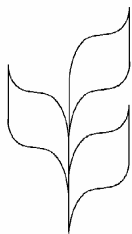




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OPEN-ENDED AD HOC WORKING GROUP OF LEGAL
AND TECHNICAL EXPERTS ON LIABILITY AND
REDRESS IN THE CONTEXT OF THE CARTAGENA
PROTOCOL ON BIOSAFETY

Second meeting

Montreal, 20-24 February 2006

LIABILITY AND REDRESS (ARTICLE 27)

Compilation of submissions on experiences and views on criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Protocol

The Executive Secretary is circulating herewith, for the information of participants in the second Open-ended Working Group of Legal and technical Experts on Liability and Redress in the context of the Cartagena Protocol on Biosafety, the submissions of the Government of the United States of America and the Government of New Zealand on experiences and views on criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Protocol, submitted following a request by the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the context of the Cartagena Protocol on Biosafety, at its first meeting.

* Re-issued to include submission from the Government of New Zealand.

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**SUBMISSION FROM THE UNITED STATES OF
AMERICA (USA)**

[21 NOVEMBER 2005]
[SUBMISSION: ENGLISH]

This is the submission of the United States Government in response to the request found in UNEP/CBD/BS/COP-MOP/2/11, Para. 44.3 which “Invites Parties, other Governments, relevant international organizations and stakeholders to share experiences and submit views on criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Protocol”.

The following criteria would be useful benchmarks for analyzing effectiveness of any rules and procedures to be developed under Article 27:

- ? The type and scope of activities covered are clearly understood.
- ? The scope of damage covered should be clearly defined.
- ? The rules and procedures should be easy to implement.
- ? It should be clear how the rules could be implemented nationally.
- ? They should provide an incentive for actors, including potentially government officials, at every stage of a transboundary movement to act with caution and care.
- ? They should assign liability to the individual who caused harm.

SUBMISSION FROM NEW ZEALAND

Part One – Share experiences

Background – New Zealand’s regulatory and liability regime

New Zealand’s regulatory regime for managing genetically modified (GM) organisms is the main tool for encouraging precaution and avoiding adverse effects. The liability regime reinforces the objective of encouraging precaution.

Managing GM organisms in New Zealand – the regulatory regime

New Zealand has an integrated multidisciplinary framework for managing GM organisms and viable GM foods. The key agency in this framework that regulates GM organisms is the Environmental Risk Management Authority or ‘ERMA’, www.ermanz.govt.nz.

ERMA is a statutory independent decision-making body responsible for protecting the environment and the health and safety of people and communities from the adverse effects of hazardous substances and new organisms.¹ ERMA is required to take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects.

Legislation prohibits all import, research and development, contained field-testing, conditional release or release to the environment of new organisms, including GM organisms, unless approved by ERMA. ERMA must assess the risks and benefits of each case on its merits. This process provides the opportunity for members of the public to make submissions on GM organisms and for hearings to be held on any applications for contained field testing, conditional release or release. There are penalties for breaching the law relating to new organisms, including GM organisms.

Common law liability regime

New Zealand has a common law liability regime – a ‘tort’ system. Legal action can be based on negligence, nuisance, the rule in *Rylands v Fletcher*² and breach of statutory duty. Liability rules generally provide compensation for property damage and certain types of economic loss. In New Zealand, personal injury is compensated via a state accident compensation regime. A victim cannot take legal action where such compensation is available.³

Liability rules for harm that might be caused by GM organisms

¹ ‘New organisms’ includes plants, animals and micro-organisms not found in New Zealand, including GM organisms.

² A common law private nuisance rule which imposes a strict liability standard where a person brings something ‘non-natural’ on to land that is likely to cause harm if it escapes. This means a defendant can be held liable even if they exercised all reasonable care and skill to prevent the escape occurring.

³ Additional information about New Zealand’s accident compensation regime can be found at www.acc.govt.nz, ‘About ACC’.

In 2002, the New Zealand Government gave careful consideration to whether it was necessary to implement a separate liability regime for harm that might be caused by GM organisms or activities.

The Government reviewed the functions of liability rules and considered how effectively those functions were achieved, in relation to harm that might be caused by GM organisms and by comparable non-GM activities.

The Government concluded that:

- Existing liability rules will not always operate effectively to encourage precaution and provide compensation in the GM context.
- These limits on the effectiveness of existing liability rules are not confined to GM, but also apply to a range of other non-GM activities.
 - For example, across the range of harm that might be caused by GM activities, liability rules will sometimes operate effectively and in other cases they will not.
 - The same is true for the range of harm that can be caused by comparable non-GM activities – in some cases liability rules operate effectively and in other cases they do not.
- Devising a new liability regime solely on the basis of a GM/non-GM distinction would, therefore, not be sound in principle.

