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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)

Update on developments in national, international and regional legal instruments on liability and redress

Note by the Executive Secretary

I. BACKGROUND

1. The issue of liability and redress for damage resulting from transboundary movements of living modified organisms was considered by the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP) at its second meeting, held in Nairobi in October 2001 and at its third meeting, in The Hague in April 2002.

2. At its second meeting, the ICCP adopted recommendation 2/1 on the steps to be taken in the interim period up to the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. In relation to the process for addressing the issue of liability and redress, the meeting also adopted a recommendation for a draft decision by the Conference on the establishment by the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol of an open-ended ad hoc group of legal and technical experts to carry out the process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from the transboundary movement of living modified organisms (LMOs) envisaged by Article 27 of the Protocol and to endeavour to complete this process within four years.

3. At its third meeting, in recommendation 3/1, the ICCP requested the Executive Secretary to continue gathering information on the issue of liability and redress in international law, to update the information contained in the note by the Executive Secretary regarding the international liability regimes (UNEP/CBD/ICCP/2/3), prepared for the second meeting of the ICCP, and to make it available at COP-MOP/1.

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

4. The note on liability and redress prepared for the second meeting of the ICCP 1/ examined the concept of State responsibility and environmental liability in customary public international law, reviewed existing multilateral treaties dealing with liability and redress for transboundary harm, and provided an overview of ongoing developments in related international forums. It further outlined and discussed possible elements of a liability and redress regime under the Protocol and suggested options for a process for the elaboration of international rules and procedures in this field.

5. The present note is prepared in response to the request for update of the information contained in the above-mentioned note by the Executive Secretary. It is also intended to facilitate the discussion on terms of reference 2/ for the open-ended ad hoc group of legal and technical experts on liability and redress that may be established at the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol by providing updated background information relevant to issues covered under Article 27. The note includes three substantive sections: section II deals with recent relevant developments in international processes not covered by the former note, while section III updates information on developments at regional level. Section IV reproduces the questionnaire on liability and redress contained in ICCP recommendation 3/1. Views submitted in response to this questionnaire are reproduced in an information document (UNEP/CBD/BS/COP-MOP/1/INF/6).

6. ICCP recommendation 3/1 also invites Parties and Governments that have not yet done so to submit information on national measures in the field of liability and redress for damage resulting from transboundary movements of LMOs. No new submissions on this issue had been received at the time this note was finalized. COP-MOP/1 may wish to use the information provided in the ICCP process in the present context 3/. Specific reference is made to the synthesis of information on national measures in the field of liability and redress for damage resulting from transboundary movements of LMOs provided in the note by the Executive Secretary on the subject prepared for the third meeting of ICCP (UNEP/CBD/ICCP/3/3). To avoid duplication, the synthesis is not reproduced here.

II. RECENT DEVELOPMENT IN INTERNATIONAL PROCESSES

A. Convention on Biological Diversity and Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP)

7. The Conference of the Parties to the Convention on Biological Diversity adopted decision VI/11 on the issue of liability and redress at its sixth meeting. The decision recognizes that further analysis of pertinent issues relating to liability and redress in the context of the Convention is necessary in order to propose the possible introduction of elements into existing liability and redress regimes, as appropriate, to address specifically liability and redress relating to damage to biological diversity, and to examine the appropriateness of a liability and redress regime under the Convention on Biological Diversity, as well as to explore issues relating to restoration and compensation. The Conference of the Parties will deal with the issue further at its seventh meeting in February 2004 with a view to advancing the process envisaged in decision VI/11.

8. Under the ICCP process, a workshop on liability and redress in the context of the Biosafety Protocol was held in Rome from 2 to 4 December 2002. The workshop was organized in response to the invitations issued to Parties to the Convention by the ICCP at its second and third meetings to organize workshops on liability and redress for damage resulting from transboundary movements of living

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1/ UNEP/CBD/ICCP/2/3.

2/ UNEP/CBD/BS/COP-MOP/1/9 contains a synthesis report of the submissions on terms of reference for the open-ended ad hoc group of legal and technical experts on liability and redress.

