UNEP

CBD

CONVENTION ON BIOLOGICAL DIVERSITY

Distr.
GENERAL

UNEP/CBD/BS/COP-MOP/1/INF/6
18 December 2003

ORIGINAL: ENGLISH

CONFERENCE OF THE PARTIES TO THE CONVENTION
ON BIOLOGICAL DIVERSITY SERVING AS THE
MEETING OF THE PARTIES TO THE CARTAGENA
PROTOCOL ON BIOSAFETY
First meeting
Kuala Lumpur, 23-27 February 2004
Agenda item 6.6 of the provisional agenda*

LIABILITY AND REDRESS (ARTICLE 27)

Compilation of views submitted in response to questionnaire on liability and redress for damage resulting from transboundary movement of LMOs

CONTENTS

* UNEP/CBD/BS/COP-MOP/1/1.

/…

SUBMISSIONS FROM GOVERNMENTS

AUSTRALIA

[22 SEPTEMBER 2003]
[SUBMISSION: ENGLISH]

Responding for request for information or initial understandings on the basis of the questionnaire annexed to recommendation 3 (para 3, recommendation 3/1)

Australia does not support the draft questions as outlined in the questionnaire annexed to recommendation 3/1 because those questions go well beyond issues of process and pre-empt discussions by the experts group to be established by the first meeting of the Conference of the Parties serving as the meeting of the Parties.

Given the complexity of the issue of liability in the area of living modified organisms (LMOs), it is better use of resources to first consider any recommendations arising from the experts' group and then seek Governments' views on those recommendations.

Australia does not support linking the Protocol's consideration of liability to that taking place under Article 14 of the Convention on Biological Diversity because the scope of coverage and nature of damage are more explicit under the Protocol.

In Australia's view, Article 27 of the Protocol does not *require* the establishment of a liability regime – it requires a process to be established to appropriately elaborate international rules and procedures in the field of liability and redress for damage resulting from transboundary movement of LMOs. Parties should endeavour to complete this process within four years of entry into force.

It is important to recall that the Protocol deals with the transboundary movement of LMOs and their environmental impact. Arguably, it is not necessary to develop a regime under the Protocol that goes beyond that transboundary movement. National legislation should be adequate to deal with national impacts and should be better placed to deal with the environmental and legal means of redress within such jurisdictions.

When looking at existing international liability regimes, it is important to recall that the Protocol does not regard all LMOs as dangerous. The Protocol specifically leaves that decision to Governments to determine, on the basis of risk assessments and in accordance with their national environmental circumstances. International liability regimes that treat the transboundary movement of a good as inherently dangerous are therefore not readily applicable.

EUROPEAN UNION [21 OCTOBER 2003]
[SUBMISSION: ENGLISH]

Introduction

The following answers from the EU to the Questionnaire annexed to the recommendation of the third meeting of the Intergovernmental Committee for the Cartagena Protocol /1 are a contribution to the adoption of a process towards the appropriate elaboration of rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms.

The EU is of the opinion that clear agreements on the definition of "damage" and on the scope of the term "damage resulting from transboundary movements" of LMOs in the context of the Cartagena Protocol on Biosafety are necessary prerequisites for the positive evolution of the process described in Article 27 of the Protocol. Of course, other elements of the process are relevant, and many of them are addressed by this questionnaire.

In this submission, the EU has set out a framework to facilitate the further discussion of the relevant issues, indicating key considerations, options and the interlinkages between different elements. The EU is conscious that the possible elements of any liability regime are closely interlinked, and that changes to one element would impact on other elements. Furthermore, each element, including those described below, is likely to change as the process identified in Article 27 develops. The EU reserves its positions on each element as they are the subject of further internal evaluation.

Q1. What type 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 LMOs?

1. The EU notes that there is some degree of overlap between the first three questions and that the answer to question 1, in particular, is closely connected to the issues covered in the next two questions. On this basis, the EU will answer the common aspects of the first three questions together (see answers to Question 2 and 3).

Q2. What type of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?

1. For a full picture of the activities that could be covered by such rules and procedures, the phrase "damage resulting from transboundary movements of LMOs" should be clarified. In particular, clarification of the concept of "damage" in the context of Article 27 of the Protocol is needed (see Question 3).

2. The term 'transboundary movement' is defined in Article 3 (k) of the Protocol as "movement of an LMO from one Party to another Party", but it can include movements between Parties and non-Parties under certain circumstances. It should also be clarified to what extent a damage "results", directly or indirectly, from transboundary movement in the sense of Article 27 of the Protocol and should be included in the scope of a liability and redress regime under the Protocol.

3. In line with Article 1 of the Protocol, the international rules and procedures referred to in Article 27 could cover activities or situations such as transport, transit, handling, and/or use of LMOs, which all fall within the scope of the Protocol (Article 4), in so far as these damages result directly or indirectly from the intentional, unintentional or illegal transboundary movement of

such LMOs between Parties, or Parties and non Parties, in accordance with Article 3 (k) of the Protocol.

4. The international rules and procedures referred to in Article 27 of the Cartagena Protocol could cover activities or situations involving LMOs that are regulated by the Protocol, namely activities intended for (a) contained use of LMOs, (b) intentional introduction into the environment of LMOs, and/or (c) direct use of LMOs as food or feed, or for processing, regardless of the level of detail of the regulation of these activities provided by the Protocol.

5. Any damage resulting from such transboundary movement could manifest itself in States of transit and/or States of import and, in the case of an unintentional transboundary movement following such accidental or deliberate release, in third States.

Q3. 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?

1. This question encompasses several distinct, but interrelated issues. In our view, the following main elements can be identified:

- the categories of damage to be included in a liability and redress regime under the Protocol;
- the definition of the damage, focusing on damage to the conservation and sustainable use of biodiversity;
- the valuation of damage and measures of reinstatement, and
- the relationship between the issue of liability & redress under Article 14 (2) of the Convention on Biological Diversity, on the one hand, and Article 27 of the Cartagena Protocol, on the other.

Categories of damage

2. There are two main starting points for the categories of damage that any rules or procedures elaborated under Article 27 might address. Firstly, there is the reference in the objective (Article 1) and in the scope (Article 4) of the Protocol to ensuring an adequate level of protection in relation to the transboundary movement, transit, handling and use of LMOs that "may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health". Secondly, there is the reference to "damage resulting from transboundary movements of living modified organisms" in Article 27 itself.

3. The regime could cover one ore more of the following categories of damage:
   a) damage to the conservation and sustainable use of biodiversity;
   b) traditional damage; and
   c) damage to human health.

Definition of damage

4. As the conservation and sustainable use of the biodiversity is the central notion that underpins both the Cartagena Protocol and the Convention on Biological Diversity, the EU will, at this stage, focus on damage with adverse affects on the conservation and sustainable use of biodiversity. In this

respect, the definition of "biological diversity" in Article 2 of the Convention on Biological Diversity should be the starting point. Accordingly, damage to the conservation and sustainable use of biodiversity would cover damage to the conservation and sustainable use of the variability among living organisms from all sources, including diversity within species, between species, and of ecosystems. However, special attention should be paid to translating the notion of damage to the conservation and sustainable use of biodiversity caused by LMOs into clear criteria for a liability regime.

5. There is a recent trend in liability regimes to include thresholds of damage. The threshold is usually in the form of a non-determined qualitative adjective, such as such 'significant' or 'measurable'. Thus, such an approach would leave the application of a threshold to practice and, ultimately, judicial institutions. Alternatively, if quantitative thresholds were to be considered, important elements such as baselines and identified criteria for the measurement of such thresholds would need to be addressed.

Valuation of damage and measures of reinstatement

6. The valuation of damage to conservation and sustainable use of biodiversity in monetary terms only becomes an issue if there is no requirement to repair the damage by means of measures of reinstatement. In such a situation, it may be considered to require the payment of compensation *in lieu*. Such an approach, however, would probably raise all sorts of problems, e.g. the determination of the value of damaged components of biodiversity which will always be somewhat arbitrary, the allocation of funds generated, and the administrative structure and costs required for such allocation. For these reasons, an approach that is based, on a case by case assessment, on the implementation of measures of reinstatement seems to be the most attractive.

