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

First meeting

Montreal, 25-27 May 2005

Item 3 of the provisional agenda*

**RECENT DEVELOPMENTS IN INTERNATIONAL LAW RELATING TO LIABILITY AND
REDRESS**

Note by the Executive Secretary

I. INTRODUCTION

1. In its decision BS-I/8, the Conference of the Parties serving as the meeting of the Parties to the Protocol requested the Executive Secretary to convene a Technical Group of Experts on Liability and Redress to undertake preparatory work for the first meeting of the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (hereinafter “the Working Group”). Accordingly, the Technical Group of Experts met in Montreal from 18 to 20 October 2004 and, *inter alia*, identified several areas where it believed that an information gap exists. In its recommendations, the Group stated that information in those areas could benefit the future work of the Working Group. One of the areas identified by the Group concerns “recent developments in international law relating to liability and redress, including soft law”. In that regard, the Technical Group requested the Secretariat to take appropriate measures in order to make the information available (see UNEP/CBD/BS/WG-L&R/1/2, para. 117 (b) (vi)).

2. The present information document has been prepared in response to that request.

**II. RECENT DEVELOPMENTS IN INTERNATIONAL LAW RELATING
TO LIABILITY AND REDRESS, INCLUDING SOFT LAW**

3. Liability and redress is a subject of interest for several international organizations and treaty processes. Therefore, there is a large body of knowledge and experiences available from these organizations and processes and it is not surprising that Article 27 of the Biosafety Protocol provides for a process of elaboration of rules and procedures in the field of liability and redress that analyses and takes into account ongoing processes in international law.

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

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4. The Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP), the interim process that was established at the time of the adoption of the Protocol to undertake the necessary preparations for the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol was, in accordance with its work plan, required to elaborate a draft recommendation on the process for elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, including, *inter alia*: (a) review of existing relevant instruments; and (b) identification of elements for liability and redress. In order to assist the ICCP in fulfilling this task, the Executive Secretary prepared for the second meeting of the Committee a note reviewing existing relevant instruments and identifying elements relating to liability and redress for damage resulting from the transboundary movement of living modified organisms (UNEP/CBD/ICCP/2/3).

5. That note examined the concept of State responsibility and environmental liability in customary public international law, and reviewed existing multilateral treaties dealing with liability and redress for transboundary harm including: (i) the nuclear liability treaties; (ii) the oil pollution liability instruments; (iii) liability regarding the transport of dangerous goods and substances; (iv) the 1972 Convention on Liability for Damage Caused by Space Objects; (v) the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (the Lugano Convention of 1993); and (vi) the 1998 Convention on the Protection of the Environment Through Criminal Law. The note also provided an overview of ongoing developments in related international forums such as: (i) the United Nations Environment Programme; (ii) the United Nations Compensation Commission; (iii) the International Law Commission; (iv) the Antarctic Treaty System; (v) the Commission of European Communities; and (vi) the Convention on Biological Diversity.

6. Following a request by ICCP at its third meeting ^{1/} to continue gathering information on the issue and to update the information contained in the note prepared for its second meeting, the Executive Secretary prepared an update on developments in international and regional legal instruments on liability and redress (UNEP/CBD/BS/COP-MOP/1/9/Add.1). This document was submitted to the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. The document includes information on the relevant work of: (i) the International Law Commission; (ii) International Maritime Organization; (iii) United Nations Environment Programme; (iv) Permanent Court of Arbitration; (v) Hague Conference; and (vi) European Union (directive on environmental liability, which was in draft form at the time). The document also contains updates on relevant processes under: (i) the Convention on Biological Diversity and the Protocol on Biosafety; (ii) Civil Liability for Damage to Transboundary Waters Caused by Industrial Accidents; (iii) Stockholm Convention on Persistent Organic Pollutants; and (iv) Antarctic Treaty.

7. The present information document is, therefore, intended to cover developments in international law relating to liability and redress that have occurred after the preparation of the above mentioned note by the Executive Secretary for the purpose of the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. In other words, the term 'recent developments' was understood to mean developments, if any, which emerged after the compilation of the information in the document just mentioned or not otherwise covered by the two documents, including the note prepared for the second meeting of ICCP (UNEP/CBD/ICCP/2/3), which reviewed developments in international law relating to liability and redress.

^{1/} Recommendation 3/1 of the third meeting of the ICCP (UNEP/CBD/ICCP/3/10, annex).

