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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

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

SUBMISSIONS FROM GOVERNMENTS

EUROPEAN COMMUNITY

[25 FEBRUARY 2005]
[SUBMISSION: ENGLISH]

EU SUBMISSION ON ARTICLE 27 OF THE PROTOCOL, ON LIABILITY AND REDRESS

Introduction

In following up on our earlier response to the questionnaire on liability and redress (see UNEP/CBD/BS/COP-MOP/1/INF/6), the European Community and its 25 Member States are pleased to submit, and share with other Parties and observers, some further considerations on specific issues of liability and redress in the context of the Cartagena Protocol on Biosafety.

It is acknowledged that the topic of liability and redress is complex and broad. Hence, the considerations set out below do not cover all pertinent elements of international rules and procedures in the field of liability and redress under Article 27 of the Protocol. It is also noted that the possible elements of any liability and redress regime are closely interlinked, and that changes to one element would impact on other elements. The EU continues to develop and elaborate its views on the elements below and other elements, on the basis of both ongoing internal evaluations and views and considerations from other Parties and observers.

1. The work of the technical group of experts

The EU very much appreciated the constructive and productive discussion by the technical group of experts on liability and redress, which took place in October last year in Montreal. We welcome in particular the Annex to the report of the meeting of the technical group (UNEP/CBD/BS/TEG-L&R/3), which in our view provides a solid and comprehensive basis for further work on the process set out in Article 27 of the Protocol.

2. Scope of 'damage resulting from transboundary movements of LMOs'

The scenarios that have been developed so far (see the Annex, Section I, to the report of the technical group of experts) are indicative of cases that could be covered by international rules and procedures in the field of liability and redress under Article 27 of the Protocol. These scenarios have guided the EU in concluding that the scope of such rules and procedures should not be limited to 'shipments' of living modified organisms, but should extend to 'transit', 'handling' and 'use' of such organisms, as long as these activities find their origin in a transboundary movement.

The limitation of the scope of rules and procedures on liability and redress to 'shipments' would significantly reduce the added value of such rules and procedures. It would also fail to contribute to the realization of the objective of the Protocol which refers to "the safe transfer, handling and use of living modified organisms".

The formulation of Article 27 of the Protocol does not contain any legal impediment to the adoption of rules and procedures in the field of liability and redress that would cover damage caused during shipments, transit, handling and use of living modified organisms as long as these activities find their origin in a transboundary movement.

3. Choice of instrument

The EU thinking on the preferred choice of instrument is driven by the aspiration to design a liability and redress regime that is promptly operational and which would apply to all Parties to the Protocol. These two objectives are best accommodated by taking a two-staged approach. That is to initially develop a regime by way of a COP-MOP decision, which would take effect, for all Parties, immediately upon adoption. This first stage would subsequently be evaluated, on the basis of which the development of a legally binding instrument could then be considered.

4. Capacity to develop national regimes

An important consideration is the relationship between the respective national regimes and international rules and procedures in the field of liability and redress. Such national regimes should provide the framework for the implementation of international rules and procedures. It is through capacity building that the respective national regimes could be initiated or further developed. Consideration should therefore be given to the development of international rules and procedures that contribute to that end.

5. Allocation of damage

All activities should internalize all their costs, in accordance with the polluter pays principle, and activities related to the transboundary movement of living modified organisms should not become an exception to this. Accordingly, liability for damage should primarily be vested in the person or persons responsible for the carrying out of an action related to the transboundary movement of living modified organisms that may be directly or indirectly at the origin of damage. In that light, we do not see merit in establishing primary or residual State liability.

This position, however, would not exclude exploring supplementary approaches, in exceptional cases of major accidents or disasters, to compensate for certain damages that could not be redressed otherwise. In this respect, the issue of financial securities will play an important role.

MADAGASCAR

[22 DECEMBER 2004]
[SUBMISSION: FRENCH]

Questionnaires sur la responsabilité et réparation pour les dommages causés par les mouvements transfrontières des Organismes Génétiquement Modifiés(OGM)

1) Quel type d'activités ou de situations couvertes par le protocole sont conçues comme favorables pour causer des dommages dans votre pays et quelle sorte de critères serait utile pour l'évaluation des dommages résultant des mouvements transfrontières des OGM sur la biodiversité ?

Réponse :

« Toute importation d' OGM /OVM d'origine animale doit respecter les dispositions prévues par les articles 33 et 34 de la loi n° 91 008 du 25 juillet 1991 relative à la vie des animaux. »
« Toute activité relative aux OGM /OVM et/ou leurs produits dérivés doit avoir l'autorisation de l'Autorité Nationale Compétente prévue à cet effet ».

« Toute personne physique ou morale qui importe des semences génétiquement modifiés et leurs produits dérivés doit avoir un permis d'importation délivré par le Conseil National des Semences (CONASEM). »

2) Quel type d'activités ou de situations pourraient- elles être couvertes par les règles et procédures internationales en référence à l'article 27 du protocole ?

Réponse :

Tout organisme génétiquement modifié (OGM)/organisme vivant modifié (OVM) et produits dérivés résultant des mouvements transfrontières, susceptibles d'avoir des effets défavorables sur la santé humaine, animale et végétale et sur la biodiversité et l'environnement.

3) Comment serait défini, évalué et classifié le concept de dommages résultant des mouvements transfrontières des OGM et serait-il différent de la définition, de l'évaluation et de la classification dans le contexte de l'article 14 paragraphe 2 de la Convention sur la Diversité Biologique ?

Réponse :

Le concept de dommages résultant des mouvements transfrontières est défini, évalué et classifié comme tout dommage portant atteinte à la santé humaine, aux animaux et à l'environnement.
Le concept est valable pour la diversité biologique.

4) Comment pourrait être le standard de responsabilité et réparation résultant des mouvements transfrontières des OGM, serait –ce à base de faute , stricte ou absolue ?

Réponse :

Article 6 : « La responsabilité de tout dommage causé des suites de l'introduction ou des activités relatives aux OGM/OVM et/ ou leurs produits dérivés incombe à l'importateur ou à l' utilisateur mis en cause . »
Article5 :
La classification et l'identification des niveaux de sécurité de projets biologiques peuvent se faire en 3 niveaux :

a) niveau 1 : projet de biotechnologie reconnus comme ne présentant pas de risque pour la santé humaine, animale et végétale, pour la biodiversité et pour l'environnement
b) niveau 2 : projets de biotechnologie reconnus comme présentant de légers risques pour la santé humaine, animale et végétale, pour la biodiversité et pour l'environnement.
c) Niveau 3 : projets de biotechnologie reconnus comme présentant de risques certains pour la santé humaine, animale et végétale, pour la biodiversité et pour l'environnement.

5) Est-ce qu'il y aurait des exemptions de responsabilité ? si oui, dans quel cas ?

Réponse :

Non il n' y a pas d'exemption de responsabilité.

6) Est-ce que la responsabilité est limitée dans le temps, si oui, à quelle période ?

Réponse :

Art 48 : « En cas d' accident ,l' utilisateur doit informer par tous moyens les plus rapides l'ANC et les autorités administratives locales dans les quarante huit (48) heures au plus tard ,par les renseignements suivants :
-les circonstances de l'accident ;
-l' identité et la quantité d'OGM/OVM et/ ou produits dérivés libérés.

Toute information permettant d'évaluer les effets sur la santé de l'ensemble de la population et sur l'environnement ;
-des mesures d'urgences prises ou devant être prises.
Le fait d'informer l' ANC ne dégage aucunement l'utilisateur de quelque obligation qui lui incombe, en vertu des règles de droit commun ou du devoir de saisir les personnes susceptibles d'être affectées.

7) Est-ce que la responsabilité est limitée au montant ? si oui, combien ?

Réponse :

En ce qui concerne les peines, il est prévu dans le projet de loi en ses articles 71 à 75 que :
Art 71 : « est punie d' un emprisonnement de six mois à deux ans et d' une amende de 200.000 Ar à 1.000.000 Ar ou l' une des deux peines seulement ,toute personne reconnue coupable de la violation des mesures de sécurité prévues aux articles 4 alinéa 1,11,12,13 du projet de loi. »
Art 72 : « est punie d' un emprisonnement de deux à cinq ans et d' une amende de 500.000Ar ou de l' une de ces deux peines seulement ,toute personne qui contrevient aux mesures d' approbation d' autorisation, de notification et d' intervention d' urgence prévue aux articles 4 alinéa 3,48,54 du projet de loi. »
Art 73 : « est punie d'un emprisonnement de cinq à dix ans et d'une amende de 2.000.000 Ar à 10.000.000 Ar ou de l'une de ces deux peines seulement, toute personne coupable d'utilisation d'OGM/OVM t/ou produits dérivés dangereux. »
Art 75 : « celui qui aura occasionné à autrui une maladie ou une incapacité de travail personnel par l' effet des OGM/OVM et/ ou produits dérivés importés,commercialisés en violation des dispositions du projet de loi et que les relations de cause à effet ont été dument établies est puni d' un emprisonnement de cinq à dix ans et d' une amende de 5.000.000 Ar à 20.000.000 Ar.(A Madagascar, 2000 Ar valent environ un dollar U.S)

8) De qui relève l'arbitrage en cas de litige sur le respect des dommages dans le domaine de responsabilité et réparation ?

Réponse :

En cas de litige sur le respect des dommages dans le domaine de responsabilité et réparation relève du Tribunal compétent du lieu du litige.

9) Comment devrait être la notion de responsabilité de l'état et responsabilité étatique dans le régime de responsabilité et réparation dans le contexte du protocole de Cartagena

Réponse :

Art 6 alinéas 3 du projet de loi
« La responsabilité de l'Etat peut être engagée du fait de sa décision relative aux OGM/OVM et/ou produits dérivés ou du non respect des prescriptions prévues par le projet de loi. »

10) Qui a droit à réclamation pour les dommages résultant des mouvements transfrontières des OGM ?

Réponse :

Toute personne victime d'introduction, d'utilisation, de commercialisation, de recherche ou d'activités industrielles liées aux OGM/OVM et/ou produits dérivés peut demander réparation de son préjudice devant le Tribunal compétent contre son ou ses auteurs.

11) Comment seraient les jugements relatifs à la responsabilité et réparation reconnues ou entrées en force dans un autre pays ? quelle juridiction ?

Réponse :

Les jugements relatifs à la responsabilité et réparation reconnues ou entrées en force dans un autre pays relèvent du tribunal compétent du pays ou se trouve le litige.

NORWAY

[21 DECEMBER 2004]
[SUBMISSION: ENGLISH]

1. What types of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of living genetically modified organisms (hereinafter referred to as LMOs)?

Question 1 is partly overlapping with questions 2 and 3.

See answer to question 2 with regard to activities/situations most likely to cause damage nationally. The activities covered under the protocol are also those that are likely to cause damage in our country. In addition, handling and use of LMOs at the national level are perceived as situations which may cause damage.

With regard to criteria to assess damage to biodiversity, see answer to question 3 explaining how damage resulting from transboundary movements of LMOs could be defined, valued and classified.

