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LIABILITY AND REDRESS FOR DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS

Note by the Executive Secretary

I. INTRODUCTION

1. At its second meeting, the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP), requested, in its recommendation 2/1, Parties, Governments and relevant international organizations to provide the Executive Secretary with information on national, regional and international measures and agreements in the field of liability and redress for damage resulting from transboundary movements of living modified organisms. The ICCP further requested the Executive Secretary to prepare a synthesis report of the information provided by Parties, Governments and relevant international organizations. The present note has been prepared in response to that request.

2. The Executive Secretary had received, as of 10 February 2002, submissions from Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Equatorial Guinea, the European Union, Fiji, Finland, Germany, Norway, Romania, Slovenia, Switzerland, the United States of America and Viet Nam. On the basis of these submissions, the Executive Secretary prepared the present synthesis document for the consideration of the third meeting of the ICCP. The original submissions are available as an information document (UNEP/CBD/ICCP/3/INF/1).

3. In addition, the Executive Secretary also received submissions from Canada, the Republic of Korea and Slovenia regarding the terms of reference for the open-ended ad hoc group of legal and technical experts under Article 27 of the Cartagena Protocol that may be established at the first meeting of the Conference of the Parties serving as the meeting of the Parties. These submissions are available as an information document (UNEP/CBD/ICCP/3/INF/2).

II. SYNTHESIS OF INFORMATION ON NATIONAL MEASURES IN THE FIELD OF LIABILITY AND REDRESS FOR DAMAGE RESULTING

* UNEP/CBD/ICCP/3/1.

FROM TRANSBOUNDARY MOVEMENT OF LIVING MODIFIED ORGANISMS

A. General observations

4. Among all the submissions, ten countries have given a summary of their national legislation relating to LMOs in the field of liability and redress, which include:

- (a) The Gene Technology Act (in force on 21 June 2001), in *Australia* (the “Australian Gene Act”);
- (b) The Law on Genetic Engineering (in force on 1 January 1995, amended on 22 May 1998), in *Austria*;
- (c) The Civil Code and the relevant administrative statutes, in *Belgium*;
- (d) The Canadian Environmental Protection Act, 1999 (CEPA), in *Canada*;
- (e) The Act on the use of Genetically Modified Organisms and Products and Amendment of some related Acts (1 January 2001, Act No. 153/2000), in *Czech Republic* (the “Czech Act”);
- (f) The Act on Compensation for Damage to the Environment (No.225, 6 April 1994), in *Denmark* (the “Danish Act on Environmental Damage”);
- (g) The Gene Technology Act (377/95) and the Act on Compensation for Environmental Damage (737/94) (the “Finnish Act on Environmental Damage”), in *Finland*;
- (h) The German Genetic Engineering Act (in force January 1990), in *Germany*;
- (i) The Gene Technology Act of 1993, in *Norway* (the “Norwegian Gene Act”);
- (j) The draft Federal Law on Non-Human Gene Technology, in *Switzerland* (the “draft Swiss Gene Technology Law”). ^{1/}

5. It should be noted that the national legislations listed above deal with liability rules relating to LMO activities in a broad context, rather than specifically focusing on liability and redress for damage resulting from transboundary movements of LMOs. Some countries reported that so far, there has been little litigation under their liability laws concerning LMOs.

6. Analysis of the national legal regimes submitted suggests that countries have taken different approaches to address liability and redress concerning LMOs. For example, some countries seem to have employed a sector-wise approach where liability provisions are introduced and inserted into the existing legislations for sectors of genes or biotechnology. The provisions on liability are adjusted to meet the specificities of LMOs. Most countries, on the other hand, have adopted a horizontal approach in which no distinction is made in applying the liability law between LMOs and other industrial activities. Some countries provide the liability rules in their legislations on gene technology by simply establishing a clear link to the existing domestic liability regimes such as the law on compensation for environmental damage as well as the liability on product. It was pointed out that the liability issue in the area of LMOs should not be

^{1/} The Draft Swiss Gene Technology Act will be discussed by the second chamber of the Parliament and the National Council during the course of 2002. The proposed liability regime is subject to possible modifications.

treated differently from that applied to other related areas for the sake of consistency and coherence; nor is it necessary to tailor the existing legal regimes to address the damage incurred by LMOs.

