevideo Programme II and made observations with regard to its implementation since 1993 and in light of the new and emerging challenges of sustainable development (those observations will be found in Annex III).

ANNEX I

DRAFT POSITION PAPER ON INTERNATIONAL ENVIRONMENTAL LAW AIMING AT SUSTAINABLE DEVELOPMENT

Introduction

1. Consistent with the United Nations Environment Programme's (UNEP's) general mandate to further the development of international environmental law, this Position Paper responds to UNEP Governing Council decision 18/9, paragraph 4, which requests that the UNEP Executive Director develop a "position paper for international environmental law aiming at sustainable development, containing, *inter alia*, compliance/implementation mechanisms, dispute avoidance/settlement procedures and new concepts and principles, with reference to existing international legal instruments as well as guidelines developed by institutions both within and outside the United Nations system." The position paper was developed with assistance of three meetings of an Experts Group on International Environmental Law Aiming at Sustainable Development, convened by UNEP and organized in cooperation with the Center for International Environmental Law (CIEL).

2. Since 1982, UNEP's action in the development of international environmental law has been guided first by the 1982 "Programme for the Development and Periodic Review of Environmental Law" (the Montevideo Programme) and, more recently, by the 1993 Programme for the Development and Periodic Review of Environmental Law for the 1990's (Montevideo Programme II). The Montevideo Programme II defines objectives, strategies, and priorities for each of the eighteen program areas, and identifies several additional subjects for possible action during the decade. Implementation of Montevideo Programme II is continuously evolving to be consistent with implementation of Agenda 21 and changing perceptions and priorities. For these purposes, UNEP Governing Council decision 17/25 provided for an intermediate review of the Montevideo Programme II not later than 1997. This request has been complemented by UNEP Governing Council decision 18/9, which requested that this Position Paper and other documents relating to international environmental law aiming at sustainable development be prepared in the context of the review of Montevideo Programme II. The review of international environmental law in general and of the implementation of the Montevideo Programme II provides insight into further actions for the development of international environmental law aiming at sustainable development.

3. Part I of the Position Paper briefly reviews the current status of international environmental law, particularly as it relates to achieving sustainable development. Parts II-V address compliance and implementation, dispute avoidance and settlement, new concepts and principles, and liability and compensation, respectively. Part VI discusses the need for, and feasibility of, new international environmental instruments based on a study requested in UNEP Governing Council decision 18/9, paragraph 5. Part VII recommends specific priorities for action to ensure the further development and effective implementation of international environmental law related to achieving sustainable development.

I. Current status of international environmental law

4. Sustainable development was the foundation underlying the 1992 United Nations Conference on Environment and Development (UNCED), which not only affirmed the goal of sustainable development, but added critical meaning and substance to the concept. As suggested by UNEP Governing Council decision 18/9, the purpose of this position paper is to review international environmental law in the light of sustainable development.

5. International environmental law has developed as a rapidly growing specific field of international law. The field is comprised of numerous international conventions, international custom, general principles of law, judicial decisions, certain acts of international organizations, teachings of certain publicists, and many non-legally binding instruments.

6. Since UNCED, the United nations Framework Convention on Climate Change, the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea have all come into force, as have a number of regional and bilateral conventions. The United nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa will also enter into force in December 1996. A number of non-legally binding instruments, including for example the declarations and programmes of actions from the Cairo International Conference on Population and Development, the Copenhagen World Summit for Social Development, the Beijing Fourth World Conference on Women, and the Istanbul Second United Nations Conference on Human Settlements have elaborated the relationship between environmental protection and other aspects of sustainable development. Certain judicial and other decisions, including the 8 July 1996 International Court of Justice Advisory Opinion addressing international environmental law in the context of the threat or use of nuclear weapons in armed conflict, have also contributed to the further development of international environmental law. The increasing number of binding treaties and other instruments that address environmental issues solely and directly or those that include or take into account environmental issues as part of their regulatory framework reflects the growing concern with the environment and the need for international cooperation. In addition to continuing to address specific resource management and health issues, international environmental law will also increasingly emphasize processes and procedures as in the UNECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context and a legally binding Prior Informed Consent instrument for certain hazardous chemicals currently being negotiated.

7. In keeping with events since the 1972 United nations Conference on the Human Environment (Stockholm Conference), a growing number of actors are now involved in the field of environment. International environmental agreements, for example, frequently create conferences of the parties, secretariats, implementation committees, technical bodies, and advisory groups. International financial and development institutions are involved increasingly in implementation of environmental treaties as they aim toward sustainable development. Similarly, regional institutions, particularly in the context of regional economic integration, are increasingly addressing environmental

issues. The role of non-governmental actors, including, *inter alia*, private industry, the scientific community, academic institutions, and environment and development organizations, is increasingly recognized as critical for the development and implementation of international environmental law. The growing number of actors involved in the field of environment offers flexibility and opportunities for innovation in resolving environmental and sustainable development problems. It also raises challenges to ensure coordination, consistency and adequate funding.

8. Because of the broad range of issues related to sustainable development, international environmental law intersects with other fields of law. The interaction of international environmental law with other fields, for example international trade, intellectual property rights, humanitarian law, or human rights, has received increasing attention and remains a major challenge for achieving sustainable development.

9. International and national environmental law are interdependent. International environmental law has implications for the priorities, goals and strategies of national law, while advances in national constitutions and other laws may provide evidence of evolving international environmental norms. International law also assists in disseminating successful approaches among States, thereby facilitating the harmonization of environmental law. In some instances international environmental law also provides a framework for financial and technical assistance for strengthening national laws and building national capacity to meet international obligations. In turn, international environmental law is in most cases implemented through national law and thus depends on national law for its effectiveness.

10. The current status of international environmental law reflects progress in the implementation of the Montevideo Programme II. Many of the above-mentioned developments are closely related to, or constitute relevant subject areas of, the Montevideo Programme II.

11. As international environmental law has evolved, it has developed certain characteristics particularly important for achieving sustainable development. International environmental law increasingly reflects an integrated approach by taking into account social and economic development goals. International environmental law also recognizes the disparities in relative development levels, allowing for differentiated implementation schedules, financial resources and technology transfers as ways to assist developing countries in meeting their international obligations. International environmental law also reflects a growing role for non-State actors and recognizes the need for broad participation in environment and development decisions. More generally, in moving toward sustainable development, international environmental law is inspiring new and innovative concepts, principles and ideas, and developing facilitating and enabling mechanisms and procedures in areas such as implementation, compliance, dispute avoidance, and dispute settlement. It is thereby playing an increasingly important role in promoting the integration of environment and development and providing an effective legal and regulatory framework for implementing Agenda 21.

II. Implementation and Compliance

12. Increasing attention is focused on improving the effectiveness of existing environmental instruments, particularly through improving compliance and implementation. Compliance and implementation can be improved in part by identifying and addressing potential problems during negotiations of international instruments. Ultimately, however, compliance and implementation depend on the existence and effectiveness of corresponding national legislation, institutions, and policies, including those that ensure access to judicial and administrative fora, and national capacity and will to implement them. More research, including case studies, is necessary to understand issues that occur at the national and subnational level. Lessons learned from such research will enhance compliance and implementation and also provide useful information to future treaty negotiations and revisions.

13. Compliance with international environmental obligations frequently requires resources, including technologies or technical expertise, that are not readily available, particularly in developing countries. Often a failure to comply reflects a lack of capacity, rather than a lack of will. Accordingly, reliance on sanctions will typically not be appropriate except in response to flagrant violations of international norms caused by a lack of will and not by a lack of capacity. As reciprocity with respect to sanctions is often not feasible in international environmental law, withdrawal of membership rights may often be the only viable option.

14. Due to the global nature of some environmental issues and the potentially high cost of compliance, particularly for developing countries and countries in transition, new "enabling" measures are emerging that facilitate and promote compliance and implementation in a spirit of global partnership. These mechanisms include the provision of additional financial resources, technical assistance, transfer of technology, capacity building, and specific cooperative approaches such as joint implementation under the United Nations Framework Convention on Climate Change. One recent example that seeks to identify appropriate enabling mechanisms is the non-compliance procedure under the Montreal Protocol on Substances that Deplete the Ozone Layer, which allows countries to report difficulties with compliance to an implementation committee, thereby enlisting the help of other Parties in achieving compliance.

15. Building the capacity of developing countries to implement their international obligations remains among the most crucial challenges for enabling compliance. Some capacity building efforts, particularly financial support and technology transfer provisions of specific international environmental treaties, are unique and essential features of international environmental law. In the future, increased cooperation and new partnerships with and among different actors, including for example the financial institutions, industry, and environment and development non-governmental organizations, will be critical for improving compliance and implementation.

16. International environmental treaties rely substantially on self-reporting. Countries are obligated to report on a broad range of activities,

including, for example, efforts to curb trade in endangered wildlife, reduce greenhouse gas emissions, eliminate production of ozone destroying substances, and conserve biological diversity. National reporting is also an important element for evaluating progress in implementing Agenda 21. Compliance with reporting requirements could be enhanced by, *inter alia:* increasing capacity to gather information and compile the necessary reports; streamlining, harmonizing and integrating existing reporting requirements; increasing transparency and public involvement in reporting; and adopting new technologies and methodologies for reporting. International cooperation and assistance should also be targeted to assist developing countries and countries in transition to implement coherent, effective and credible reporting systems.

17. Subject to their constitutive instruments, treaty secretariats can also play an enhanced role in monitoring compliance with, and improving implementation of, the obligations of Parties. In this regard, Secretariats should cooperate with one another in areas of common expertise and responsibility. National compliance plans containing specific and measurable benchmarks should be developed and submitted to treaty secretariats at or near the time of ratification. Treaty secretariats should assist Parties to ensure that domestic legislation conforms with treaty obligations and national compliance plans. Secretariats should also cooperate with the international financial institutions to assist countries to enhance their capacity to meet their international obligations. The international financial institutions should also ensure that projects they finance or support are in conformity with the requirements of applicable international and national environmental law.