2. What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?

The point of departure should be the protocol provisions which refer to four types of transboundary movements of LMOs:

- Intentional transboundary movements of LMOs namely: LMOs for intentional introduction into the environment of the Party of import; LMOs intended for direct use as food, feed or processing; and LMOs for contained use (*inter alia* Articles 4, 6, 7, 11)

- Unintentional transboundary movements, for example when LMOs cross national boundaries unintentionally. Such movements should include accidental releases of LMOs (Article 17)

- Illegal transboundary movements (Article 25)

- LMOs in transit through the territory of a Party (Articles 4 and 6)

It will be necessary to define the beginning and the end of a transboundary movement. According to Article 3(k) transboundary movement is defined as "the movement of living modified organisms from one Party to another Party, save that for the purposes of Article 17 and 24 transboundary movements extend to movement between Parties and non-Parties." A narrow definition would seem to imply only the actual shipment or transport. A broader definition on the other hand would go beyond the actual shipment and include activities at the national level such as handling and use of LMOs. An argument in favour of the latter approach is that potential damage from LMOs may be shown a long period after the completion of a shipment.

3. How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation

and classification of damage within the framework of Article 14 paragraph 2, of the Convention on Biological Diversity?

Damage resulting from transboundary movements of LMOs should as a minimum cover damage to biological diversity and human health. This is in accordance with Article 4 stating that the Protocol should apply to LMOs that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health.

The term damage in the Norwegian Gene Technology Act covers damage to persons, objects and property. Also damage in relation to sustainable use of biological diversity such as economic loss due to the presence of LMOs in agriculture or plant production may be covered under the Norwegian Gene Technology Act. This means i.e. that organic or conventional farmers could get compensated as a result of GMO contamination of organic crops. The Gene Technology Act is also intended to apply to changes in the ecological environment that occur, for example when a new organism supplants an indigenous species (see preparatory work for the Gene Technology Act contained in Proposition No. 8 to the Odelsting (1992-93).

This question also touches upon valuation of biodiversity damage, *inter alia* the duty and costs of reinstatement or restoration of the impaired environment. According to the Norwegian Gene Technology Act, the supervisory authority may impose measures on the person who is liable for damage, for example measures to retrieve or take other measures to combat organisms within a specified time, including measures to restore the environment to its previous state, as far as possible.

The order to restore the environment to its previous state presupposes that the discharge has altered the state of the environment, for example, the occurrence of or the stock or stand of particular animals or plants, or the general state of the environment, for example adverse changes in the ecosystem. The extent of restoration would depend on the changes that have occurred in the environment, and would have to be assessed in each particular case. For example an impact or risk assessment carried out pursuant to the Law would contain a description of the environment before the deliberate release or discharge. Restoration may be carried out by replanting of cultivated or wild plants, by release of fish or by building up a stock of wild animals. In some cases, complete restoration will not be possible, or not within the foreseeable future.

As far as possible, synergies with the definition of damage to biological diversity to be developed under CBD Art. 14(2) should be ensured.

4. To whom should liability for damage resulting from transboundary movements of LMOs be channelled?

According to the Norwegian Gene Technology Act the duty to implement measures lies with "the person responsible for the activity", who is defined as the person who produces or uses GMOs within the meaning of the Act. "The person responsible" is a physical or legal person who operates the activity ("operator") from which the GMOs are discharged. In general the person with the duty to provide information or to obtain approval under the Act may be subject to orders under the Act. This is also in line with the polluter-pays-principle.

It is also possible that there may be other persons responsible depending on the nature of the measures to be taken. For example, a transporter would be responsible for taking immediate measures if GMOs escape by accident during transport. However, it is normally the owner or sender who has to pay for measures. Likewise several persons may be held liable for damage resulting from GMOs under the Cartagena Protocol for example the producer; the notifier; the exporter; the importer, the user, the State

etc. depending upon their role in LMO related activities causing damage to biological diversity or human health.

5. What should be the standard of liability for damage resulting from transboundary movements of LMOs, that is, should it be fault-based, strict or absolute?

The starting point should be strict liability for damage, namely regardless of any fault on the person liable.

Whether the strict liability scheme should be completed with a fault-based regime (liability in case of damage caused by negligence) needs to be further discussed.

6. Should there be any exemptions from liability? If so, under what circumstances?

Yes, some exemptions are needed, in particular in cases of strict liability. Some exemptions such as natural disasters or "acts of God"; war and hostilities etc. should be discussed. One should also consider the need for exemptions with regard to lawful activities.

7. Should the liability be limited in time and, if so, to what period?

Both absolute and relative time-limits should be considered. For example Norwegian legislation (Act No. 18 of 18 May 1979 relating to Statutory Limitation) has imposed the following time limits:

A statutory limitation which comes into force when the first of the time limits consisting of 3 or 20 years expires. The relative three year time limit expires three years from the day the injured party obtained or should have obtained the necessary information about the damage and the person responsible. The claim becomes time-barred in any case at the latest 20 years after the damaging action or other grounds for liability ceased.

8. Should the liability be limited in amount and, if so, to what amount?

This is linked to the question of financial security. According to the Norwegian Gene Technology Act a duty to take insurance or provide financial security for liability may be imposed as a condition in the approval for deliberate release or contained use of LMOs.

9. How would judgments given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?

Like any civil liability regime, also the Cartagena Protocol regime should contain provisions with regard to recognition and enforcement of judgments in relation to damage caused by transboundary movements of LMOs. The issue of jurisdiction has two aspects: a) determining the competent court to entertain claims for compensation and b) ensuring the recognition and enforcement of judgments arrived at by such a competent court in the territories of the contracting Parties. Examples of relevant provisions can be found in *inter alia* the Basel Protocol dealing with liability for transboundary movements of hazardous waste, which leaves to the victim the choice of which competent court to seize. Once judgment is delivered it should be recognised as binding in the respecting territories of Parties, and a victim should be able to enforce it in any of those Parties.

10. What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

Reference is made to the dispute settlement mechanism of the Convention of Biological Diversity which is also the dispute settlement mechanism for the Protocol. If the process under Art. 27 results in the adoption of a legally binding instrument under the Protocol, that instrument should provide for a dispute settlement mechanism, including an arbitration mechanism.

11. What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?

Needs to be further considered.

12. Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

According to Norwegian law a claim for compensation may, irrespective of whether a claim is put forward by the authorities (in this case the Pollution Control Auhtority), also be made by a private organisation or an association with a legal interest in the matter.

UNITED STATES OF AMERICA (USA) [14 FEBRUARY 2005]
[SUBMISSION: ENGLISH]

U.S. Comments on
Issues Raised in UNEP/CBD/BS/TEG-L&R/1/3, Annex

I. Scenarios

Should it be determined that international rules and procedures on liability are necessary, the complexity of the list of scenarios reinforces the need for establishing such rules and procedures based on fault, not strict or absolute liability. Each scenario must be analyzed on a case-by-case basis and it is impossible to assign liability up front without a complete understanding of the facts of a given case considered in light of the established elements of the international rules and procedures.

An illustrative example is found in the first scenario presented under A (a)(i): "The presence of an LMO causes damage (contamination of organic crops) in Party B."

As an initial matter, there are aspects of the system that would have to be known before assigning any liability, such as: Is contamination of organic crops within the purview of "damage" envisioned by the system? There certainly may be economic damage to the organic farmer in this scenario, but that alone would not be sufficient. The Biosafety Protocol is a conservation treaty and therefore there must be some evidence of harm to biodiversity for this harm to fall within the purview of Article 27. Indeed, were one to make the argument that such harm would constitute socio-economic damage, Article 26 only allows socio-economic considerations arising from the impact of LMOs on the conservation and sustainable use of biodiversity to be taken into account, consistent with international obligations.

Even assuming, for argument's sake, that the damage here did fit within the scope of the rules and procedures, there are many facts that would need to be known before assigning liability in this case. For example:

-- Did party A properly identify the LMO?
-- Were AIA procedures followed?

-- Did party B give its consent to the import under AIA?
-- Would a "no" answer to any of these questions have made a difference in preventing the harm done in this case?

Only after analyzing issues like these could a decision on liability be determined based on fault, recognizing of course the balance of obligations the protocol itself assigns to importing and exporting parties.

A second example comes from the scenarios on contained use. B(d)(i) states: "An intentional transboundary movement takes place from Party A to Party B with the consent of Party B for the purpose of testing a LMO virus in a laboratory. This is a contained use of LMOs under the Protocol; there is an accidental release during the test that causes damage in Party B."

Once again it is not possible to assign liability in this scenario in a vacuum:

-- First, one would have to assess whether the damage is of the type covered by Article 27. It would seem unlikely that a spill in a lab would affect conservation and sustainable use of biological diversity (although this should not be ruled out). One would also have to consider whether this was damage "resulting from a transboundary movement" and whether it met the other requirements of the international system.

-- Next, assuming the damage fits within the parameters of the system, one would have to look at the facts. It is clear that the transboundary movement was intentional and that Party B gave its consent (even though it is not actually obligated to do so under the protocol). One should then ask whether the Article 18 (b) identification requirements for contained use were met. Next one would have to assess, just like in any tort claim, what caused the damage that resulted from the accidental release. Was it foreseeable that such harm could have come from the tests, and if so, who should have foreseen it? Was it in non-compliance with Article 18 requirements and, if so, whose fault was that? All of these questions are intrinsically fact-based and must be handled on a case-by-case basis.

II. Scope of "damage resulting from transboundary movements of LMOs"

Option 1 ("damage caused during the shipment of LMOs") is the option that most closely tracks the language of the Protocol. Whereas the entire Protocol encompasses a broader range of activities, including not only the transboundary movement, but also the transit, handling and use of LMOs (Article 4), Article 27 was written to cover only transboundary movements. Such a movement is defined in Article 3(k) as the "movement of a LMO from one Party to another Party."

Although the U.S. would not support an interpretation of this phrase that goes beyond option 1, it is worth noting that however this phrase is interpreted, the international rules and procedures will need to specify the exact parameters of what constitutes damage "resulting from" a transboundary movement in terms of time and activity so that exporters and importers may have legal certainty regarding the scope of this term and to avoid multiple disparate interpretations.

III. Damage

The definition of damage should be informed by the scope of the Protocol in Article 4 and the objective of the Protocol in Article 1. As such, damage in Article 27 refers to the effect of the transboundary movement of the LMO on the conservation and sustainable use of biological diversity.

Taking the definition of "biological diversity" from the Convention on Biological Diversity as a reference point, biological diversity may be assessed in terms of variability. Thus, "damage" under Article 27 would not be understood merely as a change in biological diversity; rather, it would need to include at least the elements that there be a significant and measurable change in variability and that such change be negative. It would seem essential that there be established, verified benchmarks by which to measure any claimed damage.

Concerning the damage threshold, Article 27 should address impacts on the conservation and sustainable use of biological diversity that rise above a de minimis level of, at least those that are "significant" or "substantial" and "measurable."

Once the precise definition of damage is established, including the threshold, consideration could be given to types of remedies available such as reinstatement of damaged components of biological diversity and potential monetary damages.

