EU FORUM OF JUDGES FOR THE ENVIRONMENT

SUMMARY REPORT – PART III OF THE QUESTIONNAIRE

ORGANIZATION OF THE COURTS AND TRIBUNALS AND PROSECUTION POLICY IN THE AREA OF ENVIRONMENTAL CRIME

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Introduction

A general rapporteur may be expected to give an overview of the different national reports. Such an overview can be analytical or synthetic. It can be merely descriptive or it can propound substantive propositions.

Whichever method is preferred by the author, his choice will ultimately be determined by the number of participating countries and the size of their contributions to the conference. In this respect, the mission of the rapporteur has not become any easier during the preparations for this Conference. No fewer than nineteen countries have sent in a national report, largely within the editing time allowed, which made the work of processing them much easier. Reports were sent in by Denmark, Finland, France, Germany, Ireland, Lithuania, Austria, Poland, Portugal, Sweden, the United Kingdom, Italy, Belgium, Spain, Norway, the Netherlands, Slovenia, Luxembourg and Greece.

The general report has been set up in three sections. Only the third part of the questionnaire is addressed in this section.

1. Courts and tribunals responsible for enforcing environmental law

1.1. Distinction between ordinary courts and administrative courts

We may ask ourselves which courts and tribunals are responsible for settling environmental disputes. The reports that were sent in show that in the majority of the countries, namely Belgium, Finland, the Netherlands, France, Germany, Lithuania, Poland, Portugal, Sweden, Italy, Spain, Slovenia, Luxembourg, Greece and the United Kingdom, a dual structure has been put in place, with on the one hand ordinary courts and tribunals, which have jurisdiction in civil cases and criminal cases, and on the other hand the administrative courts and tribunals. This means that the ordinary courts and tribunals are empowered to settle civil and criminal disputes, whereas the administrative courts and tribunals are empowered to settle administrative disputes. It should be pointed out, however, that the powers of the

administrative courts may differ. While in most European countries those courts only have the power to suspend and/or annul administrative decisions, in certain other countries such as France, Germany and Spain they have more extensive powers. The administrative courts in Spain, for instance, may impose provisional protective and compulsory measures. However, they cannot take the place of the administrative authorities. In Germany, they are empowered to annul administrative decisions as well as to oblige the authorities to take a decision, and they can also substitute their decision for that of the authorities. For France it should be pointed out that the administrative courts have distinct powers in cases of extreme urgency and in case of judgment on the merits. In cases of extreme urgency, they can suspend the decision, take any measure necessary to protect the fundamental rights of the petitioners and impose orders, where appropriate with periodic penalty payment. In cases where a judgment is given on the merits, they can annul the challenged decision and order the authorities to pay compensation; in special cases they can substitute their decision for the challenged decision, and they can impose fines and damages. In Portugal, they are empowered to annul administrative acts and to decide on claims for compensation against the authorities.

In Denmark, however, all sorts of cases are settled by one court system. Furthermore, there are no courts that specifically have jurisdiction in public law. This statement, however, should be qualified. In practice, a number of administrative courts have been set up for certain specific matters which are empowered to take a final decision in disputes between the State and private individuals. After that, the dispute can be brought before the ordinary courts. Ireland and Norway, too, do not have specific administrative courts and tribunals.

1.2. Distinction between civil cases and criminal cases

Whether this means that the same courts and tribunals have jurisdiction in both criminal and civil cases is not a foregone conclusion. In the United Kingdom, Germany and Spain, for instance, there is a distinction between civil courts and criminal courts. In most countries (Belgium, Luxembourg, Lithuania, France, Italy, Sweden, Poland), civil and criminal cases are tried by different divisions or chambers of the ordinary courts, and this in the first instance as well as in appeal or in cassation. In some countries, such as Portugal, this specialization has only been implemented at the appeal level. Finally, there are the countries where this distinction is less strictly emphasized, as is the case in Ireland, Finland and Denmark.

