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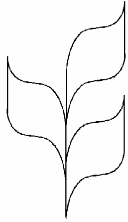

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WORKSHOP ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY
Rome, 2–4 December 2002

REPORT OF THE WORKSHOP ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY

INTRODUCTION

A. Background

1. The Workshop on Liability and Redress in the Context of the Cartagena Protocol on Biosafety was held in Rome from 2 to 4 December 2002. The Workshop was organized by the Government of Italy, with additional financial support from the European Community, in response to the invitations of the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP) at its second and third meetings for Parties to the Convention to organize workshops on liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs), as soon as possible but before the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol (recommendations 2/1 and 3/1).

2. In accordance with the established practice, the Executive Secretary requested Parties to nominate suitably qualified experts to be considered for selection as participants at the workshop. On the basis of the nominations received, the Executive Secretary, in consultation with the ICCP Bureau selected participants for the workshop taking into consideration the following criteria:

(a) Advice from the sponsors on funds available to cover the costs of supporting experts from developing countries and countries with economies in transition (maximum of 23 experts);

(b) Equitable geographical/regional representation;

(c) Priority for experts from Governments that had ratified the Protocol;

(d) Knowledge and expertise in one or more of the issues that the Workshop intended to address; and

(e) Representation of relevant organizations and other stakeholders.

3. Representatives of competent intergovernmental and non-governmental organizations, as well as stakeholders, were invited to participate.

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4. Accordingly, the Workshop was attended by experts nominated by the Governments of the following countries: Argentina, Australia, Austria, Brazil, Canada, China, Colombia, Costa Rica, Cuba, Czech Republic, Denmark, Estonia, Ethiopia, European Community, France, Greece, India, Italy, Latvia, Mauritius, Mexico, Mozambique, Netherlands, Norway, Pakistan, Poland, Russian Federation, Slovenia, Spain, Sweden, Switzerland, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Vanuatu, Venezuela, Viet Nam.

5. Observers from the following Governments also attended: Belgium, Germany, Iran (Islamic Republic of), Republic of Korea.

6. Experts from the following intergovernmental and non-governmental organizations participated in the Workshop:

(a) *Intergovernmental organizations*: Food and Agriculture Organization of the United Nations (FAO), Office International des Epizooties, Permanent Court of Arbitration, Secretariat of the Stockholm Convention on Persistent Organic Pollutants, United Nations Environment Programme (UNEP);

(b) *Non-governmental organizations*: Erasmus University, Global Industry Coalition, Greenpeace International, Solagral, Third World Network.

ITEM 1. OPENING OF THE MEETING

7. The Workshop was opened at 10 a.m. on 2 December 2002 by Ms. Patrizia De Angelis, Head of Division in the Ministry for the Environment and Territory, who welcomed the participants to Italy and said that she was very pleased to see so many delegates, bringing such a wide variety of experience in the field of liability and redress. The process called for under Article 27 of the Cartagena Protocol on Biosafety was a very important one, and she hoped that the workshop would make a significant contribution to it, since Italy, through its Ministry of the Environment and Territory, was very committed to the protection of the environment. In conclusion, she expressed the hope that in addition to successful deliberations, the delegates would also have time to enjoy the beautiful city of Rome.

8. Speaking on behalf of the Executive Secretary of the Secretariat of the Convention on Biological Diversity, Ms. Xueman Wang welcomed the participants to the Workshop, thanking the Government of Italy for its hospitality and the European Community for its additional financial assistance. She said she was pleased to see the wide interest of Governments in the issues of liability and redress for transboundary damage caused by living modified organisms Owing to space and financial constraints, it had not been possible to accommodate all who had wished to attend. It was hoped that in future it would be possible to include more participants. She recalled that the ICCP had invited Governments to organize workshops in order to increase mutual understanding of the issues of liability and redress. The current Workshop was just one step on the long journey to fulfil the requirements of Article 27 of the Protocol, and was intended to be a brainstorming meeting.

9. She noted that 50 ratifications were needed for the Protocol to enter into force and given the current rate of ratification it was hoped that the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol would possibly take place in 2003. She encouraged the participants to urge their Governments to complete the ratification process, which would demonstrate countries' commitment to the overriding goal of sustainable development.