3/ UNEP/CBD/ICCP/3/3 and UNEP/CBD/ICCP/3/INF/1.

modified organisms 4/ and was intended to be a brainstorming meeting. It reviewed existing national and regional legislation in the field of liability and redress for damage resulting from transboundary movements of living modified organisms and relevant international law on liability and redress. It further considered issues of liability and redress pursuant to Article 27 of the Protocol and a number of critical issues relevant to Article 27 were considered:

1. Understanding of Article 27 of the Protocol

9. The scope of the Article was considered, especially with regard to the term "damage resulting from transboundary movements of living modified organisms". Differing views were expressed on whether the scope of Article 27 should be understood in a narrow context to cover only transport from one point to another, or in a broad context to include all activities that fall under the scope of the Protocol, such as transit, transfer, handling and use of living modified organisms. There was some discussion on whether Article 27 represented a floor or a ceiling, which would be a political and/or legal issue to be resolved by Conference of the Parties serving as the meeting of the Parties to the Protocol.

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

10. Scenarios and activities that might be covered by Article 27 were identified. Scenarios involving transboundary movement of a living modified organism include genetically-modified (GM) crops introduced into the environment and moved intentionally from country A to B but unintentionally from country B to C; laboratory testing of genetically-modified viruses under contained conditions where an accidental release occurs and results in an unintentional transboundary movement; living modified organisms for food, feed and processing moved intentionally from country A to B that enter the food chain; and a shipment of an living modified organism where an unintentional transboundary movement occurs.

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

11. It was suggested that a liability regime could play the role of prevention and redress for damage, as well as promoting public acceptance of the industry involved in the transboundary movement of LMOs. However, it was indicated that it would be more efficient to use mechanisms other than a liability regime to prevent the occurrence of damage.

4. Definition of damage

12. Different views were expressed on whether or not a broad definition of damage should be adopted, including not only damage to biological diversity but also other aspects such as economic loss, damage to human health and socio-economic damage. It was indicated that damage to conservation of biological diversity and to its sustainable use was extremely difficult to quantify and the establishment of a threshold for damage might be necessary.

5. Channelling liability including State liability

13. The discussion focused on whether liability should be channelled to exporting States or at least on a primary basis to the person responsible for the transboundary movement of the living modified organism. In respect of the latter, the option of residual State liability was alluded to. Depending on the objective of the liability regime, liability could be channelled to the person in the best position to prevent damage if the function is prevention of damage; or to a person easily identifiable and financially capable

4/ Recommendations 2/1 and 3/1.

of covering the damage if the function is redress for damage. It was stated that strict liability was not appropriate for all types of living modified organisms and also that Article 27 did not necessarily dictate a strict-liability regime.

6. Financial security and funds

14. Compulsory financial security was seen by some as a prerequisite for the effectiveness of a liability and redress regime, although attention was drawn to the difficulties of such an approach, including the insurability of the risk, the availability of insurance and the price of alternatives to insurance, as well as the burden of ensuring compliance with the requirement to establish financial security. Regarding the establishment of a fund, various views were expressed on possible situations in which a fund could be of assistance.

7. Forms of any instrument that might result from the process under Article 27 of the Protocol

15. There were differing views with regard to the form of the outcome of Article 27, i.e. a legally-binding instrument, a non-binding instrument in the form of guidelines, or a combination of the first and second options to include a two-step approach under which initially some "soft-law" guidelines or recommendations would be developed with a view to concluding a legally-binding instrument subsequently.

16. The full report of the Rome workshop (UNEP/CBD/BS/COP-MOP1/INF/8) will be available to the Conference of the Parties serving as the meeting of the Parties to the Protocol in all six official United Nations languages.

B. International Law Commission (ILC) process

17. The International Law Commission was established by the United Nations General Assembly in 1947 to promote the progressive development of international law and its codification. The Commission, which meets annually, is composed of 34 members elected by the General Assembly for five-year terms and who serve in their individual capacity, not as representatives of their Governments. Most of the Commission's work involves the preparation of drafts on topics of international law.

18. At its fifty-fourth session, held from 29 April to 7 June and 22 July to 16 August 2002 in Geneva, Switzerland, the ILC dealt with the question of international liability in two ways. Firstly, the Commission considered and adopted parts of the report of the Working Group on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law (international liability in case of loss from transboundary harm arising out of hazardous activities). Secondly, the Commission considered and adopted the report of the Working Group on Responsibility of International Organizations.

19. The resumed work of the ILC on international liability follows the adoption by the ILC in August 2001 of the "Draft articles on the responsibility of States for internationally wrongful acts". 5/ The Commission forwarded the draft articles to the United Nations General Assembly so that it could take note of them, without recommending the negotiation of a treaty on State responsibility. The General Assembly commended the articles to the attention of Governments without prejudice to the question of their future adoption or other appropriate action. 6/ This brought to an end one of the Commission's longest studies as the issue had been selected by the Commission at its first session in 1949 as one of the

5/ Report of the ILC on the Work of its Fifty- third Session, ILC 53d Report, 2001.