IV. Causation

The issue of proximate cause needs to be analyzed and addressed, so that it is clear to both potential claimants and defendants how close the connection must be between the initial transboundary movement and the claimed harm. Foreseeability of damage and elements of causation would all be fully considered under a fault-based system of liability.

V. Channeling of Liability, role of parties of import and export, standard of liability

Under a fault-based system, liability is properly channeled to the party responsible for the harm. Sometimes this may be the exporting party, sometimes it may be the importing party or possibly even some third entity. The Protocol recognizes a balance of responsibilities between the exporter and importer throughout the process of the transboundary movement of LMOs, and the Article 27 procedures must not disturb or distort this balance.

Generally it would not seem appropriate for a State to be liable unless, perhaps, if the State were itself conducting the activity resulting in liability. Even in that case, such liability might be more properly addressed in State-to-State fora.

VI. Mechanisms of Financial Security

In order for the liability rules and procedures to practically function, insurance must be available to cover the damage resulting from transboundary movements of LMOs. Presumably the availability of insurance would be aided by developing rules and procedures that are precise in terms of scope, definition of damage and other key elements so that insurers could appropriately weigh risks.

VII. Standing/ Right to Bring Claims

It is premature to determine who may have standing to bring a claim until other elements of the rules and procedures, like the definition of damage, have been determined.

VIII. Settlement of Claims

There are many aspects of this issue that will have to be analyzed as the international rules and procedures develop. As described in our answers to the questions before MOP 1, in the United States,

foreign civil and commercial judgments are generally enforceable in federal and state courts under the Uniform Foreign Money-Judgments Recognition Act, versions of which have been adopted by more than 30 states and the District of Columbia. In the remainder of the states, recognition and enforcement is generally available under the rules of the common law as a matter of international comity. Foreign arbitral awards are enforceable under the terms of the 1958 UN Convention on the Recognition and Enforcement of International Arbitral Awards and the 1975 Inter-American Convention on International Commercial Arbitration, as implemented by the Federal Arbitration Act. We would be interested in learning more about how other countries treat foreign liability judgments under their systems.

IX. Limitation of Liability

Without yet knowing all of the specifics of the liability system under consideration, liability limits are typical features of liability schemes, although issues do arise with respect to whether liability amounts are floors (i.e., to provide minimum compensation) or ceilings (i.e., a Party may not authorize more under its legal system). In this case it may be useful to think in terms of ceilings to increase the possibility of the availability of insurance.

X. Non-Parties

As a matter of treaty law, a liability agreement could not impose obligations on Non-parties.

XI. Choice of instrument

There are a range of options available for implementing Article 27. The United States believes that attention needs to be focused on the use of existing national liability regimes or through national liability regimes that could be developed even if they do not now exist.

SUBMISSIONS FROM ORGANIZATIONS

GLOBAL INDUSTRY COALITION (GIC) [25 FEBRUARY 2005]
[SUBMISSION: ENGLISH]

Pursuant to notification 2004-111, the users and developers of biotechnology are pleased to respond to the request for further views on the matter covered by Article 27 of the Cartagena Protocol on Biosafety, in particular with respect to scenarios, approaches, options and issues identified in the annex to the report of the Technical Group of Experts on Liability and Redress (18-20 October 2004).

Respectfully submitted by:
Global Industry Coalition 1/

I. SCENARIOS

The users and developers of biotechnology are concerned that the scenarios listed in the annex to the report of the Technical Group of Experts on Liability and Redress simply discuss "damage", without any reference as to the type of damage involved, and in particular without identifying damage to biodiversity which would be within the scope of the Protocol.. This results in the scenarios being of little practical value. In addition, in the scenario where the presence of an LMO causes alleged damage described as "contamination of organic crops", this situation would involve claims for commercial economic loss as opposed to damage to the conservation and sustainable use of biodiversity, and would not be covered by the Protocol.

The scenarios provided in this annex are essentially the same scenarios that were discussed at the Workshop on Liability and Redress under the Cartagena Protocol on Biosafety that took place in Rome, Italy on 2-4 December 2003. Following this Workshop, Prof. Lucas Bergkamp, a leading author on the topic of international environmental liability law, produced an analysis of the application of existing civil law to these "Rome" scenarios that appropriately addresses the likely outcomes in law of each scenario. This analysis has been attached to this submission as Appendix I and is available online at:

http://www.croplife.org/library/documents/Biotech%20issues/BSP%20page/2004_02_%2026_PUB_Independant%20Handbook%20Liability%20and%20Redress_2E.pdf

1/ The Global Industry Coalition (GIC) for the Cartagena Protocol on Biosafety receives input and direction from trade associations representing thousands of companies from all over the world. Participants include associations representing and companies engaged in a variety of industrial sectors such as plant science, seeds, agricultural biotechnology, food production, animal agriculture, human and animal health care, and the environment.

II. SCOPE OF "DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LMOs"

Option 1
Damage caused during shipment of LMOs

Option 2
Damage caused during shipment, transit, handling and/or use of LMOs

- Neither option is appropriate or technically correct. The concept of "transboundary movement", defined in the Protocol as "the movement of a living modified organism from one Party to another Party"2/, properly serves two purposes. First, it is the jurisdictional trigger and condition precedent for the application of most of the substantive provisions of the Protocol. The Protocol only applies in these situations where there has been transboundary movement. Second, the transboundary movement must be the cause of the damage to biodiversity. That is, it must be the "cause-in-fact" of the damage, meaning that the damage would not have occurred "but for' the transboundary movement; and it must be the proximate or legal cause of the damage, meaning that there are no superseding or intervening causes and the chain of causation is not too remote. While damage to biodiversity could occur "during" shipment, transit, handling or use, it is more likely that damage to biodiversity will be discovered at some time substantially after the transboundary movement. Furthermore, damage to biodiversity will not be caused by the mere movement across a boundary, but will ultimately result from negligence or willful misconduct in the production, transport, packaging, handling, storage, permiting or use of the LMO. As noted below, some of those activities will be *inter*state and some will be *intra*state.

- There are many activities that fall within the scope of transboundary movement or that can occur during the course of transboundary movement. These include shipping, handling, storage, packaging and labeling. These same activities can also occur after transboundary movement has ceased, such as in the situation where a shipment arrives at the port of destination and then further transportation occurs across such state to a destination within that state. Such latter movement from the port to a point within a state is *not* transboundary movement since the movement is within a single state, or *intra*state. Transboundary movement, on the other hand, involves *inter*state movement, across state lines or borders. Damages resulting from or during intrastate movement related to shipping, handling, storage, packaging, labeling or use are not subject to the Article 27 process because they do not result from transboundary or interstate movement. Such damages, however, would be compensable at the State level, through extant national liability regimes.

2/ Article 3(k).

III. DAMAGE

A. Optional components for the definition of damage

(a) Damage to environment

- The Cartagena Protocol on Biosafety addresses the conservation and sustainable use of biological diversity. The scope of any liability rules to be developed should therefore pertain to the conservation and sustainable use of biological diversity rather than the "environment" at large.3

(b) Damage to conservation and sustainable use of biological diversity

- This is the express and explicit scope of the Protocol, and hence the only proper scope for assessment and restoration or restitution of damage under the Protocol. The scope of any liability rules to be developed must remain focused exclusively on damage to the conservation and sustainable use of biodiversity because rules developed pursuant to a legal instrument cannot be broader than the scope of the instrument itself. Neither the Protocol, nor its parent instrument, the Convention on Biological Diversity (CBD), provide any legal basis for coverage of traditional damages. (See also below.)

(c) Damage to human health

- Impacts to human health caused by damage to the conservation and sustainable use of biodiversity is covered by the Protocol and therefore could be part of the scope of any liability rules to be developed. "The phrase '…taking into account the risks to human health…' will take on different implications depending on the context. For example, in relation to risk assessment, the meaning is both clear and obvious. In other contexts, such as liability, the implications are neither clear nor obvious; but in every instance, given the scope of the Protocol, the risks to human health are those which follow from '…damage to the conservation and sustainable use of biodiversity…'"

(d) Socio-economic damage, especially in relation to indigenous and local communities

- For the reasons explained above concerning the scope of the Protocol and CBD and legal basis for any liability rules that may be developed, socio-economic damage *per se* are not within the scope of the Protocol. Economic damage should only be compensable to the extent that it is caused by and is an element of the damage to the conservation and the sustainable use of biodiversity. The concept and assessment of "socio" damage is subjective and unique to each sovereign Party based on the culture, values and morals of that Party, and will vary even within the state. Therefore, mandating international establishment and enforcement of restitution for "socio" damage is neither practicable nor desirable.

- Under Article 26 of the BSP, socio-economic considerations are relevant only to decision making prior to first transboundary movements. Even in that case, socio-economic considerations are limited to those "…arising from the impact of living modified organisms on the conservation and sustainable use of biodiversity…" and can be considered only to the extent consistent with other international obligations. Article 26 therefore supports the exclusion of general socio-economic damage from the scope of any liability rules to be developed. The Protocol is not an instrument designed to address or balance competing sociological or commercial interests.

3/ See IUCN, An Explanatory Guide to the Cartagena Protocol on Biosafety, para. 168.

(e) Traditional damage:

(i) Loss of life or personal injury;
(ii) Loss of or damage to property;
(iii) Loss of income.

- Except to the extent that risks to human health are caused by and are an element of the damage to the conservation and sustainable use of biodiversity, traditional damages, including economic losses or personal injury, are covered by existing legal systems in nearly every country in the world.4 Because the purpose of the Protocol is aimed at the conservation and sustainable use of biodiversity, these issues are beyond the proper legal scope of any liability rules to be developed under the Protocol. Further, existing legal regimes providing redress for traditional damages have been crafted in light of each country's unique legal experience and reflect that country's philosophy in dealing with damage. Imposing a traditional damage liability regime on Parties can impair the sovereignty of that Party (state) and raises issues of sovereignty and could be fundamentally disruptive of that Party's existing civil law systems because it will not be adapted to that Party's laws, legal traditions and unique jurisprudence on liability and redress.

(f) Costs of response measures.

- Costs of response measures are a standard part of existing regimes providing for liability and redress of environmental damage and would be included in any liability rules to be developed. Mitigation, restorations and similar response measures are, in fact, the main mechanism for redress for damage to the conservation and sustainable use of biodiversity.

B. Possible approaches to valuation of damage to conservation and sustainable use of biological diversity

(a) Costs of measures to reinstate the damaged components of the environment/biological diversity:

(i) Introduction of original components;
(ii) Introduction of equivalent components that could be on the same location, for the same use, or on another location for other types of use;

- The options for restoration of damaged components of biological diversity would be case specific. In general, however, the most important factors are the availability of an objective, science based determination of the actual damage to biodiversity (considered actual damage only when the impact is adverse and significant) in relation to an appropriate baseline, and science based analysis of options for restoration. Further, exceptions to the requirement for reinstatement should be available where the marginal benefit of reinstatement is negligible compared to the exorbitant burden of full restitution.

4/ See L. Bergkamp, Liability and Redress: Existing Legal Solutions for Traditional Damage (published in February 2004 in Compilation of Expert Papers concerning Liability and Redress and Living Modified Organisms, available on line at: http://www.croplife.org/library/documents/Biotech%20issues/BSP%20page/2004_02_%2026_PUB_Independant%20Handbook%20Liability%20and%20Redress_2E.pdf.)

