UNEP

CBD

CONVENTION ON BIOLOGICAL DIVERSITY

Distr.
GENERAL

UNEP/CBD/EG-L&R/INF/3
2 September 2005

ENGLISH ONLY

MEETING OF THE GROUP OF LEGAL AND TECHNICAL EXPERTS ON LIABILITY AND REDRESS IN THE CONTEXT OF ARTICLE 14(2) OF THE CONVENTION ON BIOLOGICAL DIVERSITY
Montréal, Canada, 12-14 October 2005

# SUMMARY OF SUBMISSIONS BY PARTIES RECEIVED BY THE EXECUTIVE SECRETARY ON LIABILITY AND REDRESS

*Note by the Executive Secretary*

## I. INTRODUCTION

1. The present note was drafted in response to paragraph 2 of decision VI/11 of the Conference of the Parties, which requested the Executive Secretary to continue collecting relevant information and to conduct analysis of such information and other relevant issues, with the cooperation of Parties, Governments and relevant organizations, and to make such information and analysis available prior to convening the group of legal and technical experts established under paragraph 1 of the decision.

2. The decision required that such information gathering should focus, as appropriate, on:

(a) Updating the documentation on sectoral international and regional legal instruments dealing with activities which may cause damage to biological diversity (oil, chemicals, hazardous wastes, wildlife conventions, etc.), as well as developments in private international law;

(b) National legal and policy frameworks allowing for mutual recognition and enforcement of judgments, access to justice, liability and redress (restitution, restoration and compensation), extra-judicial settlements, contractual agreements, etc.; and

(c) Case-studies pertaining to transboundary damage to biological diversity including but not limited to case law.

3. To facilitate the gathering of relevant information, the Executive Secretary circulated Notification 2002-055, in July 2002, requesting Parties to provide the Secretariat with relevant information addressing the aforementioned issues. Submissions were received from Argentina, Estonia, European Commission, Hungary, Poland, Switzerland, the Council of Europe and the Persistent Organic Pollutants (POPs) Convention of the United Nations Environment Programme. Their contributions are synthesized in section II of this document.

/…

4. An analysis of the submissions received reveals that national legal regimes in most of the countries address the issue of liability and redress in the context of environmental damage in generic terms, as there is no specific focus on damage to biological diversity *per se.* Moreover, the national regimes do not address the issue of liability and redress for transboundary environmental harm. Exception to these cases is the EU Directive 2004/35/CE on environmental liability which makes specific provision regarding damage to biological diversity. There may therefore be need for capacity-building in order to develop national legal systems in this regard.

## II. SUMMARY OF SUBMISSIONS

*European Commission*

5. On 21 April 2004 the European Parliament and the European Council adopted a Directive on environmental liability with regard to prevention and remedying of environmental damage (2004/35/CE). 1/ Member States have until 30 April 2007 to ensure compliance of their laws, regulations and administrative provisions with the Directive. 2/

6. The policy of the European Union on the environment is based on the precautionary and polluter-pays 3/ principles, in particular that where environmental damage occurs it should as a priority be rectified at source and that the polluter should pay. The Directive seeks to ensure that polluters are held responsible for environmental damage. Under article 1, the purpose of the Directive is:

"... to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage…"

7. The Directive would be "implemented through the furtherance of the polluter-pays principle, as indicated in the Treaty and in line with the principle of sustainable development". Thus the Directive seeks to establish a common framework for the prevention and remedying of environmental damage at a reasonable cost to society. Its fundamental principle would be to make the operator of an activity financially liable for (a) the environmental damage or (b) the imminent threat of such damage, as an inducement to such an operator to adopt measures and develop practices to minimize the risks of environmental damage so that their exposure to financial liabilities is reduced. It is asserted that, according to the polluter-pays principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures. Moreover in cases where a competent authority acts either by itself or with a third party, it shall ensure that it recovers costs incurred from the operator. Similarly, it is considered

---

1/ *Official Journal L* 143/56, 30 April 2004, vol. 47

2/ Article 19.

3/ The polluter-pays principle was enunciated by the Council of OECD in 1972. This principle is different from the principle of the operator's liability provided for in many civil liability conventions and domestic laws, which have adopted the concept of strict liability where the operator of the activity is liable for damage caused. The definition of operator changes depending upon the nature of the activity. In its publication *Environment and Economics: Guiding Principles Concerning International Economic Aspects of Environmental Policies,* OECD in recommendation C972)128, adopted on 26 May 1972, recommended on the polluter-pays principle that:

"The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortion in international trade and investment is the so-called 'polluter-pays principle'. This principle means that the polluter should bear the expenses carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortion in international trade and investment."

appropriate that the operator should ultimately bear the cost of assessing environmental damage as well as the imminent threat of occurrence of such damage occurring.