1.3. Existence of a constitutional court

Most European countries have a Constitutional Court. The constitutional court is usually a *sui generis* court of law that is positioned within the state organization opposite the other, more "conventional" state powers and is therefore not covered by the constitutional title that deals with the conventional state powers. Only in certain exceptional cases is the constitutional court part of the judiciary because the constitutional court is mentioned directly, in the wording of the Constitution, under the courts of law that form part of the judiciary (for example the Federal Republic of Germany and Poland). Access to the constitutional court, however, is not always regulated in the same way. The right to lodge an appeal directly with the Constitutional Court is usually only open to political authorities, sometimes with diversification according to the nature of the regulation against which the appeal is lodged (e.g. Poland: the president; Germany: the government; France: the Prime Minister; Portugal: the House of Representatives, etc). Express direct access for natural and legal persons to the constitutional court exists only in the minority of European countries (e.g. Belgium: insofar as these persons have an interest).

In the countries that have no constitutional court, a distinction can be made between countries where the ordinary courts and tribunals have power of constitutionality review. Denmark, Finland, Greece and the United Kingdom fall into this category. The Finnish Constitution, for instance, stipulates that when the application of a law could manifestly come into conflict with the Constitution, and the statute was not adopted in the manner provided for constitutional amendments, the court must give priority to the provision of the Constitution. Moreover, if a provision of a decree or any other legislative rule ranking lower than a statute comes into conflict with the Constitution or another law, it shall not be applied by a court or any other authority.

On the other hand, there are also countries where this power is not given to the ordinary courts and tribunals. In the Netherlands, for instance, it is accepted that constitutionality review is prohibited by the Constitution. According to the Constitution, the Dutch Parliament is responsible for legislation in conformity with the Constitution.

1.4. Powers

It should be pointed out that the powers of the different courts are somewhat similar. The criminal courts can pass sentences ranging from fines to imprisonment, where appropriate concomitant with compensation[1] and/or safety measures and remediation measures[2]; civil courts and tribunals, on the other hand, focus primarily on compensation, either in kind or equivalent; the administrative courts are chiefly empowered to rule on the suspension and annulment of administrative legal acts. In exceptional cases, injunctions may be imposed on the administrative authorities. In Austria, Greece and Lithuania, infringements of environmental law will usually give rise to administrative fines that can then be challenged before the administrative courts.

2. Specialized courts

2.1. General trend

As a rule, there are no specialized environmental courts to be found in Europe. As the Belgian report indicates, there is no legal basis for a specialization in environmental law, unlike for instance the industrial tribunals and commercial courts.

In countries, however, that have a dual structure in terms of jurisdiction in disputes, the administrative courts are developing a certain degree of specialization in environmental law, since the settlement of virtually all disputes between citizens and public authorities in environmental matters fall within their remit. We can see in those countries that environmental disputes account for a substantial portion of the administrative disputes (e.g. in Finland one third of the cases of the Supreme Administrative Court; in Belgium nearly a

[1] In Austria, a section of the Criminal Code (§§ 180-183 of the Criminal Code) is reserved for the punishment of serious environmental crimes, notably when the cost of remediation exceeds € 40000.

[2] See for instance in Belgium: certain environmental laws provide for safety measures and/or remediation measures which the court can or must impose. For example, the court must order the removal of illegally dumped waste and can order the closure of an illegally operated establishment.

quarter of the ordinary cases before the Council of State) and that this leads to a certain kind of specialization as those cases are consistently referred, whether or not on the basis of a legal rule, to the same court division or divisions. This is the case in Belgium, Germany, the Netherlands, Greece and Finland.

In the area of environmental criminal law, too, there is no such specialization, although the Belgian report indicates that, in practice, certain larger courts have developed a limited form of specialization as a result of environmental cases being consistently referred to the same division on the basis of an internal division of tasks. Those divisions are usually also entrusted with other forms of crime, so that this de facto specialization does not go to such an extent that the criminal judges can concentrate exclusively on environmental criminal law.

2.2. Exceptions

In this connection it is worth focusing on the situation in Sweden and Austria on the one hand and in Finland and France on the other.

In Sweden there exists, since the **Environmental Code** became effective in 1999, a special system of environmental courts that are attached to five civil districts and one Court attached to a civil court of appeal; these are the **environmental courts**. Those courts have been given exclusive powers. They have jurisdiction in all environmental disputes, including applications for environmental licences, environmental damage, various civil cases and challenged administrative acts of local and national authorities. However, they have no jurisdiction in criminal cases, disputes in the area of town and country planning (this could change in the future) and energy-related disputes. The administrative courts in Sweden, on the other hand, have very little to do with environmental law; the only cases they deal with are cases connected with town and country planning. The composition of the environmental courts is special in that, besides judges with a legal training, they also have judges with a scientific or technical background.

