CBD

UNEP

CONVENTION ON BIOLOGICAL DIVERSITY

Distr.
GENERAL

UNEP/CBD/WS-L&R/3
29 June 2001

ORIGINAL: ENGLISH

WORKSHOP ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CONVENTION ON BIOLOGICAL DIVERSITY
Paris, 18-20 June 2001

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

INTRODUCTION

A. Background

1. In its decision V/18, of the Conference of the Parties to the Convention on Biological Diversity decided, *inter alia*, "to consider at its sixth meeting a process for reviewing paragraph 2 of Article 14, including the establishment of an ad hoc technical expert group" and welcomed the offer of the Government of France to organize a workshop on liability and redress in the context of the Convention.

2. Pursuant to that decision, the Workshop on Liability and Redress in the Context of the Convention on Biological Diversity was held in Paris from 18 to 20 June 2001, with the financial and logistic support of the Government of France.

B. Attendance

3. In accordance with established practice, the Executive Secretary requested Parties to nominate suitably qualified experts to be considered for selection as participants at the Workshop. On the basis of the nominations received, the Executive Secretary selected participants for the Workshop taking into consideration the following factors:

(a) Knowledge and experience of international environmental law, international law relating to liability and redress for transboundary harm, or issues concerning the conservation and sustainable use of biological diversity;

(b) Equitable geographical representation; and

(c) Gender balance.

4. In addition, representatives of competent intergovernmental and non-governmental organizations were invited to participate.

5. Accordingly, the Workshop was attended by experts nominated by the Governments of the following countries: Argentina, Australia, Brazil, Burkina Faso, Canada, China, Colombia, Costa Rica, Cuba, Denmark, Ethiopia, France, Germany, Indonesia, Islamic Republic of Iran, Jamaica, Latvia, Lithuania, Malawi, Mexico, Morocco, Mozambique, Netherlands, Pakistan, Palau, Philippines, Seychelles, Sri Lanka, Sweden, Switzerland, Togo, and United Kingdom of Great Britain and Northern Ireland.

6. An expert from the European Community also attended.

7. Observers from the following Parties also attended: Belgium, Norway, Malaysia.

8. An observer from the following non-Party also attended: United States of America.

9. Representatives of the following intergovernmental and non-governmental organizations participated in the Workshop as observers:

(a) *Intergovernmental organizations*: Secretariat of the Basel Convention on Transboundary Movements of Hazardous Wastes and Their Disposal, United Nations Environment Programme (UNEP);

(b) *Non-governmental organizations*: Defenders of Wildlife, European Chemical Industry Council (CEFIC), Friends of the Earth Europe, Global Industry Coalition, Greenpeace International, International Chamber of Commerce, World Conservation Union (IUCN), Meridian Institute, SOLAGRAL, Third World Network.

ITEM 1. OPENING OF THE WORKSHOP

10. The Workshop was opened at 10 a.m. on Monday, 18 June 2001 by Mr. Olivier Jalbert, Principal Officer, Division of Social, Economic and Legal Affairs, Secretariat of the Convention on Biological Diversity. Speaking on behalf of Mr. Hamdallah Zedan, Executive Secretary of the Convention on Biological Diversity, Mr. Jalbert welcomed participants and expressed his gratitude to the Government of France for its warm welcome and for the technical and financial support that had enabled the meeting to be convened. The Workshop marked the beginning of a new stage in the implementation of the Convention. The questions of liability and redress were both important and complex, and had been the subject of long discussions during the negotiation of the Convention itself, without any consensus having been reached on the issues raised. A liability regime would tend to encourage States to adopt cautious policies in terms of economic activity. It would also allow the "polluter pays" principle to be reinforced, and would doubtless lead to the adoption of preventive measures. Reiterating the mandate of the current Workshop with respect to Article 14, paragraph 2, of the Convention, he also recalled Article 27 of the Cartagena Protocol on Biosafety and the mandate of the Intergovernmental Committee for the Cartagena Protocol (ICCP) to formulate recommendations on the subject, which it would consider at its second meeting, in October 2001. The results of the current Workshop would therefore be of value for both the Convention and the activities within the framework of the Cartagena Protocol. To facilitate the work of the experts, the Secretariat had prepared an overview of the existing legal instruments and regimes, as well as a number of issues that were relevant in the examination of Article 14, paragraph 2. In addition, the Secretariat had prepared a synthesis of all the information received from Parties since the fifth meeting of the Conference of the Parties, to supplement the synthesis prepared for that meeting. He thanked all those Governments that had supplied information on liability and redress, and extended an invitation to others to also provide information, in line with the decision of the Conference of the Parties. In conclusion, he wished all participants success in their deliberations.