8. The Directive covers environmental damage, namely site contamination and biodiversity damage and traditional damage to health and property. Paragraph 1 of article 2 defines environmental damage, which covers land, water and biodiversity, as:

"(a) Damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in annex I; Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorized by the relevant authorities in accordance with provisions implementing article 6(3) and (4) or article 16 of Directive 92/43/EEC or article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.

(b) Water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where article 4(7) of that directive applies;

(c) Land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms."

9. It thus applies to environmental damage caused by occupational activities such as waste and water management and to any imminent threat of such damage occurring by reason of any of those activities. Such activities are listed in an annex III. A strict liability regime for the operator attaches to such activities. It also applies to damage to protected species and natural habitats caused by such occupational activities other than those listed in annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent. 4/ Thus fault-based liability attaches to biodiversity damage. It only applies to damage caused by pollution of a diffuse character, where it is possible to establish a link between the damage and the activities of the individual operator. 5/ The Directive does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any rights regarding such types of damages.

10. The Directive also contains exclusions and exemptions. 6/ It does not apply to damage arising from an incident in respect of which liability or compensation falls within the scope of the 1992 Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage (1992 CLC Protocol), the 1992 Fund Convention, the 1996 International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (the HNS Convention), the Bunker Oil Convention and the 1989 Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD). It also does not apply to nuclear risks or to liability falling within the scope of the Paris Convention, the Vienna Convention, the Brussels Supplementary Convention, the Joint Convention, and the 1971 Maritime Carriage of Nuclear Material Convention. Moreover, the Directive does not prejudice the right of the operator to limit his liability in accordance with national legislation implementing the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976, including any future amendment to the

4/ Article 3.

5/ Article 4, para.4.

6/ Articles 4 and 6, annex IV.

Convention, or the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI), 1988. These exclusions apply to future amendments to these instruments.

11. The Directive does not establish liability limits. It also does not contain a system of compulsory insurance. Its article 12 confers standing on the natural or legal persons affected or likely to be affected by environmental damage or having a sufficient interest in environmental decision-making relating to the damage or, alternatively, alleging the impairment of a right, where administrative procedural law of a member State requires this as a precondition. While sufficient interest is determined by national law, the interest of any non-governmental organization promoting environmental protection and meeting any requirements under national law is deemed sufficient for the purposes of establishing standing. 7/

12. As far as traditional damage (personal injury and damage to goods) is concerned, it is not covered by the Directive although the White Paper on Environmental Liability suggested otherwise. There are a variety of reasons for that evolution. Firstly, it does not appear necessary to cover traditional damage under the new adopted scheme, at least in the first place, to achieve ambitious environmental objectives and implement to meaningful extent the 'polluter pays' and preventive principles. Secondly, traditional damage can only be regulated through civil liability. National legal systems (legislation and case law) are quite developed with respect to traditional damage, which constitute their subject matter by excellence. Having said that, recent and future developments at international level on that subject are likely to require the Commission to consider afresh the matter, at least if the Community wishes to adhere to those international civil liability instruments supplementing international environmental agreements. It is to be noted, however, that those various sectoral international initiatives 8/ do not always appear as fully consistent among themselves so that it seems difficult at this stage to formulate a general position as to how those initiatives should be considered by the Community. Further reflections are needed on that subject in light of the developments taking place at the international level.

13. The Directive establishes rules to be achieved on restoration objectives and on how to identify and choose the appropriate restorative measures so that a common basis is shared by member States in order to enable them to support the implementation of the regime. In practical terms, when environmental damage occurs, member States are required to ensure that the damage is remedied. The directive leaves it open to member States to decide when the measures should be taken by the relevant operator or by the competent authorities or by a third party on their behalf. Whenever possible, in accordance with the 'polluter pays principle', the operator, who has caused the environmental damage or who is faced with an imminent threat of such damage occurring, must ultimately bear the cost associated with those measures. Besides the prevention and the polluter pays principle, this Directive is also based on the general principle of the duty of care.2.

14. A number of pertinent issues arose during the discussions leading to the adoption of the EU Directive. In relation to the definition of biodiversity for the purpose of the Proposal for the EU Directive on environmental liability that the definition of 'biological diversity' in Article 2 of the Convention on

7/ For further information see the Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), prepared by the International Law Commission, A/CN.4/543, 24 June 2004.

8/ There is one sectoral instrument that has been signed but it is not in force yet: the 1999 Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal. There are several other ongoing or future initiatives: a potential joint liability instrument under the 1992 Helsinki Convention on the Transboundary Effects of Industrial Accidents (TEIA Convention) and 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Protection Convention). Reference can be made to the only existing horizontal international environmental liability regime, which is the 1993 Lugano Convention on Civil Liability for Damage resulting from activities dangerous to the environment. This Convention is, however, not yet in force.

