

## **Commentary On The Draft Convention On The Sustainable Management Of Lake Tanganyika**

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### **Pollution Control and Other Measures to Protect Biodiversity in Lake Tanganyika (RAF/92/G32)**

### **Lutte contre la pollution et autres mesures visant à protéger la biodiversité du Lac Tanganyika (RAF/92/G32)**

Le Projet sur la diversité biologique du lac Tanganyika a été formulé pour aider les quatre Etats riverains (Burundi, Congo, Tanzanie et Zambie) à élaborer un système efficace et durable pour gérer et conserver la diversité biologique du lac Tanganyika dans un avenir prévisible. Il est financé par le GEF (Fonds pour l'environnement mondial) par le biais du Programme des Nations Unies pour le développement (PNUD)”

The Lake Tanganyika Biodiversity Project has been formulated to help the four riparian states (Burundi, Congo, Tanzania and Zambia) produce an effective and sustainable system for managing and conserving the biodiversity of Lake Tanganyika into the foreseeable future. It is funded by the Global Environmental Facility through the United Nations Development Programme.



**Prepared by:  
under contract to:  
for the :**

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Lake Tanganyika Biodiversity Project**

## FOREWORD

This Commentary has been prepared by *EnAct* International Ltd (*EnAct*) under contract to Marine Resources Assessment Group Limited (MRAG), a member of the consortium led by the Natural Resources Institute that implemented the GEF funded project: "Pollution Control and Other Measures to Protect Biodiversity in Lake Tanganyika".

This Commentary is intended:

1. to deepen understanding of the draft Convention by drawing attention to the rationale behind particular provisions and by clarifying the meaning and implications of certain articles and the relationship between them;
2. to facilitate the interpretation of the draft Convention by discussing the international environmental law context within which it was developed and, in some cases, by referring to the discussions that shaped particular articles;<sup>1</sup>
3. to expedite on-going negotiations and discussions of the draft Convention, particularly by avoiding the need to repeat discussions that have already taken place;
4. to increase the prospects of agreement being reached on the draft Convention by enabling negotiators to identify quickly the reasons for the inclusion of a particular article, any other relevant international instruments that contain similar provisions, comments made on the articles during discussions to date, and comments and objections raised subsequent to the final legal workshop in Arusha;
5. to provide an important reference document for use both by outside commentators and by those involved in the ongoing negotiation of the draft Convention and the management of the Lake; and
6. to facilitate any future interpretation of the Convention and to help to reduce the possibility of misunderstandings.<sup>2</sup>

The authors gratefully acknowledge the contributions of the many people who have participated in developing and improving the draft Convention.<sup>3</sup>

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<sup>1</sup> This is important because in some cases it is not possible to determine from the text of the draft Convention why certain matters have not been dealt with or why a particular approach has been adopted.

<sup>2</sup> Assuming that the Convention is signed by the riparian countries in a form that is substantially similar to the draft Convention.

<sup>3</sup> The process by which the draft Convention for the Sustainable Management of Lake Tanganyika ("the draft Convention") was developed, the persons involved and the lessons learnt is set out in a paper entitled "How the draft Convention on the Sustainable Management of Lake Tanganyika was developed" (Cullinan and Hodgson, June 2000).

## CONTENTS

<b>1.</b>	<b>INTRODUCTION</b> .....	<b>1</b>
<b>2.</b>	<b>STRUCTURE OF THIS COMMENTARY</b> .....	<b>2</b>
<b>3.</b>	<b>OVERVIEW OF THE DRAFT CONVENTION</b> .....	<b>2</b>
3.1	The overall objective .....	2
3.2	The philosophical basis for the draft Convention.....	2
3.3	Management principles.....	3
3.4	Key concepts and approaches.....	3
3.4.1.	<b><i>The Lake environment</i></b> .....	<b>3</b>
3.4.2.	<b><i>Adverse impacts</i></b> .....	<b>3</b>
3.4.3.	<b><i>Standard setting</i></b> .....	<b>3</b>
3.5	Structure.....	4
3.6	Principal Obligations .....	5
3.7	Mechanisms.....	6
3.8	Institutional Arrangements .....	7
3.9	Anticipated Benefits .....	8
<b>4.</b>	<b>RELATIONSHIP WITH OTHER INTERNATIONAL LEGAL INSTRUMENTS</b> .....	<b>9</b>
<b>5.</b>	<b>GENERAL COMMENTS</b> .....	<b>9</b>
5.1	The scope of the draft Convention.....	9
5.2	The regulation of adverse impacts that are not transboundary .....	10
<b>6.</b>	<b>COMMENTS ON SPECIFIC ARTICLES</b> .....	<b>11</b>
6.1	Title .....	11
6.2	Preamble.....	11
	Article 1. Use of Terms .....	11
	Article 2. Objective.....	12
	Article 3. Jurisdictional Scope.....	13
	Article 4. Co-operation .....	13
	Article 5. Guiding Principles.....	13
	Article 6. Prevention and Minimisation of Adverse Impacts .....	14
	Article 7. Fisheries Management .....	15
	Article 8. Prevention and Control of Pollution.....	15
	Article 9. Prevention of Sedimentation .....	16
	Article 10. Conservation of Biological Diversity .....	16
	Article 11. Access to Genetic Resources .....	16
	Article 12. Navigation.....	17
	Article 13. Strategic Action Programme .....	17
	Article 14. Prior Notification .....	17
	Article 15. Environmental Impact Assessment.....	18
	Article 16. Education and Public Awareness .....	18
	Article 17. Public Participation in Decision Making Processes.....	19
	Article 18. Emergencies.....	19
	Article 19. Public Access to Information .....	19
	Article 20. Exchange of Information.....	19
	Article 21. Protection of Confidential Information .....	19
	Article 22. Reporting .....	20
	Article 23. Conference of the Parties.....	20
	Article 24. Lake Tanganyika Authority .....	20
	Article 25. Lake Tanganyika Management Committee.....	21
	Article 26. Secretariat of the Lake Tanganyika Authority .....	21
	Article 27. Technical Committees .....	21
	Article 28. Financial Resources .....	21
	Article 29. Settlement of Disputes .....	22
	Article 30. Liability of Operators of Dangerous Activities.....	22

Article 31.	Liability and Compensation .....	22
Article 32.	Access to Courts .....	23
Article 33.	Right to Vote .....	23
Article 34.	Protocols to this Convention.....	23
Article 35.	Annexes.....	23
Article 36.	Amendment of the Convention or its Protocols.....	23
Article 37.	Relationship with other International Conventions .....	23
Article 38.	Relationship with National Laws.....	23
Article 39.	Signature .....	23
Article 40.	Ratification and Accession .....	24
Article 41.	Entry into force .....	24
Article 42.	Reservations.....	24
Article 43.	Withdrawals .....	24
Article 44.	Depositary.....	24
Annex I	Environmental Impact Assessment .....	25
Annex II	List of Activities Dangerous to the Lake Environment.....	25
Annex III	Fact Finding Commissions.....	26
Annex IV	Arbitration.....	26

**SCHEDULE 1 – RELEVANT INTERNATIONAL LAW INSTRUMENTS .....27**

**SCHEDULE 2 - CONSOLIDATED RECORD OF COMMENTS ON THE CONVENTION MADE AFTER THE 1999 LEGAL WORKSHOP IN LUSAKA .....29**

## ACRONYMS AND ABBREVIATIONS

1997 Convention	Watercourses	The 1997 Convention on the Law of the Non-navigational Uses of International Watercourses
Aarhus Convention		Convention on access to information, public participation in decision-making and access to justice in environmental matters, adopted at Aarhus (Denmark) on 25 June 1998.
CBD		The Convention on Biological Diversity
Draft Convention		The Convention for the Sustainable Management of Lake Tanganyika (4 <sup>th</sup> Working Draft)
DRC		The Democratic Republic of the Congo (formerly Zaire)
EIA		Environmental Impact Assessment
Espoo Convention		The United Nations Economic Commission for Europe Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo (Finland) on 25 February 1991
FAO		Food and Agriculture Organization of the United Nations
GEF		Global Environment Facility
LTBP		The Lake Tanganyika Biodiversity Project
Ramsar Convention		The 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat
SADC		The Southern African Development Community
SADC Protocol		The 1995 SADC Protocol on Shared Watercourse Systems in the Southern African Development Community
SAP		Strategic Action Programme (for the management of Lake Tanganyika)

## 1. INTRODUCTION

Most Conventions and treaties regulating international watercourses focus on the allocation of water and the prevention of water pollution. These are not the primary issues that arise in relation to Lake Tanganyika. Accordingly, unlike most other international watercourse treaties, the focus of the draft Convention is on the establishment of a framework for the countries around the Lake (the “riparian states”) to manage the Lake as a shared resource in a manner that both protects the environment associated with the Lake and allows for the equitable and sustainable use of the Lake and its natural resources.

The 4<sup>th</sup> draft of the Convention on the Sustainable Management of Lake Tanganyika (“the draft Convention”) represents a new generation of international agreements dealing with the environment. Unlike most existing international environmental agreements, its primary aim is not to conserve a particular habitat or species, nor does it focus on controlling the abstraction of water and the discharge of pollutants into a particular water resource. It is perhaps best characterised as an integrated, sustainable development convention that is focussed on a particularly valuable ecosystem.

The draft Convention uses cutting-edge principles and mechanism of international environmental law but is designed to be flexible, practical and capable of immediate implementation (in other words it will be immediately effective even prior to the development of various protocols). It establishes a framework for long term co-operation and sustainable management of the Lake in a way that is most beneficial to the riparian countries and also establishes principles and specific obligations to guide the development of national legal, administrative and other measures potentially affecting the Lake. If implemented, this will result in the progressive harmonisation of the relevant laws of the four riparian countries.