7. As for measures of reinstatement, a distinction should be made between situations where it is possible to restore the loss of the conservation and sustainable use of biodiversity to the conditions that existed before the damage occurred and situations where that is not possible. One of the objectives of any liability and redress regime for damage to the conservation and sustainable use of biodiversity should be primary restoration. This means that loss to the conservation and sustainable use of biodiversity is restored by replacing the same components at the same place, or in a condition which leads, solely by virtue of the dynamics of the ecosystem, to a condition deemed to be equivalent or superior to the baseline condition, or alternatively by restoring the damage to its sustainable use, where feasible. If this is not possible, reinstatement by equivalent, or complementary remediation, would be the preferred method to restore a loss to the conservation and sustainable use of biodiversity. Depending on the circumstances, complementary remediation could include (a) remedial action to replace the loss to the conservation and sustainable use of biodiversity by other components at the same location or for the same use or (b) remedial action in relation to the same or other components at another location or for other types of use.

8. The valuation of other types of damage will need to be addressed separately.

Convergence of the Convention on Biological Diversity and the Protocol regarding damage to Biodiversity

9. The conservation and sustainable use of biodiversity is the central notion that underpins both the Cartagena Protocol and the Convention on Biological Diversity. The definition of damage under a liability and redress regime of the Protocol, including damage to the conservation and sustainable use of biodiversity, should not be developed in isolation from the discussion on the definition of damage to biodiversity under a liability and redress regime under the Convention on Biological Diversity. As

a matter of principle, it seems that these definitions should be developed in an harmonious and complementary manner, taking account of differences in the nature and timing of the two processes.

Q4. To whom should liability for damage resulting from transboundary movement of LMOs be channelled?

1. The notion of channelling only comes into play when the standard of liability is not based on fault (see Question 5). In those instances, liability is normally channelled in accordance with the polluter-pays principle. All the activities must internalise all the costs, and the industries and activities connected with the use of LMOs are not an exception of such a principle.

2. Accordingly, primary liability for damage resulting from the transboundary movement of living modified organisms should rest with 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 the damage. The channelling of liability to States under whose jurisdiction or control activities involving living modified organisms are carried out (see further reply to Question 11) would undermine the application of the polluter-pays principle.

3. If the liability and redress regime is more oriented to prevention (i.e. the ability to anticipate and avoid potential damage-causing events, as covered by the regime, including emergency measures where such damages are expected to occur), liability could be channelled to the person who is in the best position to prevent damage-causing events or that would be at the origin of the initial events that may finally lead to such damages. Such person may, however, not always be easily identifiable, in the jurisdiction where the damage occurred or financially solvable. If the regime is more oriented to the reparation of damage suffered by victims and the environment, then liability could be channelled to whoever, while having a responsibility in the event or process at the origin of the damage that occurred, would be more easily identifiable, judicially accessible or financially solvable (see also answer to Question 5, paragraph 2).

4. As for the operator(s) to whom primary liability should be channelled, one or more of the following persons are potentially eligible in view of their possible involvement in a transboundary movement of living modified organisms:
   (a) the producer, including the developer;
   (b) the notifier;
   (c) the exporter;
   (d) the carrier;
   (e) the importer.

5. A further issue is whether liability should be channelled to a single person or multiple persons. The channelling to multiple persons will result in the need for multiple coverage for liabilities arising out of a single incident, require a bigger share of the capacity of the relevant securities market and, hence, increase the costs of covering such liabilities. Channelling of liability to multiple persons may, however, enhance the options for claimants to recover damages.

6. The introduction of additional tiers of liability of other persons involved in transboundary movements of living modified organisms could be envisaged if the damage is not or only partly redressed by the person to whom primary liability has been channelled, notably if:

   (i) no primary liable person can be identified;
   (ii) the primary liable person escapes liability on the basis of a defence (see Question 6);
   (iii) a time limit has expired (see Question 7);

(iv) a financial limit has been reached (see Question 8);
(v) financial securities of the primary liable person are not sufficient to cover liabilities;
(vi) the provision of interim relief is desired.

7. If the injured party pays for the restoration of the damage, there should be provisions for compensating that party financially for the expenses.

Q5. What should be the standard of liability for damage resulting from transboundary movements of LMOs?

1. The standard of liability is closely connected with the scope and nature of the defences available to the person to whom liability has been channelled (see answer to Question 6). Possible standards of liability are the following:
   - *Fault-based liability.* This standard of liability presupposes intent or negligence of the actor for an event that causes damage. Reversal or reduction of the burden of proof has been used in specific circumstances by a number of existing liability and redress regimes.
   - *Strict liability.* This standard is based on the fact that the actor's act (or omission) caused the damage without fault needed to be established. This means *prima facie* liability, but the actor can avail itself of a limited set of defences (see answer to Question 6). Important differences between strict liability regimes relate to the number and the scope of the defences allowed.
   - *Absolute liability.* This standard of liability only requires the establishment of a causal link between an act -- or omission -- and the damage, and does not allow for defences.

2. The choice for a particular standard of liability or combination of standards depends on the objective and function of the liability and redress regime, which could notably be the prevention of an event that causes damage and/or the reparation of damage (see Question 4, paragraph 3).

3. A combination of liability standards is also possible, for example, in cases of potentially hazardous activities (activities that involve risks, which can be assessed and reduced but not eliminated and which may materialise in spite of efforts of a person to prevent a damage-causing event), the imposition of a strict standard of liability on the operator is justified. This could be completed by liability in case of damage caused by negligent or reckless action (fault-based liability). Therefore, it could be considered if a system of strict liability completed with a limited number of defences (see answer to Question 6), and combined with a fault-based liability scheme, is a possible option for the regime to be established under Article 27 of the Cartagena Protocol.

Q6. ***Should there be any exceptions for liability and under what circumstances?***

1. Liability and redress regimes differ according to the number and the scope of the defences allowed. Liability and redress regime that impose strict liability include a limited set of defences in order to exclude liability for damage that is the result of certain events beyond the actors' control. The following defences can be identified for discussion:

   (a) natural disasters or 'acts of God';

   (b) war and hostilities (including armed conflict, civil war and insurrection);

   (c) intentional wrongful acts or omissions of a third party (the exclusion of the primary liable persons may require in this case that all appropriate safety measures have been taken);

Other defences that can be found in international and national liability and redress regimes or drafts for such regimes include:

(d) compliance with a compulsory measure imposed by a public authority;

(e) permission of an activity by means of a generally applicable law or in a specific authorisation 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.

2. Alternatively, some of the situations listed above, notably (e) and (f), could be introduced as mitigating factors in determining the amount of damages instead of defences. The possibility of including such mitigating factors for liability under specific circumstances and without being detrimental for the victims, could be further explored.

Q7. Should the liability be limited in time and, if so, to what period?

1. The limitation of liability in time is a common feature of liability and redress regimes to reduce the risk of liability of the person to whom liability has been channelled and to avoid legal proceedings where the evidence has become unreliable.

2. A time limit within which an action may be brought, i.e. an absolute time limit, should result from the nature of the activities covered and the types of damage they may cause. International liability and redress regimes provide for absolute time limits up to 30 years. In the case of damage caused by LMOs, it should be taken into consideration that harmful effects may only manifest themselves after a long period, and damages due to the biological activity of LMOs, or due to the fact that the organisms themselves are living and may reproduce, may only appear after several generations from the (intentional or unintentional) release of the LMO.

3. It should be noted that absolute time limits are distinct from the period during which a victim should be allowed to bring a claim after the identification of the damage and the person liable. International liability regimes provide for relative time limits up to 5 years.

4. A regime of liability may contain absolute and relative time limits to liability, adapted to the specific circumstances and type of damage under which damage caused by LMOs can arise.

Q8. Should the liability be limited in amount and if so, to what amount?

1. The limitation of liability in amount is used in liability and redress regimes that are based on strict liability to reduce the risk of liability of the person to whom liability has been channelled. In other liability and redress regimes, limitation of liability in amount is not included.

2. In international civil liability and redress regimes, financial limits have been adopted in the form of *fixed limits*, which would provide for total harmonisation of national financial limits, or *minimum limits*, which would only provide for partial harmonisation of national financial limits (a floor).

3. Where present, a financial limit is not necessarily equal to and may be higher than the amount, if any, for which the liable person must cover his liability by financial securities. These compulsory financial securities, where applicable, may also be limited, independently of the financial limits, in order for example for the insurance market to be able to take into account the specific situation of the damages to be considered. The liable person can usually not avail himself of any financial limits if the harm is caused by an act or omission done with the intent of doing harm or as a reckless conduct.

4. Where present, a financial limit is introduced by considering the nature of an activity and the possible magnitude of the damage it may cause. Financial limits may differ according to the type and/or scale of the activity and could also be set at different levels for different types of damage.

5. Alternatively, the absence of financial limits per se may also be considered, in order not to limit in advance the possible liability, so that victims may receive appropriate and timely reparation. The absence of financial limits may particularly be studied if routes of redress, other than financial reparation, are to be explored.

Q9. How would judgements given pertaining to liability & redress be recognised or enforced in another country and jurisdiction?