Biological Diversity could not be considered at this stage as providing a suitable basis for the proposed regime, including as far as liability to be attached to genetically modified organisms is concerned. The Convention's definition goes beyond habitats and species and subsumes the idea of 'variability' so that it could be argued that damage to biological diversity would encompass injury to 'variability among living organisms'. According to the EC, 9/ such an approach raises delicate questions as to how such damage would be quantified and what would be the threshold of damage entailing liability. 10/ The European Commission was also that legislating, especially in such field, can only be an iterative process where the experience gained in the implementation of such scheme and new legal and technical developments on the subject should be reviewed and lead to the regime being improved where appropriate.

15. As the European Commission reported, due to the fact that the majority of member States have only recently enacted legislation on liability for environmental damage, most of the clean-up expenditures associated with the sites contaminated in the past are likely to end up being paid with public money as the original polluters cannot easily be held liable.

16. One of the key issues discussed by the Commission was whether it was desirable to enact rules at the Community level rather than leaving the issue entirely to the national level. Some of the reasons that supported action at Community level are 11/

(a) Not all member States have adopted legislation to address the problem. Thus without Community action there is little guarantee that the polluter pays principle will be effectively applied across all the Community;

(b) Most member States' legislation does not mandate national authorities to ensure that orphan sites contaminated after the entry in force of the legislation are actually cleaned up;

(c) Without a harmonized framework at Community level, economic actors could exploit differences in member States' approaches to engage in artificial legal constructions in the hope of avoiding liability.

17. Concerning biological diversity specifically, the two main Community legal instruments dedicated to the protection of biodiversity are the Habitats and the Wild Birds Directives. 12/ As the European Commission indicated, these directives lack liability provisions applying the polluter pays principle and thus encouraging efficient preventive behaviour by private (and public) partners. Currently few, if any, member States fill this void by imposing liability for biodiversity damage on private parties. Thus, Community action to protect and restore biodiversity is warranted on two main grounds: ensuring socially-efficient means are used to finance the remedying of damage to biodiversity in the Community and, by doing so, encourage efficient prevention.

---

9/ For further information on this issue, please refer to document on the *Proposal for a Directive of the European Parliament of the Council on environmental liability with regard to the prevention and remedying of environmental damage*, COM(2002) 17 final, 2002/0021 (COD), Brussels, 23.1.2002.

10/ It is to be noted that similar questions are raised within the context of the Intergovernmental Committee for the Cartagena Protocol on Biosafety (see the Note by the Executive Secretary on "Liability and redress for damage resulting from the transboundary movements of living modified organisms. Review of existing relevant instruments and identification of elements" [UNEP/CBD/ICCP/2/3 – para. 77, page 24] – http://www.biodiv.org/biosafety/mtg-iccp-02.asp).

11/ Op.cit., p.5.

12/ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p.7) and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 25.4.1979, p.1).

18. The EU Directive acknowledges that not all forms of environmental damage can be remedied through liability. In order for liability to be effective, there must be one or more identifiable polluters. Moreover, the damage should be concrete and quantifiable, and a causal link must be established between the damage and the identified polluter. Thus, liability is not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with the acts or failure to act individual actors. Although it does not provide for joint and several liability, the Directive (Article 9) provides that it is without prejudice to any provisions of national regulations concerning cost allocation in cases of multiple-party causation, especially concerning the apportionment of liability between the producer and the user of a product13.

*Council of Europe*

19. The Council of Europe reported on its Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (The Lugano Convention). The Convention was opened to signature on 21 June 1993 in Lugano. So far nine States have signed it but none of them have ratified it. The Convention will enter into force after three ratifications.

20. The Convention on Civil Liability aims at ensuring adequate compensation for damage resulting from activities dangerous to the environment and also provides for means of prevention and reinstatement. It considers that the problems of adequate compensation for emissions released in one country causing damage in another country are also of an international nature. The system of the Convention is based on objective liability taking into account the 'polluter pays' principle. However, specific rules are provided concerning the fault of the victim, causation, joint liability of the operators of installations or sites for damage, and a compulsory financial security scheme to cover liability under the Convention. 14/

21. The Council of Europe is now preparing a non-binding "European-Charter of Principles for Environment Protection and Sustainable Development", which *inter alia*, will re-launch the principles contained in the Convention on Civil Liability with the hope to stimulate the States to sign and ratify it.

*UNEP (Stockholm Convention on Persistent Organic Pollutants - POPs)*

22. The Stockholm Convention on POPs reported on the Workshop on Liability and Redress, which was held under its auspices in Vienna from 19 to 21 September 2002. 15/

23. The workshop noted the ongoing work and progress made so far by the International Law Commission, which had been asked to deal with this topic by the United Nations General Assembly, as well as issues and problems to be taken into consideration in the elaboration of rules on liability and redress. The different concepts of responsibility and liability in international law were emphasized. Responsibility comes into play when a wrongful act has been committed, whereas liability is established where no wrongful activities are involved (i.e. transport of hazardous goods by sea). Liability might apply if damage from these activities occurred and a causal link could be established. It was also noted the lack of a commonly accepted definition of the environment, as well as the difficulties of measuring environmental damage, providing causality and identifying the responsible actor. In contrast to

13/ See A/CN.4/543, para. 371, p.126-127.