The first versions of the draft Convention were prepared by a team of legal consultants on the basis of detailed drafting instructions emanating from the first regional legal workshop held in Lusaka, Zambia in February 1998. The first draft was accompanied by a brief explanatory memorandum which indicated how the recommendations of the Lusaka workshop had been given effect to in the text, and drew attention to other international legal instruments that had been used as source documents for particular articles.<sup>4</sup>

The first draft was amended during the course of the two sub-regional workshops (one for the two Anglophone countries and one for the two Francophone countries). Harmonised English and French versions of the draft Convention were then agreed in November 1999 at a regional legal workshop held in Arusha, Tanzania. After the fourth draft of the Convention was circulated, a number of further comments were received from members of the Tanganyika Biodiversity Project (“LTBP”) team, individuals and organisations within some of the riparian countries, and donors. The draft Convention was then considered by the Regional Steering Committee of the LTBP on 4 May 2000 together with various comments received on the draft Convention. The Regional Steering Committee resolved to forward the draft Convention together with various comments on it, to the Governments of the four riparian countries with the recommendation that the Governments should negotiate and sign a final version of the Convention as soon as possible.

A fuller understanding of the process of developing the draft Convention may be obtained by reading “How the draft Convention on the Sustainable Management of Lake Tanganyika was developed”.<sup>5</sup>

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<sup>4</sup> This explanatory memorandum was intended to serve as an *aide memoire* for the participants in the Anglophone and Francophone sub-regional legal workshops regarding the recommendations of the Lusaka regional workshop in order to expedite discussions of the first draft. It was never intended to provide a comprehensive commentary on the draft Convention.

<sup>5</sup> C. Cullinan and S. Hodgson, April 2000.

## **2. STRUCTURE OF THIS COMMENTARY**

This Commentary begins with a general overview of the draft Convention (section 3) to enable readers to comprehend quickly and easily the main features of the draft Convention, the philosophy underlying it and the benefits that should flow from it. Section 4 discussed the international law context in which the draft Convention was developed, section 5 contains general commentary on the draft Convention and section 6 gives a detailed commentary on each article of the draft Convention.

For ease of reference, the comments received from Tanzania, UNEP and those made at the sixth meeting of the regional steering committee are attached as Schedule 2. These comments and other relevant comments or observations made by various parties during the process, which may be relevant to the finalisation of this draft Convention, have been included in the commentary in italics. Most of these appear in the section 6 (which deals with comments on specific articles).

## **3. OVERVIEW OF THE DRAFT CONVENTION**

### **3.1 The overall objective**

The objective of the draft Convention, as expressed in article 2, is essentially to ensure the protection and conservation of the biological diversity and sustainable use of the natural resources of Lake Tanganyika and its environment. It is important to note that this objective is wider than that of the LTBP which is focussed on the prevention of pollution and the conservation of biological diversity. By referring to the sustainable use of natural resources, the objective of the draft Convention is effectively extended to encompass the sustainable development of the Lake environment as well as the protection and conservation of biological diversity. This reflects the recognition by the riparian States that it will only be possible to ensure the protection of the Lake environment by dealing with both environmental and development matters in an integrated manner (as reflected in principle 4 of the Rio Declaration).

### **3.2 The philosophical basis for the draft Convention**

The draft Convention is based on the recognition that Lake Tanganyika is the shared heritage of the riparian States; that they have a common interest in the conservation and equitable utilisation of the resources of the Lake; and that the best way of maximising the benefits to all the riparian States is by co-operating in the integrated management of the Lake and its environment. This essentially reflects a recognition that, from a management perspective, the national boundaries which bisect the Lake are irrelevant and that the health of the Lake and its environment can only be achieved by taking a regional and integrated approach.

The central theme of co-operation is elaborated in article 4 which requires the States to co-operate in good faith in the management of Lake Tanganyika and the Lake environment in an integrated and holistic manner that most effectively promotes the attainment of the objective and that gives effect to the six guiding principles set out in article 5. Article 4 also gives details as to what forms such co-operation would take, for example, planning and managing activities that may have an adverse impact on the Lake and its environment and exchanging information.



### **3.3 Management principles**

Article 5 lays down six principles that must be applied to achieve the overarching goal of sustainable development. These are:

- the precautionary principle;
- the polluter pays principle;
- the principle of the preventive action;
- the principle of public participation;
- the principle of equitable benefit sharing with local communities; and
- the requirement that Lake Tanganyika be used exclusively for peaceful purposes.

### **3.4 Key concepts and approaches**

In order to fully understand the draft Convention, it is important at the outset to understand the “ecosystem approach” inherent in the concept of “Lake environment”, the fundamental concept of “adverse impact”, and the related approach to standard setting.

#### **3.4.1. The Lake environment**

The definition of the “Lake environment” includes not only the aquatic environment of Lake Tanganyika (including the system of surface waters and ground waters that flows into the Lake) but also ecosystems and aspects of the environment<sup>6</sup> that are “associated with, affect or are dependent on” this aquatic environment. This definition effectively means that the draft Convention is based on a “ecosystem” approach, which is a more holistic approach than focussing only on the waters of the drainage basin. However it is important to note that this definition does not include waters flowing into the Lake from a non-riparian State. This amendment was made during the course of developing the draft Convention in order to restrict the application of the draft Convention to the four riparian countries.

#### **3.4.2. Adverse impacts**

Arguably the central obligation of the draft Convention is the prevention and minimisation of adverse impacts.<sup>7</sup> “Adverse impact” is defined in article 1 (see also the discussions in sections 5.1 and 6). There are four key aspects to this definition. Firstly, the impact (which may be actual or potential) must originate from the territory of a Contracting State or from a vessel or aircraft under its jurisdiction and control. Secondly, there must be an impact on the Lake environment. Thirdly, provided there is such an impact, the concept includes consequential detrimental effects of a socio-economic nature. Fourthly, the impact must be more than negligible and must not be an impact which has been assessed and determined to be acceptable under the Convention or any protocols to it.

#### **3.4.3. Standard setting**

Setting precise environmental standards (e.g. for emissions of specified pollutants into the Lake) is also difficult in the context of Lake Tanganyika for a variety of reasons. These include: the limited scientific information available, the need to balance the development needs of Lake-side communities

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<sup>6</sup> “Environment” and “ecosystem” are also defined in article 1.

<sup>7</sup> See article 6.

and the need to protect fragile aquatic ecosystems, and very limited institutional capacity to enforce standards.

In developing the draft Convention the approach adopted by some European watercourse Conventions (e.g. the Danube Convention) that require the Contracting States to use the “Best Available Techniques” was considered. This approach of setting a “dynamic” standard that will become stricter as technology improves, has been effective in highly industrialised societies with sophisticated regulatory capacity. However, this approach has not been adopted in the draft Convention, primarily because it would not be practical to enforce this standard without a number of highly qualified and experienced inspectors.

The draft Convention adopts a more flexible approach and aims to lay the basis for the Contracting States to develop specific standards as and when required by means of a Protocol to the Convention (article 8 paragraph 3). As a consequence of the definition of “adverse impact”, once an actual or potential impact has been assessed and determined to be acceptable under the Convention (for example, by agreement of if the impact does not exceed a standard specified in a protocol) it would not be regulated by the Convention.

However it is important to note the following in relation to the setting of standards under the draft Convention.

1. The draft Convention emphasises the responsibility of each Contracting State to set and enforce appropriate environmental standards within its territory but if minimum standards are agreed under the Convention then the national standards must be at least as stringent<sup>8</sup> and may be more stringent<sup>9</sup>;
2. Since standards will usually be set at the national level, in general it will be up to a particular Contracting State to prosecute any person who does not comply with those standards. However if a Contracting State does not establish appropriate standards or establishes standards that are less stringent than those agreed by the Contracting States under the Convention, that Contracting State may be in breach of its obligations to the other Contracting States under the Convention.<sup>10</sup>

### 3.5 Structure

The articles in the draft Convention have been arranged in approximately the same order as those contained in the Convention on Biological Diversity, and following the style of the CBD, the draft Convention is not divided into chapters or parts. However the draft Convention has been structured as follows.

1. **Introductory Provisions** (The Preamble and articles 1 to 3)  
These articles establish the scope and objective of the Convention.
2. **Principal Obligations** (articles 4 to 12).  
These articles set out the principal obligations of the Contracting States which are discussed more fully in section 3.6 below. The principal obligations are: to co-operate in good faith (article 4), to avoid and minimise adverse impacts (article 6), to conserve biological diversity (article 10), to regulate access to genetic resources (article 11) and to permit freedom of

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<sup>8</sup> See article 8(3).

<sup>9</sup> See article 38.

<sup>10</sup> For example article 8(2)(c) requires each Contracting State to take specific measures to prevent, control and reduce pollution from various sources, and article 6(2) requires Contracting States to take appropriate measures to prevent adverse impacts and to minimise and control those adverse impacts that cannot be prevented.

navigation (article 12). In addition, the principal threats to the Lake environment have been emphasised by specific articles. These deal with the prevention of unsustainable fishing (article 7), the prevention of pollution (article 8), and the prevention of excessive sedimentation (article 9).

**3. Mechanisms for implementing the Convention** (articles 13 to 21)

These articles provide the means to be employed in order to implement the draft Convention, and are discussed more fully in section 3.7 below. The mechanisms include: the preparation and implementation of a strategic action programme (article 13), prior notification of certain planned activities and measures (article 14) and of emergencies (article 18), environmental impact assessment (article 15), education and public awareness (article 16), public participation in decision making processes (article 17), public access to information (article 19), information exchange (article 20) and reporting (article 22).

**4. Institutional Arrangements** (articles 23 to 27)

These articles: set out the functions of the Conference of the Parties (article 23); cover the establishment of the Lake Tanganyika Authority (article 24), the Management Committee (article 25), the Secretariat (article 26), and Technical Subcommittees (article 27); and deal with the funding of these bodies and of meetings (article 28).

**5. Dispute settlement and liability** (articles 29 to 32)

These articles establish mechanisms for resolving disputes between the Contracting States (article 29 as read with Annexes III and IV) and establish the liability of operators of dangerous activities and of the Contracting States, as well as facilitating access to the courts by persons who suffer losses as a result of adverse impacts (article 32).

**6. Miscellaneous Procedural Matters** (article 33 to 44)

This part of the draft Convention deals with a range of procedural matters such as how to adopt and amend protocols and annexes.