Reform – introduction of a limited statutory liability regime

The Government noted that some of the functions of liability rules are also performed by regulatory regimes⁴ – eg, encouraging precaution. The effectiveness of the regulatory regime is more critical if liability rules are not always effective. The Government considered it was desirable to encourage greater compliance with the regulatory regime for GM and other new organisms (and therefore greater precaution).

In 2003, the Government introduced legislation⁵ to establish:

- A strict civil liability regime, available to victims for harm caused by activities in breach of the regulatory regime for new organisms (including GM organisms). This means that victims of such harm do not have to prove that the injurer was negligent.
- A civil penalty regime, whereby the State can take proceedings against persons breaching the regulatory regime, regardless of whether harm is caused. The maximum penalties are set at levels that create incentives to comply with the regime (for body corporates, the greater of \$10 million, 3

⁴ New Zealand's regulatory regime is described above.

⁵ Amendments were made to the Hazardous Substances and New Organisms Act 1996. The new provisions are sections 124A – 124I of the HSNO Act. This Act can be viewed at www.legislation.govt.nz.

times the commercial gain from the breach, or if the commercial gain cannot be ascertained, 10% of the body corporate's turnover).

New Zealand's current regulatory/liability regime

New Zealand's regulatory *and* liability regimes work together to promote precaution in the use of GM organisms. The regulatory regime is considered the most effective way of promoting precaution and the liability regime supports the regulatory regime. The liability regime for harm that might be caused by GM organisms comprises:

- Common law liability rules (as described above); and
- Statutory strict civil liability for harm caused by activities involving GM and other new organisms in breach of the regulatory regime (as described above).

Application of New Zealand's liability regime in cross-border cases

If a transboundary movement of a Living Modified Organism (LMO) causes damage in New Zealand, the victim of that damage has several options. The victim could potentially take legal action in New Zealand or in another jurisdiction that is the *forum conveniens*⁶ and has jurisdiction over the dispute.

The effectiveness of such legal action will depend on whether any resulting judgment can be enforced in a jurisdiction where the defendant has assets.

(i) Person/organisation responsible for the LMO causing damage has assets in New Zealand

If the person/organisation responsible for the LMO causing damage has assets in New Zealand, it is likely that legal action could be taken in New Zealand (under either the common law or statutory regime described above) and any resulting judgment could be enforced.

(ii) Person/organisation responsible for the LMO causing damage does not have assets in New Zealand

If the person/organisation responsible for the LMO does not have assets in New Zealand, legal action could either be taken in New Zealand or in a jurisdiction where the person/organisation has assets (if that jurisdiction is *forum conveniens* and has jurisdiction over the dispute).

If legal action is taken in New Zealand and a judgment is obtained, the victim will need to seek enforcement of that judgment in a jurisdiction where the person/organisation has assets. Whether or not the New Zealand judgment is enforceable in that jurisdiction will depend on the law of that jurisdiction. Typically, money judgments are enforceable between Commonwealth countries.

⁶ *Forum conveniens* – The New Zealand test for *forum conveniens* is the court in which the matter should most appropriately be tried, in the interests of the parties and for the ends of justice (the test from *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460). Other jurisdictions may apply a different test.

The ability to take legal action in another jurisdiction will depend on the law of the other jurisdiction. That jurisdiction will also determine whether its own law or New Zealand law will apply to the case.

Part Two – Criteria for assessing the effectiveness of rules and procedures referred to in Article 27

There must be a robust basis for introducing a new liability regime. Both the status quo and any proposed new regime should be assessed for their effectiveness according to agreed criteria.

Functions of liability rules

The main objectives of liability rules are to encourage *precaution*, provide compensation for harm, and remediate damage. Imposing an obligation on those engaging in an activity to pay for harm caused provides incentives to reduce the risk of harm, provided it is cheaper to do so than pay for the expected cost of the harm. The ability of a person harmed to claim damages (compensation) underpins and reinforces the precaution objective. The incentives for potential injurers to take precautions are reduced if they are not likely to bear the full cost of the harm they cause.

Liability rules only provide compensation for personal injury, property damage and certain forms of economic loss. They are generally not capable of addressing harm that cannot be easily quantified or compensated in monetary terms. It is generally accepted that, even in theory, there is no perfect liability regime that will work well in every situation to encourage precaution and provide compensation.

Liability regimes and regulatory regimes are therefore complementary in terms of encouraging precaution and providing compensation. Article 27 of the Protocol should not be seen in isolation from the rest of the Protocol which encourages taking precaution.

Criteria for assessing the effectiveness of liability rules

For liability rules to work well, it is important that persons suffering harm bring a claim to recover the cost of that harm and that the claim is likely to be successful, with the injurer meeting the costs of harm.

The following table sets out criteria to assess the effectiveness of liability rules. These criteria indicate when liability rules are likely to work well, and when they are not.