14/ Information obtained from http://conventions.coe.int/Treaty/en/Summaries/Html/150.htm

15/ Copies of presentations and other documents relating to the meeting can be found on the Stockholm Convention website, http://www.pops.int

responsibility, a general system covering liability in the contexts of transboundary movements and of hazardous substances is still lacking. 16/

24. The workshop discussed the possible relevance for the Stockholm Convention of the definition of damage to be elaborated under the framework of the Convention on Biological Diversity. However, it was noted that applying a liability and redress regime with regard to POPs appeared to be difficult due to the difference in nature of the pollutants, the differences in financial arrangements relating to oil transport such as compulsory insurance, a fund financed by producers that does not exist in the case of POPs.

25. The complementary linkages between the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the 1999 Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and Their Disposal and the Stockholm Convention were also discussed.

26. The workshop had enabled legal and technical experts to explore the complexities of liability in the context of the Stockholm Convention. While acknowledging the complexity of the issues and the technical difficulties, such as the establishment of a causal link between a POPs release and a particular damage suffered, participants observed that no conclusions had yet been reached on whether a liability regime would be appropriate and recommended that further debate was needed.

*Argentina*

27. In the Republic of Argentina, at the regional level, two categories of legal instruments can be identified. The first type is known as landmark agreements with generic content, which establish areas for future cooperation between Parties with a view to provide for the conservation of the environment and the prevention of damage to the biological diversity. In most cases these agreements require additional protocols that make them operative. The second category includes those agreements that provide specific mechanisms of contingency or response to certain activities that generate damage to the biological diversity.

28. Major generic legal instruments include the bilateral agreements between the Republic of Argentina and its neighbouring countries such as Bolivia (an agreement which regulates environmental issues, 1994), Brazil (an agreement for cooperation on environmental areas, 1996), Chile (an agreement for the preservation of protected areas against threat of fire, 1961; the additional Protocol on the conservation of the Antarctic environment, 1992; the additional Protocol for cooperation on forest issues, 1997; and a Bilateral Treaty on environment), with Paraguay (an agreement for the conservation and development of hydro resources in the bordering area of the Paraná and Paraguay rivers, 1996) and Uruguay (an agreement on applicable norms for water quality control in the Uruguay river, 1977). Another generic legal instrument at the regional level is the MERCOSUR Agreement on environment, or Acuerdo de Florianópolis signed on March 2001, which provides legal mechanisms of cooperation between Parties to adopt common public policy measures for the protection of the environment, conservation of biological diversity and promotion of sustainable development (article 5 of the agreement).

29. Major agreements that provide specific mechanims of contingency measures are the agreements with Brazil (Agreement of cooperation and exchange of goods used in the defense and protection of the

16/ Presented by Professor Gerhard Hafner, former member of the International Law Commission, at the Stockholm Convention Workshop on Liability and Redress, Vienna, 19-21 September 2002.

environment, 1992), Chile (Agreement of cooperation on circunstances of catastrophes, 1997) and Uruguay (Treaty of Limits of the Uruguay River and Statute of the Uruguay River, which provides the responsibility of each Party for the damage caused as a result of the contamination 17/ by its own activities or by a physical or legal person in its own territory, 1975).

30. Overall, 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.

*Estonia*

31. In Estonia there is no specific law concerning liability and redress applicable to damage caused to environment. Legal provisions on liability and redress are included in various legal instruments including the Law on Protected Natural Objects, Law on Hunting Management, the Fishing Act, the Forest Act, the Release into the Environment of Genetically Modified Organisms Act and the Penal Code.

32. Article 3 of the Sustainable Development Act establishes the general principles of sustainable development and imposes a general obligation on all 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.

33. In Estonia, the legal system includes two levels of liability: (i) Crimes under the Penal Code; (ii) Misdemeanour offences under the Code of Misdemeanour Procedure and respective laws depending the object and purpose of the law (i.e. Fishing Act; Forest Act).

34. As of September 2002, the Ministry of Justice concluded the reform of the penal provisions in Estonia. In the Criminal Code, in force prior to the reform, offences against the environment as a separate type of offences were unknown. The necessary elements of environmental offences were generally located in different chapters of the Criminal Code, in particular within the chapter on economic offences. However, the new Penal Code concentrates all environmental criminal offences and the basic part of environment misdemeanours into one chapter – "Offences against environment". This means that the environment itself is being regarded as a legal right that can be harmed.