11. An opening statement was also made by Mr. Philippe Zeller, representative of the Government of France and Ambassador for the Environment.

12. In his statement, Mr. Zeller welcomed participants to Paris and thanked the Secretariat for the work it had accomplished to prepare for the Meeting. The broad attendance was evidence of the importance that Governments attached to the issues of liability and address. Pointing to the possible elements that could be covered by the experts' deliberations, he reminded participants that they were not called upon to enter into any kind of negotiations but, rather, to bring to bear their legal expertise in an open discussion on this complex aspect of environmental law, and report to the Parties on their conclusions. The presence of invited observers from intergovernmental and non-governmental organizations would greatly benefit the discussions, and he wished all participants fruitful and constructive deliberations.

ITEM 2. ORGANIZATIONAL MATTERS

A. Election of officers

13. At the opening session of the Workshop, on 18 June 2001, participants elected the following officers for the meeting:

Chair: Ms. Marie-Laure Tanon (France)

Rapporteur: Mr. Julio Barboza (Argentina)

B. Adoption of the agenda

14. The Workshop adopted the following agenda on the basis of the provisional agenda proposed in document UNEP/CBD/WS-L&R/1:

1. Opening of the workshop.

2. Organizational matters:

   2.1. Election of officers;

   2.2. Adoption of the agenda;

   2.3. Organization of work.

3. Consideration of the process for the review of paragraph 2 of Article 14 and possible elements for a liability and redress regime within the framework of the Convention on Biological Diversity.

4. Other matters.

5. Adoption of the report of the workshop.

6. Closure of the workshop.

C. Organization of work

15. At its opening meeting, the Workshop decided to carry out its work in plenary. The Workshop also approved the proposed organization of work for the meeting as contained in annex I to the annotations to the provisional agenda (UNEP/CBD/WS-L&R/1/Add.1/Rev.1).

16. The representative of the Secretariat drew attention to the following other documentation for the meeting, as listed in annex II to the annotations to the provisional agenda: review of relevant

international legal instruments and issues for consideration (UNEP/CBD/WS-L&R/2); summary of submissions received by the Executive Secretary since the fifth meeting of the Conference of the Parties (UNEP/CBD/WS-L&R/INF/1); synthesis of submissions from Governments and international organizations in response to the questionnaire on liability and redress under the Convention on Biological Diversity (UNEP/CBD/COP/5/16).

ITEM 3. CONSIDERATION OF THE PROCESS FOR THE REVIEW OF PARAGRAPH 2 OF ARTICLE 14 AND POSSIBLE ELEMENTS FOR A LIABILITY AND REDRESS REGIME WITHIN THE FRAMEWORK OF THE CONVENTION ON BIOLOGICAL DIVERSITY

17. The Workshop took up agenda item 3 at its 1st session, on 18 June 2001. In considering the item, the Workshop had before it a note by the Executive Secretary on review of relevant international legal instruments and issues for consideration (UNEP/CBD/WS-L&R/1/2). The Workshop agreed to organize its deliberations around the following aspects:

(c) Assessment of the status of existing national and international law;

(d) The scope of paragraph 2 of Article 14: concepts and definitions;

(e) Main situations and activities to be considered in the context of the Convention on Biological Diversity;

(f) Means and process for the implementation of paragraph 2 of Article 14.

Assessment of the status of existing national and international law

18. At the 1st session of the Workshop, introductory presentations were given by Mr. Pavel Suian, (Legal Officer, Secretariat of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal), Mr. Charles Di Leva (Director, Environmental Law Centre, World Conservation Union (IUCN)) and Mr. Julio Barboza, Ambassador of Argentina, former Special Rapporteur in the International Law Commission (ILC).