18. Enhancing available fact-finding mechanisms could improve compliance and implementation. As one example, the OECD's independent review of the environmental performance of each member country includes implementation of international treaties. Broader use of fact-finding and inspection powers should also be considered as important methods for identifying and publicizing non-compliance. New fact-finding powers like those found in the inspection mechanisms of some multilateral development banks provide important examples for future efforts. Some experiences from other fields, for example human rights, labour standards, and disarmament treaties, may also provide valuable lessons for expanding the use of fact-finding in the environmental field.

19. Regional approaches to enhancing implementation and compliance may play an important role in the future. Processes of regional economic integration to the extent they aim at sustainable development may contribute to monitoring or enhancing environmental performance.

20. The role of non-State actors in facilitating a State's compliance and implementation is increasing and should be enhanced. Many non-State actors have expertise and resources to monitor and assist implementation efforts and draw attention to incidents of non-compliance. Non-State actors working cooperatively with governments can contribute significantly to a culture of compliance by helping to build the capacity for implementation, by assisting in the transfer and dissemination of technology and knowledge, and by raising the general awareness of environmental issues. To enhance the role of non-State actors, their participation should be allowed and encouraged in the

development and implementation of international environmental instruments, and more access to information about compliance and implementation should be provided by international and national institutions. Increased education concerning environmental issues, particularly at the local level, is also important for facilitating improved compliance and implementation.

21. In addressing the issues of compliance and implementation, the Experts Group has taken into account the results of the International Experts Workshop on Compliance with International Environmental Agreements, held in Washington, D.C. on 20 and 21 May 1996, and organized by UNEP in collaboration with the Georgetown University Law Center. The report of the Workshop is attached as Annex IV to the Final Report of the Expert Group Workshop.

III. Dispute Avoidance and Settlement

22. Dispute avoidance plays a particularly important role in international environmental law. The emphasis on dispute avoidance reflects the need to anticipate and prevent environmental problems as reflected in the precautionary principle and the principle of prevention of environmental harm. Area D of the Montevideo Programme II endorsed a strategy of developing "methods, procedures and mechanisms that promote, *inter alia*, informed decisions, mutual understanding and confidence-building, with a view to avoiding environmental disputes and, where such avoidance is not possible, to their peaceful settlement."

23. Increasingly important dispute avoidance and confidence-building mechanisms and procedures are: exchange of available information; the use of independent scientific and technical experts and panels; national reporting; notification and consultation procedures; prior informed consent; and transboundary environmental impact assessment. Innovative and informal measures of dispute avoidance, which frequently cost less and are more flexible, should be encouraged. By improving compliance with international obligations, the compliance and implementation mechanisms addressed in Area B of the Montevideo Programme II and in Part II above also contribute to avoiding disputes.

24. As suggested by the Montevideo Programme II, where avoidance is not possible, the peaceful settlement of disputes remains critical. Under the Charter of the United Nations, the primary mechanisms for achieving the peaceful settlement of disputes, includes "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Most of the major environmental regimes now incorporate similar mechanisms from which the parties can choose that range from non-compulsory procedures (for example, negotiation, fact-finding, mediation or conciliation) to compulsory third-party procedures (arbitration or judicial settlement). These mechanisms increasingly include both dispute avoidance and dispute settlement procedures. The range of options provides important opportunities for improved management of international environmental conflicts.

25. The utilization of permanent dispute resolution mechanisms also may facilitate the settlement of international environmental disputes. In this regard, several recent developments are noteworthy, including the International Court of Justice's creation of an environmental chamber, the establishment of the International Tribunal on the Law of the Sea, and the possible use of the Permanent Court of Arbitration. Such fora could provide new opportunities for settling environmental disputes and emphasize the necessity of ensuring the further development of a consistent body of international environmental law.

26. Intergovernmental organizations and their competent bodies, such as UNEP, may play a facilitating and assisting role in environmental dispute avoidance and settlement. Such a role can be enhanced at the request of States, through involvement of such entities in fact finding, *inter alia*, by providing technical expertise. United Nations organs could also consider seeking advisory opinions of the International Court of Justice on international environmental law questions of concern. Parties to environmental treaties that establish mechanisms to facilitate dispute avoidance and settlement should be encouraged to use such mechanisms. Regional organizations should particularly be encouraged to deal with issues at the regional level. Current examples of innovative approaches relating to dispute avoidance include the inquiry commissions that can be created at the request of any affected party under the UNECE Convention on Environmental Impact Assessment in a Transboundary Context and the implementation committee under the Montreal Protocol. Because prevention is to be preferred to cure, these and similar approaches should be actively promoted in the future development of international environmental law.

27. All countries concerned should have the opportunity to participate fully and effectively in dispute avoidance and settlement mechanisms. Procedures for dispute avoidance and settlement should be clear and equitable and should reflect reasonable time frames. Developing countries should be assisted in building the capacity and obtaining the resources necessary for participating fully and effectively in the preparation for, and conduct of, processes of dispute avoidance and settlement.

28. The role of non-State actors in helping to avoid and resolve disputes should also be enhanced. Non-State actors can, for example, provide technical assistance, assist in information exchange and distribution, and provide independent fact-finding. Affected persons and their representatives should also be given expanded opportunities to protect their interests in international environmental issues. In particular, in the context of regional economic integration, they should be able to access administrative and judicial proceedings in the country where the alleged harm originated without discrimination on the basis of their residence or nationality. International institutions should also ensure that affected individuals are provided objective, transparent and independent mechanisms for raising their claims. Possibilities for giving non-State actors a role in inter-State disputes before arbitration or judicial tribunals should also be considered.

IV. Concepts and Principles in International Environmental Law

29. In recent years, a variety of international environmental concepts and principles aiming at sustainable development has emerged in a number of different contexts. These concepts and principles are an important part, and product, of the development of international environmental law. They serve several functions: providing coherence and consistency to international environmental law; guiding governments in negotiating future international instruments; providing a framework for the interpretation and application of international environmental law in specific cases; guiding the development of domestic environmental laws and policies; and assisting the integration of international environmental law with other international law fields.

30. The nature and status of specific concepts and principles in international environmental law vary. Some are just emerging and others more developed. Some may be legally binding and some may not be legally binding. Some are supported by considerable State practice, while others lack sufficient evidence of state practice. Some are clear and others require further elaboration.

31. Several widely accepted principles of international law have important relevance for the protection of the environment. Thus, for example, the duty of States to cooperate in good faith, the requirement of peaceful settlement of international disputes, the principle of sovereign equality, and the law of state responsibility are as important for international environmental law as for international law generally.

32. The following sections A-H address certain concepts and principles, be they legally binding or not, that are particularly relevant to the development of international environmental law aiming at sustainable development. In this regard, the principles in both the Stockholm and Rio Declarations and the World Charter for Nature are important. Also noteworthy are the principles identified by the 1987 World Commission on Environment and Development's legal experts group and IUCN's 1995 Draft Covenant on Environment and Development. Many of these concepts and principles have also been applied in different contexts in specific environmental treaties.

33. International consensus is emerging that the concepts and principles discussed below may be considered as core elements in the further development of international environmental law. For each principle, a starting point for elaborating the principle in the future is suggested and a description of some of its possible basic elements is presented. The following general points should be considered with respect to each of the concepts and principles:

(a) The term principle, as opposed to concept is frequently used for convenience; it is not intended to have any legal significance and is thus without prejudice to the legal status of the principle or concept.

(b) When it comes to the implementation and application of these principles to developing countries, their special needs and concerns should be taken into account.

(c) The order in which these principles is presented is not intended to have any significance as to their relative importance.

(d) These principles are interrelated and should be considered in an integrated way.

(e) Although these principles are generally addressed to subjects of international law, such as States and international organizations, actors who are not subjects of international law are increasingly important for the application and development of these principles.

A. Integration of Environmental Protection, Social Development and Economic Development

34. Sustainable development requires the integration of environment and development. Principle 4 of the Rio Declaration provides a potential starting point for the elaboration of this principle: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." Paragraph 6 of the Copenhagen Declaration further clarified this point: "economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people."

35. Basic elements of the principle of integration might include:

(a) Requiring that decision-making take into account the environmental, social and economic dimensions of proposed actions, so that, for example, environmental concerns are integrated into policies and activities relating to economic development and social development.

(b) Seeking, in accordance with the objective of sustainable development, to ensure the conservation and sustainable use of the world's resources and the maintenance of essential ecological processes while also seeking to eradicate poverty and to achieve sustainable economic growth and development and social justice.

(c) Recognizing the importance of long-term approaches that take into account long-term strategies and that may include the use of environmental and social impact assessment, risk analysis, cost-benefit analysis, and natural resource accounting.

(d) Recognizing that the integration of environmental, social and economic policies requires transparency and broad public participation in governmental decision-making.

B. Prevention of Environmental Harm

36. A potential starting point for elaboration of the international dimension of environmental harm is customary international law as contained in Principle 2 of the Rio Declaration and Principle 21 of the Stockholm

Declaration. As for the domestic dimension of environmental harm, concepts and principles are in the process of emerging.

37. Basic elements of the principle of prevention of environmental harm might include:

(a) Recognizing that environmental protection is usually best achieved by preventing environmental harm rather than by attempting to repair or compensate for environmental damage once it has occurred.

(b) Affirming a preference for pollution prevention or waste minimization policies and approaches, including *inter alia* periodic pollution prevention audits, environmental impact assessments, internalization of environmental costs, life-cycle analyses, extended producer responsibility, and the enactment of effective environmental legislation.

(c) Recognizing that the principle is to be read in the light of the opinion of the International Court of Justice that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."

C. Common Concern of Humankind

38. A potential starting point for the elaboration of the principle of common concern may be: Threats to the global environment, such as those to global climate and biodiversity, affect the common interest of humankind and therefore are subjects of its common concern.

39. Basic elements of the principle of common concern might include:

(a) Recognizing that the environment constitutes a unity, the conservation of which concerns all humankind and that transboundary and domestic environmental issues that are not or cannot be effectively managed by national or regional efforts can also give rise to common concern.

(b) Recognizing a common responsibility for and interest of humankind in the environment.

(c) Recognizing the need to strike a balance between common concern and national sovereignty.