ITEM 2. ORGANIZATIONAL MATTERS

2.1. Election of officers

10. At the opening meeting of the Workshop, participants elected Mr. Rene Lefeber (Netherlands) as Chair, Ms. Jimena Nieto (Colombia) as Vice-Chair and Mr. Martin Batic (Slovenia) as Rapporteur.

2.2. Adoption of the agenda

11. Also at the opening meeting, the Workshop adopted the following agenda on the basis of the provisional agenda (UNEP/CBD/BS/WS-L&R/1/1) prepared by the Executive Secretary:

1. Opening of the meeting.

2. Organizational matters:

   2.1. Election of officers;

   2.2. Adoption of the agenda;

   2.3. Organization of work.

3. Review of existing legislation in the field of liability and redress for damage resulting from transboundary movements of living modified organisms and relevant international law on liability and redress.

4. Consideration of issues on liability and redress pursuant to Article 27 of the Protocol.

5. Other matters.

6. Adoption of the report.

7. Closure of the meeting.

2.3. Organization of work

12. At the opening session of the Workshop, participants adopted the organization of work proposed by the Executive Secretary in annex I to the annotated provisional agenda (UNEP/CBD/BS/WS-L&R/1/1/Add.1).

ITEM 3: REVIEW OF EXISTING LEGISLATION IN THE FIELD OF LIABILITY AND REDRESS FOR DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS AND RELEVANT INTERNATIONAL LAW ON LIABILITY AND REDRESS

13. Agenda item 3 was taken up at the 1st meeting of the Workshop, and continued at the 2nd meeting, both on 2 December 2002. At the suggestion of the Chair, participants considered the item in two clusters, the first based on presentations on international law instruments in the field of liability and redress, the second based on presentations relating to similar instruments at regional or domestic level.

14. Mr. Juerg Bally (Switzerland), speaking on his capacity as the Vice-Chair of the Intergovernmental Working Group on Civil Liability under the United Nations Economic Commission for Europe, gave a presentation on the proposed legally binding instrument on civil liability for transboundary damage caused by hazardous activities within the scope of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Convention on the Transboundary Effects of Industrial Accidents. He explained that the proposed instrument was tailored to a very specific set of circumstances. It had arisen out of an industrial accident in Romania, which in addition to causing environmental damage in that country had also caused similar damage in Hungary and Yugoslavia, which, however, had not yet been compensated. The instrument was being developed using an "interface approach," in that it was based on accidents that would fall within the scope of the two existing conventions. It stipulated specific levels of pollutants that constituted "an industrial accident," using the limits that were already established by those two conventions. It thus laid down a minimum standard, but countries were free to set higher limits in their own domestic legislation, which would then be enforced under international private law. It was intended that the instrument would entail strict liability, would set financial limits, and would call for financial securities, in the form of compulsory insurance. The instrument was still in the negotiation process, with a number of questions still to be resolved.

15. Mr. Matthew Gubb (Secretariat of the Stockholm Convention on Persistent Organic Pollutants) gave a presentation on the context, process and issues associated with the consideration of liability and redress under that Convention. While there had been no consensus among negotiators as to the need for a liability regime relating to persistent organic pollutants (POPs), the Conference of Plenipotentiaries that adopted the Convention had recognized that the issue warranted further consideration. At its first meeting, the future Conference of the Parties would decide on any further action on the matter, taking into account the report of a workshop held in Vienna in September 2002. Some participants had felt that a POPs liability regime would fill a legal gap, usefully complement the Stockholm Convention, and deter irresponsible behaviour. They were therefore in favour of an international regime on liability and redress. Others, however, felt that such a regime would not be appropriate or feasible, mainly owing to the legal and technical difficulties in channelling liability in the case of damage caused by POPs, given the long-range dispersal of POPs over a very long time.

