UNEP

CBD

CONVENTION ON BIOLOGICAL DIVERSITY

Distr.
GENERAL

UNEP/CBD/BS/WG-L&R/1/INF/1/Add.1
3 May 2005

ENGLISH ONLY

OPEN-ENDED AD HOC WORKING GROUP OF
LEGAL AND TECHNICAL EXPERTS ON
LIABILITY AND REDRESS IN THE CONTEXT OF
THE CARTAGENA PROTOCOL ON BIOSAFETY
First meeting
Montreal, 25-27 May 2005
Item 3 of the provisional agenda*

LIABILITY AND REDRESS UNDER CARTAGENA PROTOCOL ON BIOSAFETY

Compilation of views submitted on the matter covered by Article 27 of the Protocol pursuant to the recommendation of the meeting of the Technical Group of Experts on Liability and Redress**

Addendum

AUSTRALIA

[29 APRIL 2005]
[SUBMISSION: ENGLISH]

Article 27 of the Biosafety Protocol requires a process to be established to appropriately elaborate international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs), analysing and taking due account of the ongoing processes in international law. It does not require the establishment of a liability regime. For this reason, together with the lack of knowledge about the nature and scope of damage that might occur to conservation and sustainable use of biological diversity, Australia believes that consideration of many of the options, approaches and issues set out in the Annex to UNEP/CBD/BS/TEG-L&R/1/3 are premature. Australia provides more specific comments as follows.

I Scenarios

While scenarios generally provide useful tools for analysis, the discussion of scenarios in this context is premature in the absence of a clear understanding of what, if any, damage might occur. In addition, we note that many of the scenarios would fall outside the scope of article 27, for reasons such as lack of transboundary movement within the meaning given by the Protocol.

* UNEP/CBD/BS/WG-L&R/1/1.

** The submission contained in the present addendum is reproduced in the form and language in which it was received by the Secretariat.

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II Scope of 'damage resulting from transboundary movements of LMOs'

It is important to recall that the Protocol deals with the transboundary movement of LMOs and their effect on the conservation and sustainable use of biological diversity, taking into account risks to human health.

While Article 4 indicates that the scope of the Protocol extends to transit, handling and use of LMOs, the text of Article 27 is specifically limited to 'transboundary movement'. Given the absence of a reference to 'transit, handling and use', Australia's view is those activities should not be specifically considered as falling within the scope of Article 27. Thus, Option 2 would fall outside the scope of Article 27 and should not be considered in the context of liability and redress.

III Damage

Australia believes that a clear understanding of damage is a threshold issue in the consideration of liability and redress under Article 27 of the Protocol. LMOs are not necessarily dangerous or hazardous, and the risks, if any, need to be assessed on a case-by-case basis. It should not be assumed therefore that LMOs are inherently dangerous or hazardous. Much work needs to be done to identify the scope of 'damage' to which any liability or redress rules might apply Only after 'damage' is properly understood, will it be possible to consider the need for any rules and procedures.

With respect to the optional components for the definition of damage, Articles 1 and 4 of the Protocol explicitly limit the application of the Protocol to 'effects on the conservation and sustainable use of biological diversity, specifically focusing on transboundary movement'. For this reason, Australia believes that consideration of damage in the context of Article 27 should be limited to conservation and sustainable use of biodiversity. In this regard, it would be desirable to consider a threshold such as 'significant' or 'serious'.

The valuation of any damage to conservation and sustainable use of biological diversity would be complex and difficult. Much scientific and technical input would be required to determine how and when any change in biodiversity has actually resulted in damage. However, nothing can be advanced in the discussion about valuation until the scope and nature of damage are clearly understood. We are also concerned to ensure that any measures used for the valuation are practical and do not impose onerous costs or obligations on States.

IV Causation

Australia believes it is essential that a causal link be established between the damage and the activity. However, proper consideration of the causal link will have to wait until the concept of 'damage' in the context of the Biosafety Protocol is better understood.

V Channelling of liability, role of parties of import and export, standard of liability

Australia generally believes that any liability should be assigned to the party who is best placed to prevent the circumstances giving rise to damage. While States generally have a regulatory role in the context of the Biosafety Protocol, they are often not directly responsible for importing or exporting LMOs as this is usually a commercial transaction between importers and exporters, or between research institutions. For this reason Australia considers that neither State responsibility nor State liability would be appropriate for consideration in relation to Article 27 of the Protocol.

With respect to the standard of liability, Australia could not support an absolute or strict liability regime. Absolute and strict liability are generally reserved for situations where activity is ultra-hazardous. This ordinarily relates to the seriousness of the harm. At this stage, there is nothing to suggest that the transboundary movement of LMOs is necessarily dangerous. Thus, consideration of a fault based standard of liability with relevant exemptions would be more appropriate.

VI Mechanisms of Financial Security

More work is required to examine the mechanisms available for financial security, as recognised by the Technical Group of Experts meeting in October 2004. Also, we note that such mechanisms can only be formulated once a clear understanding of damage and loss has been reached. Therefore 'damage' must be defined before this work can proceed. The imposition of any rules or procedures with financial consequences for parties that cannot be supported by security such as insurance, could have the effect of preventing any transboundary movement of LMOs altogether.

VII Standing/Right to Bring Claims

Discussion on standing is premature given the lack of knowledge about the nature and scope of damage, and channelling of liability.

VIII Settlement of Claims

Discussion on settlement of claims is entirely premature given the lack of knowledge about the nature and scope of damage, and channelling of liability.

IX Limitation of Liability

Limitation in time and amount will be important in making sure that any rules and procedures are relevant and workable. A determination of appropriate limitations on liability will flow from what is learned about the nature and scope of damage.

X Non-parties

Australia notes that it is not possible under international law to impose legally binding obligations on non-Parties to the Protocol without their consent. We would be concerned with any steps to impose direct or indirect measures on non-Parties.

XI Choice of Instrument

A number of suggestions have been made regarding the type of instrument for implementing Article 27 of the Biosafety Protocol. It is important to note that Article 27 does not necessarily envisage the establishment of any legally binding instrument. Australia believes that any decision on the type of instrument is premature and should only be considered when more information is known about threshold issues such as the nature of damage and mechanisms for financial security.

Australia would welcome a more thorough analysis of the extent to which national regimes already deal with liability. It is Australia's general view that national legislation is adequate to deal with national impacts and is better placed to deal with the environmental and legal means of redress within such jurisdictions.