D. Global Partnership and International Cooperation

40. A potential starting point for the elaboration of this principle is the Rio Declaration's Principle 7: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem." This principle should be read in conjunction with other principles in the Rio Declaration that require international cooperation.

41. Basic elements of the principle of global partnership might to include:

(a) Recognizing the ecological interdependence of States and the need for broad cooperation to address and resolve environmental issues.

(b) Affirming the obligation of every State to cooperate in good faith also with respect to environmental and developmental issues.

(c) Recognizing the different capacities and responsibilities of different countries, thereby reflecting a close relationship to common but differentiated responsibilities.

E. Common but Differentiated Responsibilities

42. Principle 7 of the Rio Declaration provides a starting point for the elaboration of this principle: "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

43. Basic elements of the principle of common but differentiated responsibilities might include:

(a) Requiring that all States are individually and jointly responsible for protecting the environment and promoting sustainable development, but recognizing that, because of different levels of development, countries may have different capacities to respond to environmental problems.

(b) Recognizing that the differentiation of responsibilities should correlate to the degree of contribution to the specific environmental harm.

(c) Recognizing that differences in capabilities and in contributions to environmental harm should be reflected *inter alia* in: differential timetables for implementation of, and compliance with, international obligations; benefit sharing; international financial support; transfers of environmentally sound technologies; and international support for capacity-building.

(d) Recognizing that among the common responsibilities is a responsibility to provide collective and cooperative assistance to those countries lacking national capacity for implementation.

F. Equity Within and Among Generations

44. A potential starting point for the elaboration of the principle may be: States should meet the developmental and environmental needs of present and future generations in an equitable manner.

45. Basic elements of equity within and among generations might include:

(a) Requiring that present generations use their resources to meet their own environment and development needs in a way that protects the sustainable development of future generations.

(b) Committing to the long-term protection of the environment.

(c) Ensuring that the interests of future generations are adequately taken into account in policies and decisions relevant to development.

(d) Avoiding and, if need be, redressing disproportionate environmental harm from economic activities.

(e) Ensuring a non-discriminatory allocation of current environmental benefits.

G. Precaution

46. A potential starting point for elaborating the precautionary principle is: Where there are threats of serious or irreversible harm, lack of full scientific certainty about the cause and effects of environmental harm shall not be used as a reason for postponing measures to prevent environmental degradation.

47. Basic elements of the precautionary principle might include:

(a) Affirming a preference for anticipating environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity.

(b) Recognizing that scientific certainty, to the extent it is obtainable, with regard to environment and development issues may come too late to take effective responses to environmental threats.

(c) Recognizing that where there is an identifiable risk of serious or irreversible environmental harm, including for example extinction of species, widespread toxic pollution or major threats to essential ecological processes, it may be appropriate to place the burden of proof on the proposer of the activity potentially harmful to the environment.

H. Internalization of Costs

48. A potential starting point for elaboration of the principle might be: States should take, in accordance with their capabilities, the actions necessary to ensure that users of natural resources bear the full costs, including the environmental costs, of their economic activities. Internalization of costs includes what has become known as the polluter pays principle.

49. Basic elements of the internalization of costs might include:

(a) Recognizing the need to ensure that prices for goods and services reflect the full costs, including the environmental costs, of production, as a primary mechanism for integrating environmental protection and economic activities to achieve sustainable development.

(b) Recognizing that the principle may contribute to the removal of barriers to trade by eliminating hidden subsidies and facilitating the harmonization of environmental standards.

(c) Recognizing that additional capacity building and cooperation are necessary to assist developing countries in implementing the principle consistent with their own environment and development priorities and in ways that do not adversely affect traditional or indigenous uses of natural resources.

(d) Applying implementation mechanisms, including *inter alia* user fees, emission taxes, elimination of subsidies, pollution standards, and environment-friendly accounting systems both at the national level and within the private sector.

V. Liability and Compensation

50. In accordance with the general principles of international law, every internationally wrongful act of a State entails its international responsibility. This equally applies in the field of international environmental law. Such responsibility would include, apart from cessation of the wrongful act and other obligations, liability for damage caused including payment of appropriate compensation. Transboundary harm caused by an act or activity which is otherwise not prohibited by international law may also entail liability.

51. Both the Stockholm and Rio Declarations have called for the further development of international law regarding liability and compensation for environmental damage. This remains a major challenge for the development of international environmental law. The draft articles developed by the International Law Commission (ILC) so far: deal with prevention; concern themselves primarily with activities bearing inherent risk of transboundary harm; place obligation of due diligence and not obligation of result upon the State; leave open the need to define operator, as opposed to State, liability for significant harm; and emphasize the need to provide fora for expeditious settlement of claims to ensure innocent victims are not left to bear the loss. In addition to already established regimes, questions concerning liability are under negotiation in various other international fora.

52. International instruments that establish procedures or otherwise facilitate the settlement of international environmental damage claims through the use of private international law or national law are increasingly important. In this regard, States should develop national law regarding

liability and compensation and ensure equal rights and remedies to victims of environmental harm, including transboundary harm.

53. In addressing issues relating to liability and compensation, the outcome of the Expert Group Meeting on Liability and Compensation for Environmental Damage Arising from Military Activities, organized by UNEP in collaboration with the Foundation for International Environmental Law and Development (FIELD) during 1995-1996 has been taken into account.

VI. Priorities for Action

54. In light of the above considerations and the review of the Montevideo Programme II the following may be considered as priority areas of action in the further development of international environmental law aiming at sustainable development.

55. **Implementation of and Compliance with International Environmental Agreements:**

(a) Strengthening international institutional capacity to monitor compliance through, in particular, increasing the capacity to collect and verify data, evaluate scientific and technical information, and, in light of such data and information, make appropriate decisions.

(b) Identifying and applying new and innovative concepts, mechanisms and procedures that could enhance implementation and compliance, including, *inter alia*, financial mechanisms, technology transfer, economic incentives, and the role of the private sector.

(c) Enhancing technical assistance programmes for countries in need of assistance, upon their request, to strengthen their national capacity to implement and comply with international environmental obligations.

(d) Exploring regional approaches that could enhance implementation and compliance.

(e) Developing measures and procedures, such as the submission of compliance plans by a State when expressing its consent to be bound by a convention.

(f) Streamlining and consolidating reporting and monitoring requirements, taking into account considerations of financial and technical capacity.

(g) Promoting dialogues that involve local communities in improving implementation and monitoring compliance.

(h) Increasing the coordination and cooperation of convention secretariats among themselves and with other international entities, including the international financial institutions.

(i) Encouraging participation of non-State actors in implementation and compliance; promoting transparency regarding compliance; and enlisting the media in promoting public awareness about compliance.

(j) Analyzing and further elaborating compliance mechanisms in the light of their successes and failures.

(k) Identifying ways in which new information technologies could potentially improve the implementation of and compliance with international environmental law.

56. **Dispute Avoidance and Settlement:**

(a) Emphasizing that implementation of and compliance with international environmental law are important for avoiding disputes.

(b) Continuing to develop and use non-adversarial, flexible and transparent dispute avoidance procedures as the preferred method of addressing international environmental problems.

(c) Achieving, when disputes can not be avoided, the peaceful settlement of disputes as required under Article 33 of the Charter of the United Nations, including through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement in fora such as the International Court of Justice and the International Tribunal on the Law of the Sea, resort to regional agencies or arrangements, or other peaceful means of their own choice such as arbitration.

(d) Considering the application of new concepts such as global partnership and common but differentiated responsibilities to dispute avoidance and settlement systems.

(e) Taking steps to ensure that States, in particular developing countries, have the capacity to participate fully and effectively in all dispute avoidance and settlement procedures.

(f) Increasing access of affected persons, regardless of the State in which they reside, to judicial and administrative procedures involving transboundary environmental disputes.

57. **Liability and Compensation:**

(a) Developing further international law regarding responsibility, liability and compensation for significant environmental harm caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

(b) Developing national law regarding liability and compensation and providing equal rights and remedies to victims of environmental harm, including transboundary harm.

58. **Concepts and Principles:**

(a) Clarifying and further refining concepts and principles of international environmental law (see in particular Section IV above) which could be useful for the further development and implementation of international environmental law.

(b) Considering, in light of the above, the importance of concepts and principles for the development of global and regional instruments in the field of the environment and sustainable development.

59. **Other Priorities for Action:**

(a) Analyzing the interrelationship of international environmental law and other fields of law.

(b) Increasing UNEP's cooperation with the World Trade Organization so as to ensure that environmental concerns are fully and properly addressed and taken into account in the development of law and practice concerning trade, investment and intellectual property.

(c) Creating and strengthening mechanisms for making information relating to international environmental obligations available to non-State actors so as to make their participation in processes relating to the protection of the environment more effective.

(d) Analyzing the legal requirements and consequences of the ever-growing integration of the Secretariats of different environmental conventions resulting eventually in their amalgamation.

(e) Exploring the means to enhance cooperation at the local level on transboundary environmental matters.

60. **New International Environmental Instruments:**

UNEP Governing Council decision 18/9, paragraph 5, called for a study of the need for and feasibility of new international environmental instruments. That study is attached to the Final Report of the Workshop as Annex II.

ANNEX II

Draft Study on the Need for and Feasibility of New International Environmental Instruments Aiming at Sustainable Development

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EXECUTIVE SUMMARY

The present study responds to the request in paragraph 5 of UNEP Governing Council Decision 18/9 of 26 May 1995 for the Executive Director to prepare a study on the need for and feasibility of new international environmental instruments aiming at sustainable development.

The study identifies principal challenges in the field of environmental protection and sustainable development and attempts to ascertain the need for and feasibility of new instruments to address those challenges. After noting the efforts that are currently underway to address some of the challenges that have been identified, the study recommends that UNEP take action in the following areas:

1. Prevention of marine pollution from land-based activities;

2. Protection, allocation and management of shared fresh water resources;

3. Regulation of hazardous substances and chemicals;

4. Climate change;

5. Interaction of international environmental law with other branches of international law;

6. Enhancing public participation in environmental decision-making processes and cooperation at the local level on transboundary problems;

7. Cooperation at the local level;

8. Forest loss and management;

9. Further development of concepts and principles in the field of international environmental law and sustainable development.