19. Before addressing specific agenda items, experts were invited to make general observations. A number of experts pointed to the complexity of the issues under examination and considered that it was currently premature to speak of any specific type of instrument for liability and redress under the Convention. The first priority was to identify the kind of problem to be addressed, and to see whether it was already being adequately tackled at the domestic or multilateral levels. Only at a much later stage could one proceed to look at potential elements of any potential agreement. It was also necessary to identify the kind of situations that any liability and redress regime would attempt to cover, since there was a vast range of possible activities and actors that could harm biological diversity. In that connection, there needed to be an adequate definition of the concept of "damage to biological diversity", and how it differed from the concept of "damage to the environment". The term "environmental damage" in existing liability and redress regimes might well cover "damage to biological diversity". In addition, the term "biological diversity" itself was tremendously broad. It was also stated that a new instrument could be justified, both on the basis of activities that could cause damage to biological diversity and the possible preventive/deterrent value of a liability and redress regime.

20. Many experts praised the documentation prepared by the Secretariat and considered it to be a useful basis for the examination of the issues before the meeting. It was pointed out that a number of

countries had not responded to the request for information, although in some cases they did not have any regime or legislative framework to address the issues of liability and redress at the domestic level.

21. Although it was considered useful to look at the liability regimes that had already been negotiated, it was recalled that traditional liability and redress regimes took as their point of departure an activity, and subsequently considered the resulting potential for harm. However, the current considerations were conceptually different and took as their point of departure the damage caused to biological diversity, and only subsequently sought to identify the kind of activities that might give rise to harm.

22. Some experts noted that, while existing international regimes revealed a patchwork of treaties, addressing special activities such as maritime transport and oil pollution, nuclear energy, transboundary movements of hazardous wastes, and so forth, none of them specifically addressed the issue of damage to biological diversity. Some experts felt that there were important gaps in that framework. Given the approach adopted, a gap analysis would be useful in identifying the options available for the Conference of the Parties in addressing the issue. One view held that, once gaps in regimes had been identified, it would be necessary to consult with scientific specialists to see if the gaps matched areas where damage to biological diversity was likely to occur.

23. A number of experts pointed to the need to take into account private international law and questions of access to courts and the mutual recognition and enforcement of judgements.

24. A number of experts pointed to the need for capacity-building to strengthen environmental legislation in developing countries, which often lacked trained lawyers, judges, enforcement officials and the infrastructure to adequately implement emerging developments. It was also observed that, in applying a liability and redress regime, a country could only determine a case of harm to or loss of biological diversity if it had already been able to inventory what was present; such was not the case for many countries, particularly the developing countries.

Scope of paragraph 2 of Article 14: concepts and definitions

25. The question of the scope of paragraph 2 of Article 14, concepts and definitions, was taken up at the 2nd session of the Workshop, on 18 June 2001.

26. One expert believed that, despite the complexities and problems faced in considering a new liability and redress regime for biological diversity, the deterrent and preventive effect of such a regime was of central importance and Parties should not delay its consideration and negotiation. Another expert noted that the concepts of prevention and liability were usually addressed separately. Nonetheless, prevention could be considered from two perspectives: before and after the incident causing damage. The latter case would be relevant to a liability regime.

27. It was explained that, while environmental damage in traditional liability and redress instruments dealt with preventive measures, restoration, introduction of equivalent components, and/or compensation, a regime for biological diversity should focus more on the first of those elements – preventive measures – and on components of biological diversity which were protected by multilateral environmental agreements. Moreover, damage to biological diversity might be a narrower concept than environmental damage.

28. Concerning the phrasing of Article 14, paragraph 2, a number of experts considered that, in fulfilling their mandate at the current Workshop, it was necessary to use the broadest possible interpretation of its general thrust, as well as to focus on a broad and non-restrictive concept of the term “liability”.