1. At least if the process under Article 27 of the Cartagena Protocol results in the adoption of a civil liability and redress regime for the transboundary movement of LMOs, such regime should provide for the mutual recognition of judgements, and an expeditious procedure for securing the enforcement of judgements and court settlements. In connection with this, it will have to address certain additional issues in this respect, notably attribution of jurisdiction, and the regulation of *litis pendens* and related actions.

2. The attribution of jurisdiction as well as recognition and enforcement of judgements between EU Member States in commercial and civil matters fall under the exclusive external competence of the EC following the adoption of EC Regulation 44/2001 in December 2000 and its entry into force in 2001. This Regulation binds all, but one, of the Member States.

3. In general, it seems that the inclusion of provisions on jurisdiction as well as recognition and enforcement of judgements in relation to damage resulting from the transboundary movements of LMOs is important for the operability of an international regime on liability and redress in the context of the Article 27 of the Cartagena Protocol.

Q10. What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

1. As for the relevance of arbitration in settling disputes arising with respect to damage resulting from the transboundary movement of LMOs, a distinction needs to be made between disputes arising out of the application or interpretation of an instrument containing rules and procedures in the field of liability and redress for damage caused by the transboundary movement of LMOs (see paragraph 2, below) and disputes relating to redress for damage caused by the transboundary movement of LMOs (see paragraph 3).

2. Depending on the type of regime eventually decided, the international rules and procedures to be developed in the context of Article 27 of the Protocol could provide for mechanisms that can be invoked by states parties thereto to settle disputes with respect to interpretation and application, including an arbitration mechanism. The flexibility is one key advantage of the process of arbitration, which should be open to all the parties concerned. It is noted that the dispute settlement provisions of the Convention on Biological Diversity already apply to the Cartagena Protocol (Article 32).

3. With respect to disputes relating to payments for damage caused by the transboundary movement of LMOs, arbitration mechanisms could provide for an alternative to civil action mechanisms (see answer to Question 9). Such arbitration mechanisms are provided by international institutions, such as the Permanent Court of Arbitration that has Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

Q11. What purpose would the notion of State liability and State responsibility serve in a liability & redress regime within the framework of the Cartagena Protocol?

1. The origin of liability of a state may be (a) an internationally wrongful act (state responsibility) or (b) liability for acts not prohibited by international law (state liability).

2. State responsibility in relation to the transboundary movement of living modified organisms may arise if Parties fail to comply with the provisions of the Cartagena Protocol on Biosafety, or with the provisions of other treaties or rules of customary international law relevant for the transboundary movement of living modified organisms. The general rules on state responsibility are found in the articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, which by and large reflect customary international law (UN Doc. A/Res/56/83). Therefore, it seems that there is no need to develop special rules on state responsibility for damage resulting from the transboundary movement of living modified organisms in addition to these general applicable international rules.

3. State liability in relation to the transboundary movement of living modified organisms would arise if a state could be held liable for damage resulting from all activities, including non-governmental activities, with respect to living modified organisms within its jurisdiction or control. Primary state liability is currently provided for in one treaty, i.e. the 1972 Convention on International Liability for Damage Caused by Space Objects. At the time, primary state liability for activities in outer space was accepted, because all such activities were conducted by governments. With the advent of commercial activities in outer space, this system has come under pressure.

4. We note that the application of the polluter-pays principle is not compatible with the introduction of a system of state liability for damage resulting from the transboundary movement of living modified organisms unless the State itself is acting as an operator.

Q12. Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

1. The subjects of the right to make claims are different for interstate claims based on international law, on the one hand, and claims based on civil liability, on the other. As for interstate claims based on international law, a state has the right to make claims on its own behalf that may include claims on behalf of its nationals and, in special cases, on behalf of a group of states or the international community as a whole (see Articles 42 to 48 of the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts). As for claims based on civil liability, the right to make claims is governed by the applicable domestic law on procedural matters. The procedural rules of the applicable domestic law vary from jurisdiction to jurisdiction and will continue to do so, unless domestic laws are harmonised in this respect by means of an international instrument.

2. As for claims based on civil liability, the injured person should have the right of action.

3. In this respect, one issue that merits attention is whether claims may also be made by claimants, including stakeholders, who act in the general interest (*actio popularis*). In general, provisions granting legal standing (right to make claims) should be developed according to the types of damage covered and the objective of the liability and redress regime. Other existing international instruments addressing this issue should also be considered.

Q13. What other questions or issues are appropriate to raise or answer?

1. The coverage of liability, for instance by means of the establishment of financial securities or by other types of guaranties, is an issue that merits attention and should be addressed in the discussion on a liability and redress regime under the Cartagena Protocol.

2. The rules on the establishment of a causal link between damage and the transboundary movement of particular living modified organisms are an important aspect in the context of the definition of the liability and redress regime under the protocol, which should be addressed in the discussion on a liability and redress regime under the Cartagena Protocol. In a strict liability regime, the proof of the causal link between damage and a transboundary movement of LMO's is particularly important. When the damage results indirectly from a particular transboundary movement of LMO's, this causal link might not always be easily established.

NORWAY [15 OCTOBER 2003]
[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 Authority), also be made by a private organisation or an association with a legal interest in the matter.

REPUBLIC OF PALAU [24 SEPTEMBER 2003]
[SUBMISSION: ENGLISH]

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

The use, production, import, sale or other placing on the market of LMOs, as well as the operation of installations and premises intended for the handling, use, and introduction into the environment of LMOs. Manufactures and distributors should be strictly liable where LMOs are released into the environment, or through their production, import, sale, placing on the market, operation of any premises, etc. which causes a risk to human health or to the environment, regardless as to whether the risk was greater than foreseen when the use of LMOs was approved. Develop environmental protection legislation that establishes a general duty not to undertake an activity that pollutes or reasonably could pollute the environment. This legislation should allow persons to apply to the court for compensation,

including provisions for the Government to have the right to recover certain governmental remediation costs.

2. What types of damage resulting from transboundary movements of LMOs should be compensated?

Personal injury, damage to any and all kinds of property regardless as to whether it is owned by an individual, corporation, government or any other legal entity, costs of preventive measures and restoration of environment (ecological damage), and loss of past and future income deriving from any economic interest in any use or enjoyment of the environment.

3. How should the concept of "damage to biological diversity" be defined, valued and classified, and should this be different from the definition, valuation and classification of this concept in the framework of the Convention?

The valuation of environmental damage should not be limited solely to definable financial loss. The Republic of Palau's ability to recover damages for the loss of biological diversity should be extended to non-pecuniary damages such as the loss of the right to enjoy the environment. The draft Swiss Gene Technology Act defines the 'harm to the environment' by the costs of necessary and appropriate measures taken to restore destroyed or harmed components of the environment, or to replace them with components of equal value. The Republic of Palau agrees with this valuation. The Swiss Gene Technology act also states, "[T]he extent of the restoration will depend on the changes that have occurred in the environment, and will have to be assessed on a case by case basis- Private citizens would most likely be limited to traditional measures of damages, such as economic loss, and general damages.

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

Liability should attach to any person who has the operational control of the activities at the time of the incident causing damage. The Republic of Palau agrees with the Danish Act that defines a person as someone; 'who is causing pollution while participating in a commercial or public activity shall indemnify the loss resulting from this pollution'. In Finland, a responsible person is identified as the one whose activity has caused the environmental damage or who can otherwise be considered as the operator. The Republic of Palau agrees with both of these statements. The person responsible is a physical or legal person who operates the activity from which the LMOs are discharged, including a person or legal entity from which the goods were imported.

Also, the person who has "the duty to provide information or to obtain approval under the Act' should also be subject to liability. In a situation when LMOs are released unintentionally during transport, the transporters should also be responsible for damages and for taking immediate remedial measures. The transporters should be jointly and severally liable along with the owner or the sender to pay for the costs of remedial measures taken.

If LMOs have been imported into the country, the producer who first placed them on the market and the importer should be jointly and severally liable. The owner of a company or installation that imports such organisms for its own use should be jointly and severally liable with the producer and recourse to persons who have handled such organisms improperly, or have otherwise contributed to the creation or worsening of the harm, should also be held liable. In the case of a multi-person operation, the principle of joint and several liability may be applied under which each liable party is potentially liable for the whole damage, insofar as his/her damage is inseparable from the other.