6/ United Nations General Assembly resolution 56/83 (12 December 2001).

topics considered suitable for codification. The fundamental questions of what constitutes an international obligation, when such an obligation is breached by a State, and what legal consequences ensue are addressed in the articles. The articles further address the question of when a State can be held responsible for acts or omissions by non-State actors or by another State, what circumstances justify otherwise wrongful conduct, what a State must do to remedy an internationally wrongful act, which States have standing to complain, what kind of countermeasures are permitted and under what circumstances.

20. With regard to the issue of "International liability for injurious consequences arising out of acts not prohibited by international law", at its fifty-fourth session the Commission decided to resume the study of international liability in case of loss from transboundary harm arising out of hazardous activities and to establish a Working Group to consider the conceptual outline of the topic. The report of the Working Group, 7/ which was adopted by the Commission, set out some initial understandings and presented views on the scope of the topic, as well as on the approaches that could be pursued.

21. As regards the scope, it was understood by the Working Group that the activities to be covered by the instrument would be the same as those included within the scope of the topic on prevention of transboundary harm from hazardous activities 8/ i.e it is suggested that the instrument cover activities not prohibited by international law, carried out in the territory or otherwise under the jurisdiction or control of a State, which involve a risk of causing significant transboundary harm through their physical consequences. A threshold for triggering the application of the regime on allocation of loss caused would have to be determined, and the regime should cover loss to persons, loss to property, including the elements of State patrimony and national heritage, and damage to the environment within national jurisdiction.

22. With regard to the role of the State and the role of the operator in the allocation of loss, the operator having direct control over the operations should bear the primary liability in any regime of allocation of loss and his share would involve the costs necessary for containing the loss upon its occurrence, as well as the cost of restoration and compensation. The Working Group also considered the usefulness of developing proper insurance schemes and having mandatory contributions to funding mechanisms by the operators belonging to the same industry and it was recognized that in any regime on allocation of loss, the operator's share could be limited by the insurance available or his own resources, so the remainder of the loss would have to be allocated to other sources, i.e., State earmarked funds to meet emergencies and contingencies arising from significant harm resulting from hazardous activities. There was agreement that the State plays a crucial role in designing appropriate international and domestic liability schemes for the achievement of equitable loss allocation. The internalization of all operational costs was discussed and it was agreed that cases might arise where private liability schemes would prove insufficient for attaining equitable allocation, but views differed on the extent of residual State liability in such cases.

23. In addition to making these preliminary recommendations, the Working Group indicated that,for the work to be profitable, a model for the allocation of loss should be developed. The first report 9/ by the Special Rapporteur on this issue was considered by the International Law Commission at its fifty-fifth session held in Geneva from 5 May to 6 June and 7 July to 8 August 2003.

7/ See Yearbook 2002, document A/CN.4/L.627.

8/ See United Nations General Assembly resolution 56/82.

9/ "First report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities" by Mr. P. S Rao, Special Rapporteur. A/CN.4/531.

24. In summary, the first report by the Special Rapporteur establishes that the review of various recent and well-established models of liability and compensation schemes makes it clear that States have a duty to ensure that some arrangement exists to guarantee equitable allocation of loss. While there are some common elements in the schemes established, the report points to the fact that each scheme is tailor-made for its own context and that the duty to ensure availability of an arrangement for the equitable allocation of loss is not always best carried out in each case by negotiating a liability convention, still less one based on any particular set of elements. The report also recommends that, given the need to give States sufficient flexibility to develop liability schemes to suit their particular needs, the model of allocation of loss that the Commission might wish to endorse should both be general and residuary in character.

25. Regarding development of the allocation of loss model, the report makes several submissions for appropriate consideration by the Commission. Submissions state, in particular, that any regime that may be recommended should be without prejudice to claims under civil liability as defined by national law and remedies available at the domestic level or under private international law. The model of allocation of loss to different actors in case of transboundary harm need not be based on any one system of liability such as strict or fault-based liability. According to the submissions, channelling of liability and obligation to compensate should be directed to the person most in control of the activity at the time the accident or incident occurred. In addition, it is recommended that any regime on allocation of loss be without prejudice to claims under international law and in particular the law of State responsibility.