*One of the comments made by the UNEP lawyer on the fourth draft of the Convention was that it would be easier to read if it were divided into five or six parts, that the order of some of the articles should be changed (this is dealt with in section 6 in the commentary on the articles concerned), and that procedural matters should not be included as this would "also be helpful in speeding up the acceptance process leaving difficult decisions to a later moment". If the Contracting States prefer the Convention to be divided into sections to make it easier to read, the six divisions set out above could function as chapter headings. However, we do not consider it appropriate to delete all procedural matters from the text as suggested since these were inserted to enable the Convention to become operational immediately after the first meeting of the Conference of the Parties. Deferring all difficult matters to a later date will only result in deferring the implementation of the Convention.*

### **3.6 Principal Obligations**

In general, the main obligations of a Contracting State are:

1. to co-operate in good faith with the other Contracting States in the management of the Lake and the Lake environment (article 4);
2. to apply the principles set out in article 5 when taking decision affecting the Lake;
3. to prevent and minimise adverse impacts, whether transboundary or not, (article 6) and in particular, in relation to fisheries management (article 7), the prevention and control of pollution (article 8), the prevention of excess sedimentation (article 9) and the conservation of biological diversity (article 10); and

4. to adopt and implement appropriate legal, administrative and other measures in order to achieve the objective of the Convention.

The general obligation to adopt and implement appropriate measures is reflected in a specific form in a number of the articles of the draft Convention<sup>11</sup>. The overall effect of these various obligations, when combined with the obligation to apply the principles set out in article 5, should be to ensure the progressive harmonisation of the national legislation in each of the four countries insofar as it affects the Lake environment.

The draft Convention also imposes important obligations in relation to the regulation of access to genetic resources (article 11) and navigation on the Lake (article 12). The draft Convention deals with access to the genetic resources of the Lake environment because it will be important for the riparian countries to adopt a co-operative approach to ensure that they obtain the maximum benefit from any future use of these resources. However, the draft Convention specifically reaffirms that the results of research and development and the benefits arising from the utilisation of such resources should be shared in a fair and equitable way in accordance with the Convention on Biological Diversity.

Navigation on the Lake has been included because of the extensive use of the Lake for transportation and because shipping on the Lake is a potential source of pollution and consequently should be regulated if a truly integrated regulatory system for the Lake is to be established. This is consistent with the overall theme of sustainable development.

### 3.7 Mechanisms

In drafting the Convention an attempt has been made to include a wide range of mechanisms that can be usefully applied in order to achieve the overall objectives of the Convention. The most important mechanisms are the requirements imposed on Contracting States:

1. to prepare and implement a **strategic action programme**, to monitor its effectiveness and to revise it as necessary (article 13);
2. to **notify** other Contracting States of certain proposed activities (listed in Part A of Annex 1) and of public policies, plans or programmes that are likely to give rise to transboundary adverse impacts (article 14) and to notify the Secretariat of any emergency that causes or is likely to cause an adverse impact (article 18);
3. to introduce **environmental impact assessments** within each country for proposed activities which will be presumed to result in adverse impacts (listed in Part A of Annex 1) and to ensure

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<sup>11</sup> For example, appropriate national measures must be introduced: (i) to address the causes or potential causes of adverse impacts, to prevent adverse impacts and to mitigate those adverse impacts that cannot be prevented (article 6(2)); (ii) to prevent, control and reduce pollution from various sources (article 8(2)(c)); (iii) to manage fisheries and to eliminate unsustainable fishing practices and to reduce the pressure on over exploited fisheries (article 7(2)(c)); (iv) to prevent all causes of excess sedimentation in the Lake (article 9); (v) to conserve ecosystems and species, to prevent the introduction of, control and eradicate exotic species, and to prevent the deliberate or accidental introduction of species into areas in which they do not naturally occur (article 10(1)); (vi) to control access to the genetic and biochemical resources of the Lake and its environment (article 11(1)(a)); (vii) to prevent and reduce the risk of pollution from vessels (article 12(3)); (viii) to require an assessment to be conducted on the environmental impacts of proposed projects and activities likely to give rise to adverse impacts (article 15(1)(a)); (ix) to ensure the consequence for the Lake environment are taken into account when preparing public policies, plans and programs (article 15(1)(d)); and (x) to ensure that the public and, in particular those individuals and communities living with the Lake environment, have the right to participate in decision making processes (article 17(1)).

that when public policies, plans and programmes are being developed and implemented, that the consequences for the Lake environment are taken into account (article 15(1)(b));

4. to implement **education and public awareness programmes** (article 16);
5. to encourage **public participation in decision making processes**, particularly participation by individuals and communities living within the Lake environment in relation to decision making processes that affect the Lake environment or their livelihoods (article 17);
6. to **facilitate the flow of information** by: (a) providing public access to information concerning the Lake (article 19); (b) requiring Contracting States to exchange through the Lake Tanganyika Authority data and information concerning the sustainable management of the Lake environment and the implementation of the Convention (article 20); (c) protecting confidential information (article 21); and (d) requiring the Contracting States to report periodically to the Authority on measures taken to implement this Convention and on their effectiveness (article 22); and
7. to introduce **strict liability for the operators of dangerous activities** (article 30 as read with Annex 2) which will have the effect of reducing any compensation payable by a Contracting States that is held liable in accordance with international law for any transboundary adverse impacts arising from its failure to fulfil its obligations under the Convention (article 31).

It is notable that with the exception of the liability regime (a traditional mechanism for promoting compliance with legal instruments), the mechanisms focus on promoting the gathering and use of information about the Lake and its environment. This information will be disseminated to the public and to other Contracting States, and used to develop and implement a strategic action programme and to improve decision making processes that affect the Lake environment.

The liability regime is intended to give effect to the “polluter pays” principle and to shift the primary responsibility for avoiding serious damage to the Lake arising from inherently dangerous activities from a Contracting State to the party undertaking these activities (“the Operator”). An incentive is created for Contracting States to ensure that such Operators are properly supervised, and that adequate national laws are in place to ensure that the Operator is held liable, by providing that if the relevant Contracting State does this, any liability to compensate for transboundary harm will be reduced to the extent that compensation has been obtained from the Operator.

### **3.8 Institutional Arrangements**

The first legal workshop held in Lusaka in Zambia in February 1998 recommended that any institution established by the Convention should be kept relatively small and the costs of running institutional structures should be as inexpensive as reasonably possible. The draft Convention seeks to implement the recommendations of the workshop by establishing a Lake Tanganyika Authority (“the Authority”) consisting of a Management Committee consisting of three members from each Contracting State, and a Secretariat comprised of a Executive Director, a Deputy Executive Director and whatever staff may be necessary.

The Authority will have international legal personality (article 24) and will be answerable to a Conference of the Parties consisting of a delegation from each Contracting State, which must be lead by a Minister (article 23). The Management Committee may be assisted by any number of technical committees approved by the Conference of the Parties. The draft Convention provides that as a minimum, there must be three technical committees dealing with: socio-economic matters, fisheries management and biological diversity (article 27). The LTBP Regional Steering Committee has recommended that there should also be a permanent technical committee dealing with pollution and water quality.

The draft Convention also establishes the principles to be applied in financing the Authority (unless decided otherwise by the Conference of the Parties)<sup>12</sup> and provides that the Conference of the Parties must discuss the adoption of a protocol to establish funding or other financial mechanism to support the implementation of the Convention (article 28).

### 3.9 Anticipated Benefits

A riparian State that becomes a Contracting State can be expected to enjoy a number of benefits, some of which are listed below.

1. By establishing a framework for co-operation, the draft Convention provides for a forum in which information can be exchanged, issues discussed, and joint approaches to management developed. It is also anticipated that the prospects of obtaining funding for the sustainable development of the Lake will be considerably enhanced by the existence of the institutional structure set out in the draft Convention.
2. The draft Convention effectively establishes a “partnership” between the riparian countries on the basis of a common objective, and agreed principles and approaches to managing the Lake. It also clarifies the expectations that each of the “partners” have in relation to one another, for example in relation to the exchange of information and the manner in which each riparian State is expected to manage its portion of the Lake. This should substantially reduce the potential for conflicts between the riparian States concerning the use of the Lake environment.
3. The draft Convention also provides a framework for resolving and avoiding disputes. The Secretariat in particular, will be able to play an important role in reducing the potential for conflict. Where disputes cannot be settled by negotiation, the draft Convention provides for the use of a range of dispute resolution procedures including: mediation, impartial fact finding and arbitration (article 29 as read with Annexes 2 and 4).
4. The benefits flowing from the Lake and its environment are likely to be optimised by managing the Lake in an integrated and holistic manner and the benefits of a healthy Lake will accrue to all the riparian countries. Accordingly, it is reasonable to anticipate that the benefits to each one of the riparian countries will be greater in the long term than would have been achieved without a co-operative approach.
5. The risk to each riparian State of having one of its most valuable resources degraded should be significantly decreased if the Convention comes into effect. The draft Convention gives effect to the principle of preventive action, for example by requiring each riparian State to take measures within their territory to reduce the potential for adverse impacts of the Lake (e.g. by introducing environmental impact assessment measures, by preventing the introduction of alien species). In this way it provides a measure of comfort to each State that if it conserves its portion of the Lake in a manner consistent with the Convention, it may expect the other riparian States to do likewise.

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<sup>12</sup> The financing principles established in article 28 are: that the Contracting States will contribute in equal proportions, that in allocating the funding priority will be given to funding the additional costs associated with regional co-operation and the implementation of the strategic action programme, and to funding projects benefiting more than one country, and that each country will generally be expected to fund projects that are for its exclusive benefit.

## 4. RELATIONSHIP WITH OTHER INTERNATIONAL LEGAL INSTRUMENTS

Although the draft Convention has been designed specifically for the particular circumstances of the Lake, it also incorporates concepts and principles adapted from a wide range of international agreements. The Legal and Institutional Baseline Study prepared at the outset of the LTBP analysed various relevant international and regional Conventions and agreements that one or more of the riparian states were party to. (For ease of reference the various instruments are listed in Schedule 1.) The Baseline Study concluded on the basis of this analysis that in other contexts the riparian states had already committed themselves under customary law or by treaty, either directly or indirectly:

- to establish policies for the conservation, utilisation and development of underground and surface water;
- to use water and other natural resources in a reasonable and equitable manner;
- to protect and preserve the ecosystems of the Lake and its drainage basin;
- to incorporate natural resource conservation issues into development strategies, plans and programmes;
- to avoid and prevent environmental harm;
- to exchange information, notify, consult with and negotiate with, other states concerning environmental risks; and
- to notify other states and to co-operate with them in emergencies.