<i>Liability rules will be effective where:</i>	<i>Liability rules will be less effective where:</i>
The harm is to a few individuals (localised)	The damage affects many individuals or the environment generally (diffuse)
It is easy to identify the injurer	It is difficult to identify the injurer
It is easy to establish causation	It is difficult to establish causation
The loss is easy to quantify	The loss is difficult to quantify
The harm is foreseeable	The harm is not foreseeable
The injurer can pay for cost of harm	The injurer cannot pay for cost of harm
There is no time lag between act and harm	There is a time lag between act and harm
The likely outcome of the claim is clear	The likely outcome of the claim is uncertain
Costs of pursuing the claim are modest	Costs of pursuing the claim are high

In the cross-border context, liability rules will also be effective where the rules of private international law allow legal action to be taken and resulting judgments can be enforced and less effective where these elements do not exist.

Comments

We consider it is important to demonstrate a need for new liability rules for harm caused by the transboundary movement of LMOs, before introducing a new international liability regime under Article 27. The relevant question to ask is whether existing liability rules and rules of private international law are less likely to work effectively in the context of LMOs than in other contexts? This question should be asked of each party's domestic liability regime, taking into account avenues of redress available to parties through existing international law, in particular private international law.

The criteria set out above can be used to assess whether there are specific issues relating to the effectiveness of liability rules in the LMO context that justify a specific liability regime under the Biosafety Protocol. If a regime is justified, these criteria can then be used to evaluate the effectiveness of proposals.

We have set out in the Appendix a model for using these criteria to assess the effectiveness of liability rules in the context of transboundary movements of LMOs. Some of the concepts used in these criteria are the legal tests that would be applied by the courts when legal action is taken. In New Zealand, the legal tests for causation and foreseeability are:

- *Causation* – Whether the plaintiff would have suffered the loss “but-for” the defendant’s wrongdoing. If the loss would have arisen even without the particular defendant’s wrongdoing, normally it does not give rise to legal liability.
- *Foreseeability* – Unless liability is strict, liability will be limited to the foreseeable consequences of the defendant’s wrongdoing. That is, whether a reasonable defendant would foresee that their act would cause the type of damage that occurs to the plaintiff.

The model demonstrates that, for a range of activities involving LMOs, liability rules are no more or less effective than for comparable activities involving non-LMOs.

International context – other international liability regimes

New Zealand has supported the development of international liability regimes, in contexts where existing liability rules are not effective or the existence of any rules is unclear.

The recently negotiated liability annex to the Protocol on Environmental Protection to the Antarctica Treaty illustrates a situation where relying on existing liability rules is unlikely to be effective, for a number of reasons – for example:

- Antarctica is a unique environment which needs to be preserved:
 - Any harm caused would be to the environment generally, rather than to few individuals.
 - The loss from such harm would be difficult, if impossible, to quantify.

- The claims to territory in Antarctica, including New Zealand's claim to the Ross Dependency, are not recognised by many States. If harm occurred, there would be complex arguments regarding jurisdiction and choice of law. In addition to the complexity and delay arising from such uncertainty:
 - The likely outcome of any claim would be unclear.
 - The costs of pursuing the claim would be high.

Appendix – Model for assessing the effectiveness of liability rules

Key factors for liability rules	LMO plant – commercial growing	Non-LMO plant – commercial growing	LMO virus – contained laboratory use	Non-LMO virus – contained laboratory use
	<i>Eg. A plant is made tolerant to a specific herbicide by GM overseas, and released for large-scale growing by many growers in an importing country after receiving advance informed consent under the Biosafety Protocol (including approval under any regime in the importing country). The herbicide-tolerant trait gets transferred to a weedy relative. Over many years the weedy relative becomes widespread and excludes native plants because there are no alternative herbicides to control it.</i>	<i>Eg. A plant is made tolerant to a specific herbicide by chemical mutagenesis overseas, and released for large-scale growing by many growers in an importing country. The herbicide-tolerant trait gets transferred to a weedy relative and over many years the weedy relative becomes widespread and excludes native plants because there are no alternative herbicides to control it.</i>	<i>Eg. An exotic virus is made infectious to a range of animals by GM overseas for research into how it works. The virus is transferred to a laboratory in an importing country after receiving any required approval under the importing country's regime. The virus escapes from the laboratory affecting many animals on a single farm beside the laboratory.</i>	<i>Eg. An exotic virus that is highly infectious to animals is transferred to a laboratory in an importing country, after receiving any required approval under the importing country's regime. The virus escapes from the laboratory affecting many animals on a single farm beside the laboratory.</i>
Harm localised or diffuse	Diffuse	Diffuse	Localised	Localised
Easy to identify injurer	No	No	Yes	Yes
Easy to establish causation	No	No	Usually	Usually
Easy to quantify loss	No	No	Yes	Yes
Harm is foreseeable	No	No	Yes	Yes
Injurer likely to have capacity to pay	Depends	Depends	Yes	Yes
Time lag between act and harm	Long (years)	Long (years)	Short (days)	Short (days)
Conclusion	Liability rules unlikely to work well	Liability rules unlikely to work well	Liability rules likely to work well	Liability rules likely to work well