(b) Monetary compensation to be determined on the basis of criteria to be developed.

- Liable Parties or persons can be obliged to provide monetary compensation, rather than to undertake reinstatement measures; however, the determination of the amount must be subject to the same requirements of objectivity and scientifically sound analysis set out above.

C. Issues for further consideration with respect to valuation of damage

(a) Determination of biodiversity loss (baseline conditions or other means to measure the loss, taking into account natural variations and human-induced variations other than those caused by LMOs)

- Damage to biodiversity means a change compared to a baseline that has a significant, measurable, permanent or long-term adverse effect on the conservation status of biodiversity.

    - Adverse: Care must be taken to be certain that any identified change in accordance with these criteria is "adverse". The mere occurrence of a "change" is **not** adverse *per se* and does not *per se* amount to damage to biological diversity.

    - Significant: in order to be workable and implemented, a treaty such as the CBD and the Cartagena Protocol should focus solely on significant adverse effects.

    - Measurable: In order to be able to measure whether and what damage has occurred, the concept of a baseline condition is essential, as this will be a point of departure for any measuring technique. Since it concerns biodiversity, which is constantly fluctuating and influenced by a multitude of natural and human-induced factors, the baseline cannot be static.

    - Permanent or Long-term: Biodiversity has a way of restoring itself. Hence, a change can only be considered "damage" if the natural restoration capabilities of a certain biological diversity have been so fundamentally encumbered that such restoration will not occur. Otherwise, one is creating "artificial damages" which are to be compensated (and hence draw funds away from other priorities) where no compensation is needed since natural restoration would occur in any event.

- To avoid discrimination and promote transparency and predictability, questions of determination and valuation of biodiversity loss can and must be generally applicable to all situations, regardless of the source of the damage. Accordingly, general concepts and terms, as well as detailed analysis of what constitutes a significant, permanent or long term adverse effect on biodiversity, should be established in, or must at least in every instance be consistent with a broader framework, such as the Article 14.2 process under the CBD.

(b) Special situation of centres of origin and centres of genetic diversity

- It is the clear responsibility of the Parties (states) in making decisions to permit LMOs to take proper measures to prevent harm to and to preserve centres of origin and genetic diversity using rigorous and sound science-based risk assessment and risk management.

- If significant adverse effects occur, the value of centres or origin and genetic diversity may be determined, as in all other cases, in conformity with the criteria listed above.

(c) Formulation of qualitative threshold of damage to conservation and sustainable use of biological diversity

- "Qualitative" assessment of damage to biodiversity is subjective and unique to each sovereign Party based on the culture, values and morals of that Party, and will vary even within the state. Therefore, mandating international establishment and enforcement of criteria for a qualitative threshold is neither practicable nor desirable.

- In addition, workability and insurability of any liability rules that may be developed require an objective measure of damages and valuations. Subjective evaluations such as loss of enjoyment should not figure in these calculations.

(d) Valuation of damage to human health, socio-economic damage and traditional damage.

- See responses in the preceding sub-paragraphs.

IV. CAUSATION

Issues for further consideration

(a) Establishment of the causal link between the damage and the activity:

(i) Test (e.g. foreseeability, direct/indirect damage, proximate cause);
(ii) Cumulative effects;
(iii) Complexity of interaction of LMOs with the receiving environment and time scales involved;

- There must be a clear causal link between the alleged damage, the transboundary movement and the activities of Parties and individual operators. Only through a strict requirement to demonstrate causation (cause-in-fact and proximate) can the "polluter pays" principle be applied and equity be assured. This approach avoids the result that an innocent person (someone without responsibility for the damage) is held liable and also avoids abuse of the legal system since clear requirements for causation will discourage frivolous legal claims.

- Causation is also a critical element of any liability system for insurance purposes. Insurance is available to cover the insured only in cases where the insured's acts can be proven to have caused the compensable damage. Requiring proof of causation with respect to each of the potentially liable persons when multiple operators are involved is also a fundamental requirement for insurability. This means that joint and several liability should not be introduced, as it will impede and confuse fixing responsibility and the consequent restoration of biological diversity.

- Where the alleged damage is of a diffuse character (not attributable to particular sources/operators), liability should not be imposed.

- Questions about foreseeability, proximate and legal causation as well as cumulative effects and related complexities all are considered in the normal course of prosecuting and defending a claim for alleged damages and require no special treatment.

(b) Burden of proof in relation to establishing the causal link

(i) Relaxation of burden of proof;
(ii) Reversal of burden of proof;
(iii) Burden of proof on exporter and importer.

- The norm in legal systems all over the world is for the person alleging damage to prove all elements of the *prima facie* case. In the standard fault-based system, this includes proving that the person against who the claim is brought had a legal duty of care, that he breached that duty, and proof of causation (in fact and proximate cause) and actual damage that rises to a level of significance. There is no reason to alter the legal norm in this case.

V. CHANELLING OF LIABILITY, ROLE OF PARTIES OF IMPORT AND EXPORT, STANDARD OF LIABILITY

A. Possible approaches to channelling of liability

(a) State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol);

- Party (State) responsibility for intentionally wrongful acts that cause damage to the conservation and sustainable use of biological diversity resulting from the transboundary movements of LMOs should be one of the outcomes of the Article 27 process. State responsibility for breaches of the obligations of the Protocol, however, are not necessarily relevant to the discussions under the Article 27 liability process. Parties are obliged to comply with the provisions of the Protocol after having ratified the Protocol, but breaches of these obligations are not necessarily related to damage to the conservation and sustainable use of biological diversity. At this time, many countries have ratified the Protocol without proper implementing legislation and/or mechanisms and already may be in breach of Protocol obligations. Where concrete obligations, including timeframes for acknowledging notifications, decision-making, and posting information on the BCH with respect to approved LMOs, as well as compliance with confidential information requirements, are violated, the State responsible must be held liable for any resulting damage to the conservation and sustainable use of biological diversity. However, Parties must also be responsible for complying with their obligations under the Protocol, regardless of whether noncompliance causes damage to biodiversity.

(b) State liability (for acts that are not prohibited by international law, including cases where a State Party is in full compliance with its obligations of the Protocol).

Option 1

Primary State liability

- Parties (states) have the legal responsibility and obligation under the Protocol for reviewing and permitting the use of LMOs within their sovereign domain (the source of production and export) and for reviewing the data, or risk assessments, or decisions/approvals of the notifying (exporting) party in determining whether to allow transboundary movement (import) into their sovereign state. That legal responsibility is clearly articulated in the Protocol, and liability logically follows from malfeasance or misfeasance in meeting those responsibilities.

- The users and developers of biotechnology believe this is a matter best left to governments but would suggest that existing dispute resolution mechanisms may provide the most expedient and satisfactory solution in this case.

Option 2

Residual State liability in combination with primary liability of operator

- Even if liability is attached to the operator, the legal responsibility under the Protocol and consequent potential liability of the Party (state) must be recognized.

Option 3

No State liability

- Given the clearly described and mandatory roles of the Parties (states) under the Protocol, this option is unacceptable and disingenuous.

(c) Civil liability (harmonization of rules and procedures).

- The foregoing item appears to mix two distinct issues. For the reasons expressed previously and elsewhere in this submission, the users and developers of biotechnology do not believe that development of a civil liability regime under the Protocol is either necessary (in light of existing laws and dispute resolution mechanisms) or appropriate (the CBD process currently getting underway will address damage to biodiversity in a non-sectoral way and therefore provide the greatest protection for biodiversity without inappropriate discrimination against one particular sector). Instead, the efforts under the Protocol should focus on capacity building, possibly including the development of checklists and guidelines for national liability systems.
- The second issue – noted in parenthesis in the item above – concerns the harmonization of rules and procedures. As noted by other stakeholders and experts, the creation of a transnational process regime that helps to provide some harmonization of procedural aspects relating to liability for damage to the conservation and sustainable use of biodiversity (e.g. choice of forum, access to courts for foreign nationals, jurisdiction over foreign nationals, mutual recognition and enforcement of judgments, exchange of information), is an option for the Article 27 process that may merit further exploration.5 Such rules would build on existing international law (which covers many of the procedural aspects noted above) and would not involve development of substantive rules.

B. Issues relating to civil liability

1. Possible factors to determine the standard of liability and the identification of the liable person

(i) Type of damage;

- The objective and scope of the BSP, as well as the fact that it is an instrument subsidiary to the CBD, limits the type of damage that can be considered to damage to the conservation and sustainable use of biodiversity.

5 G.S. Nijar, Third World Network, Developing a Liability and Redress Regime under the Cartagena Protocol on Biosafety; Option 1, p. 53-54; K. Kummer, Paper No.1: Options for addressing liability and Redress under Article 27 (distributed electronically in January 2005), Option 4.

(ii) Degree of risk involved in a specific type of LMO;

- The legal obligation or duty placed on technology developers is determined by the risk assessment process. Developers can only be held responsible for risks of which they were aware or should have been aware. Similarly, other operators should be required to act in accordance with the reasonable and prudent person standard in light of information that was known or should have been known about the risks of the activity in which they are involved. The Parties have a legal obligation to review submissions, assess risk using sound science and make decisions regarding the permitting of LMOs.

(iii) Operational control of LMOs (stage of transaction involving LMOs).

- Fair, effective and workable liability systems ensure that liability is limited to damage resulting from activity over which the operator had control. Where multiple operators are at fault, liability should be proportionate to damage for which each operator is responsible. Causation is the key to any liability system. Furthermore, a fault-based system hinging on causation is the essence of the "polluter pays" principle. No predetermination about the "stages" of the transaction can therefore be made because where the fault lies, if at all, would depend on the facts and circumstances of a particular case.

2. Standard of liability and channelling of liability

(a) Fault-based liability:

(i) Any person who is in the best position to control the risk and prevent the damage;
(ii) Any person who has operational control;
(iii) Any person who does not comply with the provisions implementing the Biosafety Protocol;
(iv) Any person to whom intentional, reckless or negligent acts or omissions can be attributed;

Based on legal precedent, the nature of the technology and experience with the technology, any liability rules to be developed should properly be fault-based. This is the general rule for liability systems and there is no scientific, legal or fact-based justification for departing from the general rule in the case of LMOs. To the contrary, it is widely known that there have been no cases of actual damage to the conservation or sustainable use of biodiversity caused by LMOs to date, and it is also widely recognized that activities involving LMOs are not inherently dangerous and, therefore, should not be singled out for the more extreme standard of strict liability which are reserved in all legal systems for ultra-hazardous activities. Furthermore, LMOs will have already undergone careful risk assessment procedures, multiple regulatory reviews, and be permitted in exporting Protocol Parties, and in most cases in the importing Protocol Parties before their first transboundary movement.

In addition, it should be noted that fault-based systems promote care because they provide an incentive for operators to take care with their activities to avoid liability. Consequently, fault-based liability promotes preventive action both prior to commercialization and in the market place. On the other hand, strict liability systems by their nature inhibit innovation and development of new technologies, in large measure because the innovator can not avoid liability by exercising due care and rigorous product stewardship. Prevention of harm is far better than having to seek redress for damages after the harm has occurred.