The Republic of Palau agrees in theory with the concept of joint and several liability. The Republic of Palau follows the "Restatement of Torts" unless specifically excepted by statute or judicial determination. Presently, there are no specific exceptions to the Restatement of Torts on joint and several liability. Currently the Republic of Palau has no statutory or judicial determinations on the rule defining joint and several liability. However, under the restatement of torts, the general rule is if the separate and independent acts of two or more persons or corporations combine naturally and directly to produce a single indivisible injury, then the actors are joint tortfeasors, jointly and severally liable for the full amount of plaintiff's damages (restatement of torts).

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

The Republic of Palau agrees with the UN report that the basic standard to apply to LMO-related activities is strict liability, where liability is engaged regardless of fault.

6. In what circumstances should the liability be exempted where transboundary movements of LMOs have resulted damage?

If a standard for strict liability regimes is enforced, then a limited number of exemptions from liability should be considered. For example, damages caused by military conflicts, civil wars, and terrorist activity.

7. To what extent should a causal link be established between the damage and LMOs?

Proof of causation between damage and activities or liable persons plays an increasingly critical role in a strict liability regime. However, causation may be difficult to establish, in particular in relation to LMOs, because of the complexities of their interact-ions with the receiving environment and the possible timescales involved. To overcome this problem, Austria has adopted the approach of reversal or reduction of the burden of proof, in that causation is presumed until the defendant can demonstrate otherwise. The Austrian Law on Genetic Engineering provides that: 'the LMO subject to the contained use or a deliberate release may cause damage, it is presumed that the damage is due to the characteristics of the LMO resulting from the genetic modification. To rebut the presumption the notifier demonstrates the likelihood that the damage is not due to the characteristics of the LMO resulting from the genetic modification (or in combination with other hazardous characteristics of the LMO).' Yet such presumption would be invalid if the damage is likely to have been caused by other properties of these organisms. The Republic of Palau agrees that the Austrian law should be strongly considered as the proper procedure, but in Palau it would require a statutory change to reverse the presumption of guilt. Currently, the Republic of Palau would use the legal standard that liability attaches when causation is "more probably than not" proven. It is more likely that the Republic of Palau would adopt a rebutable presumption standard.

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

The Republic of Palau believes the Danish Act on Environmental Damage should be strongly considered, which includes two time-period limitations: three years from the day of knowledge (or should have had knowledge) of the damage (statute of limitation), and a maximum of 30 years counted from the time of the act having caused the damage. This provision would need to be added to existing statutes for Palau to be able to enact this statute of limitations.

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

The Republic of Palau does not believe there should be a cap on damages.

10. Should financial security be established to compensate for damages resulting from the transboundary movements of LMOs? If so, what should be the appropriate mechanism(s)?

The Republic of Palau in order to guarantee adequate compensation for victims of damage, intends to require the operator to maintain adequate insurance coverage. The Swiss Gene Technology Act requires the proprietors to guarantee their liability through insurance and specify the limits of liability as well as the extent and duration of the guarantee; require the person who guarantees liability to report the existence, suspension or cessation of the guarantee to the enforcement authority, and require the guarantee to be suspended or ended only after 60 days following receipt of the report. The Republic of Palau agrees with this portion of the Swiss Gene Technology act and plans to include a similar condition in our regulations.

11. Which courts and/or tribunals should have jurisdiction to adjudicate claims for damage resulting from transboundary movements of LMOs?

The Supreme Court of the Republic of Palau.

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

The Republic of Palau believes that not only should any injured person have the right to bring claims for any and all types of damages, as should all legal and government entities, as well as private organizations if they meet criteria as established by law to document their damages.

UNITED STATES OF AMERICA [25 SEPTEMBER 2003]
[SUBMISSION: ENGLISH]

Introductory Comments

- The United States notes that the mandate for Article 27 focuses the first Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety on adopting a process for the appropriate elaboration of international rules and procedures on liability in this area. The substance of the questions posed extends well beyond the issue of the process that the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety should adopt and, as such, should not be taken up until such process has been established. Nonetheless, the United States will offer initial reactions to the questions at this time.

- As part of the Article 27 process, participants should keep in mind the importance of capacity-building projects to help countries develop risk assessment procedures to evaluate the potential adverse effects of LMOs on conservation and sustainable use of biological diversity so that harm may be prevented.

- A general point not addressed by the questions is that those considering whether and, if so, how to elaborate international rules and procedures should consider the availability of insurance to cover the damage resulting from transboundary movements of LMOs.

- Also, any international rules and procedures that may be developed under Article 27 must reflect, and not disturb or distort, the Protocol's balance struck between the respective responsibilities of the exporter and importer.

- Accordingly, liability should not flow from activities that are authorized by, or otherwise consistent with, the Protocol (noting, in this regard, the last three paragraphs of the preamble, "the savings clause.")

- There are additional questions that should be considered in connection with those below:

    - In addition to promoting capacity-building, what other means should Parties consider to avoid harm to biological diversity resulting from transboundary movements of LMOs?

    - Assuming realistic scenarios of concern are identified, are they amenable to redress through existing national liability regimes or through national liability regimes that could be developed even if they do not now exist?

    - Would an international liability regime be exclusive, default, or supplemental to other mechanisms?

    - Should the liability system also take into account whether, and the extent to which, transboundary movements of LMOs might reduce other harms to biological diversity (e.g. LMOs that allow reduced use of pesticides)?

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 LMOs?

- While not anticipating damage in the United States from activities and situations covered under the Protocol, the United States is interested in the perceptions of other countries concerning types of activities/situations likely to cause damage in their countries.

- The question's use of the word "perceived" is appropriate, as a critical element of the process established under Article 27 will be to evaluate reported perceptions from a scientific point of view.

- To the extent a perceived activity or situation was found to have a scientific basis, it would then need to be considered whether such scenario is any more likely to occur than a scenario not involving LMOs and, further, whether such scenario is covered by existing legal mechanisms.

- The importance of scientific analysis at the early stage of identifying real risks to the conservation and sustainable use of biological diversity cannot be overemphasized. While international law developments should, of course, be analyzed and taken into account, it would be unfortunate if the process were to hastily apply international liability models from other fields that, from a scientific point of view, are not analogous to this one.

- With respect to criteria, please see the answer to question three below on definition of biological diversity.

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

- Assuming, arguendo, that international rules and procedures will be called for, the Protocol is clear on the scope of such rules and procedures.

- Specifically, under Article 27, any elaboration of international rules and procedures in this area would be limited to redress for damage resulting from the actual "transboundary movement" of LMOs. Whereas the Protocol itself focuses on 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." Any Article 27 international rules and procedures will need to specify the actual parameters of what constitutes damage "resulting from" a transboundary movement so that exporters and importers may have legal certainty regarding the scope of this term and to avoid a multitude of disparate interpretations.

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?

- Article 27 itself does not specify the type or threshold of "damage" from transboundary movements of LMOs that it intends to address.

- Concerning the type of damage, the United States considers that the interpretation of the term 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. It would not include, for example, socio-economic harm.

    - 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 with which to measure any claimed damage. Further, the issue of proximate cause would need 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.

- 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 significance, at least those that are "significant" or "substantial" and "measurable."

- We are interested in learning of any specific examples of damage to biological diversity that would be covered by any international rules and procedures that may be developed under Article 27.

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

- It is premature to comment on the channelling of liability, given that the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety has yet to even establish the process that will consider the necessity and appropriateness of elaborating international rules and procedures regarding liability on this topic.

- It should be noted, however, that any international rules and procedures developed under Article 27 must reflect, and not disturb or distort, the Protocol's balance struck between the respective responsibilities of the exporter and the importer throughout the process of the transboundary movement of LMOs.

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?

- As with channeling, it is premature to comment on what the substantive standard of liability should be for a regime when we are only at the stage of establishing the process to consider the issue.

- We would note at this point that, both domestically and internationally, absolute liability is extremely rare, and strict liability is ordinarily reserved for hazardous activities (which would not include transboundary movements of LMOs).

- We would also note that it would seem that a fault-based standard would be most appropriate in this context. A fault-based standard makes sense in that liability should only be imposed for activities that are inconsistent with the obligations imposed by the Protocol or are otherwise inconsistent with the specified standard of care (e.g. negligence, gross negligence etc.)

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

- Again, it is premature to comment on the substantive issue of liability exemptions with respect to the topic at hand at this stage.

- One could note generally that international regimes do generally include exemptions from liability, for example, with respect to armed conflict, acts of terrorism, *force majeure,* and third party intervention.

- Also, as noted above, it is clear that no liability should be imposed for activities taken in accordance with the Protocol. We would not view this as an exemption from liability, but rather a circumstance in which liability would never be considered in the first place.

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

- As noted above, the parameters of what constitutes damage "resulting from" a transboundary movement will have to be specifically defined. A time limit is one aspect of this question.