The draft Convention seeks to build on these principles and obligations and to adapt and develop them to meet the specific need associated with protecting Lake Tanganyika. In doing so, the drafters took into consideration both current trends in international law both in the region<sup>13</sup> and internationally,<sup>14</sup> and drew on the latest techniques and approaches. However in each case the approaches were adapted to ensure that they were appropriate to the circumstances of the Lake.

## 5. GENERAL COMMENTS

### 5.1 The scope of the draft Convention

It is important that the scope of the draft Convention is sufficiently broad to regulate all activities that may affect the Lake, while ensuring that it is not so broad as to regulate almost every activity that occurs within the territories of the riparian states. The jurisdictional scope of the draft Convention is defined in article 3 to include all human activities, vessels and aircraft under the control of a Contracting State to the extent that they result, or are likely to result in, an adverse impact. However it is important to note that a number of other mechanisms have been used to define the scope of the draft Convention.

The scope of the draft Convention has been broadened in the following ways.

1. The draft Convention regulates “adverse impacts” rather than “pollution”. “Adverse impact” is defined extremely widely to ensure that it covers detrimental effects on the Lake environment that are not caused by pollution (e.g. the effects of sedimentation), as well as detrimental impacts that arise as a consequence of detrimental impacts on the Lake environment. It is

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<sup>13</sup> For example the 1995 SADC Protocol on Shared Watercourse Systems in the Southern African Development Community (Burundi is not part of the Southern African Development Community).

<sup>14</sup> For example the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses (which is not yet in force and is consequently not yet binding).

important to regulate these consequential effects if developments affecting the Lake are to be sustainable.

2. A wide definition of “Lake environment” has been used which includes the entire watercourse system and ecosystems and aspects of the environment that are associated with, or dependent on the aquatic environment of the Lake.

The scope of the draft Convention has been restricted in the following ways.

1. Only impacts that originate from human conduct originating from the territory of, or a vessel or aircraft under the jurisdiction or control of, a Contracting State, are regulated.
2. Only certain kinds of impacts are regulated, namely actual or potential detrimental effects on the Lake environment and specified effects (e.g. on human health and legitimate uses of the Lake) which occur as a consequence of the negative impacts on the Lake environment. In other words the draft Convention does not regulate impacts that neither have a direct detrimental effect on the Lake environment, nor occur as a consequence of a detrimental effect on the Lake environment.
3. Only adverse impacts that exceed a certain threshold of significance are regulated by the draft Convention. Any adverse effect that is negligible or has been assessed and determined to be acceptable, will not be regulated by the draft Convention. It is expected that this threshold will become more clearly defined over time as the Contracting States decide by agreement or through the process of dispute resolution, which impacts they regard as acceptable and which are unacceptable.
4. The definition of “Lake environment” excludes surface and ground waters that are not within the four riparian States.

## **5.2 The regulation of adverse impacts that are not transboundary**

Most international environmental agreements, particularly those concerned with transboundary watercourses, aim to regulate transboundary impacts. The traditional view is that if an activity and the impacts it gives rise to occur within the same State, it should be regulated exclusively by the domestic law of that State. Indeed, under international law the principle of national sovereignty over natural resources would generally mean that other States would not be legally entitled to require another State to take any domestic measures to protect its own environment. Although a number of international legal instruments have emphasised that States also have certain responsibilities in respect of their own environment (for example, to conserve their biological diversity), this can be regarded as “soft law” in the sense that it does not constitute a legal duty enforceable by another State.

The draft Convention respects the principle of international law that a State has sovereign rights over its own natural resources subject to certain responsibilities, such as the duty to ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction. However, the draft Convention seeks to go beyond the traditional approach by requiring the Contracting States to act separately and jointly in a manner that recognises the reality that the Lake is a shared water body that must be managed as an integrated whole. There are a number of reasons for adopting this approach, including the following.

Firstly it is often very difficult to determine whether or not a particular detrimental effect on the Lake will have effects that are transboundary, and even more difficult to prove. If the Contracting States are only required to avoid and mitigate transboundary impacts, arguments as to whether or not a particular adverse impact extends beyond an international border could divert attention away from the primary



objective of effective management of the Lake. In the light of the limited scientific information available concerning Lake Tanganyika, such a debate may well be inconclusive in any event.

Secondly, it appears that the best way of optimising the benefits to each one of the Contracting States from the Lake is to manage the Lake as an integrated ecosystem. If this is the case, it can be argued that any adverse impact on the shared ecosystem will be prejudicial to the common interest.

The draft Convention deliberately avoids focussing on the traditional distinction between transboundary and internal impacts by requiring Contracting States to take appropriate measures to control adverse impacts whether or not there are transboundary adverse impacts (article 6 paragraph 2). This effectively gives recognition to the fact that each Contracting State has a responsibility to the other Contracting States to take appropriate management measures at the national level in order to promote the common interest. This approach is also evident in the specific obligations of the Contracting States to prevent unsustainable fishing (article 7), to prevent pollution (article 8), to prevent sedimentation (article 9), to conserve biodiversity (article 10) and to prevent pollution from vessels (article 12 paragraph 3).

In order to avoid the need to determine whether or not adverse impacts are transboundary, the draft Convention lists activities which if undertaken (usually within the Lake environment) will be presumed to cause adverse impacts (Part A of Annex I).

However, the distinction between transboundary and other adverse impacts is maintained in respect of liability. The draft Convention does not displace the normal international law rules regarding liability for transboundary harm (see article 31 paragraph 1) and does contain any provision requiring the payment of compensation in relation to adverse impacts that are not transboundary.

## 6. COMMENTS ON SPECIFIC ARTICLES

### 6.1 Title

*UNEP has suggested that the title be changed to include a clear reference to the environment e.g. "Convention on the sustainable management of the environment of Lake Tanganyika" in order to facilitate research. Another option would be "The Convention on the sustainable management of Lake Tanganyika and its environment".*

### 6.2 Preamble

The preamble sets out the rationale for entering into the Convention. It indicates the international law context in which the Convention is situated by referring to the Rio Declaration and the Convention on Biological Diversity. The 1997 Watercourses Convention and the 1995 SADC Protocol are particularly relevant in this regard but have not been specifically referred to because not all the riparian countries supported the adoption of the Water Course Convention by the United Nations General Assembly and Burundi is not part of the SADC.

### Article 1. Use of Terms

Unlike many similar definitions, the definition of "**adverse impact**" does not require the impact to be "significant". Instead all relevant actual and potential detrimental impacts are covered unless the impact is either negligible or "has been assessed and determined to be acceptable under the

Convention". This approach has been adopted in preference to using the threshold of "significance" because of the difficulty of determining what impacts on a vulnerable environment are to be regarded as significant. This definition also allows the Contracting States the freedom to change what the Convention regulates over time by co-operating in the establishment and development of mutually acceptable norms. For example, a particular impact would not be regulated by the Convention if it is acceptable to the Contracting States (perhaps because a limited negative environmental impact is outweighed by significant social gains) or if it is determined to be acceptable in the course of resolving a dispute under the Convention. (See also the discussion in section 3.4.2 above.)

The definitions of "**biological diversity**", "**ecosystem**", and "**genetic resources**" are all derived from Article 2 of the Convention on Biological Diversity.

The definition of "**environment**" does not include humans, who consequently do not fall within the definition of "**Lake environment**". However actual or potential detrimental affects on the health of people of a Contracting State or on their ability to provide for their health, safety and cultural economic well-being, or on the legitimate uses of the Lake, fall within the definition of "**adverse impact**".

The definition of "**Lake environment**" is discussed in section 3.4.1 above. The definition is intended to exclude the river which flows out of the Lake via the Democratic Republic of Congo in order to ensure that the Congo river system does not fall within the definition of the Lake, and those portions of the rivers flowing into the Lake that are situated in non-riparian countries. This definition was amended during the process of developing the draft Convention to avoid the use of the term "**basin**" and to make it clear that the draft Convention did not apply to States other than the four riparian countries. The original formulations were as follows:

" "Lake basin" means the geographical area bounded by the watershed limits of Lake Tanganyika;

"Lake Tanganyika" means the water-body known as Lake Tanganyika, the system of surface waters and ground waters that flow into the Lake and the land submerged by these waters;" "

## **Article 2. Objective**

This article follows the Convention on Biological Diversity by clearly specifying the objective of the draft Convention at the outset. The objective refers not only to the protection and conservation of biological diversity (the central aim of the LTBP) but also to the sustainable use of the natural resources of Lake Tanganyika and its environment. This emphasises from the outset that the draft Convention is intended to go beyond traditional environmental protection agreements and to focus explicitly on the sustainable protection and utilisation of an important shared natural resource.

Paragraph 2 of article 2 draws attention to two particularly important characteristics of how the Contracting States will seek to achieve the overall objective. The first concerns co-operation (which is elaborated upon in article 4), particularly in the development and implementation of harmonised laws and standards (see also the discussion in 3.4.3 above). The sub-paragraph also draws attention to the need to ensure that communities living near the Lake benefit from its resources.

*UNEP has suggested that this article be entitled "Scope of the present Convention", should incorporate article 3 as paragraph 3, and should precede the existing article 1. These stylistic changes would not change the legal effect of the Convention.*

### **Article 3. Jurisdictional Scope**

This article makes it clear by implication that the draft Convention does not regulate those activities under the control of a Contracting State that neither result, nor are likely to result in, an adverse impact. Similarly, aircraft and vessels under the control of a Contracting State will only be affected to the extent that they may cause adverse impacts. The article also makes it clear that the draft Convention does not apply to impacts on the environment beyond the borders of the riparian States.

### **Article 4. Co-operation**

This article deals with perhaps the most central theme of the draft Convention, namely co-operation between the riparian States in the management of the Lake and its environment. Paragraph 1 describes the nature of such co-operation, namely that it must be in good faith, and in a manner that both effectively promotes the attainment of the objective and gives effect to the guiding principles in article 5. Paragraph 2 describes in practical terms what such co-operation will entail. Most of these are elaborated further in the draft Convention. For example, the general obligations stated in paragraphs 2(a) and (e) regarding activities that may result in an adverse impact, should be read in conjunction with article 14 on prior notification and article 15 on environmental impact assessment. Similarly, the obligation to exchange information under paragraph 2(d) should be read in conjunction with article 20 which describes the data and information to be exchanged and the means of exchange (via the Authority); article 21 which deals with the protection of confidential information, and article 22 on reporting.