26. Regarding the scope of any regime to be developed, it is suggested that the threshold of significant transboundary harm to be adopted should be the same as that defined and agreed in the context of the draft articles on prevention. On the issue of causality, it is submitted that the liability of the person in command and control of the hazardous activity could ensue once the harm caused could reasonably be traced to the activity in question. Liability should be dependent upon the test of reasonableness and not the strict proof of causal connection and, where the harm is caused by more than one activity and could reasonably be traced to each one of them but not separated with any degree of certainty, it is submitted that States should decide in accordance with their national law and practices whether liability should be either joint and several or equitably apportioned. It is recommended that additional funding mechanisms be developed out of contributions from the principal beneficiaries of the activity, from the same class of operators, or from earmarked State funds, in order to supplement limited liability. In addition to these funds, the State should assume responsibility for designing suitable schemes specifically to address problems concerning transboundary harm. It is further submitted that the State should ensure that recourse is available within its legal system for equitable and expeditious compensation and relief to victims of transboundary harm. Finally, the report submits that the definition of damage eligible for compensation under the existing legal frameworks is not a well-settled matter and that damage to the environment per se, not resulting in any direct loss to the proprietary or possessory interests of individuals or the State, is not considered a fit case for compensation, neither are loss of profits and tourism on account of environmental damage likely to be compensated.

27. The International Law Commission considered the report by the Special Rapporteur at eight of its meetings 10/ during its fifty-fifth session and established an open-ended working group to assist in considering the future orientation of the topic in the light of the report and the debate in the Commission. In concluding the issue, the Special Rapporteur noted that there was a need for further work and reflection on the various issues raised and, if possible, to produce concrete formulations as part of the next report.

10/ Chapter VI of the Report of the International Law Commission on the work of its Fifty-fifth session http://www.un.org/law/ilc/reports/2003/ENGLISH/cover.htm.

C. Civil Liability and Compensation for Damage to Transboundary Waters Caused by Industrial Accidents

28. In July 2001, the United Nations Economic Commission for Europe (UNECE) established an Intergovernmental Working Group on Civil Liability to develop a protocol on liability for transboundary damage caused by hazardous activities within the scope of the 1992 Convention on Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) and the 1992 Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention). After 15 months of negotiation, the Working Group finalized its work on the Protocol with a view to signature and adoption of the legally-binding instrument on the occasion of the Ministerial Conference "Environment for Europe" held in Kiev from 21 to 23 May 2003. The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters was formally adopted and signed by 22 countries at the Ministerial Conference on 21 May 2003. It will be open for ratification by States Parties to one or both Conventions, but any United Nations Member State may accede to the Protocol upon approval by the Meeting of the Parties. It will enter into force when ratified by 16 States.

29. The Protocol provides for a comprehensive regime for civil liability and for adequate and prompt compensation for damage resulting from transboundary effects of industrial accidents on transboundary waters. Companies will be liable for accidents at industrial installations as well as transport via pipelines. The operator who caused the damage will be strictly liable for it, unless he can prove that one of the available defences applies to the situation. Fault-based liability is reserved for persons other than operators whose wrongful intentional, reckless or negligent acts or omissions cause damage or contribute to damage. The definition of damage under the Protocol covers traditional damage to property and loss of life or personal injury, as well as loss of income directly deriving from impairment of a legally- protected interest in any use of the protected areas and the cost of reinstatement and response measures. Financial limits of liability are set by the Protocol depending on the risk of the activity. Companies have to establish financial securities such as insurance or other guarantees to cover this liability.

30. The Protocol also incorporates provisions on private international law covering the questions of the competent court, the law applicable to claims and the mutual recognition and enforcement of judgements and arbitral awards.

D. International Maritime Organization (IMO)

31. On 23 March 2001, the International Convention on Civil Liability for Bunker Oil Pollution Damage was adopted. It enters into force 12 months following the date on which 18 States, including five States each with ships whose combined gross tonnage is not less than 1 million gross tonnage, have either signed it without reservation as to ratification, acceptance or approval, or have deposited instruments of ratification, acceptance, approval or accession. To date, it has been ratified by two States.

32. The Convention was adopted to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers. It applies to damage caused on the territory of States Parties, i.e. it applies to their territorial sea and exclusive economic zones.