Some of the foregoing items are included in the list in light of their importance, even though new instruments are not recommended at this stage.

1. Introduction

In the context of the mid-term review of the Programme for the Development and Periodic Review of Environmental Law for the 1990s (Montevideo Programme II), the Governing Council, at its eighteenth session adopted decision 18/9 on 26 May 1995. In paragraph 5 of that decision, the Governing Council:

> "Requests the Executive Director, within available resources to prepare a study on the need for and feasibility of new international environmental instruments aiming at sustainable development, addressing, on a priority basis, the principal environmental challenges, including as they relate to the broader issues of sustainable development as set forth in Agenda 21, and, in fulfilling this task, to draw upon relevant work and activities of other United Nations agencies and international organisations."

The present study responds to this request of the Governing Council.1/ In so doing, it seeks to contribute to the fulfilment of the mandate of Montevideo Programme II, in particular its programme area H, "Concepts or principles significant for the future of international environmental law".2/ The study identifies the principal environmental challenges that may require international action on a priority basis, and examines the need for and feasibility of new instruments (section 2). On the basis of this analysis, the study makes recommendations for future action (section 3).

2. The Need for and Feasibility of New Instruments

(a) Introduction

This section examines the need for and feasibility of new international environmental instruments in the field of sustainable development. Concerns are sometimes expressed in relation to the number of international environmental instruments that already exist and problems of implementation and compliance with regard to those instruments. The present study recognizes the existence of those concerns and attempts to take them into account through specific criteria for determining need and feasibility, identified below.

1/ The study draws, *inter alia*, upon: relevant decisions of the UNEP Governing Council; the 1992 Rio Declaration on Environment and Development, particularly Principle 27; Agenda 21, particularly Chapters 8, 38 and 39; the Montevideo Programme, including the Review of Montevideo Programme of 1 August 1991 and the Montevideo Programme II of 21 May 1993; relevant UNEP reports; relevant decisions and reports of the United Nations Commission on Sustainable Development; the discussions at the Expert Group Workshops on International Environmental Law Aiming at Sustainable Development, convened by UNEP in 1995-1996; global, regional and sub-regional conventions related to international environmental law and sustainable development; relevant soft law instruments; additional relevant work and activities of other United Nations agencies and international organizations; and recent literature.

2/ In particular, this study responds to the "activities" listed under that programme area.

After listing those criteria, this section undertakes to identify the principal environmental challenges and the types of instruments that may be appropriate to deal with them.

(b) Criteria for Determining the Need for and Feasibility of New Instruments

There is a broad range of factors that bear upon the *need* for new international environmental instruments aiming at sustainable development and the *feasibility* of those instruments. The criteria relating to these two issues may overlap somewhat, but in large measure they are separate. Even so, the feasibility of new instruments is, to a certain extent, a function of their need. That is, the existence of a high degree of need for a new instrument with regard to a particular challenge would generally mean that a number of the important criteria for feasibility would be met. Conversely, a low degree of need with regard to a particular problem would generally mean that a new instrument for that problem would not be highly feasible. This interrelationship between the questions of need and feasibility, and thus of the criteria for determining them, should be borne in mind in considering the following lists.

(i) Criteria for determining need

Criteria for determining the *need* for new international environmental instruments aiming at sustainable development include, but are not limited to, the following:

(1) whether there is a sound scientific basis for the elaboration of legal principles or rules concerning the challenge in question;

(2) the urgency of the challenge, including the nature and seriousness of threats to the natural environment, human health and development;

(3) the extent to which the challenge requires legal responses of a binding nature;

(4) the appropriateness of dealing with the challenge on the international, as opposed to the national level;

(5) whether a particular new regime would:

(a) promote integration of environment and development;

(b) be compatible with the existing system of international environmental instruments;

(c) add value to the existing system by filling well recognized gaps;

(d) enhance the coherence of international environmental law aiming at sustainable development; and

(e) have a positive impact upon issues beyond those directly related to the environment (e.g., international peace and security, human rights, public participation, indigenous peoples);

(6) the need for achieving greater clarification and uniformity through codification or systematization of existing principles; and

(7) the extent to which the challenge is dealt with effectively by existing instruments. This criterion includes such considerations as ratification records, the degree of compliance with the instrument, and its comprehensiveness and level of detail.

(ii) Criteria for determining feasibility

Criteria for determining the *feasibility* of new international environmental instruments aiming at sustainable development include, but are not limited to, the following:

(1) the extent to which there exists a social consensus3/ with regard to the challenge and the way in which it should be addressed (if there is national legislation on point, this may be reflected in the degree of acceptance of a given regime or principle in that legislation, including how widespread that acceptance is4/);

(2) the prevailing public policy of governments;

(3) whether there has been an express statement by the international community on the need for a new instrument or further development of an existing regime;5/

3/ The idea of social consensus includes the positions on the question of individual members of the public, industry and non-governmental organizations.

4/ Examples of subjects that are increasingly being dealt with in national legislation include environmental impact assessment and the removal of lead from gasoline.

5/ For example the provisions in the Stockholm (Principle 22) and Rio (Principle 13) Declarations calling for developing the law of liability and compensation for environmental damage; those of Agenda 21 and the Montevideo II on principles of international environmental law; those of Agenda 21 on binding instruments on prior informed consent (chapter 19) and on the legal regime of protection of the marine environment from the harmful effects of land-based activities (chapter 17); that of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal on a Liability Protocol; and that of the Convention on Biological Diversity on a Biosafety

(4) whether soft law on the subject already exists and is voluntarily applied, and the practice of its application suggests that a corresponding binding instrument would be advisable;6/

(5) the extent to which financial resources would be necessary and available for the implementation of the instrument;

(6) whether an initial dialogue among Governments has already taken place;7/

(7) whether there is an existing forum or legal framework for consultations and negotiations;8/

(8) whether there is an existing understanding of the form a particular instrument might take, or of options for that form;9/

(9) whether the appropriate geographical level (global, regional, sub-regional) of legal regulation has been identified;10/

(10) the availability of sufficient capacity, including infrastructure and appropriately trained personnel, to address the challenge; and

(11) the extent to which already existing instruments are being implemented, and whether the addition of new obligations may be unduly burdensome on states.

Protocol.

6/ For example, the possibility of transforming the amended London Guidelines for the Exchange of Information on Chemicals in International Trade into a convention on prior informed consent.

7/ For example, such as has been the case as to some issues during UNCED, CSD meetings, and UNEP Governing Council sessions.

8/ For example, the Conference of the Parties of the United Nations Framework Convention on Climate Change with regard to a possible Protocol or Intergovernmental Panel on Forests.

9/ For example, a Protocol under the United Nations Framework Convention on Climate Change; a binding instrument on forests.

10/ For example, the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, to be supported by regional agreements; the Bonn Convention on Migratory Species of Wild Animals to be developed through agreements between range States.

(c) Principal environmental challenges and types of instruments that may be appropriate to deal with them

This section first attempts to identify the principal environmental challenges facing the international community. It then considers the types of new instruments that may be appropriate to deal with those challenges.

There are several different categories of challenges, or problems, as to which there may be a need for new instruments in the field of environmental protection and sustainable development. Two will be focused upon here. The first category includes sectoral issues, that is to say, specific environmental problems such as air or water pollution. The second category has to do not with problems of the natural environment per se, but with the ways in which states address those problems. It includes the overarching principles and cooperative procedures applicable to environmental problems generally. In the light of these categories, this section takes into consideration not only challenges concerning specific sectors of the environment, but also those of a more general nature and those that may require new instruments containing principles and procedures applicable to environmental problems generally. While challenges are considered separately, it should be borne in mind that they are in fact interrelated to a large extent.

Initially, principal environmental challenges are identified without regard to whether they are currently being addressed in relevant fora. The rationale for this approach is the following: The fact that a particular challenge is being so addressed does not mean that the forum will succeed in producing an instrument, that any instrument produced will address the challenge adequately, or that the form of instrument that is adopted is the optimal one. Ongoing work on a given challenge will be taken into account in section 3 of the present study, in which specific action is recommended.

In order to keep the study within a practical scope, the time frame employed in identifying principal challenges in the field of the environment is the next phase of the Montevideo Programme II.

The criteria employed for identifying principal challenges in the field of environmental protection and sustainable development include the following: how well identified the problem or challenge is; the degree of scientific consensus concerning the challenge; the availability of solutions; whether the phenomenon in question is of an irreversible nature, and the time frame available within which the challenge may be effectively addressed; the impact of the challenge upon vulnerable populations; the impact of the challenge on security concerns; and whether a challenge or problem in fact exists in a given area, rather than whether or not that area is already the subject of some form of international instrument (for example, in some instances existing regimes may need to be strengthened, while in other areas no regime may presently exist).

Turning to the types of instruments that may be appropriate, the expression "new" instruments includes, for the purpose of this section, not only those that deal with a particular challenge for the first time, but also

those that improve upon regimes that are existing but inadequate, or that codify existing principles or rules, as well as those that address new issues.

The type of instrument that may be appropriate for a given problem will depend upon a number of factors, including the geographical scope of the problem, the presence or absence of existing instruments, the feasibility of addressing the problem on the global, regional, sub-regional or national level, and any other factors that may be relevant in the particular case.

The kinds of instruments that are available fall essentially into two categories: those characterized by the level at which they are adopted, i.e., the global, regional, sub-regional or national level; and those characterized by whether they are of a binding nature or not, e.g., treaties (binding "hard" law) versus guidelines (non-binding "soft" law).11/ Thus each individual challenge or problem may be addressed in instruments on the global, regional/sub-regional or national level, and instruments on each level may be either of a hard-law or a soft-law nature.