Austria, too, has a specialized environmental court, the **Independent Environmental Senate (Umweltsenat)**. The Environmental Senate is composed of 10 judges and 32 legal specialists. The members of the Environmental Senate are independent; they receive no orders from the federal ministries, the governments of the constituent states (Länder) or any other authority. Their jurisdiction can be illustrated as follows. In Austria, factories and projects that have an impact on the environment require various licences according to different environmental legislations. Licences for factories and projects with a major impact on the environment are granted in one single procedure, including the assessment of the environmental impact, by one single authority (the government of the constituent state – Landesregierung). This constituent state government grants the licences in accordance with the applicable environmental legislations, as laid down in the **Environmental Impact Assessment Act**.
The Environmental Senate is the body with which an appeal can be lodged against decisions of the constituent state governments in accordance with the Environmental Impact Assessment Act. The Environmental Senate can decide whether a licence is necessary in accordance with the Environmental Assessment Act and, insofar as such a licence is necessary and can be granted, on what conditions that licence should be issued.
Those decisions are open to appeal before the federal Administrative Court.

Although Sweden and Austria are the only countries that have special courts dealing exclusively with environmental cases, it is useful to mention other, less far-reaching forms of specialization.

In Finland, the **Vaasa Administrative Court** has jurisdiction to hear all appeals that are based on the Environmental Protection Act and the Water Act, and that concern the Finnish mainland[3]. Consequently, environmental cases account for around 40% of the overall caseload of the Court. Two divisions of the Court deal virtually exclusively with environmental cases. When such an appeal is heard by the Supreme Administrative Court, two expert advisers who are qualified engineers or have a degree in natural sciences are assigned to the five judges. The former special **Land Courts** have been abolished and their duties have been entrusted to the District Courts. The former **Water Courts** have now been

[3] This allocation of jurisdiction is based on historical and practical grounds.

transformed into Environmental Permit Authorities[4], while the former **Water Court of Appeal** has been incorporated in the **Vaasa Administrative Court**.

In France, a new trend can be seen in the area of criminal law, whereby the number of courts with jurisdiction to investigate and judge certain crimes is being reduced. The court of Paris, for instance, has been given exclusive jurisdiction to try violations of the law to prevent sea pollution where such violations have taken place in the exclusive economic zone, in the ecological protection zone or on the high seas. For other violations of that legislation, the jurisdiction of a limited number of courts in the coastal area has been extended in order to deal with highly complex cases. This jurisdiction is in competition with that of the normally competent courts. In connection with products and substances that are dangerous to human health, the courts of Paris and Marseilles have been given the same jurisdiction to try highly complex cases. The judicial officers of those two courts can enlist the support of assistants specializing in sanitary issues. An arrangement exists for conflicts of jurisdiction, which differs according to whether the case is still under preliminary investigation or under investigation, or whether a court judgment has been given in the case.

Some reports point out that although the country in question has no specialized environmental courts, some specialized public administrations apply administrative appeal procedures that bear quite a few resemblances to proceedings before the courts.
The United Kingdom, for instance, has the **Planning Inspectorate**; this is an executive body of the government that operates independently. It conducts local investigations in connection with appeals relating to town and country planning, licences for industrial gaseous emissions, licences for the construction of transport infrastructure, etc.

The **Nature Protection Board of Appeal** in Denmark has jurisdiction to hear appeals against decisions taken by the local authorities on the basis of the Planning Act.

[4] Environmental Permit Authorities are part of the administration of the Ministry of Agriculture, but they take decisions independently. Typical of those institutions is that they are empowered to issue permits for all kinds of water management projects (including compensations, dike reinforcement, discharge, etc), big polluters (paper and pulp industries), and water management and water pollution projects (fisheries).

3. Criminal cases

3.1. Investigation

In virtually all countries, the police services have general authority to investigate and detect environmental crimes, while in addition there are often public authorities with special investigative powers, such as environmental inspectorates and Customs services.