29. It was reaffirmed that the first priority was a definition of the concept of "damage to biological diversity". One expert noted that such a definition had to be formulated for the purpose of a legal regime. It might be different, for instance, in a scientific context. Among the other issues to be clarified were: the concept of "biological diversity"; the difference between responsibility and liability; the activities that were likely to cause harm, and whether they were legal, illegal, continuous or one-off in nature; and the concept of "threshold", in terms of both the risk posed and the damage.

30. A number of experts sought clarification concerning the phrase "except where such liability is a purely internal matter", stating that, since biological diversity was a common concern of mankind, and was identified as such in the preamble to the Convention, damage to biological diversity could not be defined as "a purely internal matter". It was suggested that, since most known causes of damage to biological diversity were caused by internal, national activities, the Conference of the Parties might wish to consider developing guidelines for national legal systems, to see which elements should be included in such systems to deal with the main causes of damage. Moreover, it might not be necessary to have an international regime.

31. One view held that, since damage to biological diversity could be considered to have a global effect, the Conference of the Parties might wish to explore the latitude inherent in paragraph 4 (i) of Article 23 of the Convention, in view of the apparent limitation imposed by Article 14, paragraph 2.

32. Attention was drawn to the lack of a regime to cover biological diversity in areas beyond the limits of national jurisdiction or global commons, such as the high seas or Antarctic. The questions raised included: who was the victim in case of damage? how could a claim be submitted? and how could the damage be assigned a value? It was noted that the scope of any regime addressing Article 14, paragraph 2, could be enlarged to include such areas.

33. It was noted that Article 14, paragraph 2, was intentionally vague in calling on the Parties to "examine" the issue on the basis of studies. Experts stressed the importance of identifying and analysing case-studies, concrete situations and practical examples in order to see the kind of incidents that a possible regime might need to address and so as to be able to present a selection of possible options for further action to the Conference of the Parties and to give guidance on the process that it could follow. It was necessary to see if currently available studies were sufficient for that purpose and, if not, to identify what further studies were needed.

34. Concerning the nature of possible studies, the following proposals were made: the Secretariat's synthesis was a good basis for the work; studies could be made, based on information to be supplied by Parties, on how Parties used environmental impact assessment to determine the concept of damage to biological diversity; studies could also examine what kinds of damage to biological diversity were occurring at the national level, and what were the causes identified. One expert considered that enough information was already available, and it was not necessary to commission any further studies.

35. It was considered that the relationship between paragraph 2 of Article 14 and Article 27 of the Cartagena Protocol needed to be clarified. The view was expressed that, since the Protocol covered specific cases of an activity that was posed potential risks for biological diversity, it was a more appropriate subject for the future negotiation of an international liability and redress regime. Some experts believed that, although the processes of examining the two cases could be linked for the exchange of information, they should be quite distinct and should not result in consideration of only one instrument to cover both cases. Some experts pointed out that Article 27 of the Protocol called for the process to be completed within a time-frame of four years.

Main situations and activities to be considered in the context of the Convention on Biological Diversity

36. The question of the main situations and activities to be considered in the context of the Convention on Biological Diversity was taken up at the 3rd session of the Workshop, on 19 June 2001.

37. In seeking to identify the types of activities causing damage to biological diversity that might come under a liability and redress regime, the following classifications were proposed: catastrophes, for which some instruments already existed (oil spills, nuclear accidents, etc.); continuous degradation of the environment, whether legal or illegal; and one-off criminal incidents. Although a conventional liability regime could be applied to the first of those, it was difficult usefully to apply such a liability regime to the second and third categories.

38. One expert listed a number of examples of past cases of environmental pollution and damage. However, in those cases the concept of damage had applied purely to economic interests, and the question of liability and redress in relation to specific damage to biological diversity had not been considered. One expert, describing several examples from his region, pointed to the case of the migratory long-nosed bat, which was being inadvertently harmed by control measures for other species of bats that were vectors of rabies. Since the long-nosed bat was a known pollinator of desert ecosystem flora in another country of its range, such control measures, now ameliorated, could be seen as a concrete case of an activity in one country that caused transboundary harm to biological diversity.