A. *Antarctic Treaty System*

8. The success of the first multinational research programme known as the International Geophysical Year (IGY) in 1957-1958 led the nations that participated in the IGY ^{2/} to negotiate and adopt an international agreement, known as the Antarctic Treaty, that sanctions the use of the Antarctic for peaceful and research purposes. The Antarctic Treaty was signed on 1 December 1959 in Washington. The Antarctic Treaty System comprises the Treaty itself and several other related agreements including the 1991 Protocol on Environmental Protection to the Antarctic Treaty.

9. Article 16 of the 1991 Protocol on Environmental Protection to the Antarctic Treaty provides that Parties undertake to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by the Protocol. In view of this provision, negotiations for a liability annex to the Protocol have been underway for several years. In 1999, the Twenty-third Antarctic Treaty Consultative Meeting (ATCM) affirmed its commitment to develop a liability regime under the Protocol and called for further negotiations within Working Group I. During thematic deliberations within the Group, the following themes were discussed: what damage the annex or annexes should cover; what operators should be covered; whether liability should be strict, joint and several; exemptions from liability; preventative measures, response action, remedial and restorative measures; third-party intervention; residual State liability; and responsibility to reimburse costs incurred. As a result of the thematic deliberations the following areas of convergence, among others, emerged:

(a) The approach should involve consideration of preventative measures, response action and liability;

(b) The definition of the term “operator” should include all States parties and all public or private legal entities or individuals engaged in activities in the Antarctic Treaty area and are authorized by or under the jurisdiction and control of a State party;

(c) The regime should be one of strict liability;

(d) Exemptions from liability will be understood to exist in cases of, *inter alia*, acts of God, *force majeure*, armed conflict, and acts of terrorism;

(e) When the need arises to conduct response action in order to prevent environmental damage, the State Party may request the cooperation of third parties or give its consent to third parties to take such action.

10. The process of elaborating rules and procedures relating to liability continued and a draft annex to the Protocol was considered at the 25th ATCM held in Warsaw from 10 to 20 September 2002, as well as at the 26th ATCM held in Madrid from 9 to 20 June 2003.

11. The twenty-seventh ATCM, which took place in Cape Town from 24 May to 4 June 2004 considered and endorsed, among other things, a draft annex proposed by the Chair of the Working Group on Liability. The later met during the first week of the twenty-seventh ATCM and dealt with a number of issues arising from a revised Chairman’s draft of the Liability Annex. These issues include: scope, non-retroactivity; limits on compensation (draft Article 9); criteria and mechanisms for the amendment of limits; actions for compensation, i.e., the question of who should bring actions (Article 7); dispute settlement mechanisms (interest was expressed to use an inquiry commission); the obligation of enforcement; the time limit for appealing to the fund and the nature and scope of the fund; definitions (Article 2), especially of “environmental emergency”, “operator” and “response action”. ^{3/} The Working Group agreed to continue working inter-sessionally.

^{2/} Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, United Kingdom, United States and USSR.

^{3/} Final Report of the Twenty-Seventh Antarctic Treaty Consultative Meeting, Cape Town, South Africa, 24 May-4 June 2004.

B. International Atomic Energy Agency

12. Following recommendation by the International Conference on the Safety of Transport of Radioactive Material held from 7 to 11 July 2003, the International Atomic Energy (IAEA) established International Expert Group on Nuclear Liability (INLEX) to explore and advise on issues related to nuclear liability. INLEX met three times between October 2003 and July 2004 and reviewed and finalized explanatory texts on the nuclear liability instruments adopted under the auspices of the Agency, namely the 1963 Vienna Convention on Civil Liability for Nuclear Damage, ^{4/} and the 1997 Convention on Supplementary Compensation for Nuclear Damage. The Explanatory Texts ^{5/} are believed to assist in the understanding and authoritative interpretation of the nuclear liability regime. The document explains, among other things, the origin of the international civil liability regime for damage caused by nuclear incidents, the purpose of the conventions, the general principles of liability upon which the regime is based, i.e., (a) absolute liability (liability without fault); (b) exclusive liability of the operator of the nuclear installation; (c) limitation of liability in amount and/or limitation of liability cover by insurance or other financial security; and (d) limitation of liability in time.

13. With respect to the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, the Explanatory Texts provide the drafting history, and an extensive review of the purpose and meaning of the provisions of the Protocol. The purpose of the 1997 Protocol as stated in the preamble is to amend the 1963 Convention in order to provide for “broader scope, increased amount of liability of the operator of a nuclear installation and enhanced means for securing adequate and equitable compensation”.