However, there are also exceptions to the rule that the police have general authority to investigate environmental crimes. In the United Kingdom, for instance, the powers of the police are limited to infringements of the protection of wild animal species and certain local environmental offences. The local authorities are empowered to investigate infringements of town and country planning law and minor environmental offences. Larger-scale infringements of environmental law are the responsibility of specialized agencies. The **Environment Agency (EA)** (England and Wales), the **Scottish Department of Environmental Protection Agency (SEPA)** and the **Department of Environment Northern Ireland (DoE NI)** are responsible for waste, water, integrated prevention and control of pollution, fisheries and infringements of the legislation on radioactivity. Government agencies such as English Nature are empowered to prosecute violations of conservation law, while NGOs and private individuals can institute private actions.

However, as a rule the police do not have units that specialize in environmental law. Yet to this rule, too, there are several exceptions: in **Germany**, the police and Customs have specialized environmental units. The public prosecution, on the other hand, has no such specialized services on a permanent basis. In **Portugal**, the judicial police and the National Republican Guard have specialized units at the national level. Since 1998, **Lithuania** has a Division of Violations of Ecology and Law with the Police Chief Commissioner's Offices of Vilnius City, and the idea is to set up a similar department in Klaipeda and Panevezys. In **Spain** there is some specialization within the *Corps Superieur de Police* (which controls the Customs) and the Guardia Civil (Seprona). **Austria** has consciously opted for specialization in environmental crimes, both locally and nationally. Some officers are specifically in charge

of environmental cases, while several hundred police *officers (UKO – Umweltkundige Organe*) have received basic and supplementary training. The Federal Office of Criminal Investigation has a special department in charge of environmental crime. The **Belgian** report points out that the investigation of environmental crimes is the task of the police and the specialized inspection services. They are led by the public prosecution officers. Since the police reform of 1998, Belgium has two general police services: the Federal Police and the Local Police. There is no certainty as to whether certain officers of the local police specialize in environmental crimes. The Federal Police, however, does have a small Environmental Unit. In **Denmark**, the police work together with the specialized environmental authorities, and in a number of cases the local police has set up units specializing in environmental law. In **the Netherlands,** most of the regional police divisions have officers or units specializing in environmental law.

In quite a few countries, environmental crimes are also investigated by specialized environmental inspection services. In France, a large number of public officials and specialized officers are authorized to investigate certain violations of environmental law. The same applies in Luxembourg, Portugal and Spain. In Belgium, the three regions have specialized environmental inspectorates that are empowered to draw up reports if they detect infringements of environmental law. In the Netherlands, there is the National Environmental Inspectorate, the Road Traffic Inspectorate, and the Conservation Inspectorate. An environmental inspectorate also exists in Poland.

An interesting example is **Norway**. **The National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM)**, set up in 1989, is a central and national police department to combat economic, environmental and data crime. ØKOKRIM is the institution that both investigates and prosecutes those crimes. It decides whether and how anyone will be prosecuted. Most environmental crimes, however, are investigated by the local police and by the specialized environmental inspectorates. All police districts have a coordinator for the combat against environmental crime, and all police units have an environmental officer. The National Police Academy organizes special training courses in combating environmental crime. ØKOKRIM, for its part, only investigates and prosecutes the bigger and more complex cases and cases that involve the public interest, and also gives support in this area to the local police. The composition of ØKOKRIM is also

significant. The environmental team is composed of people who have had police training, people qualified in natural sciences and people qualified in financial matters.

3.2. Prosecution policy

In most countries of the European Union, prosecution policy is in the hands of public prosecutors who are part of the judicial organization, but are often under the hierarchical authority of the Minister of Justice. There is therefore a division between the investigation of an environmental crime and its prosecution. There are exceptions to this rule. In some countries, the public prosecutors are part of the police force (e.g. Norway, Denmark), while in other countries this function is shared between the police and specialized government agencies (e.g. United Kingdom). In Denmark, the police are under the authority of the Central Commissioner of Police and the Ministry of Justice. A police district[5] is headed by a Chief Constable, who is also the public prosecutor in the district in question. Consequently, the police are both investigator and public prosecutor. In practice, the police carry out their duties in cooperation with the authorities in charge of the environment.