7. In regulating LMOs, the majority of national legal systems submitted operate through both civil liability and administrative mechanisms. Under civil systems, some countries have enacted specific laws to provide a basis for claiming compensation for environmental damage suffered in which LMO-activities are included, such as the Danish Act on Environmental Damage, the Finnish Act on Compensation for Environmental Damage and the Norwegian Pollution Control Act. There are common-law actions available for third parties to recover losses from damage caused by the transboundary movements of LMOs, including actions in trespass, nuisance and negligence. At the administrative level, a typical characteristic is the use of administrative licensing or authorization, such as the Gene Regulator in Australia or supervisory authority in Norway, to administer the implementation of laws and, in case of occurrence of damage, to order the polluters to take actions or to allow the authority itself to take measures, to prevent further damage and restore environment.

8. For most countries, liability law in the field of LMOs is a new issue and development of national legal and administrative regimes is urgently needed. This is particularly true for developing countries. One submission indicated that, except for some general regulations concerning gene resources, there is not an appropriate system to address LMO activities. It therefore calls for assistance and capacity-building to develop its national monitoring, control and legal framework to prevent risks to human health and adverse effects on the environment.

B. Synthesis of the information on the main elements covered in national legislation

9. The following section is structured according to the elements that are covered in most of the national legislation submitted. It summarizes the information most relevant to the liability rules in relation to LMOs. It should be noted that a comprehensive comparison of relevant provisions among national legislation is difficult, as not all the submissions have provided adequate information on those elements.

1. Types of activities/situations covered under national liability regimes

10. As indicated above, the scope of the national regimes submitted covers a wide range of LMO-activities. The typical example can be found in the Finnish Gene Technology Act that apply to the use, production, import, sale or other placing on the market of LMOs and products containing them, as well as to the launch and operation of installations and premises intended for the handling of LMOs.

11. In Denmark, LMOs are included in the list of public and commercial activities to which the Act on compensation for damage to the environment applies. The coverage of the activity is further defined as “enterprises, which are subject to the obligation to obtain an approval of the manufacturing of genetically modified organisms according to the Act on Environment and Gene Technology”.

12. The Norwegian Gene Act also deals with all LMO-related activities, including substances and products that consist of or contain LMOs. Where LMOs are legally released into the environment, the liability still arises if the risk to human health or to the environment is greater than foreseen when the use of LMOs was approved.

13. The Australian Gene Technology Act regulates dealings with LMOs in which, among others, it “prohibits dealings with LMOs (e.g. import, transport, research, manufacture, production and propagation) in Australia unless in accordance with the legislation”. All dealings that involve the intentional release of a LMO into the environment must be licensed.

14. Countries also rely on general provisions of protection of the environment as a basis for legal actions assigning liability for damage and compensation. Most of the Australian states and territories have environment protection legislation in place that establishes a general duty not to undertake an activity that pollutes or might pollute the environment. These pieces of legislation specifically allow persons to apply to the relevant court of tribunal for compensation. Canadian jurisdictions have general environmental protection legislation, which tends to address a wide range of environmental protection concerns, including the provisions for the Crown to have the right to recover certain government remediation costs. The Norwegian Gene Act refers to the “duty to prevent and limit damage”, in accordance with which the person responsible for the activity shall take reasonable measures to prevent or limit damage and inconvenience when LMOs have entered the environment in conflict with the Act or decision pursuant thereto.

2. *Definition and threshold of damage*

15. Common to most countries studied, the definition of damage resulting from LMOs covers three categories, *inter alia*:

- (a) Personal injury;
- (b) Damage to property, and
- (c) Costs of preventive measures and restoration of environment and loss of income deriving from an economic interest in any use or enjoyment of the environment.

16. Most systems include ecological damage in the third category in which the valuation of environmental damage is assessed in terms of financial loss. 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 Finnish Environmental Damage Act specifies the environmental damage by reasonable payment of compensation.

17. In defining to what extent the repaired environment can be reinstated, the Norwegian Gene Act uses the term “as far as possible”. Its preparatory legislative work further explains that:

“[T]he extent of the restoration will depend on the changes that have occurred in the environment, and will have to be assessed in each particular case. 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.”

18. With respect to the threshold of damage, very little information was received. The Austrian Law on Genetic Engineering provides that the damage to the environment should “constitute a significant damage”. The Finnish Act on Environmental Damage requires a certain toleration of the nuisance in that compensation shall only be paid if toleration of the nuisance is deemed unreasonable. In assessing tolerance of the nuisance, consideration must be given to local circumstances, regularity of the nuisance and other specific circumstances.