33. Moreover, the Convention provides a freestanding instrument which only covers pollution damage. "Pollution damage" is defined as:

(a) Loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to the cost of reasonable measures of reinstatement actually undertaken or to be undertaken; and

(b) The cost of preventive measures and further loss or damage caused by preventive measures.

34. The Convention is modelled on the International Convention on Civil Liability for Oil Pollution Damage of 1969. It establishes the requirement for a registered owner of a vessel to maintain compulsory insurance cover, as well as providing for direct action to allow a claim for compensation for pollution damage to be brought directly against an insurer. The Convention requires ships over 1,000 gross tonnage (gt) to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the liability of the registered owner for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases, not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims of 1976, as amended by the 1996 Protocol, which sets the limits for ships not exceeding 2,000 gt to 2 million SDR (US$2.56 million) for loss of life or personal injury and 1 million SDR (US$1.28 million) for other claims. Liability then increases with tonnage to a maximum above 70,000 gt of 2 million SDR + 400 SDR per ton for loss of life or personal injury and 1 million SDR + 200 SDR per ton for other claims.

E. Stockholm Convention on Persistent Organic Pollutants (POPs)

35. The Conference of Plenipotentiaries on the Stockholm Convention on Persistent Organic Pollutants (POPs), which took place from 22 to 23 May 2001, adopted a resolution 11/ recognizing, *inter alia*, that the time is appropriate for further discussions on the need for elaboration of international rules in the field of liability and redress resulting from the production, use and intentional release into the environment of persistent organic pollutants. A series of key questions that would have to be addressed when considering a possible POPs liability regime was identified at a workshop on liability and redress. These include user versus producer responsibility; State versus civil liability; which activities would be included within the scope of such a regime; and how compensation could be provided. Other issues that were highlighted were the greater difficulty of establishing causality in cases of long-term damage; the role of State responsibility; the possible applicability of compensation systems based on insurance or trust funds; circumstances that had given rise to existing international liability regimes; the adequacy of domestic versus international liability regimes; the lack of common methods to assess damage to the environment and human health; and possible scenarios under the Stockholm Convention which would be covered by the responsibility rules under international law or might warrant further consideration in regard to liability. Among the general considerations identified were also the need to take into account the time-lag between release of POPs and the manifestation of damage, the variety of POP sources and their cumulative effects, the definition of damage caused by POPs and who is to be regarded as having suffered damage, and whether the activities were undertaken, or the effects felt, by States or by individuals.

36. The workshop report will be considered at the first meeting of the Conference of the Parties likely to be held in 2005 with a view to deciding what further action should be taken.

F. Antarctic Treaty

37. Article 16 of the 1991 Madrid Protocol on Environmental Protection to the 1959 Antarctic Treaty includes a specific commitment to elaborate rules and procedures relating to liability for damage arising from activities covered by the Protocol taking place in the Antarctic Treaty area. According to the Madrid Protocol, Antarctica shall continue forever to be used exclusively for peaceful purposes. The protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research,

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11/ Resolution 4 on liability and redress concerning the use and intentional introduction into the environment of persistent organic pollutants.

in particular research essential to understanding the global environment, shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area, which must be carried out in accordance with elaborate environmental principles.

38. The process of elaborating rules and procedures relating to liability is ongoing and a draft annex to the Madrid Protocol on liability was considered at the 25th Antarctic Treaty Consultative Meeting (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.

39. The draft annex establishes strict liability for operators in respect of environmental emergencies in the Antarctic Treaty Area that arise from activities covered by the Madrid Protocol on Environmental Protection to the Antarctic Treaty. Some exemptions from liability are allowed in case of acts necessary to protect human life or safety or an event constituting a natural disaster of an exceptional character, provided all reasonable measures have been taken to prevent harmful impacts. Environmental emergencies are defined in the draft liability annex as any accidental event that results in, or imminently threatens to result in, any significant and harmful impact on the Antarctic environment. Under the draft, Parties shall require operators to undertake reasonable preventive measures that are designed to reduce the likelihood of environmental emergencies and their potential adverse impact. If environmental emergencies arise from their activities, the operators are required to take prompt and effective response action. The Party of the operator and other Parties shall endeavour to take such response action in case the operator fails to undertake it. The latter is strictly liable for payment of the costs of response action taken by other Parties and, if response action is not taken, to pay the costs of the omitted response action into the Environmental Protection Fund established by the draft. Limits on the amount of compensation for which each operator can be held liable in respect of each environmental emergency are proposed and maintenance of adequate insurance or other financial security by operators is required within these limits. A State party is not liable for the failure of the operator, other than a governmental operator, to take response action.

