



CONVENTION ON BIOLOGICAL DIVERSITY

Distr.
GENERAL

UNEP/CBD/WS-L&R/INF/1
17 May 2001

ORIGINAL: ENGLISH

WORKSHOP ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CONVENTION ON BIOLOGICAL DIVERSITY

Paris, 18-20 June 2001

Item 3 of the provisional agenda*

LIABILITY AND REDRESS UNDER THE CONVENTION ON BIOLOGICAL DIVERSITY

Summary of submissions received by the Executive Secretary

Note by the Executive Secretary

I. INTRODUCTION

1. At its fifth meeting, the Conference of the Parties, by decision V/18, renewed the call it had made, through its decision IV/10 C, to Parties, Governments and relevant international organizations to submit information to the Executive Secretary on national, international and regional measures and agreements on liability and redress applicable to biological diversity, including the nature, scope and coverage of such provisions, and information on experiences in their implementation, as well as information regarding access by foreign citizens to national courts potentially applicable to or in cases involving transboundary harm.

2. On the basis of decision IV/10 C, the Executive Secretary had prepared, for the fifth meeting of the Conference of the Parties, a synthesis document (UNEP/CBD/COP/5/16), which, *inter alia*, summarized the five submissions received by the time of the meeting. Since the fifth meeting of the Conference of the Parties, the Executive Secretary has received additional twelve submissions from Parties. The present note provides a summary of these submissions.

II. SUMMARY OF SUBMISSIONS RECEIVED BY THE EXECUTIVE SECRETARY

3. Since the fifth meeting of the Conference of the Parties, the Executive Secretary has received additional submissions from Argentina, Canada, the Commission of the European Communities, Estonia, France, Latvia, Lithuania, Norway, Poland, Sweden, Switzerland, and the United Kingdom. An analysis of these submissions reveals that the national legal regimes in most of these countries address the issue of liability and redress in the context of environmental damage in general. Except for the proposal under the Commission of the European Communities, which is examined in more detail in the review of relevant international instruments prepared for the Workshop (UNEP/CBD/WS-L&R/2), there is no specific focus on damage to biological diversity *per se*. Moreover, the regimes do not address the issue of liability and

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redress for transboundary environmental harm. The information provided addresses issues of internal environmental impacts, which are excluded from the scope of paragraph 2 of Article 14. But even in this regard, the Governments that have provided the information, save for France and Switzerland, do not make any attempt at assessing the experience gained in the implementation of these regimes as required by decision IV/10 C.

4. In **Argentina**, existing legislation does not contain any provisions relating to damage to biological diversity. The 1994 National Constitution enshrined the protection of biological diversity and incorporated the concept of reparation of environmental damage in general terms (Article 41). The Civil Code provides generally that any act or omission causing damage entails the obligation of reparation. The Penal Code does not specify any environmental offences. There has been no litigation in Argentina concerning damage to biological diversity although cases of voluntary compensation by the private sector have been recorded. Existing legislation does not draw any distinction between citizens and foreign nationals with regard to access to justice. Foreign nationals have the same rights as citizens in this respect.

5. In **Canada**, the issue of liability and redress for environmental damage is dealt with in the common law regime, the Quebec Civil Code and statute law. At common law, legal actions can be instituted for trespass, private nuisance, public nuisance, negligence and strict liability in order to secure remedies for damage that might have an environmental dimension. Similar action can be instituted under the Civil Code with respect to damage arising from the release of contaminants into the air, water or soil. Statute law has generally broadened the range of remedies available. The primary objective has been to provide the Government with effective mechanisms for the recovery of environmental clean-up and rehabilitation costs. Nevertheless, a number of the statutes create more general rights to obtain damages or injunctive relief for the violation of statutory provisions.

6. Federal, provincial and territorial jurisdictions in Canada have general environmental legislation addressing a broad range of environmental concerns, including air, water, toxics, and hazardous wastes. Such legislation, though not focused on biological diversity, contain a broad enough definition of the term "environment" to include biodiversity. General environmental legislation, including federal fisheries legislation, contains provisions that empower the Crown to recover costs incurred by the Government in environmental clean-up, mitigation and restoration measures. In addition, the legislation may also provide for private civil actions for injunctive relief for persons suffering loss or damage resulting from a violation of relevant statutory provisions. In certain instances, statutes contain provisions empowering private individuals to institute civil action to protect the environment even in cases where such individuals have not suffered any personal damage. Biodiversity-related legislation incorporates two categories of remedies regarding harm to elements of biological diversity, such as wildlife. First, the Government has a right of action to recover costs of restoration against a person who has destroyed a wildlife habitat in a wildlife management area or for compensation for the loss of the habitat if restoration is not feasible. Secondly, the courts have the discretion, upon conviction, to impose fines or services in kind to be applied directly in environmental conservation. It should be noted, however, that many of the statutory provisions addressing liability and redress for environmental damage are fairly recent and, consequently, little experience has been recorded regarding their practical application.