(b) Strict liability:

As noted above, strict liability is reserved for activities that are ultra-hazardous and, therefore, is not appropriate in the context of liability rules relating to LMOs. For strict liability systems that are in place for ultra-hazardous systems, however, the causation element, referenced in Option 2, is critical. There must be a clear causal link between the damage and the relevant action of the potentially liable person(s). Any other approach, focusing all responsibility on pre-identified persons - as is contemplated in Option 1 - would simply penalise/tax/punish a particular public or private sector component (and potentially innocent persons) without delivering any material benefit to biodiversity and would be inequitable.

Option 1

Liability to be channeled to one or more of the following persons, including persons acting on his or her behalf, on the basis of prior identification:

- The developer
- The producer
- The notifier
- The exporter
- The importer
- The carrier
- The supplier

Option 2

Liability to be channeled on the basis of establishment of a nexus of causality.

- This is the only appropriate option, and must be associated with fault of the Party or person in causing the damage to biodiversity.

3. Possible exemptions to or mitigation of strict liability

(a) Act of God/force majeure;

(b) Act of war or civil unrest;

(c) Intervention by a third party (including intentional wrongful acts or omissions of the third Party);

(d) Compliance with compulsory measures imposed by a competent national authority

- Exemptions and defences for acts beyond the control of a potentially liable party (force majeure, intervention of 3rd parties etc.) are well known to legal systems and must be included in any liability rules to be developed.

(e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator;

(f) The "state-of-the-art" defence for activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

- Legal systems also recognize certain other defences where all reasonable action has been taken to prevent such damage. These include both the "permit defence," and the "state of the art" defence. These defences render the exposure to loss more predictable and are essential components for insurability, and must be included in any liability rules to be developed.

4. Additional tiers of liability in situation where:

(a) The primary liable person cannot be identified;

- If the Party (state) is liable to the extent of its legal responsibilities, then the primary liable person will always be identifiable. Where a potentially liable private person cannot be identified, then no claim can be brought.

(b) The primary liable person escapes liability on the basis of a defence;

(c) A time limit has expired;

(d) A financial limit has been reached.

- In situations (b) – (d) set forth above, the law would simply dictate that liability does not attach. This is in fact the very essence of time and financial limits as well as exemptions and defences.

(e) Financial securities of the primary liable person are not sufficient to cover liabilities;

- If the Party (state) is primarily liable, then there should be no issue of financial security. If a private person is primarily liable, then it is imperative that any liability rules to be developed do not prevent that person from obtaining and maintaining insurance; and secondary liability and financial assurance should accrue to the Party (state) based on the legal responsibility to permit the LMO for production or to approve or consent to transboundary movement (export or import).

(f) The provision of interim relief is required.

- Interim relief, which is of a temporary nature, is available in most, if not all, legal systems but only can be invoked in clear cases in which judicial review results in a finding of imminent and irreversible danger or threats, in this case, to the conservation and sustainable use of biodiversity.

5. Issues for further consideration

(a) Combination of fault liability and strict liability;

(b) Recourse against third party by the person who is liable on the basis of strict liability

- While as noted above, strict liability is not the appropriate standard of liability in the first instance, recourse against others at fault is a standard legal feature and necessary for fairness in any liability rules to be developed.

(c) Joint and several liability.

VI. MECHANISMS OF FINANCIAL SECURITY

Issues for further consideration

(a) Modes of financial security (insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees);

- Under any liability rules to be developed, care must be taken to ensure that the requirements do not prevent or inhibit insurability.

- The financial responsibility of private parties engaged in businesses involving products of biotechnology is a subject of national corporate law. Most jurisdictions have governing legislation under which companies may do business that includes provisions on financial responsibility.

(b) Collective financial arrangements (public and/or private fund) for the purpose of, for example compensation and remediation.

VII. STANDING/RIGHT TO BRING CLAIMS

- In international and national law, legal standing to bring a claim is limited to those who suffer the actual damage. This limitation ensures that those who come to court have direct and important interests and avoids the courts being flooded with (and the public bearing the costs of) cases brought by those not directly impacted by the damage. Since protection of biodiversity is a public interest, the State, as a Party to the Protocol, has the responsibility to act and seek recovery if damage to the conservation and sustainable use of biological diversity occurs. As such, only States should be able to introduce a claim for damage under any liability rules to be developed.

- In recent years, environmental interest groups have been empowered to bring actions against governments that fail to prosecute for damages; however, no international body to date has accepted interest groups as having standing to file claims for environmental damage.

Issues for further consideration

(a) Level of regulation (international and/or domestic level)

- The issue of level of regulation is dependent upon the type of any liability rules to be developed by the Parties. Parties have a number of options under the Article 27 process, from preparing guidelines on elaboration of national legislation to setting up a process for international arbitration.6 The option selected by the Parties, whether providing guidance on domestic laws or creating a transnational process regime, will determine the level of regulation on standing/right to bring claims.

6/ See K. Kummer Peiry, Biosafety Process on Liability and Redress: Food for Thought on Key Issues, Paper No.1 "Options for Addressing Liability and Redress Under Article 27" (distributed in January 2005 to COP/MOP-1 participants and to experts who attended the Technical Group of Experts on Liability and Redress under the Cartagena Protocol on Biosafety held 18-20 October 2004, available on line at: www.ecoconsult.ch .)

- For example, should Parties develop guidance language for national liability regimes in line with the Protocol, the right to bring a claim would be defined by that regime and thus regulated at the national level. While developing an international civil liability regime for liability under the Protocol is not necessary because of existing laws and dispute resolution mechanisms, and the CBD liability process currently getting underway, if Parties negotiate an international regime, standing would be regulated at the international level and Parties would be required to ensure national civil liability legislation is in line with the international regime.

(b) Distinction between interstate procedures and civil procedures

- This issue requires further consideration by the Open-ended Working Group of Legal and Technical Experts on Liability and Redress in order to clarify the distinction between who has the right to bring a claim in an interstate procedure versus in a national civil procedure. This right of standing is different depending on the type of law, whether international or national. Liability at an international level in an interstate procedure means there is a legal relationship between states and that this relationship is governed by international law. In this situation, a state has the right to make claims on its own behalf that may also include claims on behalf of its nationals. Civil procedures involve a legal relationship between private entities (which could include the state if it is in the same position as a private entity) and is governed nationally. The injured party has the right to bring an action.

(c) Direct involvement in the transboundary movement of living modified organisms as a requirement of standing/right to bring claims

- As explained above, the State is the proper entity to bring a claim under any liability rules to be developed, thus the "direct involvement" in the transboundary movement is not sufficient to create the right to bring claims.

(d) Type of damage:

(i) Traditional damage: injured person;

- As stated in section II above, traditional damages, including personal injury and property damage, and damage to economic interests, are already addressed by virtually all existing national civil liability regimes. The Protocol's objective is the conservation and sustainable use of biodiversity, and any liability rules to be developed must remain within this scope. As such, traditional damage is not within the scope of the Protocol and the issue of standing/right to bring claims is moot for this type of damage.

(ii) Costs of response measures: person incurring the costs;

- Since Parties (states) should be the sole party with standing to prosecute claims for damage to biodiversity and collect costs of remediation, the Party should be the only "person" incurring costs of remediation and seeking recovery for those costs.

(iii) Damage to environment/conservation and sustainable use of biodiversity:

º Affected State
º Interest groups acting in vindication of common interests;

- Damage to environment/conservation and sustainable use of biodiversity is the main type of damage that should be covered by any liability rules to be developed under the Protocol, considering that the objective of the Protocol is to contribute to the conservation and sustainable use of biological diversity.

- As explained above, only States should be able to bring an action for damage under any liability rules to be developed under the Protocol.

(iv) Damage to human health: affected State;

- The objective of the Protocol is to ensure an adequate level of protection in the safe transfer, handling and use of LMOs, specifically focusing on transboundary movements, that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health. Any liability rules to be developed must be cognizant of this objective and must remain focused on protecting biological diversity. As such, the only type of damage to human health that can be included is any such damage that is caused by and an element of damage to the conservation and sustainable use of biodiversity.

(v) Socio-economic damage:

º Affected State;

º Interest groups acting in vindication of common interests or communities.

- For the same reasons outlined in section (iv) above, the only type of socio-economic damage that can be included in any liability rules that may be developed is any socio-economic damage that is directly related to damage to the conservation and sustainable use of biodiversity.

- As explained above, only States should be able to bring an action for damage under any liability rules to be developed under the Protocol.

VIII. SETTLEMENT OF CLAIMS

Issues for further consideration

(a) Inter-State procedures (including settlement of disputes under Article 27 of CBD);

(b) Civil procedures:

(i) Jurisdiction of courts or arbitral tribunals;

(iv) Determination of the applicable law;

(v) Recognition and enforcement of judgments.

IX. LIMITATION OF LIABILITY

Issues for further consideration

(a) Limitation in time.

- A clear and calculable time limit to initiate a legal action (often referred to as a statute of limitations) following: (a) an act; or (b) the time when the claimant knew or ought reasonably to have known of the damage and the identify of those who caused the damage is standard legal practice and essential for any liability rules to be developed. A limitations period also promotes vigilance and care by potential claimants concerning their legal rights, results in fewer evidentiary problems, provides predictability for defendants, and, overall, contributes to a well-functioning legal system.

- The existence of a statute of limitations also directly affects insurability. It is required in order to gain financial security from the market place, which will not provide coverage for liability for an unlimited amount of time.

- The limitation periods in domestic legal systems as well as international environmental conventions vary in length; however, generally claimants are expected to file their claims within a fairly short period after the claimant knew or should have known of the damage to biodiversity, typically three years for existing treaties on civil liability relevant to environmental damage.7

- In addition to the relative time limitation period set out above, an absolute time limit is necessary to provide clarity and to ensure the availability of insurance. An absolute time limitation period measured from the transboundary movement, ranging from ten to thirty years in existing international liability treaties for environmental damage, is appropriate and necessary to reduce evidentiary problems, to ensure the damage that can be readily identified and quantified, and to provide an end point for the actuarial calculation of insurer exposure.

(b) Limitation in amount.

- Maximum amounts for which any person could be held liability must be part of any liability rules that may be developed. They are a standard element of liability regimes, including in international instruments.8 Such liability limitations (also referred to as "caps" or "ceilings") are established in order to strike the right balance between holding persons responsible for harm they may cause and avoiding that legal consequences deter persons from innovation, technological

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7/ 2003 Kiev Protocol on Civil Liability and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents on Transboundary Waters (Article 10(2)); 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Article 17(1)); 1989 Convention on Civil Liability for Damage Cause during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (Article 18(1)).

8/ 1969 International Convention on Civil Liability for Oil Pollution Damage, as amended by 1992 Protocol, amendments adopted in October 2000, to enter into force on 1 November 2003 (Article V(1); 1996 International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea (Article 9); 1999 Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (Article 12(1) and Appendix B); Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended (Articles 5(d) and 7); Protocol of 12 February 2004 to amend the Paris Convention (Article F); Convention of 31 January 1963 Supplementary to the Paris Convention (Article 3©; Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 (Article V); 1997 Convention on Civil Liability for Nuclear Damage amending Vienna Convention (Article 7); 1989 Convention on Civil Liability for Damage Cause during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (Article 9).

advances and other pursuits that benefit the public as a whole. Establishment of a liability cap also enhances legal security and thus creates a more stable environment in which researchers, developers and users can work.