14. The need to update the definition of “nuclear damage” was one of the important issues addressed by the Protocol. In that regard, the Explanatory Texts discuss one of the “new heads of damage” introduced by the Protocol, namely measures of reinstatement of impaired environment and preventive measures. They clarify that, in view of the difficulties involved in the monetary evaluation of environmental damage, it was decided in the Protocol to limit compensation to the costs of measures of reinstatement of impaired environment and as long as such impairment is significant. It is further explained that while the question of what is a significant impairment is left to the competent court, there is an explicit instruction in the Protocol that damage is to be compensated under this head only in so far as it is not already included in the concept of property damage under the applicable substantive law. This is further illustrated in the Explanatory Texts. For example, measures taken by a farmer whose land has been contaminated would, in most cases, fall under the concept of property damage, whereas the case of damage resulting from impairment of the environment is mainly designed to cover measures taken in respect of areas owned by the general public. ^{6/}

C. International Civil Aviation Organization

15. In 2001, the International Civil Aviation Organization (ICAO) launched a study on the modernization of the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention). The study was a response to the decision taken by the Legal Committee of ICAO, at its thirty-first session held from 28 August to 8 September 2000, to include in its programme of work the modernization of the Convention. Though the Rome Convention entered into force on 4 February 1958, it has failed to generate wide support. Over time, its provisions such as those on the limits of liability became outdated and the scope of damage and other standards failed to meet present-day

^{4/} The Convention is amended by 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage. The Protocol entered into force on 4 October 2003.

^{5/} IAEA, Explanatory Texts- A comprehensive study of the Agency’s nuclear liability regime by the IAEA International Expert Group on Nuclear Liability (INLEX), July 2004. The Explanatory Texts were approved by the IAEA Board of Governors on 13 September 2004 and by the IAEA General Conference that was held from 20 to 24 September 2004.

^{6/} Ibid. p.41.

concepts and standards. Among those few States, that were once Parties to the Convention, some have, in fact, begun withdrawing. ^{7/}

16. With the assistance of a Secretariat Study Group, a Draft Convention on Damage Caused by Foreign Aircraft to Third Parties was prepared by ICAO Secretariat and submitted to the Legal Committee at its thirty-second session, held from 15 to 21 March 2004. The Committee reviewed the draft Convention and agreed that further work was needed in certain areas such as caps with respect to insurability and the rules of private international law. Following that, the ICAO Council decided, at the 6th meeting of its 172nd session on 31 May 2004, to establish a Special Group on the Modernization of the 1952 Rome Convention to advance the work. ^{8/} The main focus of the Special Group would be to balance the demands for victim protection and the availability of insurance cover with adequate protection of the air transport system that avoids a compensation regime that would threaten the financial status of the air transport sector. In this regard, the availability of war-risk insurance has become of a special concern after the attacks of 11 September 2001 on World Trade Centre in New York. The Special Group met in Montreal from 10 to 14 January 2005. The official report of the meeting, which was not yet officially available at the time of finalizing this note, is expected to be considered at the next ICAO Council meeting. ^{9/}

D. International Law Commission

17. In 1978, at its thirtieth session, the International Law Commission (ILC) decided to include in its programme of work the topic “International liability for injurious consequences arising out of acts not prohibited by international law”. In due course, two issues, namely “prevention” and “international liability” became distinct and prominent in the work of the Commission under this topic. At its forty-fourth session, in 1992, the Commission decided, based on the recommendation of its own working group, to continue the work on this topic in stages, dealing first with the issue of “prevention of transboundary damage from hazardous activities”. At its fifty-third session, in 2001, the Commission adopted the final text of a draft preamble and a set of 19 draft articles on Prevention of Transboundary Harm from Hazardous Activities, and submitted the text to the United Nations General Assembly. ^{10/}

18. At its fifty-fourth session, in 2002, the Commission resumed its consideration of the second part of the topic, namely international liability in case of loss from transboundary harm arising out of hazardous activities. By 9 July 2004, at one of the meetings of its fifty-sixth session, the Commission adopted, on first reading, eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. Governments are requested to provide their comments and observations on the draft principles by 1 January 2006.

19. The draft principles contain provisions on scope of application (principle 1), use of terms (principle 2), objective (principle 3), prompt and adequate compensation (principle 4), response measures (principle 5), international and domestic remedies (principle 6), development of specific international regimes (principle 7), and implementation (principle 8).

20. The background to the draft principles as outlined in the preamble places the draft principles in the context of the draft articles on the prevention of transboundary harm from hazardous activities

^{7/} Canada, Austria and Nigeria have deposited instruments of denunciation with ICAO in 1976, 2000 and 2002, respectively.

^{8/} Progress report on the Modernisation of the Rome Convention of 1952, working paper A35-WP/18, LE/3, 08-07-04.

^{9/} MARSH, Aviation Special Bulletin, February 2005.