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

- Again, before the COP/MOP has established a process to consider which scenarios even invite consideration of liability and by whom, it would be impossible to comment on specific liability amounts.

- One would simply note that 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).

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

- Again, we are not in a position to comment at this stage on how liability judgments, if there were an international liability system[s] under the Protocol, would be recognized/enforced elsewhere.

- We note that, 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 liability judgments under their systems.

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

- Without taking a position on whether arbitration should be used with respect to liability issues under the Protocol, we note that, technically, arbitration would be an available means for settling disputes arising with respect to damage in the field of liability and redress.

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?

- Again, without taking a position with respect to liability under this Protocol, we would generally not consider it 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, rather than in domestic courts.

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

- As with previous issues, it is premature to get into the substantive issue of who may make claims for damage under this Protocol, which would depend upon other aspects of any regime, including the definition of damage.

SUBMISSIONS FROM ORGANIZATIONS

GLOBAL INDUSTRY COALITION (GIC) [22 SEPTEMBER 2003]
[SUBMISSION: ENGLISH]

It is premature at present to explore the substantive elements of any rules or procedures that might derive from the Article 27 process until:

- A initial mandate for the Article 27 process, including the establishment and terms of reference for an open ended group of legal and technical experts has been agreed;

- Fundamental scientific and legal issues concerning the interaction of LMOs with the environment and the existence of legal rules and mechanisms already applicable to biotechnology have been examined; and

- Due account is taken of the ongoing process on liability and redress under the Convention on Biological Diversity (CBD) and other developments in international law in which work on key definitions and concepts is already underway.

This initial work is necessary to establish a clear, transparent and objective foundation for the remainder of the Article 27 process which should be directed by the Parties on the basis of the results of the initial phase of work.

Accordingly, while it is premature to consider the substantive elements of any rules or procedures, the users and developers of biotechnology wish to share some information on the broad topics and legal concepts raised by the Liability and Redress Questionnaire.1/

***QUESTION 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 LMOs?

SUMMARY RESPONSE:

Perceptions and scenarios offered by governments concerning the potential adverse effects of LMOs must be evaluated rigorously from both scientific and legal points of view to ensure that the Article 27 process that follows is properly focused on any realistic scenarios that may materialize and which are not already be governed by existing liability systems and principles.

RESPONSE:

The users and developers of biotechnology believe it is essential to explore the range of perceptions concerning the potential effects of LMOs and looks forward to reviewing the responses provided by Governments. *Once clear information about perceptions is available, scientific follow up will be necessary to determine which of these perceptions need to be addressed legally. Has a given scenario has actually materialized? From a scientific point of view, is the identified scenario more likely to occur than a comparable non-GMO scenario?*

The scientific context includes the fact that the OECD, FAO, WHO, U.S. National Academy of Sciences and other institutions have determined and have continued to confirm for more than 15 years that the safety criteria applicable to LMOs are identical to those needed to assess the safety of organisms resulting from other forms of breeding methods or natural evolution. Put another way, "[t]he risks associated with the production of recombinant DNA-engineered organisms are the same in kind as those associated with the introduction in the environment of unmodified organisms and organisms modified by other genetic techniques."2/ In short, "[t]here is no evidence that unique hazards exist either in the use of recombinant DNA techniques or in the transfer of genes between unrelated organisms." 3/

1/ See Annex to Recommendation 3/1 on Liability and Redress adopted by the Intergovernmental Committee for the Cartagena Protocol at its Third Meeting (The Hague, 22-26 April 2002).

2/ 1987 U.S. National Academy of Sciences "Introduction of Recombinant DNA-Engineered Organisms into the Environment: Key Issues," at p. 5-6.

3/ Id.

This conclusion was recently re-confirmed by the European Commission.4/ Indeed, according to the press release of European Union Commissioner Busquin: "*Research on the GM plants and derived products so far developed and marketed, following usual risk assessment procedures, has not shown any new risks to human health or the environment, beyond the usual uncertainties of conventional plant breeding. Indeed, the use of more precise technology and the greater regulatory scrutiny probably make them even safer than conventional plants and foods*; and if there are unforeseen environmental effects - none have appeared as yet - these should be rapidly detected by our monitoring requirements. On the other hand, the benefits of these plants and products for human health and the environment become increasingly clear."5/

As the foregoing indicates, the Article 27 process should not take as its primary model existing international environmental liability conventions that deal with hazardous activities which were established to meet unique needs that were not covered elsewhere. Rather, models for the Article 27 process should be drawn from rules governing activities that are comparable from a risk point of view to the transboundary movement of LMOs, i.e., the transboundary movement of non-modified living organisms such as plants, including commodities, or micro-organisms, e.g., for research purposes.

After completing a scientific assessment of perceptions and concerns, it also will be necessary to determine which remaining concerns fall within the parameters of Article 27 and should be addressed at the international, rather than national, level. Subsequently, Article 27 requires an evaluation of the extent to which such concerns are or will be addressed by ongoing process in international law, including the Article 14.2 process under the Convention on Biological Diversity.

Only if initial perceptions about transboundary movements of LMOs are evaluated in light of the existing scientific and legal contexts can the process thereafter properly focus on actual scenarios of potential concern for the conservation and sustainable use of biodiversity that are not adequately addressed by existing laws or legal principles. Without rigorous scientific and legal work at the inception to distinguish between sincerely voiced concerns versus actual threats, the Article 27 process risks losing sight of its fundamental goal of protecting biological diversity.

***QUESTION 2*:**

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

SUMMARY RESPONSE:

2.1 *Only the activity explicitly identified in Article 27, namely, the actual transboundary movement of LMOs, can be covered* by any future international rules and/or procedures to be developed under the Article 27 process.

4/ See "EC-sponsored Research on Safety of Genetically Modified Organisms - A Review of Results" EUR 19884. This publication provides a comprehensive review of the results of EC-supported research into the safety of Genetically Modified Organisms. It presents research carried out under successive EC Framework Programmes for Research and Technological Development from 1985 (Biotechnology Action Programme) to 2000 (Fifth Framework Programme). During this period, 81 projects, involving over 400 research teams, have been supported with a combined Community financial contribution of about EUR70 million. The research projects cover plants, plant microbes, biocontrol, food, bioremediation, tools, fish and vaccines.

5/ European Commission Press Release (October 2001).

2.2 Any international rules and/or procedures developed pursuant to Article 27 are *limited in scope to cases in which a transboundary movement of LMOs results in actual damage to the conservation and sustainable use of biodiversity*.

2.3 Any actual damage to the conservation and sustainable use of biodiversity would *have to meet alegal threshold, typically requiring evidence of "significant" rather than de minimis damage,* to trigger application of international rules and/or mechanisms.

EXPLANATION:

2.1 The international rules and procedures referred to in Article 27 of the Protocol can address only the activities identified in that article, which includes exclusively "transboundary movements" of LMOs. Consequently, activities other than the transboundary movements of LMOs *cannot* be covered under international rules and procedures that may be developed pursuant to Article 27.

Article 3(k) Protocol defines "transboundary movement" as the movement of an LMO from one Party to another Party (with additional provision for movements involving non-parties). The Article 27 process therefore applies only to the actual transport operation that results in the movement of LMOs from one jurisdiction to another. Such operations necessarily conclude when the movement is completed, i.e., when the shipment of LMOs arrives at its destination. *The Article 27 process therefore does not include and cannot address the handling or use of LMOs subsequent to the completion of the transboundary movement.*

This is supported by the terms of Article 4 of the Protocol, which distinguishes "transboundary movements" from "transit, handling and use" of LMOs. While a transboundary movement may (but need not) involve an element of transit, transit is not in itself a transboundary movement as it involves only movement of the LMO *through* the transit State, rather than *to* a receiving State, as required by the natural interpretation of Article 3(k). The same is true with "handling" which may occur as part of a transboundary movement but is not a transboundary movement subject to Article 27 in and of itself. That "use" is conceptually and practically distinct from "transboundary movements" is evident.

Similarly, it is clear from the wording of Articles 7 and 11 of the Protocol that a transboundary movement is to be distinguished from the eventual intended use of the LMO in the jurisdictions into which it has been brought. Thus, those Articles apply to:

> "… the first intentional transboundary movement of living modified organisms *for* intentional introduction into the environment;" and to
>
> "… the first transboundary movement of living modified organisms *intended for* direct use as fuel or feed …."

This wording makes it clear that the introduction into the environment, direct use as food, etc. takes place *once the transboundary movement is completed and are operations entirely separate from it*. While the transboundary movement is a necessary precondition of these subsequent activities, it does not form part of them for purposes of the Article 27 process.