40. The discussions on the liability annex are in their final stages with a view to concluding negotiations within the next two years.

G. United Nations Environment Programme (UNEP)

41. UNEP is currently organizing a series of expert meetings on the subject of environmental liability and compensation. The first meeting was held from 13 to 15 May 2002 in Geneva. 12/

42. The outcomes of the meeting are reflected in the meeting's report 13/ and include the identification of issues and gaps in the current network of liability and compensation. The identified issues and gaps listed in an annex to the report include: the nature and scope of environmental liability; the issue of financial assurance and supplemental compensation; procedures for resolving claims; the nature of the regime and the question of capacity-building.

43. It was recommended that UNEP evaluate and explore specific measures to better assess any value they might add to current regimes and mechanisms. The activities to be evaluated and assessed are:

(a) Development of guidelines, best practices or recommendations that otherwise facilitate the development and effective use of national and international environmental liability systems;

12/ For this meeting the Secretariat of UNEP prepared a paper, entitled "Liability and Compensation Regimes related to Environmental Damage: Review by UNEP Secretariat". The document is available at UNEP's website at http://www.unep.org/depi/liabilityandcompensation.asp.

13/ See UNEP/DEPI/L&C Expert Meeting 1/1.

(b) Development of capacity-building programmes for public authorities, including the judiciary (and where appropriate, the establishment of environmental courts and chambers), lawyers (litigating and defending), non-governmental organizations and other stakeholders, in particular, to promote and facilitate the use of national and international environmental liability systems;

(c) Promotion of research to enhance continued improvement of liability regimes, including the identification of the reasons why some agreements covering environmental liability and compensation have not attracted wider State acceptance; and

(d) Development of new international agreement(s) on environmental liability and compensation.

44. An assessment of the options for future work by UNEP in the area of environmental liability and compensation, and revisions to the study prepared, are under way and a second expert meeting on the issue is envisaged for February 2004.

H. Permanent Court of Arbitration

45. On 19 June 2001 the "Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment" ("the Rules") were approved by the Administrative Council of the Permanent Court of Arbitration (PCA). The Rules, which are based on the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, essentially provide for a unified forum to which States, intergovernmental organizations, and private parties can have recourse when they agree to seek resolution of disputes relating to the environment and/or natural resources. Characterization of the dispute as relating to the environment or natural resources is, however, not necessary for jurisdiction where all parties have agreed to settle a dispute under the Rules. The Rules were also drafted with a view to facilitating dispute resolution between two or more States parties to a multilateral agreement relating to natural resources and/or the environment. To that end, the Rules were designed to serve as arbitration and conciliation procedures in such agreements. In May 2003, the UNECE Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters was the first such instrument to include referral of disputes to arbitration under the Environmental Rules.

46. In order to provide parties seeking resolution of a dispute with both juridical and scientific resources rapidly, the Rules provide for recourse to:

(a) A panel of arbitrators with experience and expertise in environmental or conservation of natural resources law nominated by Member States and/or the Secretary-General (Article 8, paragraph 3);

(b) A panel of environmental scientists nominated by Member States and/or the Secretary-General, who can provide expert scientific assistance to the parties and the arbitral tribunal (Article 27, paragraph 5).

47. Where arbitrations deal with highly technical questions, provision is made for the submission to the arbitral tribunal of a document agreed to by the parties, summarizing and providing background to any scientific or technical issues which the parties may wish to raise in their memorials or at oral hearings (Article 24, paragraph 4).

48. Unless the parties otherwise agree, the arbitral tribunal is empowered to take, with respect to the subject matter of the dispute before the tribunal, any interim measures necessary to prevent serious harm to the environment and to preserve the rights of any party (Article 26). Because time may be of the essence in disputes concerning natural resources and the environment, the Rules provide for arbitration within a shorter period of time than under previous PCA Optional Rules or the UNCITRAL Rules. Developing country Parties may have access to the PCA financial assistance fund in order to help them defray the costs of arbitration. Furthermore, the PCA is in the process of establishing regional facilities in

various regions of the world (i.e. Costa Rica for Latin America, South Africa for Africa, Kuala Lumpur for Asia, etc.) in order to enable parties far from The Hague to resolve a dispute in their region and language of choice. Access to PCA regional facilities may also help to defray the costs involved for parties from those regions, and ensure more rapid settlement of the dispute.