3. *Channelling liability*

19. The general rule under liability regimes is to channel liability to the “operator”—the person who has the operational control of the activities at the time of the incident causing damage. The Danish Act defines that “the person who is causing pollution while participating in a commercial or public activity,

mentioned in the attachment, 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, or to whom the activity was assigned, providing that the assignee knew or should have known about the nuisance or its threat.

20. Some national legal regimes covering LMOs expand the concept of "operator" to the notifier, user, producer, importer, of LMOs and owner of an installation. For example, the Austrian Law on Genetic Engineering holds liable "the notifier of a contained use or a deliberate release of LMOs". Under the Norwegian Gene Act, the primary liability lies with the person "who produces or uses LMOs within the meaning of the Act". The person responsible is a physical or legal person who operates the activity from which the LMOs are discharged. In general, the person who has "the duty to provide information or to obtain approval under the Act" may be subject to liability. In a situation when LMOs are released unintentionally during transport, the transporters should be responsible for taking immediate measures, but the owner or the sender will pay for the costs of measures taken.

21. The draft Swiss Gene Technology Act provides elaborated rules of challenging liability. In principle, the owner of an installation ^{2/} that uses LMOs is liable for harm that may be caused during handling due to modification of the genetic material. Specifically, if the harm was caused by bringing LMOs onto the market for use as aids to agriculture or forestry, the following operators shall be liable:

- (a) The producer who first placed these organisms on the market;
- (b) If the organisms have been imported into the country, the producer who first placed them on the market abroad and the importer are jointly and severally liable;
- (c) The owner of a company or installation that imports such organisms for its own use is jointly and severally liable with the producer; and
- (d) Recourse to persons who have handled such organisms improperly, or have otherwise contributed to the creation or worsening of the harm, is reserved.

In addition, the Swiss Confederation, cantons and communes may be also liable.

22. In the case of 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. An action could be brought against any of the persons liable in the chain for full compensation. It is for that person to seek compensation from the other persons who are also responsible and for whose portion of responsibility the compensation was paid. Most legal systems described in the submissions received are based on joint and several liability.

4. *Standard of liability*

23. The reports submitted on national laws show that, to a large extent, the basic standard to apply to LMO-related activities is strict liability, where liability is engaged regardless of fault. In the Danish Act on Environmental Damage, all the activities identified in the list of the Act are subject to strict liability. The German Genetic Engineering Act focuses on the sheer risk posed by LMOs whether or not the person responsible for the genetic engineering operation is at fault. Section 23 of the Norwegian Act lays down

^{2/} Installations are buildings, highways and other fixed installations as well as modifications of land. Installations are equivalent to appliances, machines, vehicles ships and aircrafts.

strict liability “for damages regardless of any fault on his part when the activity causes damage, inconvenience or loss by deliberate release or emission of LMOs into the environment”.

5. *Exemptions from liability*

24. Countries with strict liability regimes in force allow a limited number of exemptions from liability. In general, these exemptions relate to cause where damage has been caused by or through events and situations beyond the control of the operator. According to the Austrian Law on Genetic Engineering, the following cases are excluded from liability:

- (a) Military conflicts, civil wars and natural disasters;
- (b) Damage caused by a third party not involved in the contained use or a deliberate release of LMOs and intending to cause damage; or
- (c) Action taken in compliance with legal provisions, instructions or coercive measures.

25. Other countries have similar provisions. In Denmark, the intervention, connivance or negligence of a third party or the victim will mitigate or cease liability. A compulsory order of a public authority is specified as an exemption from liability. However, prior permit does not necessarily exclude liability. In the Norwegian legal system, if unforeseen damage occurs even caused by lawful activities, the compensation provisions will nevertheless apply.

6. *Causation and burden of proof*

26. Proof of causation between damage and activities or liable persons plays an increasingly critical role in a strict liability regime. The Danish Act on Environmental Damage requires “adequate causality”. Plaintiffs in Canada have to prove their case on the balance of probabilities. In Finland, compensation for environmental damage shall only be paid if a probable causal link between the activities and the loss is demonstrated.

27. However, causation may be difficult to establish, in particular in relation to LMOs, because of the complexities of their interactions 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:

“If depending on the case 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).”