### **Article 5. Guiding Principles**

Article 4 paragraph 1 requires the Contracting States to co-operate in managing the Lake in a manner that gives effect to the principles in article 5. The effect of this is that Contracting States must ensure that they consider, and where relevant, give effect to, the principles set out in article 5 when implementing the Convention.

The principles are intended to guide the Contracting States to achieve the overarching goal of sustainable development and to guide the manner of co-operation between the States generally. The practical effect of this is that these principles guide everything done under the Convention. For example, the Contracting States must apply the principles when preparing the strategic action programmes, when planning and implementing all management measures relating to the Lake (e.g. measures relating to fisheries management, pollution control, the conservation of biological diversity and the prevention of sedimentation); and in developing and implementing legal, administrative, technical and other measures at the national level in order to implement the Convention.

It is anticipated that the principles will function as an important mechanism for promoting the progressive harmonisation of the laws of the four countries concerning the Lake. Harmonisation will therefore be guided by common principles and agreed objectives (as reflected generally in the draft Convention, and more specifically in successive strategic action programmes). It is hoped that this will be a more effective method of achieving true harmonisation of the substance rather than the texts of the legislation. This approach should also be more cost effective since countries will have the latitude to adopt specific measures appropriate to their countries without the need to compare their measures with those of other countries. (Although comparison will be possible as the relevant information will be made available pursuant to the obligation under article 22 to report implementing measures to the Authority).

The first sentence of article 5 emphasises that the needs of present and future generations must be met in “an equitable manner”. This has been emphasised firstly, because SADC member countries have agreed to place particular emphasis on ensuring that development is equitable, and secondly, to emphasise the link with the concept of “rational and equitable use”. The latter concept has been well developed in relation to the allocation of water from a transboundary watercourse. It is hoped that this wording will encourage the Convention to be interpreted in a manner which extends the concepts of “rational and equitable use” to the use of other resources of the Lake Tanganyika environment.

The principles contained in paragraphs (a), (b), (c) and (d) are well-established principles of environmental law, both internationally and in many countries.

**Paragraph (a)** requires that a precautionary approach be adopted in all situations where an actual or planned activity may have an adverse impact, even if no transboundary impact is anticipated. The Contracting States are all supportive of the principle and by signing the CBD have already accepted that this is the appropriate approach where there is “a threat of significant reduction or loss of biological diversity” (Preamble to the CBD).

**Paragraph (c)**. The principle of preventive action is given effect to in a number of ways in the draft Convention including by requiring prior notification of certain proposed activities and measures (article 14) and environmental impact assessment of certain projects (article 15).

**Paragraph (d)** concerning public participation is based on principle 10 of the Rio Declaration. Article 16 (Education and Public Awareness), article 17 (Public Participation in Decision Making Processes) and article 19 (Public Access to Information) contain specific obligations intended to give effect to the principle of public participation.

**Paragraph (f)** is based on article 2(13) of the SADC Protocol.

*UNEP has suggested amending this article by renaming it “General principles”, by reformulating the first paragraph in the form of an obligation, and incorporating sub-paragraph (f) in the first paragraph on the basis that the UNEP lawyer does not consider it to be a principle. The reason why the introduction to article 5 was not formulated as an obligation is because the obligation is specified in article 4(1), while article 5 was intended merely as a statement of the principles to be referred to when taking decisions or implementing the Convention.*

## **Article 6. Prevention and Minimisation of Adverse Impacts**

Paragraph 1. The duty to avoid causing transboundary impacts is based on principle 2 of the Rio Declaration which states that:

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

Paragraph 2. The duty of each Contracting State to take appropriate measures to avoid creating, and to minimise, adverse effects within their territories, is a fundamental obligation and many of the specific

obligations relating to the prevention of unsustainable fishing, pollution and sedimentation (articles 7 to 9 and article 12 paragraph 3), and the conservation of biological diversity (article 10), give effect to this general obligation. This paragraph is also intended to emphasise the link between action taken within each Contracting State to prevent or reduce local adverse impacts and the prevention and reduction of transboundary adverse impacts. The aquatic nature of the Lake environment means that each Contracting State has an interest in the other Contracting States taking appropriate internal measures to protect the Lake environment even if there is no apparent risk of a transboundary adverse impact.

#### **Article 7. Fisheries Management**

The specific obligations recorded in paragraph 2 are derived from the recommendations of the Framework Fisheries Management Plan for Lake Tanganyika (Reynolds, 1998) prepared under the auspices of the FAO Project "Research for the Management of the Fisheries on Lake Tanganyika" (GCP/RAF/271/FIN).

*Comments received from Tanzania suggested that this article should be expanded but the UNEP lawyer considered that inserting appropriate provisions in the Fisheries Management Plan would achieve the required result.*

#### **Article 8. Prevention and Control of Pollution**

The protection of water quality is emphasised in this article since it is fundamental to the protection of the biological diversity of the Lake.

Paragraph 2(b) gives effect to article 2(8) of the SADC Protocol, which stipulates that:

"Member States shall require any person intending to use the waters of a shared watercourse system within their respective territories for purposes other than domestic use or who intends to discharge all types of wastes into such waters to first obtain a permit from the relevant authority within the State concerned. The permit shall be granted only after such State has determined that the intended discharge will not have a detrimental effect on the regime of the watercourse system."

Paragraph 3 provides for the progressive development of the regulatory regime by the adoption of a protocol (see also the discussion in section 3.4.3). In this regard it is noteworthy that the 1997 Watercourses Convention encourages states to agree upon:

"measures and methods to prevent, reduce and control pollution of an international watercourse, such as: (a) setting joint water quality objectives and criteria; (b) establishing techniques and practices to address pollution from point and non-point sources; establishing lists of substances the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored" (Article 21(3)).

*Comments have been received to the effect that the question of water quality is inadequately dealt with in the draft Convention. However, as pointed out in the response from UNEP (see Schedule 2) this article and article 9 seek to maintain the quality of the waters of the Lake by requiring the Contracting States to take measures to address the potential causes of deterioration in water quality. Furthermore, the development of minimum water quality standards or objectives for different part of the Lake is likely to be a difficult and time-consuming process.*

## **Article 9. Prevention of Sedimentation**

This article is intended to emphasise the urgency of taking measures in the catchment basin of the Lake to prevent excessive sedimentation, which poses one of the greatest threats to the health of the Lake. It is also important to be aware of the linkages with the Ramsar Convention. In particular, at the 7<sup>th</sup> Meeting of the Conference of the Contracting Parties to the Ramsar Convention held in May 1999, the Conference adopted *Guidelines for integrating wetland conservation and wise use into river basin management*. The Conference also invited those Contracting Parties which share river basins to pursue the application of the Guidelines in a co-operative way with their neighbouring States, and urged all Contracting Parties to give priority to the application of the Guidelines (Resolutions VII.18 and VII.19).

## **Article 10. Conservation of Biological Diversity**

This article does not specify in detail all the measures to be taken to protect the biological diversity of the Lake environment as the CBD contains many specific obligations (e.g. article 8 of the CBD) and the detailed measures to be taken will be included in the strategic action programme for the Lake.

Paragraph 2. The introduction of alien species into Lake Tanganyika could pose a significant threat to biological diversity particularly as some of the riparian states are actively promoting aquaculture. For this reason the list of activities which will be presumed to result in adverse impacts (Part A of Annex 1), include aquaculture developments involving non-indigenous species (paragraph 12) and ornamental fish collecting or culturing that involves moving species to parts of the Lake where they do not naturally occur (paragraph 13). Burundi has already banned the introduction of non-indigenous species into the Lake. Article 2(11) of the SADC Protocol provides that:

“Member States shall take all measures necessary to prevent the introduction of alien aquatic species into a shared watercourse system which may have detrimental effects on the ecosystem.”

*One commentator pointed out that the precautionary principle requires that any introduction of alien species should be forbidden, except when there is positive evidence that there is no risk. The commentator suggested that since the introduction of alien species is one of the main potential threats to endemic species, the phrase “which shall not be withheld unreasonably” should be deleted from this paragraph.*

## **Article 11. Access to Genetic Resources**

The draft Convention deals with the regulation of access to genetic resources, and to biochemicals (which are not regulated by the Convention on Biological Diversity), because of the potential value of the genetic resource of the Lake and the importance of co-operation between the riparian countries in regulating access to these resources and in sharing the benefits. Since it is often difficult to determine where a biological sample originates from if it is taken from a species found in more than one country, it is important that the Contracting States collaborate in granting access to the shared resources of the Lake rather than compete in allowing access to biological prospectors. Funds derived from granting access to genetic resources also may prove to be a source of funding for the Lake Tanganyika Authority in the future.

## **Article 12. Navigation**

Navigation on the Lake has been included because of the extensive use of the Lake for transportation and because shipping on the Lake is a potential source of pollution and consequently should be regulated if a truly integrated regulatory system for the Lake is to be established. A special Technical Committee under article 27 dealing with navigation could be established if necessary.

Also of relevance to this article is Article 61(c) of the *Treaty Establishing the African Economic Community* adopted at Abuju on 3 June 1991 which requires the states to harmonise their policies on maritime and inter-state Lake and river transport.

## **Article 13. Strategic Action Programme**

The strategic action programme will be one of the main mechanisms for implementing the Convention and will include detailed conservation and management plans. This article obliges the Contracting States to participate in the preparation, revision and implementation of the strategic action programme and to integrate it into national policies, strategies, programmes and plans. This is intended to ensure that the internal government policies and plans of each Contracting State do not conflict with measures to protect the Lake that the Contracting States have agreed to take by virtue of approving the strategic action programme.

## **Article 14. Prior Notification**

Contracting States are only obliged to notify the Secretariat of:

- (a) proposed activities that are listed in Part A of Annex I (which lists activities that are presumed to give rise to adverse effects); and
- (b) public policies, programmes or plans that are likely to give rise to transboundary adverse impacts.

The 1991 United Nations Economic Commission for Europe Convention on Environmental Impact Assessment in a Transboundary Context ("the Espoo Convention") only requires those parties likely to be affected by an adverse transboundary impact to be notified. However, this draft Convention requires all Contracting States to be notified since they all border the Lake.