49. The PCA "Optional Rules for Conciliation of Disputes Relating to the Natural Resources and/or the Environment" were adopted by the PCA on 16 April 2002, and complement the environmental arbitration rules. The conciliation rules are also available for use by States, international organizations, and private parties. Unlike other conciliation procedures, the PCA Environmental Conciliation Rules enable the parties and conciliation commission to set up an implementation committee to ensure that any settlement agreement is followed. Furthermore, the conciliator must take into consideration solutions with a view to preserving the rights of the parties, and preventing serious harm to the environment. Taken together, the arbitration and conciliation rules developed by the PCA provide the international community with a wide variety of procedural machinery for addressing environmental disputes.

I. Hague Conference

50. The agenda of the meeting of the Special Commission on General Affairs and Policy of the Hague Conference 14/ in May 2000 included the issue of civil liability resulting from transfrontier environmental damage and the potential role of the Hague Conference. 15/ On the basis of a summary of already-existing international instruments and a detailed study of substantive and comparative international law of different legal systems, possible subjects that could be dealt with in a new private international law instrument were identified. While some experts felt that the topic was important and promising and spoke in favour of giving it priority, the majority of members of the Special Commission decided that no priority should be given to the preparation of a an agreement on the conflict of jurisdictions, applicable law and international judicial and administrative cooperation in respect of civil liability for environmental damage. As a result, the subject has remained on the agenda of the Hague Conference, but without priority, and hence no concerted action on this subject is being taken by the Permanent Bureau at this time. The Permanent Bureau of the Hague Conference remains attentive to the main developments on this subject.

III. DEVELOPMENTS AT REGIONAL LEVEL

European Union draft Directive on environmental liability with regard to the prevention and remedying of environmental damage

51. On 23 January 2002, the European Commission adopted a proposal for a Directive 16/ on setting up a European system of liability for environmental damage. The proposed Directive was presented to the European Parliament and to the Environment Council at its meeting on 4 March 2002. The legislative co-decision procedure then commenced. The Parliament adopted its opinion on the first reading, and on that basis, the Council adopted the common position on 18 September 2003. 17/

14/ The Hague Conference is an intergovernmental organization whose purpose is "to work for the progressive unification of the rules of private international law". The principal method used to achieve this purpose consists of the negotiation and drafting of multilateral treaties (conventions) in the various fields of private international law (e.g. international judicial and administrative cooperation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; jurisdiction and enforcement of foreign judgments).

15/ The Special Commission was presented with a note prepared by the Secretariat of the Conference on "Civil Liability Resulting from Transfrontier Environmental Damage- a case for the Hague Conference ?". The document is available at ftp://ftp.hcch.net/doc/gen_pd10e.doc.

16/ COM(2002) 17.

17/ Interinstitutional file COD 2002/0021

52. The draft proposed Directive, as it stands in the common position, aims to establish a framework of environmental liability based on the "polluter pays" principle to prevent and remedy environmental damage. Generally, the Directive takes a broad approach, covering water pollution regulated by the Water Framework Directive, 18/ damage to species and natural habitats 19/ protected at European Community and national levels, and land contamination, which causes serious harm to human health.

53. With a view to the prevention of environmental damage, the draft provides that operators who have caused a situation that may lead to environmental damage must take preventive measures to avoid that outcome.

54. A number of relevant terms are defined in Article 2 of the draft Directive e.g. "damage" is defined as a measurable adverse change in a natural resource and/or measurable impairment of a natural resource service which may occur directly or indirectly, whereas "environmental damage" means damage to protected species and natural habitats that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition taking account of criteria laid down in an annex to the draft directive. Under the draft Directive, damage caused to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator that was expressly authorized by the relevant authorities in accordance with relevant European Community or national legislation. Water damage and land damage are also included in the definition of environmental damage, to the extent defined in Article 2 of the draft directive. "Baseline condition" means the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available.

55. Under the draft, preventive measures are defined as any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimizing that damage. Remedial measures are understood as any action or combination of actions, including mitigating or interim measures, to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services in the way provided for in an annex to the draft directive.

