

Stockholm Convention workshop on liability and redress
Diplomatic Academy, Vienna
19-21 September 2002

Report of the Co-chairs as revised by participants

1. Participants were welcomed to the workshop by the Director of the Diplomatic Academy of Vienna, the Director for International Environmental Affairs of the Austrian Federal Ministry for Agriculture, Forestry, Environment and Water Management, and the Deputy Director of UNEP Chemicals. The workshop was attended by participants from Algeria, Argentina, Australia, Austria, Belgium, Canada, Chile, China, Colombia, Czech Republic, Denmark, Egypt, European Community, Finland, Georgia, Germany, Hungary, India, Iran (Islamic Republic of), Lesotho, Malaysia, Netherlands, Nicaragua, Poland, Russian Federation, Senegal, Slovenia, Sweden, Switzerland, Thailand, Ukraine, United Republic of Tanzania, United States, Uruguay, Vanuatu, Vietnam, Yemen and Yugoslavia. There were also participants from the International Maritime Organisation, UNEP, the Secretariat of the Convention on Biological Diversity and Greenpeace International. It was agreed that the workshop should be co-chaired by Ms. Iman El-Banhawy from Egypt and Mr. Gerhard Loibl from Austria.

2. The Deputy Director of UNEP Chemicals recalled that this workshop was being held in response to the request of the Conference of Plenipotentiaries that adopted the Stockholm Convention on Persistent Organic Pollutants (POPs). In its Resolution 4, the Conference had requested "the secretariat in cooperation with one or more States to organize a workshop on liability and redress in the context of the Convention on persistent organic pollutants and related matters, no later than 2002." The Resolution's preamble had "recognized that the time is appropriate for further discussions on the need for the elaboration of international rules in the field of liability and redress resulting from the production, use and intentional release into the environment of persistent organic pollutants." The workshop report would be considered at the first meeting of the Conference of the Parties with a view to deciding what further action should be taken. The Deputy Director also provided an overview of the key articles of the Convention that might be considered relevant to the discussion and explained the structure of the workshop. The first part would consist of a series of expert presentations, including an overview of international legal developments concerning liability and redress; information on existing liability regimes elaborated within the framework of the International Maritime Organisation and the Basel Convention, and recent developments under the Convention on Biodiversity and Cartagena Protocol on Biosafety; and on technical aspects of persistent organic pollutants. The second part would be working sessions to explore issues concerning POPs and liability.

3. The first presentation by Professor Gerhard Hafner, a former member of the International Law Commission, outlined existing law dealing with responsibility and liability and redress at the international and regional level. Professor Hafner referred to ongoing work and noted the progress made so far by the International Law Commission, which had been asked to deal with this topic by the United Nations General Assembly. He set out issues and problems to be taken into account in the elaboration of rules on liability and redress, and explained the different concepts of responsibility and liability in international law. Responsibility came into play when a wrongful act had been committed, whereas liability was established where no wrongful activities were involved (e.g. transport of hazardous goods by sea). Liability might apply if damage from these activities occurred and a causal link could be established. Professor Hafner identified the various elements of existing liability regimes,

such as specification of activities, damage covered, channelling of the liability, limitation of compensation, and elaborated on the different compensation systems. He also noted the lack of a commonly accepted definition of the environment, as well as the difficulties of measuring environmental damage, proving causality and identifying the responsible actor. In contrast to responsibility, a general system covering liability in the contexts of transboundary movements and of hazardous substances was lacking.

4. In the ensuing discussion, a series of key questions that might need to be addressed when considering a possible POPs liability regime were raised, including user versus producer responsibility; state versus civil liability; which activities would be included within the scope of such a regime; and how compensation could be provided. Other issues that were highlighted were the greater difficulty of establishing causality in cases of long-term damage; the role of state responsibility; the possible applicability of compensation systems based on insurance or trust funds; circumstances that had given rise to existing international liability regimes; the adequacy of domestic versus international liability regimes; the lack of common methods to assess damage to the environment and human health; and possible scenarios under the Stockholm Convention which would be covered by the responsibility rules under international law or might warrant further consideration in regard to liability.

5. Presentations were made by staff of the International Maritime Organisation (IMO) and the Secretariat of the Convention on Biodiversity. The IMO official described liability and compensation regimes currently in force, particularly the Convention on Civil Liability for Oil Pollution (1992) and the International Convention on the Establishment of an International Fund for the Compensation for Oil Pollution Damage (1992). He also outlined key elements of the Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea or HNS Convention (1996), and the International Convention on Civil Liability for Bunker Oil Pollution Damage (2001), neither of which are yet in force. The Secretariat of the Convention on Biodiversity described the preliminary work that has been undertaken as Parties begin consideration of liability issues under the Convention and the Cartagena Protocol on Biosafety. Regrettably, it was not possible for the International Atomic Energy Agency or the Secretariat of the Basel Convention to attend the workshop, but the latter made available a paper on the Protocol on Liability and Compensation for Damage Resulting from Transboundary Movement of Hazardous Wastes and their Disposal (1999), which is not yet in force.