35. On the basis of content, the necessary elements of offences against the environment in the Penal Code can be divided into three categories:

(a) Necessary elements of offences that impose criminal liability for causing risk to the environment or to a part of the environment;

17 Contamination is understood as the direct or indirect introduction of substances by the man in the marine environment, which result in injurious effects (article 40).

(b) Necessary elements of offences that impose criminal liability for causing damage directly to the environment or to a part of the environment;

(c) Necessary elements of offences that impose criminal liability for solely violation of requirements, permits or procedures of utilization of the environment or a part of the environment, without causing directly damage or risk to the environment.

36. The Penal Code prescribes criminal liability for violation of the requirements for utilization of components of the environment such as flora, wild fauna, landscape, and protected natural objects. For offences against the environment, the Penal Code enables to punish both natural persons and legal persons. The type of punishment depends on the type of offence (i.e. whether it is a criminal offence or a misdemeanour). A misdemeanour is an offence, which is provided for the Penal Code or another Act, and the principal punishment prescribed is a fine or a detention.

37. If a natural or legal person has been punished either under the Penal Code or the Code of Misdemeanour Procedure and other particular Act, it has an obligation to redress the damage caused under civil liability. The Law of Obligations Act stipulates the general provision of compensation for damage caused by environmentally hazardous activities. It is provided that if damage is caused by environmentally hazardous activities, damage related to deterioration in environmental quality shall also be compensated for in addition to the damage caused to persons or the property thereof. Expenses related to preventing an increase in the damage and to applying reasonable measures for mitigating the consequences of the damage, and the damage arising from the application of such measures shall also be compensated for. Damage and expenses shall be compensated for to the extent and pursuant to the procedure provided by law.

38. The Special Acts provide also for compensation. For instance, the Act on the Protected Objects of Nature gives to the Environmental Inspectorate and the administration of the protected area the right to claim the compensation for the damage caused to the protected object of nature and to claim compensation also for the protection of the rights of other persons.

39. The Government of Estonia has approved on 25 July 1995 a regulation no.275 that provides the basis for a state to claim compensation for the damage caused to wild flora and fauna. This regulation includes measures for claiming and amount of the damage in Estonian currency. The regulation covers all listed fauna and flora species, including protected species. However, according to the Government of Estonia a special Act for environmental civil liability and redress is still needed in order to systemize and organize all parts of issues pertaining to civil liability and redress.

40. Regarding access to justice, Estonia has ratified the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, whose Article 9 gives the public access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities that contravene provisions of its national law relating to the environment or which are in contradiction with Article 6 of the Convention. Article 6 regulates matters related to public participation in decisions on specific activities that may have a significant effect on the environment.

*Hungary*

41. Protection of the environment in Hungary is laid down at the highest level in Act XX of 1949, the Constitution of the Republic of Hungary.

42. In the Hungarian legislation there are three main aspects of liability derived from activities which may cause damage to biological diversity: consequences in civil, criminal and administrative law. The general basis of the wide-spread legal liability is laid down in the Act LIII of 1995 relating to General Rules of Environmental Protection (EPA), Section 101:

> "(1) Those posing hazard to, or polluting or damaging the environment with their activities or omissions, or those performing their activities by violating regulations regarding environmental protection (hereinafter together: 'unlawful activity') shall be liable (under criminal law, civil law, administrative law, etc.) in accordance with the contents of this Act and the provisions of separate legal rules.
>
> "(2) Those pursuing unlawful activities shall:
>
> (a) Stop posing a hazard to or polluting the environment and shall cease damaging the environment;
>
> (b) Accept responsibility for the damage caused;
>
> (c) Restore the state of the environment existing before the activity.
>
> "(3) In case the measure in subsection (2), clause (c), is not taken or is unsuccessful, the authority or court entitled thereto may restrict the activity or may suspend or ban it until the conditions it established are ensured."

43. The definition of "*environment"* is specified in the paragraph (b) of Section 4 of the General Rules of Environmental Protection (EPA), as the environmental components, the systems, processes, and structure thereof. Environmental component means land, air, water, the biosphere as well as the built (artificial) environment created by humans, furthermore, the constituents thereof.

44. "*Posing hazard to the environment"* means an activity or omission, which may result in damaging the environment.

45. "*Damaging the environment"* means an activity, which results in environmental damage. "*Environmental damage"* is a change in or pollution of the environment or a component thereof, of the utilization of any of its components to such an extent, as a result of which its natural or previous state (quality) can only be restored by intervention, or cannot be restored at all, or which adversely affects the biosphere.

46. Under the EPA's provisions when the fact of unlawful activity occurs the following steps have to be taken:

> "(2) Those pursuing unlawful activities shall:
>
> (a) *Stop posing hazard to or polluting the environment* and shall finish damaging the environment;
>
> (b) A*ccept responsibility* for the damage they caused;
>
> (c) *Restore the state of the environment existing before* the activity."