Distinct and separate treatment of transboundary movement and subsequent use is not unique to the Protocol. It also can be seen in the Basel Convention, which distinguishes between "*transboundary movements* of hazardous wastes" on the one hand "*and their disposal"* on the other.

2.2 That the "damage" referred to in Article 27 is limited to damage to the conservation and sustainable use of biodiversity is compelled by the stated objective of the Protocol. As described in

Article 1, the Protocol's purpose is to contribute to providing an adequate level of protection against potential adverse effects of LMOs on the conservation and sustainable use of biodiversity.

The restriction of Article 27 to damage to the conservation and sustainable use of biodiversity also follows from the fact that the Protocol derives from and is therefore a subsidiary instrument of the Convention. The Protocol's subsidiary position vis-a-vis the Convention is evidenced by the facts that: (a) the Protocol was developed pursuant to an enabling clause in the Convention on Biological Diversity (see CBD, Art. 19.3); (b) only Parties to the Convention on Biological Diversity can become Parties to the Protocol (Art. 29); and (c) issues not specifically addressed by the Protocol are governed by the relevant provisions of the Convention (Art. 32).

Given that the Protocol is subsidiary to the Convention on Biological Diversity, Article 31(2) of the Vienna Convention on the Law of Treaties requires that it be interpreted in relation to the Convention on Biological Diversity. The clear focus of the Convention on Biological Diversity is on the conservation and sustainable use of biodiversity. Further, the Convention explicitly restricts consideration of liability and redress to "damage to biological diversity" and even then such damage is limited only to matters that are not purely internal concerns subject to the exclusive sovereign right of each nation to determine for itself. *The Convention's exclusive focus on damage to biodiversity means that it does not address traditional damage (including personal injury, property damage, consequential or economic loss but leaves these matters to national law, to the extent that such damage is not the subject of international treaties or other agreements. Because the Protocol derives from the authority of the Convention, to exceed the use and interpretation of these terms and concepts as they are employed in the Convention would require amendment of the Convention itself.*

2.3 International rules and/or mechanisms developed under the Protocol should be triggered only where the damage to the conservation and sustainable use of biodiversity is *significant*. A concrete threshold or trigger for the application of a legal system is commonplace and, indeed, is a concept embedded in the Protocol which aims to provide an "adequate" level of protection for the conservation and sustainable use of biodiversity. This same concept is found in the Convention on Biological Diversity, which does not consider all impacts on biodiversity as a breach of its obligations but only those that rise to a level of significance. Thus, under the Convention on Biological Diversity, States are obliged to "identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity" and to regulate those activities that may result in significant adverse impacts. (See CBD, Art. 7(c) and 8(l)). Similarly, under the Convention on Biological Diversity, environmental impact assessment is required only in cases where proposed activities are likely to significantly impact biodiversity. (See CBD, Art. 14.1).

The inclusion of a threshold concerning the level of actual damage to the conservation and use of biodiversity to trigger legal consequences is a standard part of national and international regimes. Indeed, Parties to the Convention on Biological Diversity *already have identified the need to address "the concept of 'threshold' in terms of both the risk presented and the damage" as a matter of priority in the Article 14.2 process.*6/ The need for a legal threshold for any rules or mechanisms developed under the Protocol process is supported by general principles of international environmental law, which require that liability attach only when the impact on the environmental value in question rises above a certain threshold of significance. According to the International Law Commission (ILC):

> The harm must lead to a real detrimental effect ... Such detrimental effects must be susceptible of being measured by factual and objective standards.... In carrying out lawful

---

6/ Report of the Workshop on Liability and Redress in the Context of the Biological Diversity Convention (18-21 June 2001, Paris), at paragraph 29.

> activities within their own territories, States have impacts on each other. These mutual impacts, so long as they have not reached the level of "significant," are considered tolerable. [T]he threshold of intolerance of harm cannot be placed below "significant."7/

This general ILC position on the level of damage necessary to trigger operation of legal systems for recourse is supported by widespread treaty practice in environmental conventions.8/

QUESTION 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(2) of the Convention on Biological Diversity?

SUMMARY RESPONSE:

3.1 What constitutes "damage" to the conservation and sustainable use of biodiversity first must be determined, and then valued and classified, in accordance with the definitions set forth in the CBD.

3.2 Key terms and definitions in the field of liability and redress with respect to damage to the conservation and sustainable use of biodiversity under the Convention on Biological Diversity and its subsidiary instruments (including the Protocol) must be consistent and should first be developed in the broadest context (i.e., the CBD) before being considered for more specific situations.

EXPLANATION:

3.1 The Convention on Biological Diversity defines "biological diversity" in terms of variability.9/ Only the definition set forth in Article 2 of the CBD is relevant for either the Convention on Biological Diversity or the Protocol. Damage to the conservation and sustainable use of biodiversity can, therefore, only be understood to mean a change in variability among living organisms, where such change in variability is also adverse, e.g., decreases biodiversity with respect to desirable, in contrast to pest, organisms.

To establish the existence of damage to the conservation and sustainable use of biodiversity that may be subject to future international rules and/or mechanisms under Article 27, it will not be enough to demonstrate that LMOs arrived in a locale as a result of a transboundary movement. Indeed, given that a positive increase in variability of biodiversity may well result from the transboundary movement of LMOs, it is clear that mere presence of LMOs imported from another country is not enough. Instead, one must demonstrate that:

(a) the transboundary movement itself has resulted in a change in variability;

7/ International Law Commission, Draft Articles on International Liability for Injurious Consequences Arising out of Acts not prohibited by International Law (1996), Commentary to Draft Article 2, paragraphs 4,5.

8/ Article 1(1) of the UN Framework Convention on Climate Change, for example, defines "adverse effects of climate change" as "changes in the physical environment or biota resulting from climate change which have *significant* deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare." Similarly, the Protocol on Environmental Protection to the Antarctic Treaty, dealing with one of the world's most pristine and fragile ecosystems, requires that "activities in the Antarctic Treaty area shall be planned and conducted so as to avoid: …. (ii) *significant* adverse effects on air or water quality; [and] (iii) *significant* changes in the atmospheric, terrestrial (including aquatic), glacial or marine environments…."

9/ See, Article 2: "Biodiversity means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems."

(b) the change is adverse; and

(c) the adverse change is significant.

The question of precisely when a change in variability becomes "adverse" and when it may be considered to be a "significant" adverse effect will require detailed work and analysis by experts concerning the valuation and classification of biodiversity as part of the Article 14.2 and Article 27 processes.

3.2 As explained in Section 2.2, the Protocol is an agreement subsidiary to the Convention on Biological Diversity. In legal terms, therefore, the Parties to the Protocol can not devise binding legal principles which go beyond the four corners of the Convention on Biological Diversity or terms that may contradict those utilized and/or to be developed pursuant to Article 14.2 of the Convention on Biological Diversity. Further, it is clearly more appropriate for the general concepts and terms concerning liability for damage to the conservation and sustainable use of biodiversity to be established in a broader framework, as the rules for liability in the Convention on Biological Diversity must be capable of applying to the entire range of potential threats to biodiversity and additional rules and/or agreements that may be developed under the CBD concerning other specific situations (e.g. alien invasive species).

The usual legislative approach, both in international and domestic law, is to develop first the basic principles which are capable of general application and which allocate liabilities in an equitable manner (*lex generalis*) and then, where it is clearly shown to be necessary, to modify or refine those principles to enable them to apply to special circumstances which display particular characteristics (*lex specialis*). There is no scientific or legal reason to depart from this normal and generally accepted legislative practice in the case of LMOs.

QUESTIONS 4-9 AND 12:

It is premature to begin to explore the substantive elements of any rules or procedures that might derive from Article 27 until the nature of the process envisaged by that Article has been determined by the States Parties to the Protocol at their first meeting. General information on the topics of channelling of liability, standards, exemptions, limitations (in time and amount), enforcement of judgements, and standing may be found in Annex I.

QUESTION 10:

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

RESPONSE:

Arbitration can play an extremely influential role in the determination of disputes arising in relation to liability and redress and, in this context, could well become the primary method for resolving any disputes. Arbitration is often preferable to other options because it:

- Offers the possibility of detailed and neutral resolution of disputes to an extent that may not be achievable in local courts;

- Enables the parties to a dispute to determine the procedure that will be followed by the tribunal (which is of considerable importance where the dispute is likely to involve significant volumes of detailed technical evidence);

- Enables the parties to select the tribunal, ensuring that the tribunal possesses the necessary expertise and experience to determine difficult technical issues;

- Provides for the empanelling of expert assessors to evaluate or determine issues of fact;

- Frequently achieves significantly quicker results than domestic courts; and

- Results in awards that are widely enforceable through the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, which is very widely ratified.