16. Ms. Amy Hindman (UNEP) gave a presentation on an examination carried out by UNEP of a wide range of environmental liability regimes. The study had initially resulted in a very detailed background paper, and then in a meeting of experts on liability and compensation for environmental damage, held in Geneva in May 2002. The experts had identified a number of "soft laws" addressing issues relating to liability and compensation, as well as a number of regional, global and national "hard laws". They had also noted that many liability regimes had not entered into force, and had set out to examine which ones were in operation, and the reasons for that. Among the important factors which would determine whether or not a liability regime would be successful, the experts had identified the intended purpose of the liability regime, i.e. to provide a remedy and/or to deter irresponsible conduct; the nature and scope of liability; the issues of financial assurance and supplemental compensation; and the procedure for resolving claims. The experts identified four recommendations for UNEP to evaluate and assess as to their desirability and viability: development of guidelines and best practices; capacity-building programmes; promote research to bring about continued improvement and implementation of liability regimes; develop a new international agreement or agreements on environmental liability and compensation. UNEP was currently evaluating these recommendations, and it was expected that there would be a further meeting of experts early in 2003.

17. More information was sought regarding why some liability regimes had been successful and which had not. It was indicated by some experts that the successful ones had in common the fact that they related to activities of major economic significance, which meant that there was a body of opinion in

favour of making them function adequately. On the other hand, those with a broader, more diffuse, focus had been much less successful.

18. The second cluster of presentations was related to regional or domestic legislation. The European Commission gave a presentation on a Commission proposal for a directive currently being discussed within the European Community on environmental liability with regard to the prevention and remedying of environmental damage. Consideration of the topic had a lengthy history, going back at least to a 1993 Parliamentary resolution. The aim of the directive was not only to apply the polluter-pays principle in an effective manner, but also and primarily to prevent environmental damage from occurring in the first place. The underlying principle was that the operator should bear the cost of prevention and of any remedial measures to be taken and that the individual member State would compel the operator to do so. The directive related to the public law relationship between the competent authorities in European Union member States and operators of occupational activities, but did not give private parties the right to seek compensation. Additionally, its scope was restricted to species and habitats that were already protected under European Community legislation or under national legislation prepared pursuant to it. In addition to a strict liability regime for environmental damage for specified activities, it also includes a fault-based liability regime for damage to biodiversity caused by non-hazardous activities. It allowed a number of defences, such as the "state-of-the-art defence," under which a past environmental action could not be held to entail liability if it had not been considered harmful at the time it had taken place. Where the operator was not liable, or did not take preventive and remedial measures, the draft directive would compel the competent authority to take any necessary preventive and remedial measures. In such a case, the costs should be recovered from the operator. There was no time limit on liability. The directive did not provide for compulsory financial security, but encouraged the development of appropriate insurance instruments. There was nothing to prevent member States from taking measures stricter than those in the draft directive. Additionally, it was envisaged that failure to take action by the relevant public authority would be reviewable by an independent court or other independent and competent public body, following a request by persons adversely affected or likely to be adversely affected.

19. Mr. Bally (Switzerland) gave a presentation on the Swiss law on genetic engineering. The law made a distinction between contained use and release into the environment, whether for experimental purposes or for marketing of a product. In the event of damage arising out of contained use or experimental release, strict liability applied to the permit-holder. In the event of damage arising out of release for marketing purposes, strict liability applied to the permit-holder if the victim was a farmer or a consumer of a farmer's product. He also explained that a defect in a product fell under the traditional law on liability for consumer products. Liability was unlimited, the time-limit was three years after knowledge of the damage, and the absolute time limit was 30 years.

20. Ms. Anne Daniel (Canada) gave a presentation on the Canadian legal system for liability and redress. She stressed that whatever might, or might not, come out of the negotiations relating to Article 27, it was important to remember that countries could still make appropriate arrangements within their own domestic control. In Canada, a federal State, environmental matters were regulated both by the provincial and the federal levels of government, as well as by municipalities, and by certain aboriginal self-governments. Canada was mainly a common-law country, with a civil-law system in Quebec, with the result that redress was controlled by court judgements, not by statute. The Canadian Environmental Protection Act (CEPA) served as a legislative framework through which Canada implemented a number of international treaties, covering various environmental aspects: chemicals, living modified organisms, and so on. Under CEPA, a number of civil remedies had been provided, which augmented the common law. In addition, a wide range of sentencing options, including those of a quasi-civil nature, were available to judges in cases where there had been convictions for violations of CEPA, such as directing the offender to pay an amount to environmental groups for their work in the community. Some of those ideas might be of interest to those currently developing national biosafety frameworks. For example,

Canada had an Environmental Damage Fund, to which fines levied could be allocated. While the emphasis was on prevention of environmental damage, there were also strong sanctions for punishing those who nevertheless caused such damage.