47. However, as indicated by the Government of Hungary, although the instruments provided by the EPA Act seem to be the best solution possible, they are not always effective. Restoration of the environment existing before the damaging activity is sometimes unfeasible and it is not certain that the amount of the environmental liability insurance will balance the loss.

48. In most cases imposing an environmental fine seems to be an effective legal instrument. But there are also some limitations with it, particularly when the liable person/company has a large income that paying the fine seems to be more appropriate for them than making a non-refundable environmental investment. In Hungary, there were some initiatives to increase the legal limits of environmental fines, however, this could create a further problem for small private enterprises.

49. Concerning channelling of liability, provisions are stated in the Section 102 of the EPA, in particular: (i) the liability for the unlawful activity – with the exception of criminal and misdemeanour liability, is imposed on the possessor (user) of the real property, on which the activity is or was carried out – until evidence is provided to the contrary; and (ii) the owner shall be exempted from the joint and several liability, if it names the actual user of the real property and proves beyond any doubt whatsoever that the responsibility does not lie with him.

50. Provisions relating to liability for damage are laid down in Section 103. Damage caused to other Parties through acts or omissions entailing the utilization or loading of the environment shall qualify as a damage caused by an activity posing hazard to the environment, and the provisions of the Civil Code (Act IV of 1959 on the Civil Code of the Republic of Hungary) on activities entailing increased hazard shall be applied (Sections 345 and 346).

51. The strict liability regime in the Hungarian Civil Code (Section 345) states that a person who carries on an activity involving considerable hazards shall be liable for any damage caused thereby. Being able to prove that the damage occurred due to an unavoidable cause that falls beyond the realm of activities involving considerable harzards shall relieve such person from liability. These provisions shall also apply to persons who cause damage to other persons through activities that endanger the human environment. Section 346 provides that if a damage is caused by two or more persons through activity that involves considerable hazard, the general rules and regulations governing liability shall apply to their relationship with one another. If the cause of damage is not attributable to either party, but it derives from a malfunction that occurred within the realm of activity involving considerable hazard performed by one of the parties, that party shall be liable for paying damages. If the cause of damage is a malfunction that occurred in the sphere of both parties' activity involving considerable danger and, furthermore, if such malfunction cannot be attributed to one of the parties, each party shall, since individual responsibility cannot be established, bear liability for his own loss.

52. Relying on the general rules of liability, damage means any injury to person or property. So there are two types of damage: (i) damage in asset (containing the harm, loss of income, and reasonable cost); and (ii) non-pecuniary damages (injury of inherent rights).

53. When the judgment in any legal action requires restoration, the defendant has to compensate for all the damaged caused. In the Hungarian legislation, restoration and compensation happen usually when the damage is caused by intentional activity. Generally, in the case of negligence restitution means only compensation of the harm.

54. To strengthen the provisions of the EPA the Criminal Code (Act IV of 1978) regulates three crimes under the title of "Crimes against Public Health", which are related to the environment: (i) damaging of the environment; (ii) damaging of nature; and (iii) unlawful deposition of wastes hazardous to the environment.

55. In Hungary there is a separate Act on Nature Conservation (No. LIII of 1996) which has almost the same protection system as the EPA.

*Poland*

56. The *State Ecological Policy for 2003-2006*, which was approved by the Council of Ministers in December 2002 currently in force in Poland, provides for the need to respect the principle of sustainable development in strategies and policies in specific economic sectors, when developing any sectoral strategies or policies. This document includes also a separate chapter which deals with liability for causing damage to the environment through projects under implementation, that relates to relevant legal regulations provided for in both national and international legislation. According to provisions in the *State Ecological Policy*, the Polish Government shall be obliged to review every four years the compliance of the national legal regulations in the field of civil liability for impact on the environment from projects under implementation with relevant international requirements, and propose any necessary amendments in these regulations. Such review will be conducted once the new European Union Directive regarding environmental liability is adopted, expected for 2005. The review will also take into account respective international Conventions and the Protocols thereto.

57. At present, mutual recognition and enforcement of court judgments, both civil and criminal, is possible under bilateral agreements between the Republic of Poland and other countries [i.e. Agreement between Republic of Poland and Republic of Belarus on judicial assistance and legal relations under civil, family, labour and criminal laws, signed on 26 October 1994 (O.J. of 1995, No. 128, Item 619); and the Agreement concluded with the Republic of Lithuania, signed on 26 January 1993 (O.J. of 1994, No.35, Item 130)]. In addition, Poland is a Party to the *Lugano Convention* of 16 September 1998, on Jurisdiction and Enforcement of Court Judgements in Civil and Commercial Cases.