6. Following the presentations, workshop participants discussed the traceability of oil pollution to its source; the tiers of compensation available under the IMO liability regimes; the concept of “victim”; the distinction between compensation and reparation; the historical reasons for the development of the IMO conventions; the possible relevance for the Stockholm Convention of the definition of damage to be elaborated within the framework of the Biodiversity Convention; and reasons for the lack of any ratifications to date of the Basel Protocol on Liability, such as the unresolved issue of the financial limits under the Protocol as well as the inherent complexity of introducing a liability regime into existing domestic law. Applying a liability and redress regime with regard to POPs appeared 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.

7. A presentation by Dr. Reiner Arndt of the German Federal Institute for Occupational Safety and Health addressed factual issues associated with Persistent Organic Pollutants. He described the specific characteristics of POPs (“very hazardous chemicals”) that distinguish

them from other substances, underlining the long-term effect of POPs at long distances from their place of origin. POPs were concentrated in the colder regions, having come from all parts of the globe where they are produced, used or consumed. Dr Arndt explained the technical difficulties and challenges in identifying POPs found in the environment and ascertaining their source. Among other things, he pointed out the obstacles (a) in determining whether a particular chemical was released after a particular point in time (i.e., after the Stockholm Convention or a potential liability protocol had come into force) or instead was part of the historical POPs releases that he called "background noise", and (b) in determining whether any particular damage was attributable to new releases or to that "background noise".

8. Issues discussed after Dr Arndt's presentation included access for developing countries to capacity-building in Best Available Techniques and Best Environmental Practices; complementary linkages between the Rotterdam, Basel and Stockholm Conventions; identifying POPs and tracing them to their source; the disposal of developing countries' stockpiled POPs; the potential of a liability regime as a tool to enhance Convention compliance and to compensate victims of POPs; channelling liability to users or producers; the possible desirability of waiting for information on POPs inventory, monitoring, compliance and effectiveness evaluation before further exploring liability issues; establishing causality in the case of unintentionally produced POPs; the need for UNEP/WHO collaboration in the area of DDT alternatives; the lack of uniform methods of monitoring; the difficulties of assessing harm to the human body; the World Summit on Sustainable Development's position on corporate accountability; and the availability of funds from the Global Environment Facility to assist in dealing with POPs.

9. To facilitate further exploration of the issues, participants divided into two smaller working groups and later reported back to the full group. A range of scenarios were discussed involving production, use, import/export, stockpile management, waste and existing or new POPs. Many of these scenarios were ruled out or considered to be of less relevance in connection with a potential liability regime, for example because they were already covered by the Basel Convention or by general rules of responsibility, or were not within the scope envisaged in Resolution 4 of the Conference of Plenipotentiaries that adopted the Stockholm Convention. One scenario, based on an assumption that the States involved were Parties to both the Stockholm and Rotterdam Conventions, was elaborated in more detail.

- Company X produces chlordane in State A lawfully under the Convention (and is permitted to do so by State A).
- Company X exports to Company Y in State B (in accordance with the Rotterdam Convention).
- Company Y uses the chlordane for one of the uses for which State B has an exemption under Annex A Part 1.
- The use results in transboundary/long-range damage within the territory of State C.
- Who would be entitled to claim compensation and from whom?

10. Among the general considerations identified by the groups were the need to take into account the time-lag between release of POPs and the manifestation of damage; the variety of POPs sources and their cumulative effects; the difficulties in establishing a causal link between a particular source and a specific damage; the definition of damage caused by POPs and who is to be regarded as having suffered damage; and whether the activities were undertaken, or the effects felt, by States or by individuals. Furthermore, it was discussed which damages could be covered by a potential liability regime, and whether or not liability could be applied retroactively where damage had been caused before the entry into force of

such a regime. (No precedent was cited for retroactive application of a liability regime in either international or domestic law.)

11. Some participants suggested that a number of difficulties identified in the discussions could be solved by channelling liability to the producer, who might be identified more easily than the potentially large number of users. Others expressed doubts as to the practicability and fairness of such an approach, since a producer could not necessarily know of and control the uses to which the product was put. One participant expressed the view that the limited circumstances under which a liability regime could be applicable in the Stockholm context suggested that further efforts would be better concentrated on the existing rules of responsibility. Others felt that continued exploration of the possible need for a liability system was warranted. One participant drew the workshop's attention to the European Commission's White Paper on environmental liability, which noted that not all forms of environmental damage could be remedied through liability. It suggested that for liability to be effective there needed to be one or more identifiable actors (polluters), concrete and quantifiable damage, and a causal link between the damage and the identified polluter(s). The participant noted that, in his view, the discussion had cast doubt on whether any of these three key elements would apply in the context of POPs.

12. Another participant referred to the potential deterrent effect of a liability regime and the need to weigh the cost of alternative "preventive" measures against such a liability approach. She suggested that the lack of or inadequacy of domestic liability regimes should be taken into account when assessing the need for an international regime. While acknowledging the complexity of the issues and the technical difficulties, for example in establishing a causal link between a POPs release and particular damage suffered, she observed that no conclusions had yet been reached on whether a liability regime would be appropriate and felt that further debate was needed.

13. In concluding remarks, the host Government noted the broad participation in the workshop. The workshop had enabled legal and technical experts to explore the complexities of liability in the context of the Stockholm Convention, in preparation for COP-1 consideration of the matter.

14. In closing the session the co-chairs stated that they hoped the discussion at the workshop and the report thereon would assist COP-1 in deciding what further action would be taken.