Importantly for developing countries, many institutional arbitration systems provide extensive bureau and other support services to the parties to assist with the processing of a claim.

Disputes between the States Parties to the Protocol may be resolved in accordance with the dispute resolution mechanisms set out in Article 27 of the Convention on Biological Diversity; i.e., negotiation followed by mediation to be followed, if unsuccessful, by either arbitration under Part I of Annex 2 to the Convention on Biological Diversity or by reference to the International Court of Justice.

QUESTION 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?

RESPONSE:

The users and developers of biotechnology believe this is primarily a matter for the consideration of governments but is of the view that the dispute resolutions mechanisms that already apply to the Protocol might be a more productive avenue in case of any dispute that may arise between governments.

Annex I

It is premature to explore the substantive elements of any rules or procedures that might derive from the Article 27 process until the nature of the process envisaged by that Article has been established by the Parties at the First meeting of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety. The private sector wishes, however, to share some information on the broad topics and legal concepts raised by Questions 4-9 and 12 in order to contribute toward improved understanding of general legal principles often raised in these discussions.

CHANNELLING OF LIABILITY

QUESTION 4:

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

RESPONSE:

Liability should be borne by those who are at fault. Liability may be channelled to one or more persons for any given activity where fault exists; similarly, liability may be channelled to one person but with the right to seek redress against another who is at fault.

In short, liability should fall upon those who are at fault. A well-designed liability system allocates liability to various actors in relation to their respective levels of legal responsibility. Determining the appropriate allocation of responsibilities (i.e., channelling of liability) requires a detailed examination of the particular series of activities in question, the actors involved at various stages and their relative degrees of fault

The general approach of channelling liability to various actors for defined activities within their control may be seen in the Basel Protocol in connection with transboundary movements of hazardous materials and their subsequent disposal. Liability under that Protocol attaches to the carrier until the point at which the waste comes into the possession of the disposer, who then becomes responsible for the waste and potentially liable for any damage that occurs after taking possession.10/ This solution combines the features of many of the best known and most successful international regimes for the allocation of liability for environmental harm.11/

STANDARD OF LIABILITY

QUESTION 5:

10/ Article 4(1), Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Waste and their Disposal provides "The person who notifies in accordance with Article 6 of the Convention shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes." Unless the exporting State assumes the duty to notify under Article 6 of the Convention, the person referred to is the generator or exporter of the waste – see Article 6(1), Basel Convention.

11/ A similar approach can be seen in the widely accepted regime for civil liability for environmental harm arising from the carriage by sea of oil and for dangerous chemicals. Under the 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended), supplemented by the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. The model has recently been endorsed by the adoption by member states of the International Maritime Organisation of the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (not yet in force). See also, 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS) by Sea.

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?

RESPONSE:

Absolute liability, which imposes liability on the defendant without the need for the plaintiff to prove fault *and which does not allow for any defences*, is virtually unknown in international environmental law.12/

Strict liability imposes liability with the need to prove causation but without the need to show fault. Commonly, it permits certain limited defences to be pleaded, including the permit defence and the state-of-the-art defence. Strict liability generally is limited to liability regimes for hazardous activities such as transport of oil and hazardous materials and nuclear activities.13/

Fault-based liability is commonly utilized for activities that are not inherently hazardous and requires the claimant to prove that the damage has occurred because of the wilful act, negligence or other culpable fault of the defendant.

EXEMPTIONS FROM LIABILITY

QUESTION 6:

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

RESPONSE:

Existing international liability conventions in the environmental field typically provide that no liability shall attach if the damage arose solely as a result of: war risks;14/ *force majeure*;15/ or sabotage or

12/ The sole example is to be found in the Convention on Liability for Damage Caused by Space Objects, governing activities radically different from any other activity that may have an adverse effect on the environment and certainly cannot be compared to the situation concerning LMOs.

13/ See e.g., Article 4(1), Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Waste and their Disposal; Article III(1), 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended); and Article 7(1), 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS) by Sea; and Article II, 1963 Vienna Convention on Civil Liability for Nuclear Damage.

14/ Article IV(3)(a), Vienna Convention on Civil Liability for Nuclear Damage; Article III(2)(a), 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended); Article 8(a), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment; Article 7(2)(a), International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea; Article 4(5)(a), Basel Protocol on Liability and Compensation for Damage resulting from transboundary Movements of Hazardous Wastes and their Disposal.

15/ Article III(2)(a), 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended) ("natural phenomenon of an exceptional, inevitable and irresistible character"); Article 8(a), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment ("natural phenomenon of an exceptional, inevitable and irresistible character"); Article 7(2)(a), International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea ("natural phenomenon of an exceptional, inevitable and irresistible character"); ; Article 4(5)(b), Basel Protocol on Liability and Compensation for Damage resulting from transboundary Movements of Hazardous Wastes and their Disposal. Article IV(3)(b), Vienna Convention on Civil Liability for Nuclear Damage as originally drafted contained an exemption for damage caused by a "grave natural disaster of an exceptional character", but this provision will be removed by Article 6(1) of the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, when it enters into force.;

terrorism.16/ (The saboteurs or terrorists, on the other hand, would most certainly be subject to civil and potentially criminal liability for damage resulting from their acts.) Because they are entirely beyond the power of the defendant to avoid or control, exemptions for these classes of risk are customarily included in international environmental liability conventions as striking an appropriate balance between protecting the interests of victims and doing justice to the defendant. Another common exemption exists where an act or omission resulting in harm is required by a responsible government agency.17/

Some conventions contain other exemptions, such as where damage is caused by tolerable levels of pollution under local circumstances,18/ where acts giving rise to the damage were taken in the interests of the person suffering damage (providing that it was reasonable to expose that person to the risk of damage) 19/ or where a failure of a responsible person to furnish information wholly or partly caused the damage.20/

Most conventions also provide an exemption to the extent that the damage is attributable to the gross negligence or fault of the person suffering the damage.21/

LIMITATION PERIODS

QUESTION 7:

Should liability be limited in time and, if so, for what period?

RESPONSE:

Domestic legal systems as well as international environmental conventions typically include provisions for limitation periods (often referred to as a statute of limitations) within which any person claiming to have suffered damage as a result of an incident is required to bring a legal claim. Claims filed after the limitations period will not be recognized and the cases will be dismissed.

16/ Article IV(2), Vienna Convention on Civil Liability for Nuclear Damage; Article III(2)(b), 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended); Article 8(b), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment; Article 7(2)(b), International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea; ; Article 4(5)(d), Basel Protocol on Liability and Compensation for Damage resulting from transboundary Movements of Hazardous Wastes and their Disposal.

17/ Article IV(1)(c), 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended); Article 8(c), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment ("resulted necessarily for compliance with a specific order or compulsory measure of a public authority"); ; Article 4(5)(c), Basel Protocol on Liability and Compensation for Damage resulting from transboundary Movements of Hazardous Wastes and their Disposal (same wording); Article 7(2)(c), International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances By Sea.

18/ Article 8(d), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.

19/ Article 8(e), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.

20/ Article 7(2)(d), International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea,

21/ Article IV(2), Vienna Convention on Civil Liability for Nuclear Damage; Article 4(5)(d), Basel Protocol on Liability and Compensation for Damage resulting from transboundary Movements of Hazardous Wastes and their Disposal refers to the "wrongful *intentional* conduct" of the plaintiff; Article IV(3), 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended); Article IV, Vienna Convention on Civil Liability for Nuclear Damage; Article 9, Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment; Article 7(3), International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea.

These limitation periods vary in length, however, in general terms, claimants are expected to file their claims within a fairly short period after the incident alleged to have caused damage, typically around 3 years. A defined and relatively short limitations period 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.

LIABILITY LIMITATIONS

QUESTION 8:

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

RESPONSE:

Liability systems commonly include a maximum amount that any person could be legally compelled to pay upon being found responsible for the damage or violation in question. Such liability limitations 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 advances and other pursuits that may benefit the public as a whole. Liability ceilings also may be important for insurability.

For the same reasons, maximum liability limitations are a standard feature of most international environmental liability instruments.22/

To achieve the desired societal objectives, liability limitations must not only exist but be established at appropriate levels, commensurate with the risks of given activities relative to other activities on the basis of sound science.