^{10/} The Commission also adopted, at the same session, a text of draft articles on Responsibility of States for internationally wrongful acts. See the *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10)* for the texts and commentaries on (i) the draft articles on Responsibility of States for Internationally Wrongful Acts (chapter IV, paragraphs 76 and 77), and (ii) the draft articles on Prevention of Transboundary Harm from Hazardous Activities (chapter V, paragraphs 97 and 98).

adopted in by the Commission in 2001. It is clearly stated that the draft principles are sought to provide the means by which those who suffer harm or loss as a result of accidents or other incidents involving hazardous activities, which may occur regardless of the compliance of a State with its prevention obligations, are not left to carry those losses and are able to obtain prompt and adequate compensation. Such interrelationship of the issues of “prevention” and “international liability” emphasized by the Commission was further reflected by maintaining the scope of the draft articles on prevention of transboundary harm in the scope of application of the draft principles (draft principle 1).

21. ILC followed a number of assumptions/basic understandings in preparing the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. These basic understandings are:

(a) The draft principles should be general and residual in character and without any prejudice to the relevant rules of State responsibility adopted by the Commission in 2001; ^{11/}

(b) As mentioned earlier, the scope of the liability aspect should be the same as the scope of the draft articles on prevention of transboundary harm from hazardous activities, ^{12/} including the use of the same threshold, ‘significant’ to trigger the regime;

(c) The regime should provide for prompt and adequate compensation for the innocent victims and contingent plans and response measures should be in place over and above those contemplated in the draft articles on prevention;

(d) Liability for activities falling within the scope of the draft principles should be attached primarily to the operator and such liability would be without requiring proof of fault, and may be limited or subject to exceptions, taking into account social, economic and other considerations;

(e) A scheme of allocation of loss may be adopted, spreading the loss among multiple actors, including the State, recalling the prevention duties of the State which entail certain minimum standards of due diligence;

(f) In most cases the substantive or applicable law to resolve compensation claims may involve either civil liability or criminal liability or both, and would depend on a number of variables; and

(g) The Commission has reserved the right to reconsider the matter of the final form of the instrument (the text of draft principles) at the second reading in the light of the comments and observation of Governments.

D. International Maritime Organization

22. The Assembly for the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage approved, at its ninth session held from 19 to 22 October 2004, a modification to the 1992 Fund’s Claim Manual with respect to criteria for the admissibility of claims for costs of measures to reinstate the environment. It was noted that the modification become necessary to reflect the fact that it was virtually impossible to bring damaged site back to the same ecological condition (*ex ante*) that would have existed had an oil spill not occurred. The revised Manual also makes a distinction between claims for costs of reinstatement measures and claims for economic losses caused by environmental damage and the different criteria that applied to these claims Accordingly, the Manual now includes, as examples of economic loss due to environmental damage: (i) a reduction in revenue for a marine park or nature reserve which charges the public for

^{11/} Draft articles on responsibility of states for internationally wrongful acts (2001).

^{12/} Draft articles on prevention of transboundary harm from hazardous activities (2001).

admission; and (ii) a reduction in catches of commercial species of marine products directly affected by the oil. ^{13/}

E. United Nations Compensation Commission

23. The United Nations Compensation Commission (UNCC) is a subsidiary organ of the United Nations Security Council established in 1991 to process claims resulting from Iraq's invasion and occupation of Kuwait. Compensation is payable for successful claims from a special fund that receives a portion of the proceeds from Iraq's oil sale. The UNCC has received over 2.6 million claims from about 100 Governments seeking a total of approximately US\$ 350 billion.

24. According to paragraph 16 of Security Council resolution 687 (1991), Iraq is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources. Claims for environmental damage fall into two broad groups. The first group comprises claims for environmental damage and depletion of natural resources in the Persian Gulf region, including those resulting from oil-well fires and the discharge of oil into the sea. The second group of claims relate to the costs of clean-up measures undertaken by Governments that provided assistance to affected countries in the region in order to alleviate or mitigate damage caused by the oil-well fires or the oil spills.

25. The UNCC Governing Council adopted decision 7 (S/AC.26/1991/7/rev.1) on criteria for processing environmental claims. Accordingly, direct environmental damage and depletion of natural resources as a result of Iraq's unlawful invasion and occupation of Kuwait which the Council has found to constitute compensable losses or expenses include ^{14/} losses or expenses resulting from:

- (a) Abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters;
- (b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;
- (c) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;
- (d) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage;
- (e) Depletion of or damage to natural resources.