39. It was held by some experts that, for a liability regime to be considered in the context of the Convention, the following elements needed to be present: international or cross-boundary aspects; harm to biological diversity; identifiable responsible actor. Direct harm to individual endangered species, such as legal taking and trading, was covered under national environmental protection laws and international treaties, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), but a liability regime was not available. The cross-border movement of genetically modified seeds was considered as an example of an activity that could come under an eventual regime of the Cartagena Protocol.

40. Where an activity harmed only the biological diversity of the country in which it took place, the only victim was the country concerned and a number of approaches were available to it to secure redress from the perpetrator(s). It was proposed that a study be made of all the systems that countries had in place to deal with activities that concerned loss of biological diversity which was not necessarily transboundary, as well as details of actual court cases and results, with a view to exchanging experiences and best practices.

41. The technical aspects of examining concrete cases of harm to biological diversity called for scientific expertise that was not fully available at the current Workshop. It was thus suggested that scientific expertise was needed to supplement the legal experts at any future meeting of a group to examine the issues in question.

Means and process for the implementation of paragraph 2 of Article 14

42. The question of the means and process for the implementation of paragraph 2 of Article 14 was taken up at the 4th session of the Workshop, on 19 June 2001.

43. Experts pointed to the need for a process for further consideration of some, if not all, of the issues raised at the current Workshop, including: clarifying and defining the basic concepts, such as damage to biological diversity, its valuation and classification, and the relationship with environmental damage; the question of introducing into existing liability regimes some elements to specifically address

damage to biological diversity; the opportunity of developing a liability regime under the Convention, which would complement existing regimes; an analysis of situations and activities that would contribute to damage to biological diversity; and an examination, based on Article 3 of the Convention of prevention measures, whereby violation of the obligations would entail state responsibility.

44. Some experts suggested that the work should not be limited to liability and redress, but should be extended to prevention measures, such as: environmental impact assessment; licensing systems for activities; imposing and enforcing obligations on operators; and notification of and consultation with potentially affected States. It was observed that the principle set out in Article 3 had a broader application to environmental damage and, as part of customary international law, applied beyond the scope of the Convention on Biological Diversity.

45. Because of national sovereignty considerations, it was considered that the scope of Article 14, paragraph 2, was limited. Issues of a purely internal character were excluded. Nonetheless, it was pointed out that this exclusion applied only to liability; the other concepts, such as damage, restoration, compensation and redress contained in the paragraph should be examined in their own right, even in an internal context.

46. It was proposed that the Conference of the Parties might wish to set up a group of legal and technical experts, with a mandate to include consideration of the issues raised. The group could be composed of government-nominated experts, selected on the basis of the criteria used for the present Workshop, and could also include scientific and economic experts, as well as representatives of other relevant international organizations. It was noted that the scientific dimension of threats to biological diversity needed to be fed into the process. One expert proposed the immediate establishment of an open-ended working group to elaborate a liability and redress regime under the Convention.

47. The view was expressed that no consensus had been reached on whether there were significant gaps in existing regimes, nor on whether significant harm to biological diversity was occurring with no remediation. The Parties could thus request that further studies be undertaken, possibly focusing on : updating of sectoral and other international regimes; new developments in private international law; national regimes on access to justice, mutual recognition and enforcement of judgements; definition of damage; domestic legal regimes. Several experts proposed that, if further studies were needed, the process should not wait for them to be completed. They could be conducted in parallel to a process of expert meetings. It was noted that information could be sought from Governments by means of a questionnaire. The proposal was made that non-judicial processes for dealing with damage to biological diversity, such as amicable settlement, should be investigated, particularly those applied in the developing countries.

48. Many experts stressed that the two processes – under Article 14, paragraph 2, and under Article 27 of the Cartagena Protocol – should be kept separate. However, it was pointed out that the products of the two processes could be mutually enriching. One expert considered that the two processes could be merged.

49. It was also suggested that a small group of experts, with limited representation, could be set up before the establishment of an open-ended working group. Either a second meeting of the present group could be held, or an even smaller group could be formed. The small group could have a focused mandate, to concentrate on a few specific issues, which could then submit its findings either directly to the Conference of the Parties or to a wider group of experts. Some experts pointed out that they would not wish to see the size of the group reduced. In that connection, reference was made to the process used for the consideration of issues of access and benefit-sharing under the Convention.