- A cap on liability also is essential to render a system insurable, and hence, workable.

X. NON-PARTIES

Issues for further consideration

(a) Possible special rules and procedures in the field of liability and redress in relation to LMOs imported from non-Parties.

XI. CHOICE OF INSTRUMENT

The choice of instrument must relate to the needs of Parties. It appears that many of the Parties calling for urgent and immediate action under the Protocol are concerned that they are "not covered" when it comes to liability for damage to biodiversity. While most countries have laws and legal systems in place that would answer, work must be done to identify these provisions and determine if there are any gaps. There may also be issues with respect to the functioning of the legal/judicial system, which is fundamental to providing for legal redress whether or not new international rules are negotiated.

- Because the situation for many is considered urgent, immediate action to conduct gap analyses at the national level and national legal capacity building where necessary should be undertaken.
- Because the broader liability process under Article 14.1 of the CBD will automatically apply to any damage to biodiversity related to transboundary movements of LMOs, the users and developers of biotechnology believe that instrument is the more appropriate process for consideration of all definitional issues, provision of capacity building to improve national judicial and legal systems, and creation of any international liability rules that may be necessary for the conservation and sustainable use of biodiversity. This approach would provide the greatest protection for biodiversity, would avoid the discriminatory effect and likely inconsistencies that would result from developing rules for specific sectors and would avoid wasting resources and duplication of effort.
- With respect to the options included in this annex, the users and developers of biotechnology could support Option 3 because it offers the immediate assistance a number of countries believe necessary. The option to review guidelines and take further action in the future as is contemplated in Option 4 is always available if the need arises.

Option 3
Non-binding instrument.
(a) Guidelines;
(b) Model law or model contract clauses.

Option 4
Two stage approach (initially to develop a non-binding instrument, evaluate the effects of the instrument, and then consider to develop a legally binding instrument)

Appendix 1

Analysis of the Applicability of Existing Civil Law to the Rome Scenarios

Prof. Lucas Bergkamp

At a workshop on liability and redress in the context of the Cartagena Protocol on Biosafety (BSP), held in Rome on 2-4 December 2002, four scenarios were presented to focus the discussion on the scope of a possible liability regime (the "Rome Scenarios," which are verbatim reproduced in the boxes below). They involve various transboundary movements (hereinafter referred to as "TBM") of LMOs. The Rome Scenarios do not describe whether there is any damage and, if so, what kind of damage.

The Rome Scenarios raise a multitude of issues. This paper does not provide an exhaustive discussion of all issues, but concentrates on the most common problems and major issues. For purposes of the analysis below, it is assumed that each of the Rome scenarios, in fact, results in some sort of damage (i.e. damage as to which a victim may have a claim for compensation); whether the possible types of damage fall within the scope of the BSP is discussed in the final paragraph of this section. Note, however, that none of these scenarios necessarily results in any damage; in fact, based on current knowledge, the potential for any damage is virtually non-existent, except where virulent and pathogenic micro-organisms destined for contained use are not handled in accordance with the applicable regulatory restrictions (note: the same concerns exist for non-LMO virulent and pathogenic micro-organisms).

The Rome Scenarios involve the following hypothetical situations:

- Scenario 1 *GMO Crops*: LMOs are moved from one country to another but unintentionally enter a third country.

- Scenario 2 *Laboratory Test of Virus*: An accidental release occurs during a planned TBM resulting in an unintentional release in a third country.

- Scenario 3 *LMOs-FFP That Enter the Food Chain*: LMOs for food, feed or processing are intentionally shipped from one country to another and enter the food chain in the country of import.

- Scenario 4 *Shipment through Transit Country*: LMOs destined for another country are accidentally released in a country of transit.

Each of these scenarios is discussed in turn below. Both possible civil liability and state liability are analyzed.

I. GMO CROPS

This scenario is described the Rome workshop materials as follows:

A ⇒ B
⇓
C

- A, B and C are Parties
- Introduction into the environment: field trial or commercial growing
- Intentional TBM (A→B) and unintentional TBM (B→C)
- Variations:
  - A is a non-party
  - Intentional TBM (A-B) is illegal (Art. 25)

In this case, there is an intentional TBM of LMOs from County A to Country B for purposes of introduction into the environment (field trial or commercial growing), which results in an unintentional TBM of LMOs to a third country, C. A, B, and C are Parties, with a variation where A is a non-Party. Another variation involves an illegal TBM from A to B (Article 25 BSP) that results in unintentional TBM of LMO to Country C. Thus, this scenario actually involves three different scenarios.

ANALYSIS:

Scenario 1 raises a number of issues, as a result of the variations. The basic problem in Scenario 1 would appear to be that a GMO crop unintentionally ends up in Country C. This scenario might be thought to create a risk of environmental damage (e.g. through displacement of other species or gene transfer).

First, the TBM to and subsequent use in Country B would not appear to raise any issues; the introduction into the environment proceeds as planned. Country B can be said to have accepted the TBM and use of the LMO in its jurisdiction and any risks that may be associated with it.1 However, even where the regulations are observed, both civil and state liability may be invoked. Under legal regimes that do not recognize regulatory compliance as a defense (which is commonly the case), operators2 are exposed to liability where, despite compliance with applicable regulatory requirements, they failed to meet their duty of care under the circumstances.3 Of course, where jurisdictions permit a regulatory compliance defense, operators that have met all relevant applicable regulatory requirements would not be exposed to liability. (Note that there are good policy reasons supporting the regulatory compliance defense.) In addition, if Country A failed to meet its "due diligence" or "good governance" obligation,4 it may be liable too for any ensuing damage in other countries.5 Of course, in most cases where a state adopts a good regulatory regime and complies with its obligations under the BSP, it has met its due diligence requirement.

Second, in one of the variations, however, the TBM is illegal. In that case, Country B did not consent to the TBM and did not assume any risks that may be associated with the TBM and subsequent use of the LMO. Under general fault-based civil liability regimes, where operators violate regulatory requirements, such violations will be often be regarded as *negligence per se*6 and operators will be liable for damage caused by such acts. In addition, if the illegal TBM is due to Country A failing to meet its

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1/ The BSP, of course, allows a state to accept such risks, although one could argue that approval of a TBM of a LMO does not necessarily imply acceptance of each and every risk.

2/ The term "operators" refers loosely to persons operating or controlling the relevant activity that may cause damage.

3/ The relevant duty of care in this case is to ensure that acts comply with applicable regulatory requirements. Conversely, a violation of applicable regulatory requirements constitutes fault or negligence *per se*.

4/ The "due diligence" requirement ("obligation de vigilance") is part of international public law. It is viewed as an element of a state's primary obligation towards the environment. Birnie and Boyle, for instance, state that: "Treaty formulations overwhelmingly favour the due diligence interpretation of states' primary environmental obligations, and (...) the most convincing interpretation of the state responsibility precedents is that in most cases this standard now reflects customary law." Birnie P, Boyle AE. International Law & The Environment. Oxford: Clarendon Press, 1992, p. 94. In essence, the due diligence requirement imposes a duty of care,*/ as that term is used in civil liability law. Smith BD. State Responsibility and the Marine Environment, The Rules of Decision. Oxford: Oxford University Press, 1988, p. 63.*/ States are required, for instance, to take all necessary steps to prevent substantial cross-border pollution and to demonstrate the kind of conduct expected of "good government" mindful of its international obligations. Shaw MN. International Law. Fourth Edition. Cambridge: Cambridge University Press, 1997, p. 594.

5/ This would also be so if Country A is not a party to the CBD and BSP.

6/ The "negligence per se" rule basically provides that an operator that violated applicable regulatory requirements is deemed to have acted negligently.

obligations under the BSP, or its general "due diligence" obligation, Country A would be liable vis-à-vis Country B for the damages caused by its failure. Thus, there is potentially both civil and state liability involved in this scenario.

Third, as to the unintentional TBM from Country B to Country C, two situations should be distinguished. The first situation is where neither the operator nor Country B breached any applicable obligation or duty of care imposed on it. In this situation, Country C would not have claims against the operator or Country B under general principles of civil and state liability. Whether individuals who suffered damage in Country C would have any claims would depend on the national law of Country C. If, for instance, Country C has adopted some strict liability statute that covers the kind of activity and damage at issue, those individuals may be able to recover their damage. A different situation exists where the responsible person or Country B breached an obligation applying to it or a duty of care. Under these circumstances, persons suffering damage in Country C and Country C would have claims against the responsible person or Country B under common principles of fault liability.

To conclude, in Scenario 1, depending on the specific details, claims for damages may well lie against the responsible person and/or the state.

II. LABORATORY TEST OF VIRUS

This scenario is described in the Rome materials as follows:

A ⇒ B
⇓
C

- A, B and C are Parties
- Contained use
- Accidental release
- Intentional TBM (A→B) and unintentional TBM (B→C)

In Scenario 2, a virus (which also qualifies as an LMO) is shipped from Country A to Country B for contained use. However, there is an accidental release and an unintentional TBM from Country B to Country C. Countries A, B, and C are Parties.

ANALYSIS:

An accidental release normally involves breach of applicable regulatory requirements (i.e. an unlawful act, in some jurisdictions referred to as a wrong) or breach of the general duty of care (i.e. negligence or fault). There is in any event an unlawful act if the shipment was not properly authorized under the BSP and applicable national law. The accidental release could give rise to damage (e.g. damage resulting from disease) in Country B or Country C. This scenario might be thought to create a risk of personal health damage (e.g. if the modified virus causes disease in humans).

If individuals in Country B suffer damage, the operator (in this case, probably the person in control of the virus when it was released, i.e. the laboratory operator) is likely exposed to liability if the operator failed to meet his statutory or other obligations. If Country B's government failed to meet its obligations (e.g. it failed to exercise reasonable care in inspecting the laboratory's facilities), it may well be exposed to liability too under national government liability law. If all parties involved met their

obligations (which makes an accidental release extremely unlikely), damages may still be recoverable if there is an applicable regional or national strict liability statute.

If individuals in Country C suffer damage, they would basically be in the same position as individuals in Country B. Thus, if Country B's government was at fault, Country C's citizens or Country C itself would have claims against Country B. Some additional issues may arise that are typical for cross-border litigation, such as issues of applicable law and jurisdiction of the courts of Countries B and C. International private law addresses such issues.

III. LMOS-FFP THAT ENTER FOOD CHAIN

This scenario is described in the Rome materials as follows:

A ⇒ B

- A and B are Parties
- Intentional TBM (A→B)

In the third scenario, LMOs are shipped from Country A to Country B for direct use as food, feed or for processing. Like Scenario 2, this scenario may be perceived as creating a risk of human health damage (e.g. if the LMO food causes allergies) in Country B.