7. Access to Canadian courts is not usually affected by the residency status of the plaintiff, although the scope of a particular statute might be restricted to protection of the environment in a specific Canadian jurisdiction. Some jurisdictions may have procedural rules that could affect access to the courts by foreign plaintiffs, depending on the cause of action.

8. In **Estonia**, there is no special law concerning liability and redress for environmental damage. Legal provisions relating to the issue are contained in various legal regimes including the Law on Protected Natural Objects, Law on Hunting Management, the Fishing Act, the Forest Act, and the Release into the Environment of Genetically Modified Organisms Act. Article 3 of the Sustainable Development Act establishes the general principles of sustainable development and imposes a general obligation on all

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persons to avoid causing damage to the environment. Moreover, Article 53 of the Constitution provides the legal basis for the regulation of liability and redress for environmental damage. These two instruments provide the legal system with broad principles which should form the basis for addressing the issue of liability and redress for environmental damage.

9. Both the Estonian Criminal Code and Administrative Offences Code impose criminal liability with respect to acts or omissions that violate specific requirements of environmental legislation governing fishing, forests, wild game, pollutants, release and handling of genetically modified organisms, etc. The Protected Objects Act, the Act on Hunting Management, the Forest Act and the Fishing Act empower State agencies to claim compensation for damage caused to wild fauna and flora. Civil remedies are provided under the Civil Code. Two reform initiatives are likely to improve the state of the law in this area. The proposed Environmental Supervision Act will enable the Environmental Inspectorate to claim compensation for environmental damage. Similarly, the Code of Obligations Act contains special provisions concerning redress measures for environmental damage.

10. The Estonian Civil Procedure Code regulates issues relating to access to justice in civil matters and grants rights of recourse to every person whose rights have been infringed without distinction as to citizenship. As regards tort liability, the Civil Code contemplates situations where the act giving rise to liability or the damage occasioned takes place in different countries. Where the incident which is the basis of a claim occurs in one country and the corresponding damage in another, the law of the country where the damage arises may apply at the request of the injured party.

11. In **France** liability for damage to biological diversity, as is with environmental damage in general, is treated under the general principles governing criminal and civil liability. Civil liability is based on the Civil Code, which distinguishes between strict and fault-based liability. The two liability regimes established under the Code Civil and applicable in an environmental context, have provided a more effective framework for environmental liability. However, there is little recourse to civil-law redress regimes, because of the burden of proof (fault liability) or the burden of the causal link (strict liability) imposed on plaintiffs, and the low level of compensation awarded in cases of ecological damage. The violation of environmental regulations constitutes fault upon which a claim for compensation may be based. In addition, special regimes have been established to address environmental damage arising from specific activities. For example, the Law of 30 October 1968 was amended by the Law of 16 June 1990 concerning civil liability in the area of nuclear energy, which imposes liability on the owner of a nuclear installation for any damage resulting from a nuclear accident. Similarly, the Law of 26 May 1977 imposes liability for oil pollution damage.

12. Any person who has suffered damage has the right of access to the courts for redress. However, in certain instances the law grants a right of action to non-governmental environmental organizations. The civil jurisdictions have wide discretion regarding reparation of damage. They can award compensation, require restoration of the damaged environment, or order the cessation of activities causing damage. Actions for compensation must be brought within ten years from the date of damage.

13. The assessment by the French authorities of the experience in the implementation of the foregoing legal provisions is that there is need for improvement. The civil law regime does not fully respond to the problem of liability and redress for environmental damage, nor does it provide an effective mechanism for the implementation of the polluter pays principle enshrined in article L110-1 of the Environment Code.

14. In **Latvia**, the issue of liability and redress for damage to biological diversity is addressed both by the Criminal Code and the Code of Administrative Offences. In both instances criminal liability is imposed for damage to specially protected habitats or animal or plant species. In addition, the Code of Administrative Offences imposes liability with respect to destruction of rare or threatened species and illegal import of alien species. Draft regulations under the 2000 Law on the Protection of Species and

Habitats propose a significant increase in the penalties for damage to specially protected habitats and species.

15. In **Lithuania**, the Environment Protection Law, 1992, establishes the main principles governing liability and redress for environmental damage. Liability is imposed for any unlawful activity that causes damage to the environment, human health or property. The person responsible for the damage has the obligation to pay compensation or, where feasible, restore the damaged environment. Claims for compensation for damage arising from unlawful activities can be brought by any person who has suffered damage and by State agencies where damage relates to the public interest. Foreign citizens have the same rights of access to judicial instances as citizens of Lithuania. There are currently draft treaties with Latvia and Poland regarding liability and redress for environmental damage.