50. One expert proposed that the present group should endeavour to meet again before the sixth meeting of the Conference of the Parties.

Consideration of recommendations to the Conference of the Parties and of the Chair's observations on the discussions

51. At its 5th and 6th sessions, on 20 June 2001, the Workshop considered draft recommendations to the Conference of the Parties, prepared by the Chair on the basis of the deliberations in the Workshop.

52. The Workshop adopted the draft recommendations, as amended. The recommendations are contained in annex I to the present report.

53. Several experts considered that the current group should also have included in its recommendations alternative regimes concerning restoration and compensation.

54. At its 6th sessions, the Workshop also considered the Chair's observations on the discussions of the Workshop.

55. The Chair's observations are contained in annex II to the present report.

ITEM 4. OTHER MATTERS

56. No other matters were raised for discussion.

ITEM 5. ADOPTION OF THE REPORT OF THE WORKSHOP

57. The Workshop adopted the present report at its 6th session, on 20 June 2001, on the basis of the draft report contained in document UNEP/CBD/WS-L&R/L.1.

58. It was agreed that the Rapporteur, with the assistance of the Chair and the Secretariat, would be entrusted with the finalization of the last part of the proceedings and that the report would be distributed to participants as soon as it was available.

ITEM 6. CLOSURE OF THE WORKSHOP

59. After the customary exchange of courtesies, the Chair declared the Workshop closed at 6 p.m. on Wednesday, 20 June 2001.

Annex I

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

A. Awareness raising and capacity-building

1. The Workshop noted the central importance of capacity-building and cooperation measures under the Convention to strengthen capacities at the national level with regard to measures for the prevention of damage to biological diversity, the establishment and implementation of national legislative regimes, policy and administrative measures on liability and redress, including through the elaboration of guidelines.

B. Process for the review of Article 14, paragraph 2

2. On the basis of its deliberations, the Workshop recommends to the Conference of the Parties, for its consideration at its sixth meeting, the following elements regarding a process for the review of Article 14, paragraph 2.

Further information and analysis

3. Further to the information made available for the purpose of the workshop, the Executive Secretary be requested to collect information and conduct analysis, with the cooperation of Parties, Governments and relevant organizations, and make such information and analysis available prior to convening the Legal and Technical Experts Group proposed under paragraphs 4-5 below:

(a) Information, in particular with regard to:

(i) Update 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;

(ii) 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;

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

(b) Further analysis relating to:

(i) Coverage of existing international regimes regarding damage to biological diversity;

(ii) Activities/situations causing damage, including situations of potential concern and whether they can be effectively addressed by means of a liability and redress regime;

(iii) Concepts and definitions relevant to paragraph 2 of Article 14.

Legal and technical experts group

4. A Legal and Technical Experts Group should be convened with the objective to assist the Conference of the Parties in its task under paragraph 2 of Article 14. The Legal and Technical Experts Group could review the information gathered and continue the analysis referred to under paragraph 1 above. This analysis could further address issues discussed during the Workshop, including:

(a) Clarifying basic concepts and developing definitions relevant to paragraph 2 of Article 14 (such as the concept of damage to biological diversity, its valuation, classification, and its relationship with environmental damage, the meaning of "purely internal matter");

(b) Proposing the possible introduction of elements, as appropriate, to address specifically liability and redress relating to damage to biological diversity into existing liability and redress regimes;

(c) Examining the appropriateness of a liability and redress regime under the Convention on Biological Diversity, as well as exploring issues relating to restoration and compensation;

(d) Analysing activities and situations that contribute to damage to biological diversity, including situations of potential concern; and

(e) Considering preventive measures on the basis of the responsibility recognized under Article 3 of the Convention.

5. The Legal and Technical Experts Group should be composed of government-nominated experts based on a fair and equitable geographical representation and including observers from relevant international organizations and convention secretariats.

Annex II

CHAIR'S OBSERVATIONS

1. These observations were drafted under the personal responsibility of the Chair to give a synthesis of the main points emerging at the end of the Workshop.