ANALYSIS:

An important difference with the previous scenario is that this scenario does not necessarily likely involve non-compliance with statutory or regulatory requirements or a general duty of care. Nevertheless, such breaches may also play a role here. For instance, the chance that an LMO food causes allergies is a function of the care with which the genetic modification is researched, designed, and executed; careful and effective regulation may also contribute to this process. Thus, where health problems occur, there is a greater chance that the care levels of the developers and producers fall below the levels required by law. Where this is so, any resulting damage is recoverable under general liability concepts.

In addition, under product liability laws, LMO foods that cause allergies may well be deemed defective, e.g. if they do not meet the safety the consumer may expect. This may be so, for instance, where the genetic modification is not made according to design, or no adequate warning is provided.

It also possible that one of the states involved may be liable under international state responsibility principles or regional or national liability law. If, for instance, Country B did not take adequate measures to control the risks (e.g. it failed to issue warnings although it was required to do so under applicable laws), it may be exposed to claims for damages. Much would depend on the specific facts.

IV. SHIPMENT THROUGH TRANSIT COUNTRY

This scenario is described in the Rome materials as follows:

A ⇒ T ⇒ B
⇓
C

- A, T, B and C are Parties
- Accidental release (to be destined for contained use or introduction into environment)
- Intentional TBM (A→T→B) and unintentional TBM (T→C)

In the fourth scenario, there is an accidental release of a LMO while it is passing through a transit country (T) in connection with a TBM from Country A to Country B for contained use or introduction into the environment. Following the accidental release, there is an unintentional movement from the transit country to Country C. Countries A, B, C, and T are Parties.

ANALYSIS:

The analysis set forth above in respect of Scenarios 1 and 2 apply also here. The fact that the unintentional release took place while the LMO was in transit does not change the basic analysis. Both responsible private parties and states may be exposed to liability under these circumstances.

V. CONCLUSIONS

The Rome Scenarios raise some general issues that invite a rebuttal.

First, although the scenarios do not identify any damage, to some they might be thought to create risks of all possible types of damages, including property damage, personal injury, harm to economic interests, environmental harm, and biodiversity damage. Even if that were, in theory, possible, all damages other than biodiversity damage fall outside the scope of the BSP process.7/ After all, the scope of any BSP liability and redress regime cannot be broader than the BSP itself. Thus, even if the concerns were legitimate, harms other than biodiversity damage are not to be considered in connection with the BSP process. Indeed, states around the world have been reluctant to recognize economic damage absent physical injury,8/ and initiatives in respect of environmental damage are still evolving. Bringing these types of damage within the scope of a possible BSP liability and redress regime would not only be inconsistent with the BSP's scope, but also lead to unequal treatment and discrimination, as the same damage would be recoverable or not recoverable, depending on its specific cause. More precisely, if a

7/ Article 4 BSP, which defines the Protocol's scope, states that the BSP applies to "the transboundary movement, transit, handling, and use of all living modified organisms that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risk to human health." This language is somewhat ambiguous, but the best reading is that secondary health effects resulting from biodiversity damage are to be considered, e.g. in connection with risk assessment. However, that does not necessarily imply that a possible liability and redress regime, which is referenced in Article 27 BSP, should extend to health effects. Given the BSP's objective, i.e. protecting biodiversity, any possible liability and redress regime should also be focused on biodiversity protection. Cf. IUCN Guide to the Cartagena Protocol, p. 33, fn. 170. There would in no event be grounds for the creation of a separate cause of action for personal injury where there is no biodiversity damage.

8/ This kind of harm is sometimes referred "pure economic loss." See Banakas EK (editor). Civil Liability for Pure Economic Loss. London: Kluwer Law International, 1997. Dunné JM van. Liability for Pure Economic Loss: Rule or Exception? A Comparatist's View at the Civil Law - Common Law Split on Compensation of Non-Physical Damage in Tort Law. 4 European Review of Private Law 1999.

person suffers physical injury due to a TBM of a LMO, he would have a right to claim damages, while a person suffering exactly the same injury due to a TBM of a non-modified organism (e.g., a foreign species), would have no cause of action.

Second, all Rome Scenarios involve LMOs, none involve common threats to biodiversity damage arising from foreign species. However, there is an on-going CBD process that focuses on liability and redress for biodiversity damage irrespective of its cause. For a number of reasons, including particularly the protection of biodiversity, a general environmental liability and redress regime should be preferred over one that covers only biodiversity damage caused by transboundary movement of LMOs. A regime specific to transboundary movements of LMOs would not only fail to cover biodiversity damage arising from other causes, but would also create discrepancies in the treatment of possible biodiversity damage arising from LMOs: if biodiversity damage is caused by a transboundary movement of LMOs it would be covered by the regime, but if it is caused by LMOs not in transboundary movement, the damage would not be covered.9/

Third, the Rome Scenarios can be analyzed usefully only if additional facts are presented and regional and national liability regimes are included in the analysis. As discussed in another paper in this volume,10/ regional and national liability laws already cover most of the damage that may be perceived to be associated with LMOs. For instance, damage caused by negligent, wrongful or unlawful movement, handling, or use of LMOs is normally covered under general, fault or other liability laws. If persons did not comply with applicable relevant statutory or regulatory requirements that is often deemed negligence per se or a wrongful act. Violations of obligations under the CBD or BSP will invariably trigger liability where such violations increased the chance of biodiversity harm. Further, damages caused by LMOs that constitute defective goods are covered by product liability laws, which often impose strict liability. Damages caused by activities involving LMOs that constitute dangerous or ultra-hazardous activities, assuming such activities could be identified, may well be covered by specific strict liability regimes.

Finally, the assumption that there is a potential gap in the existing liability and redress regimes, namely biodiversity damage, requires further analysis. Of course, if existing regimes do not cover biodiversity damage, they can not contribute to the CBD's and BSP's objectives of protecting biodiversity. Indeed, the concept of damage under civil liability law has traditionally not covered damage to *res nullius* or *res communes,* which constitute important elements of the environment. However, that is changing rapidly and this "gap" is rapidly closing. International and regional liability regimes increasingly cover environmental damage. National liability regimes, as discussed in another paper in this volume,11/ have found ways to provide for compensation for environmental damage. These evolutions include liability statutes, novel interpretation of existing rules by courts, and applications of Constitutional or administrative law in a manner that effectively creates civil liability (see, e.g., the Philippine Supreme Court's interpretation of the constitutional right to a healthy environment). Note also that the importance of liability for biodiversity protection should not be exaggerated. There is a strong case for an objective fault or wrong-based liability regime, which creates optimal incentives for prevention and, in some form or another, is part of the civil liability regimes of many nations. But

9/ There is discussion about the question whether the BSP limits compensable damage to damage caused by transboundary movement only. The relevant provision of BSP, however, refers explicitly to transboundary movement; the issue is to what extent indirect or consequential damage resulting from a transboundary movement may be brought within the scope of any possible BSP liability and redress regime.

10/ See related article, L. Bergkamp "Liability and Redress: Existing Legal Solutions for Traditional Damage."

11/ See related article, L. van der Meer "General Environmental Liability: Approaches and Best Practices."

beyond that, liability does not contribute to prevention.12/ And since biodiversity damage is often irreversible and irreparable, prevention is key. This explains also why the CBD and BSP are aimed at prevention of biodiversity damage and are relying on *ex ante* regulatory regimes to pursue that objective.

INTERNATIONAL GRAIN TRADE COALITION (IGTC) [25 FEBRUARY 2005]
[SUBMISSION: ENGLISH]

I. INTRODUCTION

The International Grain Trade Coalition (IGTC) is pleased to provide views and information relevant to Article 27 of the Cartagena Protocol on Biosafety (the Protocol), as requested by the Technical Group of Experts on Liability and Redress at the conclusion of its 18-20 October 2004 meeting in Montreal, Canada.

The IGTC was formed in June 2001 to encourage the adoption of international regulations to enable the global grain industry to remain effective in providing, through responsible and efficient international trade, a critical portion of the world's food and feed. The IGTC's 19 trade organizations represent more than 2500 members in more than 80 countries that are involved in importing and exporting food, feed and processed products.

On average, more than 300 million tons of grains, oilseeds, pulses and special crops are traded each year across international boundaries. A reliable and expanding volume of international trade in these crops is crucial to meeting the needs of global consumers for a safe, secure and nutritious food supply. The current focus of the IGTC is the implementation of the Protocol and its impact on international commerce in agricultural commodities.

The IGTC recognizes the objective of the Protocol is to introduce regulatory control over the transboundary movement of products of modern biotechnology that may have an adverse effect on the conservation and sustainable use of biological diversity. However, the IGTC has serious concerns about the Protocol's potential impact on the capability and cost of moving globally the large volumes of food and feed crops required to meet the world's demands each year for a nutritious and affordable food supply.

II. THE NATURE OF THE INTERNATIONAL GRAIN TRADE

The structure of agricultural production as well as the crop marketing arrangements varies from country to country. However, in general, marketing and distribution systems have evolved to ensure that crops are efficiently stored, transported and processed with minimal costs from origin to final consumption.

Nearly all of the more than 300 million tons of grains, oilseeds, pulses and special crops traded each year for food, feed and processing are shipped as bulk commodities. Bulk commodities are not sold as readily identifiable lots, and can be interchangeable with another lot of similar quality. Once a crop leaves the farm, it is normally commingled with crops from other farms making it virtually impossible to trace the components of a shipment back to the farm or field on which it was produced. The sheer quantities handled make it impossible to segregate by individual variety at zero thresholds.

12/ This is so because under both fault and strict liability an operator exercises exactly the same level of care, i.e. he takes the same preventive measures, namely only those that are cost-effective. The operator does not take preventive measures that are not cost-effective, i.e. measures the cost of which exceeds the cost of the damage they avoid; strict liability does not change that calculus. Thus, strict liability does not result in more prevention than fault liability.

For example, there are on average 7 million beans in every ton of soybeans. Most beans move from the field by truck to farm storage, then by truck to country or river elevators to be loaded into railcars or barges for shipment to export elevators for loading into ocean vessels. The speed of the movement is staggering. A modern export elevator is loading at about 3,000 tons per hour or 21 billion beans per hour. And the volumes are equally staggering. Ocean vessels can carrying between 25,000 and 50,000 tons, which would translate into 175 to 350 billion beans on each vessel. Some vessels even carry up to 100,000 tons. And these billions of individual beans have arrived onto these vessels from hundreds of farms through numerous elevators via thousands of trucks, railcars and/or barges. Obviously, it is impossible to keep track of each single bean.

The problem is further complicated once the shipment arrives at its final destination. Once the beans (or for that matter any bulk commodity) are discharged, they are either stored into numerous different bins at port facilities or loaded directly into hundreds of rail cars, trucks or barges for transportation to inland processing plants.

III. THE IMPLICATIONS OF AN INTERNATIONAL SYSTEM OF LIABILITY AND REDRESS ON THE INTERNATIONAL GRAIN TRADE

The size, complexity and number of parties involved in the international grain trade, as described above, illustrate that caution should be exercised in developing and implementing an international system of liability and redress. Disruption in the grain trade would be devastating for millions of farmers around the world; hundreds of thousands of businesses (and their employees) that rely on their ability to economically buy and/or sell grain; thousands of businesses (and their employees) that are actually involved in the grain trade; and hundreds of millions of people around the world who consume products that have, at some point in their life cycle, traveled internationally.