16. In **Norway**, three legislative instruments contain provisions on liability and redress applicable to damage to biological diversity. These are the Pollution Control Act, the Gene Technology Act, 1993, and the Act relating to Petroleum Activities, 1996. The Pollution Control Act imposes strict liability on the owner or operator of an activity that causes pollution damage, and it creates an obligation to pay compensation for any loss incurred. The Act does not expressly mention damage to biological diversity, save for infringement of “rights in common”. Under section 58, compensation may be claimed for pollution that interferes with benefits arising from the exercise of such rights. However, compensation is limited to reasonable costs of restoring the damaged environment. A claim can be made by the pollution control authority, a private organization or an association with a legal interest in the matter. Where a private organization or an association brings a claim, the pollution control authority is entitled to determine how the compensation awarded shall be used. The Gene Technology Act requires the person responsible for the introduction of genetically modified organisms into the environment, contrary to applicable regulations, to take all reasonable measures to prevent or limit any damage. The same rule applies to authorized introductions that subsequently prove hazardous to human health and the environment. Liability for damage is strict, requiring no proof of fault. Redress measures in case of damage include compensation and restoration of the affected environment. In addition, the supervisory authority may require the person responsible to take appropriate measures to recover or combat the organisms within a specified time, including measures to restore the environment to its previous state. The Act relating to Petroleum Activities deals with liability for damage arising from incidents of oil pollution within Norwegian territory. Interestingly, the Act also covers damage caused to fishermen due to reduction in fish stocks.

17. In **Poland**, the Constitution of 1997 creates general national obligations, including with respect to the protection of the environment and liability for environmental damage. Activities for the protection and sustainable use of biological diversity are undertaken by public authorities on the basis of operative plans and programmes. Programmes in the agricultural sector cover, among others, the protection of agricultural biodiversity, and landscape protection. In the forestry sector, the Forests Act imposes an obligation on owners and users regarding proper management of forest resources. Breach of this obligation entails administrative penalties. Both the Nature Protection Law and the Environment Protection Law impose liability for damage to biological resources. Breach of regulations dealing with protected areas or species entails criminal liability. Redress measures in such situations may include restoration of the damaged environment where feasible.

18. In **Sweden**, existing legislation does not specifically address damage to biological diversity. The strict liability provisions of the Environment Code are not applicable to damage to biological diversity. Nevertheless, the general provisions of the Tort Liability Act can be applied to such damage. Under this regime, liability is fault-based and covers a wide range of damage, including damage to common interests such as harm to biological diversity. Experience with implementation is rather limited. A Supreme Court decision in 1995 awarded compensation to the Environmental Protection Authority in a case concerning the killing of two wolverines through illegal hunting. Damages were assessed on the basis of “costs for protection of biological diversity rendered useless because of the illegal act”.

19. Foreign citizens have the same rights of access to Swedish courts as nationals. In addition, the 1974 Nordic Environmental Convention would be applicable and prevails, on the basis of the more favourable law principle, over national legislation.

20. In **Switzerland**, national law contains only a limited number of provisions on liability and redress applicable to biological diversity. These provisions are in the fisheries legislation and the Law relating to the protection of the environment. The latter imposes liability on the owner of a waste disposal site for any damage arising from pollution. The Swiss legal framework dealing with liability and redress is currently under review. Several important amendments have been proposed, including amendments relating to damage to the environment and biological diversity. For example, it is proposed that public authorities as well as non-governmental organizations should have a right of action against polluters. Switzerland is a party to the Lugano Convention on Competence of Courts and Enforcement of Civil Judgments. Under the Convention, a foreign national suffering damage arising from a transboundary incident can institute proceedings at the place where the damage occurred against a Swiss polluter and enforce the judgment in Switzerland.

21. The situation in the **United Kingdom** was summarized in the synthesis of submissions prepared for the fifth meeting of the Conference of the Parties to Convention (UNEP/CBD/COP/5/16), and there have been no significant changes since then. The new submission, however, contains important information regarding access to justice. Most of the statute-law arrangements place the responsibility for taking action in the public interest firmly with the public authorities. However, in the case of statutory public nuisance, private citizens can take direct legal action themselves for redress. In addition, citizens and other private entities, and bodies representing them, can also obtain redress through, for example, judicial review of administrative action. The Government is currently considering the question of giving public interest groups a right to pursue representative actions, including compensation claims, on behalf of others who have sufficient legal interest.