A. Assessment of the status of existing international and national law

2. Through the documentation issued by the Secretariat for the meeting, and the analysis which was made of it during the Workshop, a number of preliminary conclusions can already be drawn.

1. International law

3. The present status of international law is merely a matter of fact, on which the secretariat documentation gives a very good view; this fact was widely recognized.

4. International instruments which apply in practise to liability in an environmental context are very few and deal with limited issues.

5. Only three regimes are in force and do apply:

(a) Civil liability for oil pollution damage (two conventions combined) in case of a maritime transport; it is the only international regime from which practical experience can be drawn, because it applied to over 60 maritime wreckages;

(b) Liability in the area of nuclear energy, with two separate groups of instruments: the Paris-Brussels regime, and the Vienna regime (International Atomic Energy Agency); these regimes have never been applied because no incident in the sense of these conventions has occurred among Parties to date;

(c) The space liability regime is of little interest for environmental damage.

6. Whatever the efforts undertaken in recent years in the field of international liability regimes, it was underlined that all the other instruments which have been adopted and are mentioned in the documentation are *not in force*. For a number of them, it is doubtful that they will ever enter into force. They are all based on the same approach through hazardous activities, with variations in scope and provisions. Work in this field has met many failures: either because the negotiations were not concluded, or because the adopted instrument did not enter into force. Other instruments are still undergoing negotiations (Antarctic regime). This experience calls for caution and a well defined objective before starting another exercise .

7. When one considers the few instruments in force, other limitations apply: limited participation (number of States parties), ceilings in liability, no redress whatsoever for damage caused beyond territorial seas or, in some instances, beyond economic zones. The main limitation rests with the definition of environmental damage, which does not address specifically damage to biological diversity. Even if one considers the more traditional and wider concept of environmental damage, it does not cover damage which has no economic dimension, except for a certain amount of remedial measures.

8. A number of existing instruments are presently under revision, with the purpose of improving the definition and scope of environmental damage, and increasing the limit of liability.

9. The general rules for responsibility and liability of States drafted under the auspices of the International Law Commission may cover a number of situations within the scope of Article 14 of the Convention on Biological Diversity.

10. The draft articles on responsibility of States have been finalized, and may soon be adopted, depending on a decision of the next session of the United Nations General Assembly. Their entry into force as treaty law will depend on the fulfilment of usual ratification procedures. The articles would apply in case of the infringement by a State Party of any international instrument for the protection of the environment.

11. The draft articles on liability of States for injurious consequences arising from acts not prohibited by international law have not met with consensus. The sole existence of such liability in customary law is controversial, and there is strong resistance to its development. Only part of the draft articles, dealing with the obligation of States to take preventive measures (*after* an incident) or impose such measures on operators, has been finalized. However, it may take some time before these articles are formally adopted.

12. If one tries to sum up this overview, it is obvious that a very large number of possible situations *are not covered* by international law. But one cannot qualify them necessarily as *gaps*, in the sense that not all of them require an international liability regime. The real gaps have to be further assessed, and some elements for this assessment were gathered during the Workshop.

13. The assessment of what is presently covered is generally shared. But the question of the main gaps, on the contrary, give rise to a wide range of views. Some experts consider that some fields are not covered because there is presently no clearly identified issue at stake, or no predominant international aspect justifying an international regime. Others feel that the existing corpus of international law is lagging far behind the main issues of environmental protection, and should keep pace with them. A common view is that this assessment of possible gaps can only be performed activity by activity, or through a classification of activities giving rise to damage.

2. National legislation

14. As regards national legislation, the information gathered in the documentation is as yet incomplete. It was, however, stated that a number of Parties did not provide any national submission because they had no legislation applying to environmental liability.

15. For those Parties who submitted a description of their national law, none of them refer specifically to the concept of damage to biological diversity. Only very few indications are given on practical implementation of these regimes and assessment of their effectiveness, sometimes because the legislation is too recent to be assessed.

16. But legislation and experience in this field is developing. It progressively covers wider aspects of environmental damage.

17. It was stressed that a majority of cases of damage to biological diversity was occuring in a purely national context, so that national law was of crucial importance to achieve the objective of the Convention.