28. The German Genetic Engineering Act has adopted the similar approach where the burden of proof on causation is alleviated by means of a rebuttable presumption. When the damage was caused by LMOs, it is presumed to have been caused by such properties of these organisms as a result from genetic engineering operations. Yet such presumption would be invalid if the damage is likely to have been caused by other properties of these organisms.

7. *Limitation of liability in amount and time*

29. Only a few submissions mentioned the financial limits of liability in their legislation. Denmark stated that “the liability is unlimited (with the exception of damage caused by activities carried out under compulsory government requirement)”. In Canada, there are no ceilings to damage awards. In contrast, German law provides for caps to make up for the stricter form of liability and take into account the liable party’s interest in economic predictability and insurability. Liability is limited financially to a per event maximum of DM 160 million (81.8 million euros).

30. Time limits within which claims for compensation can be instituted are specified in the draft Swiss Gene Technology Act. Proceedings for the recovery of damage are subject to a limitation period of three years after the injured party recognizes the harm and the person liable, and 30 years at the latest after:

(a) The event that caused the harm occurred or came to an end within the company or installation; or

(b) The LMOs were first placed on the market.

31. Similar provisions can also be found in the Danish Act on Environmental Damage, which includes two time-period limitations:

(a) Five years from the day of knowledge (or should have had knowledge) of the damage, the tortfeasor, and his location;

(b) A maximum of 30 years counted from the time of the act having caused the damage.

8. *Financial safeguard/insurance*

32. In order to guarantee adequate compensation for victims of damage, some countries require the operator to maintain insurance. In accordance with the Austrian Law on Genetic Engineering, “public liability insurances are required for the contained use in biosafety level 3 (large scale) and biosafety level 4 and for the deliberate release of LMOs”. In Australia, the Gene Technology Regulator may impose a license condition on a person dealing with a LMO requiring them to be adequately insured against any loss, damage or injury that may be caused to human health, property or the environment by the licensed dealing. Under the Germany Genetic Engineering Act, operators are obliged to provide for guarantee for any damage or injury that may be caused by genetic engineering operations.

33. To protect the injured party, the Federal Council, in accordance with the draft Swiss Gene Technology Act, may carry out the following guarantee:

(a) Require the proprietors to guarantee their liability through insurance or in another form;

(b) Specify the extent and duration of the guarantee;

(c) Require the person who guarantees liability to report the existence, suspension or cessation of the guarantee to the enforcement authority;

(d) Require the guarantee to be suspended or ended only after 60 days following receipt of the report referred to in subparagraph (c) above.

9. *Access to information*

34. Both the Austrian Law on Genetic Engineering and the German Genetic Engineering Act stipulate that the liable persons have the obligations to provide the injured party with information about the characteristics and adverse effects of LMOs as well as steps involved in the genetic engineering operations or a release. The provision of such information is, however, subject to rules of confidentiality.

10. *Procedural issues – access to justice*

35. Under civil-law liability regimes, in principle, only a person with a direct interest (i.e., a person having suffered some damage or loss) may bring a civil action for compensation. However, recent developments in some national legal regimes allow some private organizations recognized as having a “special grant” to the resources at issue, to claim costs of preventive measures. Denmark is a case in point. In Norway also, compensation can be claimed by a private organization or an association with a legal interest in the matter. The compensation awarded then accrues to the pollution control authority, which decides how the compensation awarded is to be used.

36. The Canadian Environmental Protection Act also contains important access to justice provisions, including a common-law right to sue for personal loss as result of a violation of the Act and a right to request investigation of an alleged offence which has caused significant harm to the environment. If the Minister fails to conduct the requested investigation within a reasonable time or otherwise responds unreasonably, the applicant is allowed to bring an environmental protection action in the courts. Various kinds of relief can be sought in such actions, including orders to cease the offence or to negotiate a plan to correct or mitigate the resulting harm to the environment or to human, animal or plant life or health.

11. *Administrative powers*

37. All the national systems studied have introduced administrative mechanisms in dealing with LMO activities and the damage caused. The licensing and monitoring systems in the legislation provide the authorities with considerable powers to control LMO activities and take action to protect or restore environment by either ordering remediation or cleaning up themselves and reclaiming the cost. These powers are also supported by administrative charges for non-compliance.

38. For example, the Australian Gene Act establishes “a statutory officer, the Gene Technology Regulator, to administer the legislation and make decisions under the Act including issuing of licenses”. Extensive monitoring and investigation powers have been given to inspectors. Where the Regulator incurs costs as a result of taking steps in order to avoid imminent risk of death, serious illness, serious injury or serious damage to the environment, the person who creates the risk is liable for those costs.