ENFORCEMENT OF JUDGEMENTS

QUESTION 9:

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

RESPONSE:

As part of the internationalisation 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 the subsequent enforcement (e.g. by execution or seizure of property of

22/ Article V(1), 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 1November 2003; Article 9, International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea; Article 12(1) and Appendix B, Basel Protocol on Liability and Compensation for Damage resulting from transboundary Movements of Hazardous Wastes and their Disposal. The disposer's liability is capped at 2 million SDRs. Liability of other persons unconnected with the transboundary movement or disposal is unlimited – see Article 12(2) – but these persons are likely to be unlawfully meddling with the waste.

the defendant within the jurisdiction of the State receiving the request). There are a number of multilateral agreements of this sort, often associated with regional economic integration organisations.23/

This existing system of reciprocal recognition and enforcement of foreign judgements can be utilized to enforce judgements rendered by national courts, regardless of the particular subject matter.

STANDING TO BRING CLAIMS

QUESTION 12:

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

RESPONSE:

The question of who has legal standing (the right) to bring claims for redress in any legal system, is highly complex but fundamentally reflects a policy judgement about which persons or entities are sufficiently involved with the matter in dispute to merit the possibility of pursuing legal action. In both national and international systems, legal standing to bring claims generally is confined to those who have suffered actual damage.

This insistence on a genuine interest stems from a desire to avoid the courts being flooded with (and the public bearing the costs of) claims which are without real substance from persons whose interest is only theoretical or moral. The proper method of advancing such claims lies in the political sphere.

Traditionally, the necessary interest to have standing has been narrowly defined to include only those with a close personal or property interest which is impacted by the matter in dispute. In recent years, however, this requirement has been relaxed somewhat to allow environmental interest groups *to challenge the decisions of public officials* in matters relating to environmental issues with which the interest group is involved or on which it has special knowledge which would assist the court. In no case, however, has any international body accepted that such public interest groups may seek compensation for environmental harm.

INTERNATIONAL GRAIN TRADE COALITION (IGTC) [22 SEPTEMBER 2003]
[SUBMISSION: ENGLISH]

Response to Questionnaire in the Annex to UNEP/CBD/ICCP/3/10

Question 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 LMOs?

Response: Criteria for assessing damage to biodiversity resulting from transboundary movements of LMOs must be objective, transparent, and employ science-based principles. Damage to biodiversity must

23/ See, e.g., the EU's Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; and the Las Lenas Protocol on the recognition and enforcement of judgments and arbitral awards in the Mercosur.

be readily observable, significant and calculable applying established fault-base liability principles (i.e., actual economic harm).

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

Response: 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 who are proven to be actually at fault for the damage, e.g., a local importer who diverts an LMO shipment for non-food, non-feed or non-processing purposes. 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 minimis, damage to trigger application of any international rules and procedures developed under the Protocol.

Question 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(2) of the Convention on Biological Diversity?

Response: Damage to be defined under Article 27 should mean a change in variability among species, where such change in variability is also adverse and significant. Furthermore, it is important that the rules and definitions on liability and redress formulated under the Biosafety Protocol be consistent with similar rules and definitions under the Convention on Biological Diversity to avoid creating conflicts between both agreements.

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

Response: Liability should be channelled 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. Exporters and transporters who comply with their labelling and other obligations but which 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 under the Protocol.

Question 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?

Response: The standard of liability for LMO shipments of food, feed or further processing must be fault-based. In other words, it is imperative that liability be based upon conduct that constitutes, at minimum, negligence or some failure to exercise reasonable diligence or care. Exercising due care and following best practices should be available as a defense against liability claims. Furthermore, developing a liability regime based on strict or absolute liability for LMOs is ill advised because it would impose unmanageable and unknowable risks that are unworkable in a global, bulk commodity shipment environment. Without some commercial predictability, including who is liable and for what conduct may a party be held liable, the parties are unable to manage and provide for risks, including insurance, and injured parties could be left with no source for recovery.

Question 6: Should there be any exemption from liability? If so, under what circumstances?

Response: Existing international liability conventions in the environmental field typically provide that no liability shall attach if the damage arose solely as a result of: war risks; *force majeure;* or sabotage or

terrorism, Because these events are entirely beyond the power of the defendant to avoid or control, exemptions for these classes of risk are customarily included in international environmental liability conventions as striking an appropriate balance between protecting the interests of victims and doing justice to the defendant. Another common exemption exists where an act or omission resulting in harm is required by a responsible government agency.

Some conventions contain other exemptions, such as where damage is caused by de minimis levels of pollution under local circumstances, where acts giving rise to the damage were taken in the interests of the person suffering damage (providing that it was reasonable to expose that person to the risk of damage) or where a failure or a responsible person to furnish information wholly or partly caused the damage.

Most conventions also provide an exemption to the extent that the damage is attributable to the party suffering the damage is itself negligent or at fault, or where that party willingly assumes the risk of a particular action. As noted earlier, exporters and transporters who comply with their labelling and other obligations but which 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 under the Protocol.

Question 7: Should liability be limited in time and, if so, to what period?

Response: Domestic legal systems as well as international environmental conventions typically include provisions for limitation periods (often referred to as a statute of limitations) within which time any person claiming to have suffered damage as a result of an incident is required to bring a legal claim. Claims filed after the limitations period will not be recognized and the cases will be dismissed.

These limitation periods vary in length but generally claimants are expected to file their claims within a fair and reasonable period after the incident alleged to have caused damage, typically around 3 years. A defined and reasonable limitations period promotes vigilance and care by potential claimants concerning their legal rights, results in fewer evidentiary problems, provides predictability and enhances insurability for potential defendants, and, overall, contributes to a well-functioning legal system.

Question 8: Should liability be limited in amount and, if so, to what amount?

Response: Liability systems commonly include a maximum amount that any person or entity could be legally compelled to pay upon being found responsible for the damage or violation in question. Such liability limitations 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 advances and other pursuits that may benefit the public as a whole. Liability ceilings are also important for insurability.

For the same reasons, maximum liability limitations are a standard feature of most international environmental liability instruments.

To achieve the desired societal objectives, liability limitations must not only exist but be established at appropriate levels, commensurate with the risks of given activities relative to other activities on the basis of sound science. For LMO cargos for food, feed or further processing, the maximum liability applicable to parties responsible for the transboundary movement of commodity shipments should be the value of the cargo or possibly some reasonable multiple of such value (e.g., twice).

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

Response: As part of the internationalisation 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 judgements pronounced by other parties to the treaty and for the subsequent enforcement (e.g. by execution or seizure of property of the defendant within the jurisdiction of the State receiving the request). There are a number of multilateral agreements of this sort, often associated with regional economic integration organizations.

This existing system of reciprocal recognition and enforcement of foreign judgements can be utilized to enforce judgements rendered by national courts, regardless of the particular subject matter.

An impartial third party is essential in determining liability and redress under a science-based, fault-based liability and redress system. Notwithstanding the theoretical rules which are adopted to determine and allocate liability, costs will increase substantially and trade will be disrupted and inhibited if trading partners are forced to defend their actions in numerous countries based upon what may be politically-inspired challenges.

Consequently, the Protocol should require that companies in the international development, sale and distribution of LMOs participate in an international arbitration system to resolve disputes over LMO transboundary movements.

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

Response: Arbitration can plan an extremely positive role in the determination of disputes arising in relation to liability and redress and, in this context, could well become the primary method for resolving any disputes.

Arbitration is often preferable to other options because it:

- Offers the possibility of detailed and neutral resolution of disputes to an extent that may not be achievable in local courts;

- Enables the parties to a dispute to determine the procedure that will be followed by the tribunal (which is of considerable importance where the dispute is likely to involve significant volumes of detailed technical evidence);

- Enables the parties to select the tribunal, ensuring that the tribunal possesses the necessary expertise and experience to determine difficult technical issues;

- Provides for the empanelling of expert assessors to evaluate or determine issues of fact;

- Frequently achieves significantly quicker and more cost-efficient results than domestic courts; and

- Results in awards that are widely enforceable through the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, which is widely ratified.

Importantly for developing countries, many institutional arbitration systems provide extensive bureau and other support services to the parties to assist with the processing of a claim. Disputes between the States Parties to the Protocol may be resolved in accordance with the dispute resolution mechanisms set out in Article 27 of the CBD; i.e., negotiation followed by mediation to be followed, if unsuccessful, by either arbitration under Part I of Annex 2 to the CBD or by reference to the International Court of Justice.

Question 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?

Response: This is primarily a matter for the consideration of governments.

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

Response: While this is a complex question, the answer should fundamentally reflect a policy judgement about which persons or entities are sufficiently involved with the matter in dispute to merit the possibility of pursuing legal action. In both national and international systems, legal standing to bring claims generally is confined to those who have suffered actual, direct economic damage and not those whose interest is based on political or social ground (e.g., public interest groups seeking compensation for environmental harm).