The first draft of the Convention provided for the participation by Contracting States in the internal environmental assessment procedures of other Contracting States. As a result the original formulation of this article required the notification to include sufficient details of the internal notification procedure to enable other Contracting States to participate in it. However, these provisions were removed during the process of developing the draft Convention as they were considered to be impractical given the fact that environmental impact assessment procedures are still being developed in several of the riparian States.

The deletion of the paragraphs dealing with participation in environmental impact assessment procedures in other Contracting States has meant that article 14 does not expressly oblige a Contracting States to consult with one another after notification. (*This point is made in the comments from Tanzania set out in Schedule 2.*) However, consultation is required by the provisions of article 15

(4) in respect of proposed activities listed in Part A of Annex I. Therefore the issue of consultation only arises in respect of a public policy, plan or programme that is likely to give rise to transboundary adverse impacts. These relate to government policies in each of the Contracting States and some of the participants in the final legal workshop considered that it would not be politically acceptable to impose an obligation on a Contracting State to consult in respect of these, although a State may of course, choose to do so in the spirit of co-operation.

It should also be noted that article 15 paragraph 1(b) requires Contracting States when developing and implementing public policies, plans and programmes, to take account of the consequences for the Lake environment including any comments received from other Contracting States. This should go a considerable way towards achieving the desired result without imposing a legal obligation to consult on these matters.

### **Article 15. Environmental Impact Assessment**

Paragraph 1(a) requires each Contracting State to introduce appropriate environmental impact assessment procedures for proposed projects and activities likely to give rise to adverse impacts. This obligation could be met by the introduction of appropriate national environmental impact assessment legislation, but it is important to note that sub-paragraph 1(c) requires that compliance with any conditions imposed to protect the Lake must be monitored and the conditions enforced.

Traditional environmental impact assessment procedures only assess the impacts of large or “significant” development projects. However, the environmental consequences of major public programmes or public policies (such as transport policies), are often overlooked even though they can result in very significant adverse impacts. The recognition of this fact has led to the development of the concept of “strategic environmental assessment” which extends environmental assessment to policies, plans and programmes.

The concept of strategic environmental assessment is introduced by articles 14 and 15 of the draft Convention. Article 14 paragraph 1 of the draft Convention requires Contracting States to notify the Secretariat of any “public policy, plan or programme likely to give rise to transboundary adverse impacts”. This could be, for example, a policy to promote industrial fishing on the Lake, a land-use plan, or a government programme to encourage extensive small-scale agriculture in an area of the Lake basin that is vulnerable to erosion. Article 15 paragraph 1(b) requires Contracting States to introduce procedures and institutional arrangements to ensure that when public programmes and policies are developed and implemented, the consequences for the Lake environment are taken into account. It also requires the Contracting State concerned to take account of comments received from another Contracting State (which might occur in response to a notification under article 14).

Paragraphs 2 to 6 set out the environmental impact assessment procedures to be applied to proposed activities that are presumed to give rise to adverse effects. However they do not apply to public policies, plans or programmes notified to the Secretariat under article 14.

### **Article 16. Education and Public Awareness**

Public awareness is an essential precondition for building effective public participation in decision-making processes (article 17) and to the long-term effect of management of the Lake, particularly in view of the difficulties of enforcing legislation in distant parts of the Lake. This important article is unusual in international legal instruments of this nature as it obliges Contracting States to invest in measures designed to enhance the ability of the public (particularly those living near the Lake) to participate in the management of the Lake. This article gives effect to principles (d) and (e) of article 5.



### **Article 17. Public Participation in Decision Making Processes**

This article gives effect to principle 10 of the Rio Declaration and to Article 5, paragraph (d). Developing effective mechanisms for ensuring effective participation, particularly by communities living in more remote parts of the Lake environment, is likely to be a challenging task for the Contracting States. Nevertheless, it is an important precondition for building an effective management system based on co-operation between governments and the users of the Lake's resources.

### **Article 18. Emergencies**

Paragraph 1 gives effect to article 2(9) of the SADC Protocol.

The proactive emergency response planning required under paragraph 2 is yet another practical manifestation of the principle of co-operation referred to in article 4. It is hoped that the implementation of provisions such as this will progressively strengthen the relationships between the riparian countries as the mutual benefits of co-operation become more evident.

### **Article 19. Public Access to Information**

In drafting this article, reference was made to Aarhus Conventions. A right of public access to relevant information has been created to facilitate public involvement in decision-making. As with the preceding article, effectively implementing this article is likely to be challenging and may require the development of innovation methods. However, it is likely to be an important building block of a long-term management regime based on the full participation of Lake users.

### **Article 20. Exchange of Information**

This article is intended to allow a Contracting State to request, via the Authority, that another Contracting State furnish information concerning the sustainable management of the Lake environment and the implementation of the Convention. It is important to note that this article only requires data and information that is already available to be exchanged, as distinct from article 22 which requires each Contracting State to compile and submit reports to the Authority on various measures taken under the Convention.

This article also give effect to the 1991 *Treaty Establishing the African Economic Community* which requires the parties to promote co-operation and exchange information on plans and management of, *inter alia*, exploitation and distribution of water resources (article 56). Exchanges of the specific data mentioned in sub-paragraph 1(a) is required under Article 2(5) of the SADC Protocol. (See also the 1997 Watercourses Convention, article 9(1).) The provisions of Article 12 of the 1994 Danube Convention were also taken into consideration in drafting this article as suggested by the first legal workshop in Lusaka.

### **Article 21. Protection of Confidential Information**

This article has been inserted to balance the rights of public access to information and the information exchange and reporting provisions of the draft Convention. It essentially ensures that the provisions of

the draft Convention do not undermine existing laws in each of the Contracting States relating to the protection of confidential information and data.

## **Article 22. Reporting**

The submission of reports by Contracting States concerning the implementation of a Convention (for example under the Convention on Biological Diversity) has proved to be one of the most effective measures for promoting effective implementation of international environmental agreements. This article specifies the minimum content of such reports but also provides for the development of more detailed reporting requirements which must be considered by the Contracting States at the second meeting of the Conference of the Parties. It is hoped that this report will play an important role in promoting co-operative management of the Lake and in harmonising the legal provisions in each of the Contracting States.

## **Article 23. Conference of the Parties**

The Conference of the Parties established by article 23 is the forum in which the Contracting States meet and consider progress made on implementing the Convention as well as the adoption of any protocols, and the amendment of the Convention itself or of any protocols to it. It is also responsible for overseeing the work of the Lake Tanganyika Authority and consequently cannot form part of the Authority.

Paragraph 6 allows for the participation of observers at meetings of the Conference of the Parties. This is intended to facilitate the participation, subject to the consent of the Contracting States, of other bodies that are in a position to contribute to the long term management of Lake Tanganyika, or to the proceedings of a particular meeting (e.g. the GEF).

*UNEP has suggested that the financial provisions contained in article 28 should be removed and that article 23 paragraph 4 be amended to read: "The [Contracting States] shall unanimously adopt rules of procedure for their meetings. The [Contracting States] shall unanimously adopt financial rules, prepared in consultation with the Authority, to determine, in particular, their financial participation under this Convention and under protocols to which they are parties."*

*We are not in favour of deleting the financial provisions in article 28. Previous experience with other international agreements, including agreements in the region, suggest that implementation is often hampered by protracted discussions regarding financing. Section 28 is intended to establish clear principles for financing which will apply in the absence of any agreement to the contrary by the Conference of the Parties.*

## **Article 24. Lake Tanganyika Authority**

This article establishes the Lake Tanganyika Authority, comprising a management committee and a secretariat, as an international legal person. It is hoped that the establishment of a body with international legal personality which can contract in its own right will facilitate the efficient management of the Lake and the funding of projects for joint activities since funds could be made available directly to the Authority.

The establishment of the Authority is fully consistent with a number of existing regional agreements including the SADC Protocol on Shared Watercourses and the *Lagos Plan of Action* adopted under the auspices of the OAU in 1980. For example, the Lagos Plan of Action urged African states to create regional and sub-regional institutions for the inventorying and utilization of shared natural resources

(paragraph 70(b)) and to establish joint river or Lake basin organisations to promote inter-governmental co-operation in the development of shared water resources (paragraph 85).

#### **Article 25. Lake Tanganyika Management Committee**

The institutional arrangements for Lake Tanganyika were discussed at the first legal workshop in Lusaka in 1998. The workshop recommended that a committee of experts from each of the countries (i.e. the Lake Tanganyika Management Committee) be established. The Management Committee would be supported by a permanent secretariat based in one of the riparian countries.

The first legal workshop recommended that the Management Committee would be similar to, but not the same as the Steering Committee for the LTBP. It would meet at regular intervals and would supervise the implementation of the strategic action programme. It would also review the work of the secretariat and make regional policy decisions concerning the management of the Lake. It would report periodically to a conference of ministers (i.e. the Conference of the Parties).

The effectiveness of the Lake Tanganyika Authority will be heavily dependant on the resources made available to it. The establishment of long term funding mechanisms as envisaged by article 25 paragraph 5, will be an important in determining the sustainability of this institution.

#### **Article 26. Secretariat of the Lake Tanganyika Authority**

The article provides for the establishment of a Secretariat comprising an Executive Director, a Deputy Executive Director and other staff. The Secretariat will be responsible for facilitating implementation of the Convention.

*Comments received from Tanzania suggest that the title of Executive Director should be changed to "Executive Secretary" as is the case with other regional organisation like SADC, and COMESA.*

The first legal workshop suggest that the Secretariat would initially comprise only two departments, one to deal technical aspects (e.g. pollution control, fishing, the protection of biodiversity) and a second to deal with administrative, financial and legal matters. It was suggested that initially the Secretariat would probably require about eight professional staff: a director, deputy director, four professionals in the technical department and two in the administrative department.

#### **Article 27. Technical Committees**

This article is intended to provide for the establishment of as many technical committees (whether permanent or temporary) as may be required for the effective implementation of the Convention.