21. The experts from Australia, Norway, Poland, Uganda and the United Kingdom also gave general descriptions of their domestic legislation in the area of liability and redress.

ITEM 4. CONSIDERATION OF ISSUES ON LIABILITY AND REDRESS PURSUANT TO ARTICLE 27 OF THE PROTOCOL

22. Agenda item 4 was taken up at the 2nd meeting of the Workshop, on 2 December 2002, and continued at the 3rd and 4th, on 3 December. Introducing the item, the Secretariat drew the attention of participants to a note by the Executive Secretary (UNEP/CBD/BS/WS-L&R/1/2) that had been prepared to help identify the activities and the main elements to be covered in the context of Article 27 of the Protocol. The Chair said that he hoped to hear a general debate on the issues identified in that document, as well as any other issues the participants might wish to raise. He pointed out also that the Workshop was intended as a brainstorming session unconstrained by political considerations, and the results of the discussions would be submitted to the Executive Secretary, who would make them available as an information document.

23. The Chair invited participants to give general thoughts on the issues identified in the Secretariat's paper and indicate the main topics that they wished to discuss at the Workshop. Many participants praised the documentation prepared by the Secretariat and considered it to be a good basis for the examination of the issues before the meeting. It was pointed out that since the current Workshop was a good opportunity for discussion unconstrained by political instruction, participants should make every effort to think of innovative ideas and approaches.

24. It was felt that the opportunity should be seized to tackle the most significant issues, including:

(a) Understanding of Article 27 of the Protocol;

(b) Types of activities or scenarios for damage that might be covered by Article 27 of the Protocol;

(c) Objectives and functions of liability rules and procedures for damage resulting from transboundary movements of living modified organisms;

(d) Definition of damage;

(e) Channelling liability, including State liability;

(f) Financial security and funds;

(g) Forms of any instrument that might result from the process under Article 27 of the Protocol.

25. In addition, it was suggested that one topic for discussion was a precise definition of the type of living modified organisms that needed to be considered, since at present the concept was too general and insufficiently defined.

26. Views were expressed that a useful starting point would be to examine the unsuccessful liability regimes, and the reasons for their lack of success. It was suggested that the more specific the approach taken, the greater was the chance of success.

27. Some experts indicated that the discussion needed to concentrate on what it was about the issues that made an international regime necessary at all, and why they could not be covered by domestic law. An issue to be resolved was that of where to draw the line between matters to be resolved at the international level and those that could be handled under domestic law.

28. It was emphasized that more attention should be given to capacity-building in connection with liability rules and procedures.

Understanding of Article 27 of the Protocol

29. The Chair invited participants to give their initial thoughts about the scope of Article 27 of the Protocol, in particular with respect to the term "damage resulting from transboundary movements of living modified organisms".

30. The view was expressed that Article 27 left all options open and that the sole role of the workshop was to examine all the options in depth, and consider all the issues, for the subsequent information of the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol.

31. It was also stated that Article 27 should be understood in a broad context, which should take into account not only transport of LMOs, but also other activities under the Protocol, in particular transit, handling and use of LMOs that also fall under the scope of the Protocol (Article 4). It was further indicated that the effects of LMOs might be observed only over a potentially long period. Damage might therefore manifest itself well after the completion of a specific shipment and well after the introduction of the LMO into the environment. However, it was also pointed out that Article 27 refers only to the transboundary movements of LMOs, implying the transport from one point to another.