As already indicated, the appropriateness of each kind of instrument to deal with a particular problem must be assessed according to all relevant factors. In some cases a combination of these kinds of instruments may be appropriate, such as a global framework of principles which is implemented through binding agreements on regional and possibly other levels. Even within a particular type of instrument there are different possibilities. For example, a global convention may contain a framework of principles,12/ a more detailed regulatory regime,13/ or may even contain provisions of both

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11/ It is recognized that an instrument adopted in soft-law form, such as a United Nations General Assembly declaration, may in fact constitute a codification, or restatement, of existing principles of general international law. The emphasis in this study is upon the form of the instrument rather than whether a particular soft-law instrument may have some binding legal effect.

12/ For example, the Vienna Convention on the Protection of the Ozone Layer of 22 March 1985.

13/ For example, the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969.

kinds.14/ Similarly, soft law instruments may be of a more15/ or less16/ detailed nature.

Furthermore, there is a range of possible mechanisms for implementing the instruments in question. These include the establishment of lists of substances or activities to be regulated that may be easily and quickly updated; decisions of committees or other bodies; the use of annexes, protocols of provisional application, and similar techniques; action plans; financial mechanisms; mechanisms facilitating the transfer of technology; and mechanisms contributing to capacity-building.

Below are listed what are considered, on the basis of the criteria identified above, to be the principal challenges in the field of environmental protection and sustainable development on the international level, together with the type of instrument that may be appropriate to deal with each challenge. A brief explanation of the reasons for including each item is offered. Other challenges that are significant but are not considered to rise to the level of importance of the principal challenges are listed in Annex B. Types of instruments are identified without regard to any ongoing work with regard to a particular challenge, in order to provide a yardstick against which to measure whether that work is appropriate to deal with the challenge, according to the criteria set out above. The items are not listed in order of priority.

(1) Protection, allocation and management of shared fresh water resources

The United Nations has long recognized the importance of the conservation and harmonious utilization of internationally shared freshwater resources. Among the many meetings under held United Nations auspices at which this subject has been addressed are the United Nations Water Conference (Mar del Plata, 14-25 March 1977), the United Nations Interregional Meeting on River and Lake Basin Development with Emphasis on the Africa Region (Addis Ababa, 10-15 October 1988), and the International Conference on Water and the Environment (Dublin, 26-31 January 1992). Fresh water is the subject of an entire chapter of Agenda 21: Chapter 18, Protection of the quality and supply of freshwater resources: application of integrated approaches to the development, management and use of water resources. Programme area N of the

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14/ For example, the United Nations Convention on the Law of the Sea of 10 December 1982. This is also true of a number of environmental agreements that contain provisions of a general nature in the agreement itself and detailed provisions in annexes.

15/ For example, the "Friendly Relations Declaration," Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, United Nations General Assembly resolution 2625 (XXV) of 24 October 1970.

16/ For example, the "Outer Space Declaration," Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space, United Nations General Assembly resolution 1962 (XVIII) of 13 December 1963.

Montevideo Programme II is entitled "Environmental protection and integrated management, development and use of inland water resources." One of the strategies contained in that programme area is to:

> "(a) Encourage the development of cooperative mechanisms between States including, as appropriate, international legal instruments for the protection and integrated management, development and use of transboundary water resources with a view to the prevention, reduction, control and reversal of their degradation and for the prevention and peaceful resolution of disputes between States".

In 1970 the United Nations General Assembly recommended that the International Law Commission (ILC, or Commission) "take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification."17/ The Commission later began work on the project, which was completed in 1994. In October 1996 the General Assembly will convene a Working Group of the Whole to elaborate a framework convention on the basis of the draft articles adopted by the ILC. The growing scarcity of fresh water per capita is well known, as is the potential for international conflict over shared freshwater resources.

A global, framework convention with specific agreements for regions or shared drainage basins is recommended for the second challenge because of the dual needs in this field: first, to establish an agreed set of general principles and rules governing all international watercourses; and second, to apply and adjust those principles and rules to the unique conditions of each international watercourse and the needs of the states concerned. The reasons for the second need would not appear to require further elaboration. With regard to the first need, there are several reasons why an agreed set of general principles and rules should be established, including: to provide a model for states sharing international fresh water resources, indicating the factors that should be taken into consideration in their relations concerning those resources; to establish a basic set of norms, negotiated on the global level, for the guidance of states in the absence of a specific applicable agreement; and to anticipate and provide a legal framework for dealing with the growing problems that are likely to arise between states with regard to international watercourses.

(2) Climate change

Climate Change is addressed in Chapter 9 of Agenda 21, Protection of the Atmosphere. The Berlin Mandate, adopted at the First Session of the Conference of Parties to the United Nations Framework Convention on Climate Change in Berlin, March 1995, calls for the elaboration of a protocol to the Convention. The protocol would strengthen international efforts to deal with this all-important problem by establishing specific reduction targets and providing for financial assistance and transfer of technology to developing countries.

17/ United Nations General Assembly resolution 2669 (XXV) of 8 December 1970, paragraph 1.

The problem of climate change is of such magnitude that UNEP should continue monitor efforts to deal with it and help to ensure that the process continues forward in an expeditious and scientifically sound manner.

(3) Transboundary air pollution

Chapter 9 of Agenda 21 is devoted to Protection of the Atmosphere. The fourth programme area addressed in that chapter is Transboundary atmospheric pollution. In that connection, Chapter 9 states that the programmes established under the 1979 Geneva Convention on Long-Range Transboundary Air Pollution, and its protocols, "need to be continued and enhanced, and their experience needs to be shared with other regions of the world." Programme area J of the Montevideo Programme II is entitled "Transboundary air pollution control". One of the strategies under that programme area is to:

> "(a) Consider the possible development of international legal instruments and mechanisms at appropriate levels for the prevention, control and reduction to acceptable levels of emissions causing transboundary air pollution and their effects".

The 1979 Convention covers the ECE region. There is a need in some, but not all other regions for agreements on the subject.

Regional agreements would be most appropriate with regard to this challenge. A global instrument would not seem necessary in view of the fact that a model already exists in the form of the 1979 ECE Convention. As mentioned above, Agenda 21 calls for the sharing of the experience with the 1979 Geneva Convention, and the Montevideo Programme II also identifies this as an important need.

(4) Cooperation at the local level on transboundary problems

Transboundary problems such as air and water pollution, waste water treatment, and the provision of safe drinking water are often best dealt with at the local level, between the concerned authorities on either side of the boundary. This approach is not only the most direct and often the most efficient, but it also helps to prevent essentially local or regional challenges from escalating into disputes between states on the international level. While no instrument is recommended with respect to this challenge, it is believed that UNEP could perform an important function in assisting states in the development of cooperative relationships between and among regional and local authorities of neighbouring countries, and, where appropriate, in the conclusion of regional agreements on the subject.

(5) Marine pollution from land-based activities

It is noted in Chapter 17 of Agenda 21 that "[l]and-based sources contribute 70 per cent of marine pollution . . . . Many of the polluting substances originating from land-based sources are of particular concern to the marine environment since they exhibit at the same time toxicity, persistence and bioaccumulation in the food chain. There is currently no global scheme to address marine pollution from land-based sources." That chapter recommends that states "[c]onsider updating, strengthening and

extending the Montreal Guidelines [for the Protection of the Marine Environment from Land-Based Sources], as appropriate", and that they "[i]nitiate and promote the development of new regional agreements, where appropriate".

On November 3, 1995, a Global Programme of Action for the Protection of the Marine Environment from Land-based Activities was adopted by an Intergovernmental Conference that met for that purpose under UNEP auspices in Washington, D.C. The Conference also adopted the Washington Declaration on Protection of the Marine Environment from Land-Based Activities. Programme area O of the Montevideo Programme II is entitled "Marine pollution from land-based sources". The strategy under that programme area is, in part, to: "Cooperate in the development of regional treaties, protocols or other instruments regarding the degradation of the marine environment from land-based activities, where necessary . . . ." Finally, Article 207 of the 1982 United Nations Convention on the Law of the Sea is entitled "Pollution from land-based sources". Paragraph 4 of that article provides in part:

> "States, acting especially through competent international organizations or diplomatic conference[s], shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources .... "

This provision of the 1982 Convention, which now has some 105 parties, constitutes an especially significant recognition of the need for concerted action with regard to this pressing issue.

A global action plan with binding regional agreements is recommended for this challenge because there is a need for both global goals and guidelines and binding regional agreements that tailor the global standards to suit specific regions.18/ This is also the approach called for by Agenda 21, and is supported by Article 207 of the 1982 United Nations Convention on the Law of the Sea. A number of protocols have already been concluded under the Regional Seas Programmes.19/ A global soft-law instrument is perhaps preferable to a binding convention for several reasons, including the greater feasibility of achieving the former, the difficulty of achieving agreement on binding global principles that apply to all regional seas, and the inherent advantages of an action plan, including its flexibility, its use as a goal-

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18/ The fact that a Global Programme of Action has been adopted in this field is recognized in section 3 (c)(iii) below.

19/ These include: the Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-based Sources (Athens, 1980); the Protocol for the Protection of the Marine Environment Against Pollution from Land-based Sources (Kuwait, 1990); the Protocol for the Protection of the South-east Pacific Against Pollution from Land-based Sources (Quito, 1983); and the Protocol on Protection of the Black Sea Marine Environment Against Pollution from Land-based Sources (Bucharest, 1992). A draft protocol on the protection of the marine environment from land-based activities is currently being developed under the Wider Caribbean Action Plan.

setting device, and the likelihood that it could command wider acceptance than a binding instrument.

(6) Protection of soils

The importance of protecting soils against degradation is reflected in action that has been taken to that end by a number of international organizations. In 1972 the Council of Europe recognized the importance of the problem by adopting the European Soil Charter. This was followed by a set of principles entitled the World Soil Charter, adopted in 1981 by FAO. Agenda 21 deals with soils in Chapter 12 entitled "Managing fragile ecosystems: Combating desertification and drought". Programme area B of that chapter is entitled "Combating land degradation through, inter alia, intensified soil conservation, afforestation and reforestation activities". It notes that desertification affects nearly one quarter of the global land area. Other forms of soil degradation, such as waterlogging and salinization, affect additional areas of land. Programme area K of the Montevideo Programme II is entitled "Conservation, management and sustainable development of soils and forests". One of the activities under this programme area is to:

> "(a) Promote effective implementation of the Plan of Action for the realization of the goals and objectives of the World Soil Charter, including the preparation of guidelines for domestic legislation and related institutional mechanisms".