58. The access to justice is guaranteed in the Polish law by means of the provisions included in the Code of Administrative Procedure (O.J. of 2000, no.98. Item 1071, further amendments) for cases judged by way of administrative decisions; the Code of Civil Procedure (O.J. of 1964, No.43, Item 296, further amendments) for cases concerning relations under civil law; and the Code of Penal Proceedings (O.J. of 1997, no.89, Item 555, further amendments) for the cases under criminal law. Additionally, the access to information on case relating to the environment will be provided under the Convention on the Access to Information, Public Participation in Decision-Making, and the Access to Justice in Matters Concerning the Environment, which was signed in Aarhus on 25 June 1998.

59. The issue of liability for damage caused (including damage caused by operation of an enterprise or plant, or by hazardous substance) and the claims for compensation for the damage is regulated by the provisions in Articles 415 through 449 of the Polish Civil Code (O.J. of 1964, No.63, Item 93, further amendments). Specific regulations relating to the liability for damage caused by impact on the environment are included in Articles 332 through 328 of the Act of 27 April 2001 on Environmental Law. In addition to the rules as laid down in the Civil Code, the Environmental law added new opportunity for the entity directly affected by damage, or by entity, who suffered from damage caused by illegal impact on the environment, to lodge claim regarding restoration and preventive measures (Article 323 in Environmental Law). Liability for damage caused to the environment shall not be excluded by the fact that the activity is conducted on the basis of and within the limits of a governmental authorization (Article 325 in Environmental Law). As far as the liability is concerned for damage caused by pollutants originating onboard (including polluted oils), respective provisions are included in the Marine Code (O.J. of 2002, No.138, Item 1545) – Article 265 and the subsequent articles, and in Article 279 and the subsequent articles, as well as in the International Convention on Civil Liability for Damages Caused by Oily Pollutants, signed in Brussels, on 29 November 1969 (O.J. of 2001, No. 136, Item 1527), the International Convention on the Establishment of International Compensation Fund for Damages caused by Oily Pollutants, signed in Brussels, on 29 November 1969 (O.J. of 1986, No. 14, Item 79), and in the

Convention on Limited Liability for Marine Claims, signed in London, on 19 November 1976 (O.J. of 1986, No.35, Item 175).

60. Polish legal acts relating to the issue of liability for damage caused by impact on the environment from projects under implementation are following:

(a) The Act of 27 April 2001 – *Environmental Law* (O.J. of 2001, No.62, Item 627, further amendments) and its implementing regulations. The Act lays down the principles for environmental protection and the conditions of using environmental resources, with regard to the requirements of sustainable development18.

(b) The Act of 27 April *on Waste* (O.J. of 2001, No.62, Item 628, further amendments) and its implementing regulations. The Act lays down the principles for conduct of waste in a way securing the protection of human life and health and of the environment, according to the principle of sustainable development. 19/

(c) The Act of 11 May 2001 *on Packaging and Packaging Waste* (O.J. of 2001, No.63, Item 638) and its implementing regulations. The Act lays down the requirements to be met by packaging with regard to the principles for conduct of packaging and packaging waste, that provide for the protection of human life and health and of the environment, according to the principle of sustainable development. 20/

(d) The Act of 11 May 2001, *on Economic Operators' Obligations in the Scope of Managing Certain Wastes and on the Product and Deposit Charges* (O.J. No.63, Item 639) and its implementing regulations. The Act lays down the obligations for importers and manufactures of products, in relation to placing definite products and products in packaging on domestic market. 21/

*Switzerland*

61. In Switzerland, the Federal law relating to the Protection of the Environment was amended with the addition of articles 59 (a) and (b) on 21 December 1995; the articles entered into force on 1 July 1997. Article 59(a) concerning liability stipulates:

> "(1) The owner of an enterprise or installation which represents a special threat to the environment shall be liable for damage arising from effects occurring when such a threat becomes reality. The actual damage to the environment shall be excluded.

18/ The Act includes in particular the provisions concerning the conduct in case of the occurrence of a serious accident (including industrial accident), the conditions for release of substances or energies into the environment, the conduct of the substances which pose particular danger to the environment (asbestos and PCBs), the principles for the protection of land surface, as well as the provisions concerning liability in the field of environmental protection, and it introduces sanctions for non-compliance with the requirements.

19/ The Act includes in particular the requirements to produce waste and the principles for conduct of waste, including hazardous waste (understood as, *inter alia*, waste oils, used or outdated chemicals). It is imposed obligations on the owners of waste (including producers of waste) in relation to proper carrying out the activity in the field of waste collection, transport, recovery and disposal. The Act includes also regulations relating to the international marketing of waste.

20/ In particular, the Act imposed obligations on the producers and importers of very toxic, carcinogenic, mutagenic or hazardous substances, and who collect from sellers the multi-use packaging for these substances and packaging waste thereof.

21/ In particular, the Act made the operators obliged to provide for definite recovery and recycling levels of packaging and post-use waste.