32. Apart from the possible interpretation of the term of "damage resulting from transboundary movements of living modified organisms" by the Conference of the Parties serving as the meeting of the Parties to the Protocol, it was noted that even a narrow interpretation of this phrase did not prevent the the Conference of the Parties serving as the meeting of the Parties to the Protocol from broadening the scope of Article 27. There was some discussion on whether Article 27 was a floor or a ceiling, which would be a political and/or a legal issue to be resolved by the Conference of the Parties serving as the meeting of the Parties to the Protocol.

Types of activities or scenarios for damage that might be covered by Article 27 of the Protocol

33. The Chair tabled scenarios or activities that may be covered by Article 27 of the Protocol contained in the annex to the present report. He indicated that the scenarios identified in the annex were for purpose of discussion and therefore based on broad interpretation of Article 27 of the Protocol and that they were not exhaustive. He noted that the scenarios could be used as tools to guide participants to elaborate substantive issues relating to Article 27.

34. The view was expressed that a fundamental question was whether the transboundary movement of living modified organisms giving rise to the damage was intentional or unintentional. Depending on that difference, different aspects arose in a possible liability system.

35. Regarding the question on the catastrophe that could be caused by living modified organisms, a distinction was drawn among a nuclear catastrophe, in which the consequences would be present for a long time; a major oil spill, in which the pollution faded away after a few years, leaving no trace; and the sort of catastrophe in which a release of living modified organisms caused a species to become extinct, which by definition was forever. Such extinction may also occur in the case of nuclear and oil pollution. Once genetically modified organisms cross-bred with conventional organisms, the effects were irreversible. However, there were different views on this question.

36. The view was expressed that there were no parallels between a biosafety-related catastrophe and a more conventional disaster such as a nuclear accident or an oil spill, since the effects of a release of living modified organisms could not be identified. In fact, it was also suggested, there was no need to define a particular catastrophe or damage in order to establish a liability regime. On the contrary, the liability regime should be defined independently of any catastrophe or damage that might, or might not, occurs. However, it was stated that a definition of damage or a catastrophe was needed and had to be rooted in the contemporary scientific and legal context.

37. It was stated that a liability and redress regime should be developed on a proactive basis, not in response to any incidents. In this context, experts were reminded of the objective of the Protocol, in particular precautionary approach referred to in the Protocol.

38. The view was expressed that the scenarios did not only cover damage to biodiversity, but also economic harm to farmers. Such economic harm was dealt with elsewhere, but lay completely outside the scope of the Convention or the Protocol (except, peripherally, as Article 26 related to socio-economic considerations).

Functions and objectives of liability rules for damage resulting from transboundary movements of living modified organisms

39. The view was expressed that the primary focus of any liability regime should be reparation of damage. In addition, prevention of damage was also identified as one of the objectives of any liability regime. Promoting acceptance by the public of the industry involved in the transboundary movement of LMOs could also be an important function.

40. However, doubts were expressed as to whether prevention could be achieved through a liability regime. It was not clear to what extent a liability regime would have a preventive effect. It might well have a deterrent effect, but a preventive effect was not as clear. Liability regimes were what came into force once prevention had failed. In this context, it was suggested that different mechanisms could be used or developed for the purpose of prevention.

41. Additionally, it was said whereas preventive measures in the event of a conventional accident such as an oil spill were easy to understand, the concept of preventive measures in the context of a release of living modified organisms was less easy to grasp.

42. Having regard to the object and purpose of the Protocol, it was also noted that a liability and redress regime should not be so strict as to prevent the intentional transboundary movements of LMOs.

43. It was further noted that a liability regime might also have a corrective function in relation to illegal transboundary movements of LMOs.

Definition of damage

44. It was suggested that a broad definition of damage should be adopted, which would include not only damage to biodiversity, but also cover other aspects, such as economic loss, damage to human health, and socio-economic damage.

45. It was pointed out that in addition to ecological damage, a release of genetically modified organisms could also cause commercial loss, as in the case of an organic farmer whose harvest became contaminated by genetically modified seeds.

46. Regarding socio-economic damage, it was pointed out the Protocol specifically allowed for coverage of that type of damage. For example, the survival of an indigenous population, or of peoples in a developing country in general, might be linked to a particular species at risk from living modified organisms. It was indicated, however, that inclusion of this type of damage might not be appropriate.