*The sixth meeting of the Regional Steering Committee of the LTBP recommended that a fourth permanent technical committee dealing with water quality / pollution control should be added under paragraph 1. This would be fully consistent with the purposes of the draft Convention.*

#### **Article 28. Financial Resources**

This article seeks to establish the basic principles that will govern contributions to the budget of the Authority and the allocation of funds, unless the Conference of the Parties agree otherwise. The establishment of fundamental rules that will apply in the absence of agreement to the contrary is intended to reduce the risk of disputes regarding funding at meetings of the Conference of the Parties. The agreed principles also seek to emphasise the continuing commitment of the Contracting States to

funding national measures to implement the Convention. Paragraph 5 also envisages that the Conference of the Parties will in future explore options to provide sustainable long term funding for the implementation of the Convention. This will be essential for the successful implementation of the Convention.

### **Article 29. Settlement of Disputes**

This article is intended to encourage Contracting States to settle disputes by negotiation in the first instance, and if that is not successful, to adopt a number of other procedures established by the draft Convention. The intention was to create a great deal of flexibility regarding the settlement of disputes to maximise the opportunities for resolving disputes.

This article is modelled on Article 27 of the Convention on Biological Diversity.

### **Article 30. Liability of Operators of Dangerous Activities**

This article is based on section 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities. It imposes strict liability on any private or public person who undertakes an activity that is regarded as inherently dangerous to the Lake environment and is listed in Annex II (which currently lists prospecting for and exploiting hydrocarbons under the Lake and activities related to dangerous substances). The reason for this is firstly to give effect to the polluter pays principle, and secondly, to facilitate the enforcement of the Convention, particularly in circumstances in which a Contracting State may be reluctant to claim compensation from another Contracting State because of the effect it may have on the diplomatic relationship between the countries.

It also imposes certain obligations on the Contracting State within whose territory the dangerous activity is undertaken to monitor the person undertaking the dangerous activity ("the Operator") and to ensure that financial security is provided to cover potential liability under the Convention.

*UNEP has suggested that the definitions of "operator" and "dangerous activity" should be moved to article 1 entitled "Use of terms". This is a matter of style. The definitions were included here for ease of reference since they are only referred to in articles 30 and 31, but could be moved to article 1 without changing the legal affect of the draft Convention.*

### **Article 31. Liability and Compensation**

Paragraph 1 makes it clear that the normal international law rules of State liability apply to failure to fulfil obligations under this Convention.

Paragraph 2 is intended to create an incentive for Contracting States to regulate the conduct of dangerous activities within their territories as required by article 30, by providing that a Contracting State will only be held liable for harm arising from dangerous activities to the extent that the liability has not already been discharged by the Operator or by another party. In this way States are able to limit their liability by passing on responsibility to Operators (which are the parties deriving most of the economic benefit from undertaking the dangerous activities).

### **Article 32. Access to Courts**

This article is intended to facilitate the bringing of actions to claim compensation by allowing the claimant to bring actions before the courts of other Contracting States (but subject to the law of that country). This would also facilitate the bringing of claims against Operators.

### **Article 33. Right to Vote**

This is a standard provision similar to Article 31(1) of the Convention on Biological Diversity. *UNEP has suggested that this article should appear later in the draft Convention.*

### **Article 34. Protocols to this Convention**

This article is similar to Article 28 of the CBD. *UNEP has suggested that the time limit for the distribution of texts in paragraph 3 should be deleted and agreed upon in rules or procedure determined by the Conference of the Parties.*

### **Article 35. Annexes**

This is a standard provision similar to Article 30 of the CBD. However it should be noted that some conventions which allow annexes to be adopted without the unanimous approval of all the parties (such as the CBD), restrict the contents of annexes to procedural, scientific, technical and administrative matters.

### **Article 36. Amendment of the Convention or its Protocols**

This article is based on Article 29 of the CBD.

### **Article 37. Relationship with other International Conventions**

This article is intended to ensure that the Convention does not hinder the adoption of more stringent measures under other Agreements, for example under the auspices of SADC.

### **Article 38. Relationship with National Laws**

As with article 37, this article is intended to ensure that the Convention establishes minimum and not maximum standards for national legislation.

### **Article 39. Signature**

This article makes it clear that the Convention may only be signed by the four riparian states.

#### **Article 40. Ratification and Accession**

Paragraph 2 makes it clear that only the four riparian States may accede to the Convention or any protocol to it. If at a later date the Contracting States wish to allow Rwanda to accede to the Convention on the basis that part of the Lake basin lies within Rwanda, this article would require amendment.

The first draft of the Convention had allowed for the possibility of Rwanda becoming a signatory at a later date by formulating this paragraph as follows:

“This Convention and any protocol shall be open for accession by States whose territories include part of the Lake basin, from the date on which the Convention or the protocol concerned is closed for signature. The instruments of accession shall be deposited with the Depositary.”

Although not all the States within the Lake Tanganyika Basin are members of SADC it is worth noting that the SADC Protocol on Shared Watercourse systems provides that:

“The utilisation of shared watercourse systems within the SADC region shall be open to each riparian or basin State, in respect of the watercourse systems within its territory and without prejudice to its sovereign rights, in accordance with the principles contained in this Protocol ...” (article 2(1)); and

“Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as participate in any relevant consultations.” (article 4(1))

#### **Article 41. Entry into force**

This article is modelled on Article 36 of the CBD.

#### **Article 42. Reservations**

This article is identical to Article 37 of the CBD.

#### **Article 43. Withdrawals**

This article is modelled on Article 38 of the CBD.

#### **Article 44. Depositary**

*Comments received from Tanzania suggested that the Depositary should be the Chief Executive Officer of the Authority. This view is not supported by the UNEP lawyer nor by the authors. It is recommended that the standard international procedure of depositing originals of the Convention, its protocols, and instruments of ratification, exceptions, approval, excision or withdrawal with the Depositary should be maintained. However, consideration could be given to changing the identity of the Depositary to another international organisation which is likely to be more involved in the ongoing implementation of the Convention than the OAU.*

## Annex I Environmental Impact Assessment

Article 15(2) provides that a proposed activity listed in Part A of this Annex must be subject to an environmental impact assessment that produced documentation conforming with the requirements of Part B.

### Part A.

Part A lists the activities which if undertaken in the Lake environment will be presumed to result in adverse impacts. The intention is that all activities that are highly likely to have significant adverse impacts on the Lake environment are either specifically listed or fall within the ambit of the final paragraph (all activities that are likely to create a significant risk of serious adverse impacts or of transboundary adverse impacts). A Contracting State is required to notify other Contracting States and the Secretariat (article 14) and to ensure that a special environmental impact procedure is followed (article 15 paragraphs 2 to 6) before authorising a listed activity.

Listing specific activities is intended to provide clarity and a greater degree of certainty as to the types of activities to be subjected to environmental impact assessments. *However the list could be improved. One commentator has suggested adding "the construction and extension of harbours in the Lake environment".*

*Paragraph 9 dealing with large scale water abstraction activities is intended to ensure that water abstraction by the riparian States from any river flowing into the Lake does not deplete the rivers to the extent that the health of the Lake is adversely affected. At the time of drafting it was considered that precise information would be available from the special studies for inclusion in this paragraph. However in order to retain flexibility, paragraph 9 should be amended to refer to the minimum amount prescribed in the strategic action programme.*

**Part B** is based partially on Appendix II to the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context adopted under the auspices of the United Nations Economic Commission for Europe, but has been expanded and adapted.

## Annex II List of Activities Dangerous to the Lake Environment

Article 30 requires Contracting States to take special measures to ensure that parties undertaking activities that are inherently dangerous to the Lake environment (the "dangerous activities" are those listed in Annex II), are closely monitored and are held strictly liable for any adverse impacts that may result. "Strict liability" in this article means that it is not necessary to prove fault on the part of the operator of the dangerous activity, for the operator to be held liable. However, the operator may escape liability either wholly or partially by proving one of the defences in paragraph 5 or 6.

The intention was that only particularly and inherently dangerous activities should be listed and consequently only two categories of activity are listed. *However the list could be extended and one commentator has suggested that the list should include some fishing practices, extraction of ornamental fish, quarrying in river beds, gold mining, farming of alien fish in the basin, and managing a dam in the watershed and that the word "transport" should be added to "production, handling, storage, use" in paragraph 2.*

### **Annex III      Fact Finding Commissions**

Impartial fact finding is becoming an increasingly important mechanism for enforcing international agreements. It is a particularly useful technique where there is a dispute concerning facts (particularly of a scientific or technical nature) which are critical to the resolution of the dispute. The 1997 Watercourses Convention provides a similar procedure in article 33.

### **Annex IV      Arbitration**

The provisions of this Annex are similar to Part 1 of Annex II to the CBD and to the Arbitration Annex to the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, but have been reorganised in an attempt to improve clarity.



## SCHEDULE 1 – RELEVANT INTERNATIONAL LAW INSTRUMENTS

### Status of directly relevant international legal instruments to which riparian states are party

Name	Status	Parties			
		Burundi	Congo	Tanzania	Zambia
The African Convention on the Conservation of Nature and Natural Resources	In force 16 June 1969	X	X	X	X
Convention for the Protection of the World Cultural and Natural Heritage	In force 17 December 1972	X	X	X	X
Convention on International Trade in Endangered Species of Wild Flora and Fauna	In force 3 May 1973	X	X	X	X
Convention on Wetlands of International Importance Especially as Wildfowl Habitat (Ramsar)	In force 21 December 1975				X
Agreement for the Establishment of the Organisation for the Management and Development of the Kagera River Basin	In force 1977	X		X	
Convention on Biological Diversity	In force 29 December 1993	X	X	X	X
SADC Protocol on Shared Watercourse Systems in the Southern African Development Community Region.				X	X
Convention on the Law of the Non-navigational Uses of International Watercourses	Opened for signature: 21 May 1997. Not in force.				

### Other relevant international and regional treaties

The following are the most important international and legal instruments establishing the international law context for the draft Convention on the Sustainable Management of Lake Tanganyika.