39. The supervisory authority under the Norwegian Act may order the person responsible “to retrieve or take other measures to combat the organisms within a specified time, including measures to restore the environment to its previous state as far as possible”.

40. Belgium has enacted various administrative statutes to ensure an effective clean-up, which relies on compelling restoration orders given by public authorities and less on litigation.

12. *Criminal law*

41. In some countries, illegal importation of LMOs may give rise to criminal charges. Under the Australian Quarantine Act 1908 fines and imprisonment terms may be imposed for the the importation of

LMOs into Australia without an import permit. Offences for dealings with a LMO in contravention of the Australian Gene Act, or in breach of licence conditions may result in five years imprisonment.

III. RECOMMENDATIONS

42. According to its work plan, adopted by the Conference of the Parties at its fifth meeting, the ICCP is required to elaborate 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;
- (b) Identification of elements for liability and redress.

43. To date, ICCP has mainly focused its work on two areas: information-gathering and elaboration of a process referred to in Article 27 of the Protocol. In collecting information, ICCP has reviewed the international legal instruments on liability and redress (UNEP/CBD/ICCP/2/3), and gathered information on national legislation on the liability rules relating to LMO-related activities. It has also benefited from the ongoing process on liability under the Convention on Biological Diversity. At its second meeting, ICCP recommended that information-gathering and analysis on the issue of liability and redress pursuant to Article 27 of the Protocol should continue. In this connection, ICCP, at its third meeting, may wish to take the following action:

(i) *Information gathering and analysis*

(a) Examine the synthesis of information gathered in the present note and the related information document (UNEP/CBD/ICCP/3/INF/1), as well as the report of review of existing relevant instruments and identification of elements prepared for the second meeting of the Committee (UNEP/CBD/ICCP/2/3);

(b) On the basis of the information considered, analyse and identify activities and situations that need to be addressed in the field of liability and redress for damage resulting from transboundary movements of LMOs;

(c) Invite Parties, Governments and relevant international organizations to submit their initial views on liability and redress for damage resulting from transboundary movements of LMOs on the basis of the questionnaire annexed to the present note no later than three months before the first meeting of the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol;

(d) Request the Executive Secretary to compile a synthesis report of the views submitted in accordance with subparagraph (c) above for consideration at the first meeting of the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol; and

(e) Renew the invitation that it had made at its second meeting to Parties to the Convention, to organize workshops, as soon as possible but in any case before the first meeting of the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol.

44. With respect to the process referred to under Article 27 of the Protocol, ICCP at its second meeting recommended to the first meeting of the Conference of the Parties serving as the meeting of the Parties to establish an open-ended ad hoc group of legal and technical experts to carry out the process

pursuant to Article 27 of the Protocol. The terms of reference for the ad hoc group will be defined by the first meeting of the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol. As indicated above, some countries have submitted their views on this matter. ICCP, at its third meeting, may wish to take the following action:

(ii) *Terms of reference*

(a) Exchange views on elements of the terms of reference for an ad hoc group of legal and technical experts that may be established by the first meeting of the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol, so that Parties and Governments could be better prepared for their submissions on this matter requested in ICCP recommendation 2/1; and

(b) Request the Executive Secretary to compile the views submitted on terms of reference and prepare a synthesis report of these views for consideration at the first meeting of the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol.

Annex

**QUESTIONNAIRE ON LIABILITY AND REDRESS FOR DAMAGE RESULTING
FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS**

1. What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?
2. What types of damage resulting from transboundary movements of LMOs should be compensated?
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?
4. To whom should liability for damage resulting from transboundary movements of LMOs be channelled?
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?
6. In what circumstances should the liability be exempted where transboundary movements of LMOs have resulted damage?
7. To what extent should a causal link be established between the damage and LMOs?
8. Should the liability be limited in time, and if so, to what period?
9. Should the liability be limited in amount and, if so, to what amount?
10. Should financial security be established to compensate for damage resulting from the transboundary movements of LMOs? If so, what should be the appropriate mechanism(s)?
11. Which courts and/or tribunals should have jurisdiction to adjudicate claims for damage resulting from transboundary movements of LMOs?
12. Who should have the right to bring claims on damage resulting from transboundary movements of LMOs?