47. The view was expressed that the Protocol referred to conservation and sustainable use of biodiversity as well as to human health and that damage to human health would be understood as resulting from damage to biodiversity.

48. It was also suggested that damage to biodiversity could happen only where there was a centre of origin of a species. It was indicated that once it became known that a living modified organism had contaminated a natural ecosystem, in some cases it was quite a simple matter to eradicate the genetically modified crops or plants before damage to biodiversity would occur. It was suggested that it would be necessary to map the centres of origin, while at the same time it was also indicated that damage to biodiversity should not be limited to centres of origin, especially concerning animals and micro-organisms.

49. Regarding the redress for damage to biodiversity, ex-post preventive measures or restoration could be undertaken. Yet when damage was irreversible, it was indicated that equivalent measures or compensation could be envisaged.

50. Damage to conservation of biodiversity and to its sustainable use was extremely difficult to quantify and not all changes to biodiversity would give rise to liability. The establishment of a threshold for damage might be necessary. The scenarios in the annex to the present report could cover a wide range of matters, including living modified organisms intended for direct use for food or feed, or for processing, which were lightly regulated in the Protocol, but not necessarily covered in a liability regime under the Protocol.

51. The view was also expressed that damage to biodiversity was not necessarily the same as damage to the environment. Also, the definition of "damage" for the purposes of Article 27 was one issue, and the definition of what damage was to be covered by any liability regime yet to be developed was a quite different one. It was suggested that it should not be automatically assumed that because the issue of damage might be discussed in the context of Article 27, that automatically meant that such damage would be covered by a liability regime.

52. It was suggested more scientific understanding was needed on the adverse effects on the conservation of biodiversity and the sustainable use of biodiversity, and on whether a simple change actually constituted damage.

53. It was also noted that the notion of adverse effects should be linked to prior conservation status which could be evaluated on the basis of technical information such as population statistics and distribution range.

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Channelling liability, including State liability

54. The view was expressed that liability should be channelled to exporting states, pointing to the lack of trust between exporting and importing States, the need to protect the poor, and the objective of the Protocol which is to foster transboundary movement of living modified organisms between states. According to another view, liability should be channelled to the person who is responsible for the transboundary movement of a living modified organism, at least on a primary basis alluding to the option of residual State liability.

55. The view was expressed that the decision to channel liability to a particular person presupposes the imposition of non-fault based liability as the standard of liability. In this respect, it was mentioned that users further down the chain from producers or exporters should be subject to different standards of liability (fault-based or strict).

56. It was stated that strict liability was not appropriate for all types of LMOs and also that Article 27 did not necessarily dictate a strict-liability regime.

57. As for channelling of liability to the person responsible for the transboundary movement of a living modified organism, the view was expressed that channelling should be guided by the objective of a liability and redress regime. If the function was prevention of damage, liability should be channelled to the person who was in the best position to prevent damage. If that function is reparation of damage, liability should be channelled to a person easily identifiable and financially capable of covering the damage. In this respect, promoting acceptance by the public of the industry involved in the transboundary movement of living modified organisms could also be a decisive factor in channelling liability. In the case of illegal transboundary movements of living modified organisms, it should be the illegal trafficker who should bear the liability.

58. The view was also expressed that the authorization of an import of transboundary living modified organisms was based on a risk-assessment in the importing State and that therefore liability should not be channelled to the exporter or exporting State. According to another view, the authorization of an import and the channelling of liability were different matters that should not be mixed. In that respect, reference was also made to the submission of incorrect or incomplete information to the importing State.

Financial security and funds

59. Several experts explained that in their countries applicants for a permit to import or export living modified organisms had to establish financial security in the form of a bond, bank guarantee, insurance policy or similar instrument. Although the view was expressed that the establishment of compulsory financial security under a liability and redress was a necessity for such a regime to be effective, other participants mentioned a number of difficulties, including the insurability of the risk, the availability of insurance, the price of alternatives to insurance, and the burden of ensuring compliance with the requirement to establish financial security.