- the 1968 African Convention on the Conservation of Nature and Natural Resources;
- the 1972 Convention for the Protection of the World Cultural and Natural Heritage;
- the 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna (“CITES”);
- the 1971 Convention on Wetlands of International Importance Especially as Wildfowl Habitat (“the Ramsar Convention”);
- the 1976 *Communaute Economique des Pays des Grands Lacs*;
- the 1977 Agreement for the Establishment of the Organisation for the Management and Development of the Kagera River Basin;
- the 1980 *Lagos Plan of Action* adopted under the auspices of the OAU;
- the 1987 Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System;
- the 1991 *Treaty Establishing the African Economic Community* adopted at Abuju;
- the 1992 Convention on Biological Diversity;
- the 1995 Agreement on the Preparation of a Tripartite Environmental Management Programme for Lake Victoria;
- the 1995 Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region;
- the 1997 Convention on the Law of the Non-navigational Uses of Transboundary Watercourses;
- the Agreement on Migratory Water Birds of Africa-Asia; and
- the terms of reference of the FAO Committee for Inland Fisheries in Africa (CIFA), and of the CIFA Sub-committee on Lake Tanganyika.

## SCHEDULE 2 - CONSOLIDATED RECORD OF COMMENTS ON THE CONVENTION MADE AFTER THE 1999 LEGAL WORKSHOP IN LUSAKA

### 1. COMMENTS MADE BY THE 6<sup>TH</sup> MEETING OF THE LTBP REGIONAL STEERING COMMITTEE

It was suggested that the Executive Director mentioned in article 26 should be called "Executive Secretary" as he would be heading an Executive Secretariat.

Zambia felt that a committee for pollution should have been included in technical committees mentioned in Article 27 of the draft convention. This was supported by the other delegations. The consultant noted that although this had been discussed at the various legal workshops and rejected, it could, of course, easily be included.

### 2. GENERAL COMMENTS FROM UNEP

With respect to the **title** "Convention on the Sustainable Management of Lake Tanganyika", it may be slightly changed to include a clear reference to the environment - for instance, "Convention on the Sustainable Management of the Environment of Lake Tanganyika". Adding this key word may facilitate research.

At the outset, we would prefer dividing the Convention into five or six parts. The number of articles is many and the present format and outline is not coherent. For instance, in the present text, voting rights appears right after liability, compensation and access to justice, but before the article concerning protocols. Dividing the Convention into parts would avoid incoherence and enable an easier overview. Second, rules of procedure should be left aside since they are to be adopted at a later stage. The present document should only provide for basic rules, which is not the case. This should also be helpful in speeding up the acceptance process leaving difficult decisions to a later moment.

More consistency is needed as regards the use of commas throughout the document (for example, the present Article 5 (d) and (e)).

We note the use of the term "Contracting State" throughout the Convention. Accordingly, the use of "Contracting State" may imply provisional application of the Convention after its adoption. If this is not the intention, the term "Party" may be more suitable. According to the Vienna Convention on the Law of Treaties (1969) "Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force. "Party" means a State which has consented to be bound by the treaty and for which the treaty is in force.

Under Part I, "Scope of the present Convention" should be outlined in **Article 1** followed by "Use of terms" in **Article 2**. Article 1 and 2 should shift place and headings should be changed. **Article 3** should be deleted. Its content could be included in Article 1 para.3 requiring necessary changes to the numbering of Articles.

Under Part II, the present "Guiding Principles", **Article 5**, should be changed to "General Principles", Article 3. The "introduction" should be changed to read: "[Contracting States] shall in their respective territories utilise the natural resources of Lake Tanganyika in a equitable, reasonable and sustainable manner to protect, conserve and manage the needs of present and future generations. To this end the following principles shall be applied:". In addition, the present (f) does not seem to be a principle. It may shift place to form the first paragraph.

We note **Art. 23 para.4** and suggest that the text be amended to: "The [Contracting States] shall unanimously adopt rules of procedure for their meetings. The [Contracting States] shall unanimously adopt financial rules, prepared in consultation with the Authority, to determine, in particular, their financial participation under this Convention and under protocols to which they are parties."

We note **Art. 30** and suggest the following modifications: Definitions on "Operator" and "dangerous activity" should be moved to "Use of terms". The Liability clause may also be simplified.

Time limits, for distribution of texts by the Secretariat, of six months should be deleted and agreed upon in the Rules of Procedure (E.g. Arts. **34 para.3** and **36 para.2**).

### **3. COMMENTS FROM TANZANIA AND RESPONSES FROM UNEP**

(The UNEP responses are given in *italics*)

#### **Article 7: Fisheries Management**

This Article is not exhaustive. In view of development in fisheries management, it may be useful to include the management of ornamental fish, fish farming and aquaculture.

*The Article is broad enough to include the Tanzania proposals of adding management of ornamental fish, fish farming and aquaculture among other forms of fisheries management. The Article calls on Contracting States to co-operate and take measures to promote sustainable fisheries management on Lake Tanganyika. This includes all kinds of fisheries management. This Article further calls on Contracting States to develop, implement and enforce a framework fisheries management plan for Lake Tanganyika and develop and adopt fisheries policies and legislation. In taking these measures, Contracting States have an opportunity to add or provide for all forms of fisheries management.*

#### **Water Quality**

The Draft Convention does not clearly provide/cover matters relating to water quality. The Draft Convention may provide for Contracting States to develop and agree on minimum water quality standards.

*The draft convention provides for water quality in Article 8 which provides for prevention and control of pollution. The measures to be taken in implementing this Article are aimed at ensuring water quality and dealing with different sources of pollution which can affect water quality. Regarding the issue of providing that Contracting States develop and agree on minimum water quality standards, the Draft convention clearly provides in Article 9 that a protocol to this convention will specify the minimum measures and standards to be adopted by each Contracting State.*

#### **Article 14: Prior Notification**

Under the Draft Convention a Contracting State is only obliged to give prior notification. This is quite inadequate. I would think a notification should be followed by consultations between the proposing state of an activity, policy, plan or programme and the other Contracting Parties.

*The current text implies the use of consultation subsequent to notification. However, notification followed by mandatory consultation seems like a practical impossibility, as suggested by Tanzania. Consultation should only follow if the notification is acted upon by the notified State. The aim of providing for notification is to ensure the availability of information on activities and other circumstances that could affect the interests of States in relation to shared natural resources. In international agreements there are normally two obligations in this item, the requirement to provide information to potentially affected States on particular activities, and a requirement to engage in consultation. Consultation usually means provision of certain information in respect of the activity or plan to the other State. The States may wish as proposed by Tanzania to clearly provide for consultations and the role of the secretariat in such consultations. However, consultation should not*

*follow for every notification but where the notification is acted upon by the notified State. Notification followed by mandatory consultation seems like a practical impossibility.*

#### **Article 24: Institutions**

The institutional framework needs to be streamlined along similar regional institutions. It appears as if the CoP is not, functionally, an organ under the Convention as is the case with other international conventions.

By separating the CoP from other institutions/organisations creates a funny structure which presupposes three distinct functional institutions. It may be proposed that the representation in CoP and the Authority be provided for.

*In general, the proposed institutional structure could be simplified and further outlined in the rules of procedure. However, we would like Tanzania to further formulate why it does not see the COP as an organ under the Convention. The proposal of streamlining the institutional framework along similar regional institutions is important. Consideration should also be given to the fact that running institutions is expensive for developing countries. Can you afford holding meetings of all these bodies? In other regional agreements of a similar nature you will have the Conference of the Parties which gives policy direction and is a decision making body on how the implementation of the Convention and related activities should be undertaken. You will have a secretariat full time or not to liaise with States in the implementation of the Convention. An Ad hoc working group of experts would then be established by the COP to prepare the Action Plan and to provide any expert advice to the Conference of the Parties on an Ad hoc basis. The institutional framework could be looked into in the light of having clear functions and the ability to manage these institutions by the Parties. The latter may not be a problem if the Parties pay their way to meetings and share the cost of hosting these meetings. Experience shows that financial constraints do affect the effectiveness of institutions developed in conventions of the developing countries, even where there is a COP and a secretariat only. The representatives of the Conference of the Parties are normally parties. Non parties may be invited but they do not have voting rights. In general, the proposed institutional structure could be simplified and further outlined in the rules of procedure.*

#### **Article 24(4): Executive Director**

Article 24(4) provides for the Chief Executive Officer of the Authority to be the Executive Director. Given the institutional framework the Chief Executive Officer title could better be Executive Secretary as is the case to other regional organisation like SADC, COMESA.

*Art. 24(4) provides for the Chief Executive Officer of the Authority to be the Executive Director. Tanzania proposes the title should be changed to Executive Secretary. The Parties may choose to change it or retain it, it does not make much difference as long as the functions are clearly defined.*

#### **Official Language**

The Convention does not provide for the official/working language. It should provide that the official/working language should be English and French and such other languages as the CoP (if it is the supreme organ) may determine.

*Official languages are normally not an issue for the Convention, but the rules of procedure. In this regard it should be noted that the current text, shall be signed in English and in French, both texts being equally authentic.*

#### **Article 40: Ratification and Accession**

Due to different legal and Constitutional set up and procedures, this Clause/Article should be recasted to provide that the convention shall be ratified or acceded by the contracting states in accordance with their constitutional procedures.

*It is well known that different States have different legal and constitutional procedures regarding ratification. Even if States choose not to clearly provide for this it is implied that in ratification every country follows its procedures. The Contracting States' constitutional procedures are implied by the current text, which is standard.*

#### **Article 44: Depository and Registration**

This Article should be redrafted to provide for a depository to be the Chief Executive Officer of the Authority and registration of the convention to the United Nations and the Organisations of African Unity and such other organisations as may be decided. The Article should read:

“Article 44: Depository and Registration

The original texts of this Convention and Protocols and all instruments of ratification and accession shall be deposited with the Executive Secretary of the Authority (as proposed in item 6 on 24(4) who shall transmit certified copies to all contracting states.

The Executive Secretary shall register this Convention with the United Nations, the Organisation of African Unity and other organisations as may be decided by the CoP.”

*The designation of the depository of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depository may be one or more States, an international organisation or the chief administrative officer of the organisation. The problem with the Tanzania comment/proposal on the depository is that it is not clear when the Authority will come into operation. In most cases the institutions established under a Convention start working as soon as the Convention enters into force; this may take time, meanwhile who will be the depository? The designation of the depository of a treaty may be made by the negotiating states, either in the treaty itself or in some other manner. The depository may be one of the states, an international organisation or the Chief Administrative Officer of the Organisation. Registration or sending the original instruments of ratification and/or accession to the UN or OAU as may be decided by the COP is not a bad idea.*