These instruments demonstrate clearly a broad recognition of the problem and of the need to increase efforts to deal effectively with it.

Global guidelines or a global declaration is recommended for this challenge because of the increasing importance of the problem on the global level. A binding instrument has not been recommended because, despite the importance of the problem, it may not be sufficiently understood on the political and social levels, either internationally or nationally, to merit such an approach. The recommendation would help to implement Programme area K of the Montevideo Programme II, mentioned above.

(7) Forest loss and management

Chapter 11 of Agenda 21 is entitled "Combating Deforestation". It recognizes that: "There are major weaknesses in the policies, methods and mechanisms adopted to support and develop the multiple ecological, economic, social and cultural roles of trees, forests and forest lands."20/ There is widespread agreement on the need to strengthen efforts to deal with forest loss around the world. The Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests21/ (Statement of Forest Principles) adopted at the Earth Summit were a first step, but must be

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20/ Agenda 21, paragraph 11.1.

21/ A/CONF.151/26/Rev.1(Vol.I), Annex III.

followed by agreements on the regional level on the protection and management of forests.

(8) Regulation of hazardous substances and chemicals

International efforts to deal with the effects of hazardous substances and chemicals on human health and the environment have been stepped up as understanding of these effects has increased. In general, the growing chemical load on the environment is of concern. With regard to persistent organic pollutants (POPs), for example, work is underway, or has recently been concluded, by the Inter-Organization Programme for the Sound Management of Chemicals (IOMC), the International Programme on Chemical Safety (IPCS) and the Intergovernmental Forum on Chemical Safety (IFCS). The IFCS Ad Hoc Working Group on POPs adopted its final report at its meeting in Manila, Philippines in June, 1996,22/ stating, *inter alia*, that international action, including a global, legally binding instrument, is required to reduce the risk to human health and the environment from releases of the twelve specified POPs. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal applies only to hazardous wastes. Efforts are currently underway to put into binding form the amended London Guidelines on prior informed consent (PIC) with regard to chemicals in international trade. Provisions on export of domestically prohibited products could be included. There is a serious regulatory gap in this area with regard to radioactive wastes. Finally, there is emerging recognition of the threat to human and animal reproduction from endocrine disruptors.23/

There appears to be a widespread recognition of a global, legally binding instrument on POPs. Regional instruments on this subject could also be appropriate in some cases. A global, legally binding agreement on prior informed consent (PIC) is also needed in this area.

(9) Interaction of International Environmental Law with other branches of International Law

One of the bases for action under Chapter 39 of Agenda 21 is:

> "(b) The need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of developing countries"."

These efforts should address such matters as the compatibility and complementarity between multilateral environmental agreements24/ and World

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22/ IFCS/WG.POPs/Report.1.

23/ See generally Theo Colborn, Dianne Dumanoski & John P. Myers, Our Stolen Future (1996).

24/ Including the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol and the Basel Convention.

Trade Organization (WTO) law; the resolution of disputes at the interface of trade and environment; ensuring that patents and other intellectual property rights, regulated by the TRIPS agreement under the WTO, are supportive of both the objectives of the Convention on Biological Diversity, as called for by article 16(5) of that convention, and technology transfer; and the relationship of international environmental law with international humanitarian and human rights law (e.g., Protocol I of 1977 Additional to the Geneva Conventions of 12 August 1949, arts. 35 and 55; also arts. 54 and 56 of that Protocol), as well as with the rules of international law governing mass movements of populations due to armed conflict. There is also a need for increased coordination of the efforts of different international bodies to deal with the interaction between international environmental law and other branches of international law.

It is recommended with regard to this challenge that UNEP focus in particular on the relationship between multilateral environmental agreements and WTO law. The fact that work is being done on this subject in the context of the WTO does not necessarily mean that there is no need for additional, or separate action. The work of the WTO in this area is being done from a trade perspective, as is appropriate for that organization. The problem should also be addressed from a perspective of environmental protection and sustainable development. UNEP is in fact already in the process of examining the trade impacts of multilateral environmental agreements. There is no reason to believe that the two efforts could not be complementary and mutually supportive, especially since the work in the context of the WTO has not yet come to fruition.25/

(10) Public participation in environmental decision-making processes

Principle 10 of the Rio Declaration states that: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level." There is a clear need to improve the access of individuals at the national level to information concerning the environment held by public authorities, and to enhance the opportunity of individuals to participate in environmental decision-making processes.

The elaboration of internationally applicable principles relating to public participation in environmental decision-making processes is recommended for this challenge. Such an instrument could develop the principles contained in Principle 10 of the Rio Declaration. It could benefit from the experience of the OECD and ECE, and could provide a model for the negotiation of similar agreements in other regions.

25/ At the second session of the Commission on Sustainable Development, it was noted that close cooperation between GATT/WTO and UNEP was important, "in particular, when considering the relationship between the provisions and dispute settlement mechanisms of the multilateral trading system and those of multilateral environment agreements, including with respect to the question of compliance with trade provisions in multilateral environmental agreements negotiated under the auspices of the United Nations". These comments were reiterated at the Commission on Sustainable Development at its fourth session.

(11) Coordination of institutional mechanisms in the field of the environment and sustainable development

The proliferation of secretariats in the field of the environment and sustainable development is a well-known phenomenon. Many new conventions are managed by their own secretariats, creating the possibility of overlapping competencies and duplication of effort. Calls have consequently been made for, *inter alia*, the coordination of the work of these bodies, in order to enhance the effectiveness of the efforts of states in the field of the environment and sustainable development.

These appeals should be supported. While the approach of consolidating secretariats may prove to be too politically controversial to be feasible, improved coordination of their activities would produce clear benefits and should not arouse significant controversy.

(12) Achievement of a common understanding and interpretation of concepts and principles in the field of international environmental law

Chapter 39 of agenda 21 is entitled International legal instruments and mechanisms. The first basis for action in Chapter 39 is:

> "(a) The further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns".

Programme area A of that chapter states that the "priorities for future law making on sustainable development . . . may include an examination of the feasibility of elaborating general rights and obligations of States, as appropriate, in the field of sustainable development, as provided by General Assembly resolution 44/228." One of the programme areas contained in the Montevideo Programme II is programme area H entitled "Concepts or principles significant for the future of international environmental law". The objective of that programme area is to "[f]urther develop, as appropriate, international environmental law."

Much progress has been achieved in the development and elaboration of concepts and principles on environment and sustainable development in recent major conventions,26/ as well as in soft-law instruments, notably the Stockholm (1972) and Rio (1992) Declarations.27/ While some of the principles contained in those instruments are undoubtedly of a legally binding

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26/ See, for example, the principles set forth in the United Nations Framework Convention on Climate Change, Article 3; and the Convention on Biological Diversity, Article 3.

27/ See also the Draft International Covenant on Environment and Development prepared by the IUCN Commission on Environmental Law in cooperation with the International Council of Environmental Law, IUCN *Environmental Policy and Law Paper No. 31* (World Conservation Union, 1995).

nature,28/ the status of others is uncertain. A common understanding and interpretation of concepts and principles in the field of the environment and sustainable development would promote environmental protection and sustainable development, and would assist states in their negotiation of new instruments. It is therefore recommended that work on the identification and further development of general concepts and principles in the field of environmental protection and sustainable development be continued, whether in meetings dedicated to this end or in the context of work on sectoral issues or on problems in the field. Governments should be assisted in the achievement of a common understanding and interpretation of concepts and principles in this field.

(d) Challenges that are being or have recently been addressed in various international fora

The following challenges identified above are currently being, or have recently been addressed in the international fora indicated.

(i) Protection, allocation and management of shared fresh water resources

In 1994, the United Nations International Law Commission (ILC) adopted on second reading a set of articles on the Law of the Non-Navigational Uses of International Watercourses. On the recommendation of the ILC, the United Nations General Assembly, in Resolution 49/52, decided to "convene a Working Group of the Whole . . . to elaborate a framework convention on the law of the non-navigational uses of international watercourses on the basis of the draft articles adopted by the International Law Commission."29/ This meeting will be held for three weeks in October, 1996. Work is also being done to develop regional agreements, including, for example, the sub-regional project on Lake Victoria under the UNEP/UNDP Joint Project on Environmental Law in Africa.

(ii) Marine pollution from land-based activities

The Global Programme of Action for the Protection of the Marine Environment from Land-based Activities was adopted on November 3, 1995, at the High-level Segment of the Intergovernmental Conference to Adopt a Global Programme of Action for the Protection of the Marine Environment from Land-based Activities. 30/ Also adopted at that meeting was the Washington

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28/ This is in particular true of the principle that states shall not cause significant transboundary environmental harm, contained in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. The legal status of this principle has been confirmed most recently by the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons of 8 July 1996 (paragraph 29).

29/ United Nations General Assembly resolution 49/52 of 9 December 1994, operative paragraph 3.

30/ Document UNEP (OCA)/LBA/IG.2/7, 5 December 1995.

Declaration on Protection of the Marine Environment from Land-Based Activities.31/ In addition, there are ongoing efforts to develop an instrument on persistent organic pollutants (POPs).32/

(iii) International trade in hazardous substances

Negotiations are currently underway on the subject of prior informed consent (PIC) in the field of chemicals. The negotiations are aimed at arriving at a binding instrument on the basis of the amended London Guidelines.

(iv) Compatibility of multilateral environmental agreements with WTO law

The subject of the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements, has been under consideration for a number of years within the context of the GATT and the WTO. Currently, the WTO's Committee on Trade and Environment (CTE) is seized of the matter. The CTE will prepare a report to the first biennial meeting of the WTO Ministerial Conference scheduled to be held in Singapore in December 1996. Detailed proposals have been submitted to the CTE by Japan, New Zealand and the European Community. There is no comparable work being done by intergovernmental bodies whose mandate is chiefly in the field of environmental protection and sustainable development.