18. The recommendations adopted by the Workshop identify areas for further refining this assessment.

B Scope of Article 14, paragraph 2

19. A few observations on the wording of this provision are especially useful for the follow-up to the Workshop:

(a) The introduction makes it essentially an enabling provision for the COP to deal with the matter of liability and redress, without stating any definite obligation;

(b) The qualification made at the end of paragraph 2 of Article 14 *("except where such liability is a purely internal matter"*), in the context of the 1992 negotiation, probably means that the Conference of the Parties is not entitled to deal with liability of *States*, except where there is an international dimension;

(c) Apart from this restriction, the manner in which the Conference of the Parties will approach and define the way to implement this article is essentially a matter of policy.

20. Although different views were expressed, there is possible consensus on the above interpretation.

21. As for damage to biodiversity, it is a central concept. Biodiversity is defined by the Convention, but not damage itself. Anyhow, one expert with scientific background considers that knowledge is sufficiently advanced today to assess, evaluate and quantify such damage. It needs further elaboration with a combination of scientific and legal expertise, and should include a notion of significant threshold.

22. The need for such a definition, to be specifically distinguished from environmental damage at large, is yet to be demonstrated. It could become part of the refinement of the definition of environmental damage already used in a number of instruments at national and international levels. Some experts stressed that this definition should include not only purely ecological aspects, but also the loss of income from the use of biological diversity.

23. The relation between paragraph 2 of Article 14 and Article 27 of the Cartagena Protocol on Biosafety is one area that elicited very divergent views. As a matter of fact, the activity covered by Article 27 of the Protocol is within the scope of the wider Article 14. In that sense, the development of rules under Article 27 can be considered as a partial implementation of Article 14, for an activity considered as a priority because of major concern. A definition of damage to biodiversity, could be considered as a common element to both issues. However, the two provisions have a different status and agenda, so that views were largely diverging on how to handle the matter; they range from independence, to coordination or even a combination of the two.

C. Activities and situations to be covered under Article 14, paragraph 2

24. Participants expressed their views on:

(a) What kind of situations they had in mind, which are not presently covered by existing international instruments on liability, may raise concern ;

(b) What should or could be covered by an international regime dealing with "damage to biological diversity".

25. Some of these activities and situations have been identified during the discussion, and constitute a very preliminary case assessment:

(a) Situations created by invasive species, depleting domestic ecosystems, with sometimes important economic implications; the introduction is not necessarily attributable to a definite activity or operator;

(b) Other situations where alien species have been introduced on purpose, for economic reasons (fish, crops and so on);

(c) Damage arising from public works (like the damming of a watercourse for irrigation or other purposes); this includes situations where such activities are continued although it is very well known what the consequences will be in terms of loss of biodiversity (relation with impact assessment);

(d) The taking of endangered and protected fauna and flora in the wild (usually illegal taking);

(e) Damage to global commons, especially the high seas; damage to migratory species;

(f) Damage from industry, either from a catastrophic accident, or continuous pollution;

(g) Pollution or destruction of natural habitats by agriculture, especially intensive methods;

(h) Damage caused by GMOs, especially GMO seeds.

26. These situations should probably be complemented and further examined, as it is proposed in the recommendations of the Workshop.

D. Possible future developments

27. As a result of the above observations, the most meaningful developments for international liability law, which have to be further assessed for feasibility and opportunity, are the following.

(a) The improvement of instruments in force, to take better care of environmental damage, and especially damage to biodiversity (possibly through recommendation of the Conference of the Parties);

(b) Supplementing existing instruments by a regime designed under the Convention.

28. Those two are among the options identified in the recommendation. It should be added possible initiatives to bring into force existing liability instruments which are most meaningful for the purpose of protecting biodiversity, or to extend participation to them, as well as the development of guidelines for national legislation on environmental liability, and exchange of experience on its implementation.

29. Finally, before it is envisaged to convene a negotiating group that will succeed within a reasonable time-scale, a number of conditions should be met:

(a) A clear objective should be assigned to it, with consensus on the scope of the work;

(b) Essential information is gathered on legal material and case studies to which the experts will be able to refer.

Marie-Laure TANON