In many Member States (France, Belgium, Luxembourg, the Netherlands, Poland, Portugal, Spain, Lithuania and Italy), proceedings are, as a rule, instituted by the public prosecution. In a number of these legal systems, the aggrieved parties can institute proceedings by bringing an action for damages (e.g. France, Belgium) or directly summoning the perpetrators to appear before the criminal court (Belgium). In some of those countries (France, Poland, Belgium), certain administrative authorities can commence criminal proceedings themselves for certain infringements (forestry legislation, hunting offences, fisheries legislation, Customs affairs).

For organizational reasons, Finland opted for a system of key prosecutors, where it is thus possible to refer environmental cases consistently to the same prosecutor, giving rise to a

[5] There are 56 in Denmark.

certain specialization. This kind of system exists in Spain, too. The environmental prosecutor is the prosecutor in charge of environmental crimes. Each province has such an environmental prosecutor. Conflicts of jurisdiction are resolved by the Chief Prosecutor. In the Netherlands, there is at least one prosecutor in each district who specializes in environmental law.[6] As a result of a recent reorganization of the public prosecution, a division has been set up, alongside the ordinary prosecutors, to deal with environmental and economic crimes. The jurisdiction of this division covers the whole country. One special feature in Sweden is the fact that the police investigate the crimes, but that these investigative powers have also been given to the public prosecutors, together with the prosecution. No specific government agency exists for the prosecution of environmental crimes. There is, however, a certain kind of organization within the public prosecution[7], but this is organized according to internal rules.

In 1993, a Prosecution Policy Commission was set up in Flanders (Belgium) on which representatives of the relevant ministries and the relevant government departments (such as the Environmental Inspection Department, the Building Inspection Department, etc) periodically consult with representatives of the attorneys-general and the police. This consultation resulted in priority memos regarding the prosecution of town and country planning offences and environmental crimes. In these memos, criteria are established to decide for which crimes prosecution is a priority. However, there is no integrated prosecution policy as yet. The large majority of criminal proceedings are instituted in response to complaints and notifications. An active detection of environmental crimes will depend on the (rare) commitment and enthusiasm of an individual investigator or judicial officer.

In Austria, environmental crimes are prosecuted by the public prosecution and by administrative authorities. A distinction is made between administrative penal law and ordinary penal law. Administrative penal law is enforced chiefly by administrative authorities and gives rise to the imposition of administrative penalties. More serious environmental crimes, defined in the Penal Code, are punished under ordinary environmental penal law. Such cases fall within the jurisdiction of the criminal courts. They are investigated and prosecuted by the police and the public prosecutor.

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6 The prosecutors know each other and work together.

7 Furthermore, the police and the public prosecutors take part in one or two special training courses in environmental law, prepared specially for them by a Swedish university.

The Greek report, too, points out that many environmental laws provide for the imposition of administrative sanctions in case of infringements. This is also the case in Lithuania, where 11 different government agencies can impose administrative sanctions for infringements of environmental law. In Poland, the police or other competent authorities can impose fines for the least serious environmental offences. Such decisions are open to appeal before the court.

Although Austria and Portugal opted for specialization within the police services, no such specialization exists for the public prosecutors.

The national reports that quote figures show that the number of cases that are prosecuted varies to a great extent. In the United Kingdom, the number of prosecutions is said to be around 7,000 each year. In France, there were around 1,800 convictions in 2002 for violations of environmental law, of which around 1,150 convictions for violations of hunting and fishing regulations. In Austria, 133 criminal cases (violations of the environment section of the Penal Code) were successfully tried in 2001. In Finland, the annual number of criminal convictions varies between 25 and 40. Denmark quotes 250 to 350 convictions per year. For Belgium no overall figures are available. In large districts, more than 1,500 new cases are brought before the Public Prosecution each year, of which around 5% are effectively prosecuted before the court. In Norway, around 6,000 cases are reported to the police each year, but the number of actual prosecutions is considerably lower. In Sweden, some 3,624 reports were drawn up in 2003 for environmental crimes, of which 20 to 30% resulted in prosecution before the criminal court.

4. Civil cases

4.1. General

In most of the countries, the civil courts are empowered to award damages, either in kind or the equivalent. Consequently, the civil courts are only confronted with environmental cases where damages are claimed. In certain countries the civil court is quite frequently referred to – in France, for instance, more than 3,300 actions for compensation for environmental damage have been reported in 2002 – whereas in other countries it seems that the civil court is called upon far less frequently. Here, too, it should be observed that no specialized civil

environmental court exists. In Sweden, the ordinary courts and tribunals have little concern with environmental matters, since specialized environmental courts do exist there.