60. The view was also expressed that financial security might not be appropriate as discussion of it generally led to the limitation of such security (capping) while mechanisms other than financial security might also be envisaged, such as direct restoration of the damage by the person responsible for it.

61. It was noted that in many negotiations on liability instruments, the question of the introduction of compulsory financial security in a liability and redress regime was left open to the last minute, and established in a rush. If the process under Article 27 would move in this direction, precise technical and financial information would be needed in early stage of the process.

62. As for the establishment of a fund, various views were expressed: that it could be complementary to or an alternative to the introduction of compulsory financial security in a liability and redress regime; that a fund alone, unsupported by a liability and redress regime, would be meaningless; that the preventive function of a liability and redress regime would be lost if liability would be channelled to the fund rather than to a person involved in the transboundary movement of living modified organisms; and that it would not make sense to force the biotechnology industry to pay in advance for damage that might never occur. A number of difficulties were noted in relation to the establishment of a fund, including the different functions of financial securities and funds, differences in pricing between financial securities and contributions to a fund, the identification of contributors to a fund, and the willingness of the biotechnology industry to contribute to a fund in the absence of a history of numerous and expensive accidents.

63. As for possible contributors to the fund, the view was expressed that the producer, and the State in which the producer was situated, should contribute to the fund. Another view mentioned that the contributions to a fund could be made on a compulsory or a voluntary basis, and that further discussion would be necessary on this issue. As for the eligibility to make applications to the fund, it was mentioned that such eligibility might be limited to developing countries and economies and transition.

64. Several views were expressed with respect to possible situations and activities in which a fund could be of assistance, including:

(a) Emergencies, in which respect it was noted that emergency relief should be provided before lengthy and cumbersome legal procedures are completed and also that payments from the fund could be recovered from the person liable under a liability and redress regime;

(b) Situations where the liable person cannot be identified or is exempted from liability;

(c) Implementation of capacity-building programs in the field of risk-assessment as well as liability and redress.

Forms of any instrument from Article 27 of the Protocol

65. The Chair invited participants to consider this sub-item at the 5th meeting of the Workshop, noting they had already provided a wide range of views on the topic. He said that, at one end of the range had been the zero option, which he understood to mean that liability and redress were adequately covered elsewhere in international and/or domestic regulatory frameworks. At the other end of the range, several experts had expressed strong support for a legally binding instrument, although three main reservations had been expressed about it: the time it would take to negotiate, the additional time that would elapse before its entry into force, and the likelihood that not all Parties would subscribe to it. Between those two extremes, some experts had said that the outcome should be a non-legally binding instrument, in the form of guidelines, recommendations, or a self-enforcing mechanism. Participants were invited to address the issue in combination with possible building-blocks for a liability and redress regime.

66. The view was expressed that more technical information was needed, on aspects other than the legal one: causation, burden of proof, identification of specific living modified organisms that had caused damage, what “damage” actually meant, what “conservation and sustainable use” actually meant, and so on.

67. In recalling the history of the negotiations, it was noted that some countries had wished for a complete legally binding instrument as an integral part of the Protocol, but because of time constraints and other pressures they had finally agreed on an enabling clause, namely Article 27. However, it was indicated that the choice of the final outcome was a political decision, and that it was the duty of the

workshop to provide the best possible information to the Conference of the Parties serving as the meeting of the Parties to the Protocol.

68. It was felt that as the current Workshop was a forum for discussion, not for negotiation, participants had an obligation to examine all the options, not taking anything off the table. Since one idea on the table was that of a fully-fledged legal instrument on liability, and since so many international liability regimes had failed (the two notable exceptions being those covering oil pollution and nuclear accidents), there was a need to ascertain why a liability regime in the context of Article 27 would work. It was pointed out that a key feature of those regimes that did work was that they were very specifically focused.

69. It was suggested that a best-practices approach could be adopted in order to make suggestions to help those countries that were developing a biosafety regime for the first time.

70. In support of the call for a legally binding instrument, it was pointed out that such an instrument would allow for the introduction of a uniform system would be introduced, rather than one relying on varying domestic regimes. In any event, non-binding instruments were not usually observed.