26. The UNCC Governing Council adopted a number of decisions since 2001 based on the recommendations of the panel of Commissioners, and awarded payment of compensation for several claims. The claims relate to expenses incurred for measures to abate and prevent environmental damage,

^{13/} For the text of revised Claims Manual see Annex to document 92FUND/A.9/20. For the Record of Decisions of the Ninth Session of the Assembly see document 92FUND/A.9/31 of 22 October 2004.

^{14/} Paragraph 35 of decision 7 (S/AC.26/1991/7/rev.1). See paragraph 22 of the Report and Recommendations of the Panel of Commissioners concerning the second instalment of "F4" claims (S/AC.26/2002/26) for thoughts regarding the non-exhaustive nature of the list of specific losses and expenses under paragraph 35 of decision 7 of the UNCC Governing Council.

to clean and restore the environment, to monitor and assess environmental damage and public health risks alleged to have resulted from Iraq's invasion and occupation of Kuwait.

27. The Panel addressed a number of issues relating to causation in order to determine Iraq's liability and eligibility of each particular claim for compensation. In one instance, for example, the Panel made it clear that although the mere fact that the contribution of other factors (as parallel or concurrent causes) to any loss or damage may not necessarily exonerate Iraq from liability, the evidence submitted by the claimant must provide a sufficient basis for determining what proportion of the damage could have reasonably be attributed directly to Iraq's invasion and occupation of Kuwait.

28. As at December 2004, all but approximately 25,000 of the claims filed with the Commission were resolved. It is estimated that all remaining claims will be resolved by June 2005. 15/

F. United Nations Economic Commission for Europe

29. The Inland Transport Committee of the United Nations Economic Commission for Europe (UNECE) considered, at its sixty-sixth session held from 17 to 19 February 2004, a revised text of the 1989 Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail, and Inland Navigation (CRTD). The revised text was prepared by Ad Hoc Meeting of Experts constituted to look into the CRTD. The Committee noted that participation in the sessions of the Ad Hoc Meeting of Experts held from 7 to 9 July and on 3 and 4 November 2003 was rather low. The Committee considered that in view of the uncertainties as to the willingness of member States to ratify a new CRTD, it would be premature to adopt the revised text. It felt necessary to pursue the matter in an informal manner and, therefore, decided not to renew the mandate of the Ad Hoc Meeting Experts. Member States are invited to study the revised CRTD and to conduct informal consultations. 16/

G. European Union

30. In February 2004 the Council of the European Union (EU) and the European Parliament approved a directive on environmental liability 17/ after the differences on certain issues between the two institutions of the EU were ironed out through a conciliation committee. In accordance with the conciliation process, the Council of the EU and the European Parliament agreed on adjustments with respect to the evaluation of the provisions relating to: (a) the development of financial security instruments, and (b) the exclusion of damage covered by certain international liability instruments.

31. Directive 2004/35/CE introduces a system of public liability for environmental damage without prejudice to domestic civil liability regimes for environmental damage. "Environmental damage" is defined in the directive as (a) damage that has significant adverse effects on reaching or maintaining the conservation status of protected species and natural habitats; (b) water damage, i.e. damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential of waters; and (c) land damage, i.e. land contamination that creates a significant risk of human health being adversely affected. The Directive also defines "damage" as a measurable adverse change in a natural resource or measurable impairment of a natural resource service, which may occur directly or indirectly.

32. According to the directive, operators shall bear the cost of prevention and clean-up or remediation measures. 18/ The member State concerned may cover those costs but only as a means of last resort. The limitation period for the recovery of costs is five years from the date on which those measures have been

15/ UNCC at a glance, at <http://www2.unog.ch/uncc/ataglance.htm>

16/ Report of the Inland Transport Committee on its Sixty-sixth Session (17-19 February 2004), , Inland Transport Committee, Economic Commission for Europe, ECE/TRANS/156, paragraphs 113-115.

17/ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJEC 2004, L 143/56)

18/ Paragraph 1, Article 8, Directive 2004/35/CE.

completed or the liable operator, or third party, has been identified, whichever is the later. Strict liability is the standard for defined hazardous activities while fault is the basis for other activities.

33. Member States are not restricted from maintaining or adopting more stringent provisions. ^{19/} The Directive requires member States to report to the Commission on the experience gained in the application of the directive by 30 April 2013 at the latest. Such reports shall include “a review of the application of the directive to environmental damage caused by genetically modified organisms (GMOs), particularly in the light of experience gained within relevant international fora and Conventions, such as the Convention on Biological Diversity and the Cartagena Protocol on Biosafety, as well as the results of any incidents of environmental damage caused by GMOs”. ^{20/}

^{19/} Paragraph 1, Article 16, directive 2004/35/CE.

^{20/} Paragraph 3(b), Article 18, directive 2004/35/CE.