In the United Kingdom, Denmark and the Netherlands, the civil courts are charged with two types of environmental cases: in private law (e.g. nuisance) and in public law (e.g. assessment of unlawful acts, omissions and decisions).

As we have said earlier, the civil courts are primarily empowered to award damages. In the United Kingdom, however, a judge who is confronted with a particular dispute may also take other decisions, such as injunction (in civil law disputes) or declaration on a point of law, quashing order, mandatory order or prohibition order (in public law disputes). In Lithuania, too, the civil court can settle a dispute in several ways, for instance by granting a particular right, restoration of the relationship, prohibition to perform certain acts, etc.

4.2. Right of action of NGOs

It is generally acknowledged that NGOs have a right of action in specific environmental cases, with a distinction being made according to the type of dispute. This right is usually subject to certain additional conditions.

A noteworthy arrangement is the **Belgian** Act of 12 January 1993 establishing a right of action for the protection of the environment. This Act empowers the president of the Court of First Instance to establish and, where appropriate, to order the cessation of “evident infringements” of environmental law or serious threats of such infringements, or to order measures to prevent damage to the environment. The president may act at the request of an NGO, which however must meet certain conditions. The NGO must comply with all the rules of the law on associations, its objective must be the protection of the environment, and in its bylaws it must circumscribe the territory covered by its activity. The legal person must have been incorporated for at least three years on the day it institutes the action for cessation. By submitting its activity reports or other relevant documents it must furnish proof of an effective activity that is in keeping with its corporate purpose and that is concerned with the collective environmental interest which it seeks to protect.

In **France**, a right to intervene in the criminal proceedings is granted to public associations, on condition that they have been empowered to do so by the legislator. Private associations may, under certain conditions, exercise the rights granted to a party claiming damages. For private associations it is required that they have been given permission by the public administration and that their corporate purpose is compatible with such an intervention. A right of action is also granted without permission from the public administration, on condition that the associations have been in existence for five years already, and only for certain environmental crimes.[8]

In **Finland and Spain**, NGOs in principle have no right of action, save for certain specific exceptions. NGOs in Finland can, on the basis of specific legal provisions, appeal to administrative courts against administrative decisions if they meet the special requirements that are imposed. In Spain, NGOs can institute public actions for specific environmental crimes on the basis of certain legal provisions.

NGOs in **Poland** can take legal action on condition that they are allowed to carry out their activities on the basis of legal provisions.

In **Germany**, right of action for NGOs is limited to the administrative courts and is dependent on their prior recognition by the government.

In **Lithuania**, the rule is that NGOs must be registered in the register of legal persons. In that case, they can take part in the legal proceedings as claimant, respondent or intervening party. Such a condition applies in **Luxembourg** too.

In **Portugal**, NGOs have right of action in administrative cases. In **Austria**, they cannot take legal action before the civil courts.

In **Sweden**, NGOs have right of action before the environmental courts. This means that this right only applies for certain environmental cases, in particular in connection with licences and conservation. Criminal cases, civil cases and many administrative decisions of local and

[8] For example, crimes in connection with water protection.

governmental authorities therefore fall outside this scope. Furthermore, this right of action is subject to certain additional conditions: the NGO in question must be a non-profit association, its corporate purpose must be in keeping with the action, the NGOs must be at least three years old and must number at least 2,000 members. In addition, the right of action is assessed case by case.

In the **United Kingdom**, NGOs have a right of action on condition that they have a sufficient interest. This interest is examined case by case. A comparable situation exists in **Denmark**, **Norway** and **Greece**. Here, too, all persons, including associations, have the right to bring an action before the Danish or Greek courts as claimant or respondent. The claimant, however, must prove a material and individual interest. In Norway, the right of action is based on a 25-year-old precedent. The only condition that is imposed there is that the action is in keeping with the purpose of the association.

In **the Netherlands,** Article 305a of the Civil Code grants right of action to NGOs, insofar as those NGOs have legal personality. This means that they must have been incorporated by notarial deed and that the corporate purpose must be in keeping with their actions. Furthermore, the right of action is limited to actions for injunction and must not involve claims for damages. It is not conditional upon any recognition or authorization by the government.