The IGTC understands and appreciates that no one involved in proposing or establishing the rules on liability and redress seeks to undermine current international commerce in trading grains. Nevertheless, the trading system is so diverse and so intricate that unanticipated adverse consequences to the shipment of raw grains and food around the world should be of concern to everyone involved in this process. This is the context in which the IGTC provides these comments on various scenarios as requested by the Secretariat to the Convention on Biological Diversity.

IV. COMMENTS ON SCENARIOS C, D AND E

The members of the IGTC are involved in the export and import of products that could be implicated by the Protocol. Consequently, the IGTC defers comments on Scenarios A and B, involving Living Modified Organisms (LMOs) for planting or laboratory use. Our comments focus on Scenarios C, D and E: placing products containing LMOs on the market, the shipment of those commodities, and accidental release during their repatriation to the State of origin.

The three scenarios all contemplate either an "illegal" transboundary movement of LMOs or a movement that may be legal but which results in an "accidental release." Taken together, the three scenarios raise very important questions about when a shipment may be deemed to be illegal, how damages are determined in the context of an illegal shipment or an accidental release, who is subject to those damages, and how those damages should be determined. The IGTC does have views on these issues, particularly as they apply to the grain shipper transporting the product. Our views are intended primarily to ensure that the grain trade may continue unimpeded in the years following implementation of the Protocol.

V. HOW TO DETERMINE LEGALITY

In determining the legality of a shipment, the IGTC believes strongly that exporters and shippers that comply with their labeling obligations, but do not develop the technology, produce the products, or decide how the products get used when they reach the importing country, should be exempt from liability unless they actually have been negligent or engaged in wrongdoing in the context of shipping the products. It is important to recognize that it is virtually impossible to guarantee the complete absence of LMO products in commodity shipments.

Exporters/importers should only be responsible for releases of LMOs that they cause or negligently permit to happen and that cause significant harm to the conservation and sustainable use of biodiversity. But it is important that government officials from all States understand that exporters and shippers should not be responsible for the intentional or inadvertent misconduct of another party.

For this reason, the standard of liability for LMO shipments of food or feed, whether or not there is to be further processing, must be fault-based. There should be no liability for any party that has not acted intentionally illegally, or been negligent, or failed to exercise reasonable diligence or due care. The exercise of due care and following of best practices should always be a defense against liability claims. There should be no absolute or strict liability, as such a regime would impose unmanageable and unknowable risks on all parties in a global, bulk commodity shipment environment. As noted previously, it is imperative that there be commercial predictability in order for the grain trade to continue to function in a way that ensuring food and feed are available around the world.

VI. THE LIMITS OF LIABILITY

The Scenarios also implicate the question of the limits of when liability may attach under the Protocol. While Article 27 references damage resulting from transboundary movement, the IGTC believes that the actual transboundary movement itself of LMOs is not an appropriate focal point for the international rules and procedures referred to in Article 27 of the Protocol. Rather, such rules and procedures should apply to damage that may occur subsequent to the transboundary movement, and to those parties that are proven to be actually at fault for the damage, such as a domestic user who diverts an LMO shipment for non-food, non-feed or non-processing purposes or who does not exert sufficient care during transportation from discharge to the point of use. It is also important that any actual damage to the conservation and sustainable use of biodiversity meets a legal threshold of significant, rather than de minimus, damage to trigger application of any international rules and procedures developed under the Protocol. Damage under Article 27 should mean damage to biodiversity, or a change in variability among species, where such change is also adverse and significant. Any rules adopted pursuant to the Protocol should be consistent with similar rules and definitions under the Convention on Biological Diversity to avoid any conflicts or divergent interpretations.

With respect the Scenarios and who should be liable if any liability attaches, liability should be channeled to those who are directly at fault, and apportioned among jointly liable parties in relation to their respective levels of responsibility and degrees of fault. Thus, in the various Scenarios described, exporters and transporters who comply with their labeling and other obligations, but do not develop the technology, produce the products, or decide how the products get used when they reach the importing country, should not have liability. They could be partially responsible if they are knowing parties to an improper shipment, or an improper diversion of products, or negligent in connection with an accident that causes a significant adverse change in variability among species. On the other hand, if there is a spill into the ocean, current international and contractual rules would provide for liability, and no new liability or liability regime should be created under the Protocol. Similarly, if there is only "damage" created to a private party because the wrong products have been shipped, then existing legal remedies, including

breach of contract and breach of warranty, should be utilized to compensate the victim. The liability and redress rules under the Protocol should only be used if there is significant species damage.

Regarding the questions involving when remedies may be sought under the Protocol, and in what amounts, the IGTC strongly believes that there should be a statute of limitations requiring actions to be brought within a reasonable amount of time after the event, probably three years from the incident leading to the damage. Domestic legal systems as well as international environmental conventions typically include such statutes of limitation. Such a period promotes vigilance and care by potential claimants, results in fewer evidentiary problems, provides predictability, and enhances the possibility that participants in the trade may find available insurance coverage. There should also be a maximum claim that any person or entity could bring. Such a liability limitation would strike a balance between holding persons responsible for the harm they may cause, and avoiding legal consequences that severely disrupt the trade, deter advances in technology, or otherwise undermine the ability to ship and receive food and grain worldwide. The IGTC believes that the maximum liability under the Protocol should be no more than twice the value of the cargo itself but in any event insurance for damage of this kind is unattainable. Otherwise, the potential liability will be seen as unlimited, and insurance for the shipments will be unattainable. If that were to occur, trade would be severely disrupted, if not halted completely.

VII. THE NATURE OF PROCEEDINGS TO DETERMINE LIABILITY

The Protocol is a treaty among States. Because only States are signatories, disputes arising directly under the Protocol may only involve States that have adopted the treaty. Every State will implement the treaty differently within its own borders. Accordingly, existing legal mechanisms should not be changed under any liability and redress rules adopted within the framework of the Protocol. Private parties may be implicated in legal actions within a State pursuant to the State's statutory law.

To the extent that private parties are implicated in legal actions within a State, an impartial third party is essential in determining liability and redress under a science-based, fault-based liability and redress system. Costs will increase substantially and trade will be disrupted and inhibited if trading partners are forced to defend their actions in numerous countries based on what may turn out to be politically-inspired charges. While the Protocol cannot and should not attempt to create a cause of action against private parties, the IGTC believes that the current system of arbitration utilized among trading partners in international trade should continue to be used. Non-participants in the trade, however, are not subject to arbitration, and should be bound by the dispute resolution rules in their respective countries.

As part of the internationalization of the administration of justice, States have entered into a multiplicity of treaties by which they provide for the recognition in each other's courts of judgments pronounced by other parties to the treaty, and for subsequent enforcement of those judgments. The existing system of reciprocal recognition and enforcement of foreign judgment awards, including award by arbitration (Convention on Recognition and Enforcement of Foreign Arbitral Awards) can be used to enforce judgments rendered by national courts and arbitrators.

The World Trade Organization ("WTO") is an international forum where member governments negotiate and implement trade agreements and settle disputes that arise under those agreements. The WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes establishes a system for the resolution of trade disputes that arise between member governments. This is a forum that could be utilized to resolve government-to-government disputes under the Protocol. However, non-governmental entities are not subject to the jurisdiction of the WTO, and neither the WTO nor any other international body is the proper venue for disputes involving private parties. Such disputes, if they arise, should be resolved through existing legal channels in the involved country, or if they arise between parties to the trade, they should be resolved through the well established arbitration systems under which international trading currently takes place.

VIII. ADDITIONAL COMMENTS

While the IGTC's perspective on the options for liability and redress is well illustrated in the discussion of Scenarios C, D and E of the Annex, the IGTC would like to emphasize and supplement its comments in the following areas:

A. Valuation of damage

With respect to damage valuation, damages recoverable under the Protocol should be limited to a change in variability among species. This is consistent with the scope and authority of the Protocol. Adoption of a more expansive view of the definition of damage would be beyond the scope of the Protocol, potentially subjecting the system of liability and redress to enforcement challenges. The Protocol addresses the conservation and sustainable use of biological diversity, and accordingly the system of liability and redress under the Protocol should be crafted carefully to address damage to biodiversity, including reasonable costs of response actions reasonably taken. For the system to maintain credibility and support among its stakeholders, any particular damage to biodiversity should not be actionable unless it has the following minimum characteristics:

- Objectively and scientifically measurable, i.e., measured against a scientifically established baseline;
- Adverse;
- Significant; and
- Permanent, i.e., not self-correcting over a reasonable period of time.

Liability for any such damage should be reduced to the extent appropriate to provide an incentive to a damaged party to prevent or mitigate any further damage to the biodiversity once the initial damage is discovered or reasonably should have been discovered.

B. Channeling liability to the State

The starting point for channeling liability should be to identify the party who is at fault for causing the damage, regardless of whether the party is an individual, an entity or a government. Liability should rest with the party that commits the negligent act or omission or intentional wrongdoing that proximately causes damage to the conservation and use of biological diversity. Accordingly, for example, if a State fails to comply with a requirement of the Protocol or other legal requirement, and such violation causes, in whole or in part, the damage in question, then the State should be responsible for the damage attributable to its non-compliance. The Protocol could recommend an alternative dispute resolution system from court litigation, such as arbitration or mediation.

C. Mechanisms of financial security

In order to avoid disruption to the international grain trade, which would severely and adversely impact farmers and businesses worldwide, financial security must be available and affordable. At the heart of

any workable system of financial security is the ability to objectively and scientifically calculate the risks for which the financial security is made available. The more complex and subjective the liability structure, the more likely it will be that financial security (at least that provided by third party providers) will be cost-prohibitive, if not unavailable altogether. For this reason, a system of liability and redress under the Protocol must be narrowly tailored to address harms suffered to biodiversity, without unnecessarily complicating the system in a manner that renders the risks to stakeholders, including farmers and businesses worldwide, unknowable and unmanageable. If the risks are very difficult, if not practically impossible, to quantify upfront – perhaps because the nature of the damage is subjective, an adequate baseline for biodiversity is not required, or the damage may self-correct over time – then the potential provider of financial security has no incentive to participate.

D. Choice of instrument

The IGTC believes strongly that serious consideration should be given to the merits of a non-binding instrument. An instrument that is well considered but nevertheless non-binding has the dual advantage of providing meaningful guidelines or best practices for allocating liability and resolving disputes, while also alleviating the pressure of commitment to a system of liability and redress that may not be equipped to address the real life incidents of damage. One challenge inherent in this process is that the system of liability and redress is being created to deal with "what if" situations, or "scenarios," that have not actually occurred; the system is not being established in the context of responding to historic harms to biodiversity. A guideline approach would afford stakeholders of the Protocol to gain some practical experience with the type, variety, and degree of damage suffered by the conservation and sustainable use of biological diversity. An approach that is useful, but non-binding, also has the benefit of maintaining consistency between the BSP and the broader liability process under Article 14 of the Convention on Biological Diversity.