"(2) As a rule, the following enterprises and installations shall be regarded as representing a special threat to the environment:

(a) Those which the Federal Council makes subject to article 10 22/ on the basis of the substances or organisms used or the wastes produced;

(b) Those which are used for waste disposal;

(c) Those in which liquids harmful to water are handled;

(d) Those containing substances or organisms for which the Federal Council introduces a licensing requirement or enacts other special regulations.

"(3) Anyone who can show that the damage was caused by force majeure or by gross negligence on the part of the injured party or of a third party shall be relieved of liability."

62. Article 59(b) concerning guarantee provided:

"For the protection of injured parties, the Federal Council may:

(a) Require owners of certain enterprises or installations to provide a guarantee for their liability by taking out insurance or in some other way;

(b) Set the scope and duration of this guarantee or leave this to the authority to decide on a case-by-case basis;

(c) Require those providing a guarantee for he liability to notify the enforcement authority of the existence, suspension and cessation of the guarantee;

(d) Prescribe that the guarantee shall not be suspended or cease until 60 days after receipt of the notification;

(e) Make provision for the land on which waste disposal sites are situated to become the property of the canton when the site is closed, and enact regulations concerning any compensation."

63. In addition, Switzerland is a Party to the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents. The Protocol was formally adopted and signed by 22 countries at the Ministerial Conference "Environment for Europe" in Kiev, Ukraine, on 21 May 2003. The Protocol will be open for ratification by States Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and/or the Parties to the Convention on the Transboundary Effects of Industrial Accidents, but any other member State of the United Nations may accede to the Protocol upon approval by the Meeting of the Parties. The Protocol will enter into force once 16 States have ratified it.

64. The Protocol will give individuals affected by the transboundary impact of industrial accidents on international watercourses (e.g. fishermen or downstream waterworks) a legal claim for adequate and prompt compensation. Companies will be liable for accidents at industrial installations, including tailing

22/ Article 10, para.1, provides in part: "Any person who operates or intends to operate installations which, in exceptional circumstances, could seriously damage persons or the environment shall take steps to protect the populations and the environment…"

dams, as well as during transport via pipelines. Physical damage, damage to property, loss of income, the cost of reinstatement and response measures will be covered by the Protocol. 23/

65. The Protocol sets financial limits of liability depending on the risk of the activity, i.e. the quantities of the hazardous substances that are or may be present and their toxicity or the risk they pose to the environment. To cover this liability, companies will have to establish financial securities, such as insurance or other guarantees.

66. The Protocol will also ensure the non-discrimination of victims: victims of the transboundary effects cannot be treated less favourably than victims from the country where the accident has occurred.

67. The Protocol provides compensation for the cost of reinstatement of the impaired transboundary waters. That means that damaged or destroyed biodiversity in the context of transboundary waters has to be reinstated (Article 2, paragraph 2, little iv of the Protocol).

68. The new Swiss Draft Law on genetic engineering also provides compensation for damaged or destroyed environment including biodiversity loss. The Swiss Parliament which is heading to the end of the debate of the Draft Law recently agreed on the provisions on liability.

69. For Switzerland the most important instrument in the field of private international law is the Lugano Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters of 16 September 1988. 24/

## III. GENERAL ASSESSMENT

70. An analysis of the submissions received reveals inadequacies of existing domestic frameworks on the basis of items specified in paragraph 2 of decision VII/11 on Liability and Redress in the context of Article 14(2) of the Convention, including:

(a) Damage to biodiversity is not specifically addressed in most existing national laws. Often, national legal regimes provide general guidelines within existing domestic regulations;

(b) There is no specific law concerning liability and redress applicable to damage caused to environment;

(c) There is a lack of elaborate provisions on restoration and preventive measures. The focus is on criminal penalties and payment of damages; and

(d) There are no special provisions relating to mutual recognition outside the framework of multilateral agreements and general domestic law, which could facilitate enforcement and access to justice on environmental matters.

---

23/ Information on the Protocol on Civil Liability and Compensation was obtained from the United Nations Economic Commission for Europe, http://www.unece.org/env/civil-liability/welcome.html

24/ For more information please consult: http://www.curia.eu.int/common/recdoc/convention/en/c-textes/lug-idx.htm. Cases-studies are included in the third report on national case law on the Lugano Convention of 2001 (SN 4502/01). Unfortunately, as Switzerland indicates, there is no case in the field of civil liability for damages caused to the biodiversity.

71. An alternative to the lack of or inadequacy of national liability regimes would be the development of an international regime or regional frameworks. Indeed, this was one of the inspirations for the EU Directive referred to previously. Such an approach would also avoid the problem of lack of harmonization of different liability regimes.

72. It is also apparent that there is an urgent need to build national capacities in the area of liability and redress for damage to biological diversity or more generally environmental damage. Capacity-building is one of the critical elements for the development and implementation of liability and redress measures that address biodiversity damage.

---