(v) Public participation in environmental decision-making processes

Work on a draft convention on public participation in environmental decision-making is currently in progress within the U.N. Economic Commission for Europe (ECE). This would be, by its nature, a regional instrument. It could, however, provide a valuable model for efforts to respond to Principle 10 of the Rio Declaration on a more general level.

31/ Document UNEP (OCA)/LBA/IG.2/6, 5 December 1995, pages 16-19.

32/ This includes the work of the Inter-Organization Programme for the Sound Management of Chemicals (IOMC), which includes UNEP, ILO, FAO, WHO, UNIDO, and OECD; the preparation of the International Programme on Chemical Safety (IPCS) report on twelve short-listed POPs; and the Intergovernmental Forum on Chemical Safety (IFCS) Intersessional Group Meeting including its Expert Meeting on POPs, held in Manila, Philippines, 17-23 June 1996 on international action.

3. Recommended Action

In light of the foregoing analysis, and taking into account work that is currently underway in the relevant international fora, it is recommended that competent international bodies, such as UNEP, take action in the following areas.33/ Certain of these areas are included because of their importance, even though a new instrument is not recommended at this time, because the need for and feasibility of related new instruments should be further explored.

(a) Marine pollution from land-based activities: Where appropriate, elaborate and conclude regional protocols to implement the Global Programme of Action of 5 December 1995.34/

(b) Protection, allocation and management of shared fresh water resources: Elaborate and conclude agreements or protocols concerning specific regions or international drainage basins.35/

(c) Regulation of hazardous substances and chemicals: Elaborate and conclude a global legally binding instrument on persistent organic pollutants (POPs), as recommended by the Intergovernmental Forum on Chemical Safety (IFCS), and on prior informed consent (PIC).

(d) Climate change: Monitor efforts, in particular those being made through the appropriate legal instruments, to address climate change and help to ensure that the process continues forward in an expeditious and scientifically sound manner.

33/ These recommendations are not listed in any order of priority.

34/ See the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, document UNEP (OCA)/LBA/IG.2/7, 5 December 1995; and the Washington Declaration on Protection of the Marine Environment from Land-Based Activities, adopted on 1 November 1995 at the High-level Segment of the Intergovernmental Conference to Adopt a Global Programme of Action for the Protection of the Marine Environment from Land-based Activities; document UNEP (OCA)/LBA/IG.2/6, 5 December 1995, Annex II, pages 16-19. The Global Programme of Action contemplates, *inter alia*, the development of an instrument covering persistent organic pollutants (POPs).

35/ In elaborating these agreements or protocols, states may wish to take into consideration, *inter alia*, the framework agreement to be negotiated by a Working Group of the Whole of the Sixth Committee of the United Nations General Assembly, beginning 7 October 1996, on the basis of the draft articles on the law of the non-navigational uses of international watercourses prepared by the International Law Commission.

(e) Interaction of International Environmental Law with other branches of International Law: Strengthen cooperation between concerned bodies to ensure that environmental considerations, as well as agreements in the field of the environment and sustainable development, are taken fully into account in the development and application of other branches of law, in particular WTO law and regional agreements on trade and investment.

(f) Enhancing public participation in environmental decision-making processes: Undertake efforts to elaborate internationally applicable principles relating to public participation in environmental decision-making processes and to promote the incorporation of these principles into national laws, as appropriate.

(g) Enhancing cooperation at the local level on transboundary problems: Promote the development of cooperative relationships between and among regional and local authorities of neighbouring countries, and, where appropriate, the conclusion of regional agreements on the subject.

(h) Forest loss and management: Promote the elaboration and conclusion of regional agreements on the protection and management of forests, in the light of the Statement of Forest Principles.

(i) Further development of concepts and principles in the field of International Environmental Law and Sustainable Development: Continue work on the clarification and further development of concepts and principles in the field of environmental protection aiming at sustainable development, whether in meetings dedicated to this end or in the context of work on general problems or sectoral issues in the field of the environment and sustainable development. The achievement of a common understanding and interpretation of concepts and principles in this field should be promoted. Further consideration should be given to the importance of these concepts and principles for the elaboration of global and regional instruments in the field.

ANNEX A

Background

In 1982 the Governing Council of the United Nations Environment Programme (UNEP) adopted the Montevideo Programme for the Development and Periodic Review of Environmental Law.36/ The Montevideo Programme has guided UNEP in the further development of environmental law, in particular through international legal instruments in the field of the environment.

On 21 May 1993 the UNEP Governing Council by its decision 17/25 adopted the Programme for the Development and Periodic Review of Environmental Law for the 1990s (Montevideo Programme II) as a broad strategy for the activities of UNEP in the field of environmental law for that decade. In that decision the Council also emphasized the role of UNEP "in the continued progressive development of international environmental law as a means for achieving wider adherence to and more efficient implementation of international environmental conventions, and for future negotiating process for legal instruments in the field of sustainable development, in accordance with paragraph 39.1(a) of Agenda 21."

In the context of the mid-term review of the Montevideo Programme II, the Governing Council on 26 May 1995 adopted decision 18/9. In paragraph 5 of that Decision, set forth in the Introduction to the present Study, the Governing Council requested the Executive Director to prepare a study on the need for and feasibility of new international environmental instruments aiming at sustainable development. The present study responds to that request.

36/ UNEP Governing Council decision 10/21 of 31 May 1982.

ANNEX B

Other Important Challenges in the Field of Environmental Protection and Sustainable Development

A. Challenges

1. Liability and compensation in the field of transboundary movements of hazardous wastes (Article 12 of the Basel Convention envisages elaboration of a liability protocol)37/

2. Loss of biodiversity (issues remaining to be addressed include biosafety (a Working Group to develop a protocol on this subject was recently established), liability for damage to biodiversity, the relationship between intellectual property protection and the sustainable development objectives of the Convention, and the Convention's trade-related provisions)

3. Protection of the environment in times of armed conflict (the existing legal regime is fragmented; it needs to be made more coherent)

4. Threats to environmentally sensitive areas (mountains, wetlands, etc.)

5. Urbanization and population growth, problems of human settlements, including their growth, demographics, unsustainable production and consumption patterns

6. Transboundary air pollution (continue efforts to share the experience with the 1979 Geneva Convention on Long-Range Transboundary Air Pollution and its protocols with other regions of the world, and to develop of international legal instruments and mechanisms in those regions, as appropriate)

7. Emergency avoidance, preparedness and response (on the global level)

8. Protection of the environment in the global commons/areas beyond the limits of national jurisdiction

9. Biosafety: control of the introduction of alien species and of genetically modified organisms

10. Localized but recurring air pollution problems, especially in urban settings

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37/ Cf. the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, adopted on 3 May 1996 by the International Conference on Hazardous and Noxious Substances and Limitation of Liability convened by the International Maritime Organization in London from 15 April-3 May 1996.

11. Environmental damage caused by military activities outside of war.

B. Challenges listed under A, above, that are being or have recently been addressed in various international fora

1. Liability and compensation in the field of transboundary movements of hazardous wastes (the Conference of the Parties to the Basel Convention has established an ad hoc working group of legal and technical experts to consider and develop a draft protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal; its fourth session met in Geneva in June 1996).

2. Biosafety: control of the introduction of alien species and genetically modified organisms (the Conference of the Parties to the Convention on Biological Diversity has decided to hold negotiations on this subject).

ANNEX III

OBSERVATIONS REGARDING THE PROGRAMME FOR THE DEVELOPMENT AND PERIODIC REVIEW OF ENVIRONMENTAL LAW FOR THE 1990s (MONTEVIDEO PROGRAMME II)

The Third Meeting of the Expert Group Workshop on International Environmental Law Aiming at Sustainable Development considered the Montevideo Programme II and acknowledged that the Programme was a well-balanced and viable document and that its implementation should continue through 1990s. They further agreed on concrete observations regarding the specific programme areas of the Montevideo Programme II which follow below.

AREA A - Enhancing the Capacity of States to Participate Effectively in the Development and Implementation of Environmental Law

Of overriding importance remains the problem of ensuring the fullest possible participation of developing countries and countries with economies in transition in the processes of development of environmental law (conferences, meetings, etc.) Thus, the necessity to provide adequate funding, although it is not a legal problem, cannot be overemphasized.

Progress in this area would have been more comprehensive had the above problem been solved.

Special emphasis should be laid on sub-paragraphs (c), (d), (f), and (g).

AREA B - Implementation of International Legal Instruments in the Field of the Environment

The significant progress that has taken place in this area should be noted.

Of overriding importance remains the need for further improvements in reporting and data collection systems. Helping developing countries and countries with economies in transition to establish and consolidate their national systems is essential.

Of importance is the further development of non-compliance regimes and procedures; their potential for improving observance by states of their treaty obligations is considerable.

Area B should be implemented in direct conjunction with Area D.

Special emphasis should be laid on sub-paragraphs (b) and (d).

AREA C - Adequacy of Existing International Instruments

This area seems to be of less importance than the others; there remain also doubts about the appropriateness of the term "adequacy".

In many ways this area is dependent on the contents of the relevant international instruments and is self-regulating.

More attention should be paid at the negotiation stage to the question of the means by which effective implementation of the international instrument can be achieved.

Special emphasis should be laid on sub-paragraphs (a)(iii) and (c).

AREA D - Dispute Avoidance and Settlements

Greater emphasis should be placed on the avoidance and prevention of disputes. Appropriate mechanisms and procedures need to be elaborated, and a relevant study would be appropriate.

More attention should be paid to the development and application of appropriate procedures at the regional level and to greater transparency and openness of proceedings at the national level.

The need for more confidence building measures cannot be overemphasized.

A promising new development is the growth in opportunities for access by individuals and non-governmental entities to judicial and administrative procedures on environmental matters.

The existence of liability obligations can serve as a disincentive in preventing disputes regarding environmental matters.

There is a need for greater assistance to developing countries and countries with economies in transition on all the matters covered by the area.

Special emphasis should be laid on sub-paragraphs (a)(iii) and (b).

AREA E - Legal and Administrative Mechanisms for the Prevention and Redress of Pollution and other Environmental Damage

Special and priority emphasis should be laid on sub-paragraph (d) which is of the greatest importance in this area.