71. It was indicated that certain transboundary aspects necessarily dictated the need for a legally binding instrument. In particular, while liability could be channelled to the importer or the importing state under national law, a binding international instrument would be needed if it was intended to channel the liability to anyone else, outside the jurisdiction where the damage occurred.

72. It was stated that guidelines could not be developed in the absence of a legally binding instrument, because the whole purpose of guidelines was to give information on how to implement a legally binding instrument.

73. It was felt that a combination of a legally binding instrument and non-binding guidelines might be the appropriate outcome. In this respect, it was noted that Article 27 of the Protocol would be exhausted within four years from of the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol; and that, at that time, it could be amended to provide for some basic features of a liability and redress regime in combination with a non-legally binding instrument that could provide for guidelines supplemented with incentives to follow them, such as capacity-building measures.

74. It was stated that it would not be possible to negotiate a free-standing legally binding instrument under the Protocol within four years.

75. A two-step approach was proposed: initially to develop some "soft law," guidelines or recommendations, on all of the topics which had been under discussion at the current workshop, and subsequently to continue to work on the issues with a view to concluding a legally binding instrument in due course.

76. Summarizing the discussion, the Chair said that he had heard many views in favour of a legally binding instrument, the main building block of which would be a civil-liability regime, perhaps with some residual State liability. If it proved too problematic to develop a comprehensive binding instrument, perhaps the combined binding and non-binding approach was the right one. To cover the period between the adoption and entry into force of a legally binding instrument, a non-legally binding instrument could serve as an interim arrangement.

77. He noted the suggestion of a best-practices approach, and the desirability of capacity-building in the field of liability and redress. He also noted that participants had called for rules and procedures to

regulate transboundary movements. Guidelines could not be a substitute for such rules, but could at least augment them.

78. He also noted that several participants had indicated the need for more information on several issues that were addressed at the workshop, including why other liability and redress regimes had been successful, the availability of financial securities, and the establishment of cause-and-effect relationships, which could all be considered at a future workshop.

Other elements to be incorporated in a regime under Article 27

79. Another issue raised was that of arbitration, which could be handled by the Permanent Court of Arbitration. It was suggested that the Permanent Court of Arbitration would be more expeditious in action than judicial courts and also that it could provide for interim arrangements.

ITEM 5. OTHER MATTERS

80. There were no other matters.

ITEM 6. ADOPTION OF THE REPORT

81. The Rapporteur presented the draft report of the Workshop (UNEP/CBD/BS/WS-L&R/1/L.1), at its 6th meeting, on 4 December 2002. The draft report, as orally amended, was adopted.

82. It was agreed that the Rapporteur, with the assistance of the Chair, the Vice Chair and the Secretariat, would be entrusted with the finalization of the last part of the proceedings.

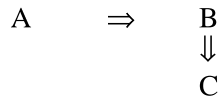
ITEM 7. CLOSURE OF THE MEETING

83. Following the customary exchange of courtesies, the Chair declared the Workshop closed at 5 p.m. on Wednesday, 4 December 2002.

Annex

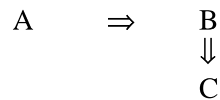
SCENARIOS FOR THE TRANSBOUNDARY MOVEMENT OF LIVING MODIFIED ORGANISMS

I. GMO CROPS



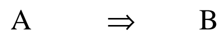
- A, B and C are Parties
- Introduction into the environment: field trial or commercial growing
- Intentional TBM* (A→B) and unintentional TBM (B→C)
- Variations: - A is a non-party
  - intentional TBM (A-B) is illegal (Art. 25)

II. LABORATORY TEST OF VIRUS



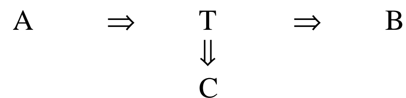
- A, B and C are Parties
- Contained use
- Accidental release
- Intentional TBM (A→B) and unintentional TBM (B→C)

III. LMOS-FFP THAT ENTER THE FOOD CHAIN



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

IV. SHIPMENT



- 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)

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* TBM refers to transboundary movement.