

Note on Liability and Redress*

The questions of liability for, and redress of, transboundary damage to biodiversity and damage to biodiversity of areas beyond national jurisdiction are highly important for many different reasons, including the following:

When activities under one countries' jurisdiction significantly affect lands, ecosystems, species and other components of biodiversity across national boundaries or outside of any country's jurisdiction, it is often difficult or impossible to obtain cessation, restitution and compensation or redress (that is, to obtain funds or other resources necessary to respond to the damage);

When the person or entity that causes such damage is not held responsible or required to bear the costs of his harm, several principles of international liability and international responsibility are compromised including especially the "polluter (or user) pays principle." In essence, if he may take such actions without bearing their true costs, the responsible party receives an unearned benefit, and many others in society bear an unjustified burden;

In addition, with regard to domestic application of liability for damage to biodiversity, more experience is needed on the use of liability as a tool for enhancing positive compliance. Voluntary guidelines or principles or other tools of capacity-building may be of inestimable value in addressing these issues.

* This background note was circulated by IUCN at Seventh meeting of the Conference of the Parties to the Convention on Biological Diversity (COP7) at Kuala Lumpur, Malaysia, February 9-20, 2004.

With the entry into force of the Cartagena Protocol, the CBD family of instruments and processes has double incentive to address key concerns relating to responsibility for harm to biodiversity. With regard to liability, the Protocol moves a step beyond the CBD's approach. Article 14.2 of the CBD only calls on the parties to "examine the issue of liability and redress, including restoration and compensation." By contrast, Article 27 of the Protocol requires the COP-MOP to "adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms," and recommends that they take only four years to "complete the process." Recognising that the research and analysis for both liability analyses will be similar, it is clearly important for the COP and the COP-MOP to join forces to address these matters.

In COP-6, the parties "requested the Executive Secretary to re-convene the group of legal and technical experts ... to review information gathered by the Executive Secretary and to conduct further analysis of pertinent issues relating to liability and redress" under Article 14.2 of the Convention. Due to lack of funds, however, this meeting was not held.

Need for Progress in the Development of International Principles

IUCN wishes to underscore the importance of the questions of liability and redress for biodiversity damage and the need to make progress on this issue. Clear and generally accepted rules on liability for and redress of harm caused in one country, or outside of the jurisdiction of any country, by persons or activities under the jurisdiction of another country are an important tool. Not only do they provide for more effective determinations of responsibility and swifter compensation for the harms caused, but the possibility of liability for harms caused often also creates a strong incentive for good corporate citizenship in the regard to the environment.

IUCN recognizes the difficulties posed by this often highly controversial issue. In light of its critical importance to the objectives of the convention, however, IUCN recommends that the COP:

Give priority attention to the development of rules or principles that can govern or guide the development and application of general principles of law relevant to the individual or collective responsibility to redress cross-border damages and those affecting areas outside of the jurisdiction of any state.

Reconvene, if possible, the “group of legal and technical experts” on liability and redress (if possible in conjunction or co-ordination with the liability process under the Cartagena Protocol), with a mandate to find and develop recommendations regarding areas of common understanding, and mechanisms for addressing or discussing open or controversial issues.

If funding or other problems limit the Secretariat’s abilities to convene such a group, consider other mechanisms and partnerships to promote the necessary expert analysis and input, that will enable CBD-8, whether or not in conjunction with the work done under the Cartagena Protocol, to take positive and useful action enabling the development of necessary understandings, mechanisms and discussions.

Guidelines for National Application of Principles of Liability and Redress with Regard to Harm to Natural Resources

Beyond the critical need to create a basis for international redress, however, the COP may wish to look further into the ways that it can assist in this issue. Certain types of legal systems have not in the past relied on the use of liability as a tool for enhancing positive compliance, but are developing interest in its domestic use. IUCN does not believe that liability mechanisms alone can encourage or increase compliance, but recognizes that many useful lessons and benefits for the COP and the Parties can be derived from further examination of liability and redress issues. Accordingly, IUCN suggest that the COP authorize any expert group or other process to consider the role of voluntary guidelines on principles of national domestic liability and redress mechanisms, and/or other tools of best practice and capacity-building as potentially valuable in addressing these issues.

IUCN is ready to take part of these efforts through its network of 800 environmental lawyers from 120 countries around the world (the IUCN Commission on Environmental Law). The roster of environmental liability experts within this list includes both practical and academic experts from five continents. We believe that this resource can be useful to the CBD and its parties in the process of addressing this important issue.

In this connection, we commend to the COP the IUCN Draft International Covenant on the Environment and Development (revised 2003), available from IUCN Publications (see especially Part IX, Articles 47 - 49).