In view of the evident discrepancy in the level of development of appropriate national legislation between developed and developing countries, assistance aimed at narrowing the gap is needed.

Study is recommended regarding the potential use, in appropriate case, of criminal and administrative legislation as means of promoting

prevention and of redressing pollution and other environmental damage.

The area should be implemented in conjunction with sub-paragraph (d) in Area B.

AREA F - Environmental Impact Assessment

The significant progress that has been made in recent years, particularly with respect to the activities of UNEP, should be noted.

Elaboration, at the international level, of guidelines with regard to standards and requirements of EIA (environmental impact assessment) that could be used as a model at the national level on matters such as scope, methodologies, thresholds, and criteria is recommended. The need for capacity building at the national level is particularly important.

Special emphasis should be laid on sub-paragraphs (c) and (f).

AREA G - Environmental Awareness, Education, Information and Public Participation

This is one of the most important areas in the whole of the Programme. To make it more effective and useful, it should cover, in particular, activities at the national level. Appropriate knowledge and information should reach the population at large. This would, in turn, result in enhanced public participation in environmental matters.

Under this chapeau patterns of consumption and production should also be studied and assessed from the legal perspective.

The role of UNITAR should also be noted.

Special emphasis should be laid on sub-paragraph (a).

AREA H - Concepts or Principles Significant for the Future of International Environmental Law

The progressive development of international environmental law should be promoted.

Of interest, of course, are not only the rights of States but of individuals too. Studies on the matter that have been, and are being, addressed outside the Montevideo Programme and UNEP should be taken into account.

Special emphasis should be laid on sub-paragraph (d).

AREA I - Protection of the Stratospheric Ozone Layer

In promoting the widest possible acceptance and effective implementation of the regime involving the Vienna Convention and the Montreal Protocol, account should be taken of the London, Copenhagen and Vienna amendments and adjustments.

Encourage the provision of assistance, mobilizing the support of institutions, mechanisms, and organizations established by the regime, including the Implementation Committee, to those states unable to fulfil their obligations in the form of technology transfer, capacity building, drafting legislation, and financial assistance.

Address the issue of illegal trafficking in ozone depleting substances and equipment for production of such substances.

AREA J - Transboundary Air Pollution Control

Promote the acceptance and full implementation of existing treaty regimes.

Consider the development of an international "code of conduct" including such principles as prevention, precaution, control, internalization of costs, cooperation, assistance to developing countries, transfer of technology, and providing for education, information and capacity building.

Promote through the United Nations Economic Commissions or competent regional organizations, the development of regional action plans for combating transboundary air pollution. The conclusion of regional conventions should be encouraged following the example of the 1979 Geneva Convention and existing bilateral conventions.

Attention should be drawn to the need for national legislation to take into account transboundary effects of air pollution and also the principles of non-discrimination and equality of access regarding information, participation and remedies.

Encourage cooperation between and among regional and local authorities of neighbouring countries.

AREA K - Conservation, Management and Sustainable Development of Soils and Forests

Promote wide acceptance and implementation of the Desertification Convention, as well as the Biodiversity Convention and the Climate Change Convention.

Coordinate the implementation of the various international conventions concerning conservation, management and sustainable development of soils and forests and the activities of international institutions concerning the same.

Promote the implementation of international rules by States through developing national legislation and, as necessary, facilitating assistance through *inter alia* capacity building, technology transfer, internalization of costs, cooperation, information and education.

Promote the integration of regional and national policies in particular by the preparation of action plans as well as education and training plans for the implementation of such policies with the aim of promoting cooperation between and among local bodies and non-state actors.

Encourage the conclusion of both global and regional agreements on forest management.

AREA L - Transport, Handling and Disposal of Hazardous Wastes

Encourage emerging regional initiatives and the implementation of regional agreements.

Assist states in implementing international rules concerning the control of transboundary movements, in particular in combating illegal movements of waste, supporting regional efforts in this field, and if necessary assist, states in developing national capacities.

AREA M - International Trade in Potentially Harmful Chemicals

The development of guidelines for national legislation and institutional machinery based on the London Guidelines should be encouraged pending the conclusion of ongoing negotiations in this field.

The Sofia Guidelines on Information and Participation should be taken into account in developing community right-to-know or other public information dissemination programmes.

AREA N - Environmental Protection and Integrated Management, Development and Use of Inland Water Resources

Adoption of the Draft Articles on the Law on Non-navigational Use of International Watercourses should be supported and consideration should be given to the further development of sub-regional conventions following the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, as well as to the conclusion of other regional treaties conventions drawing upon this Convention.

AREA O - Marine Pollution from Land-Based Sources

Support implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities and of the Washington Declaration on Protection of the Marine Environment from Land-Based Activities.

Protocols should be developed in the framework of the Regional Seas Program where such protocols do not exist, for the prevention, reduction and control of land-based activities.

AREA P - Management of Coastal Areas

With a view to developing general guidelines for integrated coastal zone management, the consistency of obligations resulting from existing international instruments should be studied.

The existence of measures and action plans concerning regional seas and wetland should be noted and, if necessary, adapted so as to ensure better management of coastal areas where such plans do not exist, they should be developed.

AREA Q - Protection of Marine Environment and the Law of the Sea

Take note of the conclusion of the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and the FAO's 1993 Agreement to Promote Compliance with International Conservation and management Measures by Fishing Vessels on the High Seas and its Code of Conduct on Responsible Fisheries, which supplemented the United Nations Convention on the Law of the Sea, encourage the widest possible acceptance of these and promote, to the extent possible, the principles and provisions thereof.

Noting that the revised 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, the 1992 Convention on the Protection of the Black Sea against Pollution, and the 1992 Paris Convention on the Protection of the Marine Environment of the North-East Atlantic which integrated the Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft and the former Paris Convention for the Prevention of Marine Pollution from Land-Based Sources, apply *inter alia*, the principles of prevention, precaution and internalization of cost, encourage a new, integrated approach to the protection of the marine environment based on these examples.

AREA R - International Cooperation in Environmental Emergencies

The legal basis for international cooperation in environmental emergencies has made significant progress in recent years, but there is still need for more progress to be made in this area.

Sub-paragraph (c) was duly fulfilled.

AREA S - Additional Subjects for Possible Consideration During the Present Decade

Regarding further implementation in this area, the 'feasibility study' should be taken into account.

Of the topics mentioned or listed under the chapeau, it is important that sub-paragraphs (a), (b), (c) and (f) receive the necessary attention and develop further. Sub-paragraphs (a) and (g) are wide-ranging in nature and are of permanent importance. Sub-paragraph (d), in view of its sensitivity at the present time and its complexity, requires special attention. Regarding the implementation of this sub-paragraph, UNEP needs to be even more active within the WTO/CTE so as to ensure that the environmental concerns are fully addressed and taken into account in the development of law and practice concerning trade and the environment.

ANNEX IV

REPORT OF THE INTERNATIONAL EXPERT WORKSHOP ON COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS WASHINGTON, D.C., 20-21 MAY 1996

1. The International Expert Workshop on Compliance with International Environmental Agreements was convened by the United Nations Environment Programme (UNEP) in cooperation with the Georgetown University Law Center in Washington, D.C. on 20-21 May 1996.

2. The Workshop was organized within the purview of the UNEP Programme for the Development and Periodic Review of Environmental Law for the 1990's (Montevideo Programme II), and in particular its programme area "B" (Implementation of international legal instruments in the field of the environment).

3. The Workshop was opened at 9:30 a.m. on 20 May 1996. The participants of the Workshop were welcomed on behalf of UNEP by Ms. J. Fox-Przeworski, Director, UNEP Regional Office for North America and by Mr. Sun Lin, Director, UNEP Environmental Law and Institutions Programme Activity Centre, and by Ms. E. Brown Weiss on behalf of the Georgetown University Law Center.

4. During the two-day discussions the participants considered the following issues:

- Major factors affecting compliance;
- Significance of whether agreement is binding;
- Incentives for compliance, including financial assistance, industry programs, training and education;
- Usefulness and effectiveness of monitoring, reporting, transparency and the "sunshine" approach to compliance;
- Implications for policy; policy recommendations.

5. Participants discussed many ideas for increasing compliance with international environmental agreements and suggested they be explored further. On the basis of this discussion, they specifically recommended the following:

International Financial Institutions

Link financing by international financial institutions to compliance with international agreements.

Link investment insurance schemes to compliance with relevant international legal obligations.

Inform international financial institutions about international and national environmental legal obligations and provide systematic

information to them on what international legal obligations each country has undertaken relevant to environment. Secretariats should keep international financial institutions informed about the agreements and national compliance with them.

Strengthening Compliance Mechanisms

Consider potential compliance problems during treaty negotiations and include measures to promote compliance.

Develop compliance plans that accompany country ratification of international agreements. The ratifying State should inform the treaty secretariat of the country compliance plan. Compliance plans should include benchmarks. The secretariat should ensure that domestic legislation conforms with treaty obligations.

Develop a participatory approach to determining domestic needs and to priority-setting. This will build political will and develop a culture of compliance ("compliance culture").

Provide for effective participation by civil society, including industry and nongovernmental organizations, in developing and implementing the agreements. Media involvement and policies promoting transparency can assist.

Strengthen horizontal coordination among major agencies and departments at the national level and vertical coordination between national and sub-national units of government.

Strengthen domestic institutions concerned with compliance, including the judiciary and legislative bodies.

Monitoring, Reporting, and Communication of Information.

Strengthen treaty reporting requirements through the following measures: uniform formats for reporting in order to provide comparability of data; frugal data reporting requirements (the frugality principle); equity in reporting data and providing access to the reports.

Develop international tracking schemes for environmentally dangerous materials. These should incorporate the most recent technological advances.

Promote on-site dialogues that involve local communities. These should be non-adversarial, help to develop local capacity, and monitor efforts at implementation and compliance with the agreement.

6. The Workshop concluded its deliberations at 5.30 P.M. on 22 May 1996.

7. Workshop participants attended in their personal expert capacity. While they agree in general with the recommendations to increase compliance, they do not necessarily agree with everything in the report.