56. The draft Directive establishes strict liability for environmental damage caused by a number of activities listed in its annex III and imminent threat of such damage occurring by reason of any of those activities. Such activities include, *inter alia*, installations subject to permit in pursuance of the integrated pollution prevention and control directive; 20/ waste management operations; transboundary movement of waste; 21/ manufacture, use, storage, processing, filling, release into the environment and on-site transport of various dangerous substances, dangerous preparations, plant protection products and biocidal products; contained use, including transport of genetically modified micro-organisms; 22/ deliberate release into the environment, transport and placing on the market of genetically-modified organisms. 23/ Strict liability is incurred by the operator, who shall without delay take the necessary preventive measures where environmental damage has not yet occurred but there is imminent threat thereof. Once environmental damage has occurred, the operator is required to take the necessary remedial measures, as

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18/ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22/12/2000 p. 1).

19/ Damage to biological diversity is not referred to in the scope of the draft Directive as it is limited to damage to protected species and habitats.

20/ Council Directive 96/61/EC of 24. September 1996.

21/ Covered by Council Regulation (EEC) 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the EC.

22/ Covered by Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms.

23/ Covered by Directive 2001/18/EC of the European Parliament and of the Council.

well as all practicable steps, immediately to control, contain, remove or otherwise manage the situation in order to limit or to prevent further environmental damage and adverse effects on human health.

57. For other activities not listed in annex III, the draft Directive establishes liability for the operator for damage to protected species and natural habitats whenever he has been at fault or negligent. For all activities, it is a requirement that there be a causal link between the activity of an individual operator and the damage, while damage caused by pollution of a diffuse character is not covered by the draft directive.

58. The competent authority shall approve the potential remedial measures suggested by the operator and decide, with the cooperation of the relevant operator, which remedial measures the latter shall implement. The operator shall bear the costs unless one of the following sets of circumstances applies:

(a) He can prove that the environmental damage or an imminent threat of such damage was caused by an act of armed conflict, hostilities or insurrection or a natural phenomenon of exceptional, inevitable and irresistible character;

(b) He can prove that he was not at fault or negligent and that the environmental damage was caused by an emission or activity that was expressly authorized or was believed to be safe for the environment according to the state of scientific and technical knowledge (state-of-the-art defence) when it occurred, 24/ in which case the member State may allow the operator not to bear the cost of the remedial action.

59. The competent authority monitors compliance with the given duties of the responsible operators. When the operator cannot be identified or is not required to bear the costs, the competent authority may itself decide to take preventive or remedial action. As an additional control mechanism, public interest groups, such as environmental non-governmental organizations, and natural or legal persons affected or likely to be affected by environmental damage, have the right to request public authorities to act and may challenge the decision to accede to or refuse the request for action by filing a lawsuit or obtain review by another independent and impartial public body competent to review the procedural and substantial legality of the decisions, acts or failure to act.

60. The draft includes provisions concerning transboundary damage, providing that member States shall cooperate with a view to ensuring that preventive action, and where necessary, remedial action is taken in respect of any such environmental damage. For the crucial issue of possible insolvency of operators, which would jeopardize the implementation of the polluter pays principle, the member States shall take measures to encourage the development of financial security instruments and markets with the aim of enabling operators to use financial guarantees to cover their responsibilities under the directive on a voluntary basis. The issue of availability of insurance and other types of financial security for activities imposing strict liability on the operator are among the issues to be revisited in a report by the Commission, in the light of which proposals for mandatory financial security may be submitted. Another report to be drafted by the Commission no later than ten years after the entry into force of the directive will include, *inter alia*, a review of the application of the Directive to environmental damage caused by genetically- modified organisms, particularly in the light of experience gained within relevant international forums 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 genetically-modified organisms.

61. The final adoption of the Directive by the European Parliament and the Council of Ministers is likely to take place in 2004. Thereafter, the member States of the European Union will have to incorporate it into national law within three years.

24/ Article 8(4).

IV. QUESTIONNAIRE ON LIABILITY AND REDRESS

62. In its recommendation 3/1, ICCP invited Parties, Governments and relevant international organizations to submit to the Executive Secretary information or initial understandings on the basis of the questionnaire annexed to this recommendation, on a voluntary basis, no later than six months prior to the first meeting of the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol, with a view to assisting Parties to develop understandings on issues relating to liability and redress for damage resulting from transboundary movements of living modified organisms and requested the Executive Secretary to compile the information submitted and make it available at the first meeting of the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol. For ease of reference, the questionnaire is reproduced in the annex to the present note, while the information submitted and received by the Secretariat by the time this note was finalized is available in an information document (UNEP/CBD/BS/COP-MOP/1/INF/6).

V. RECOMMENDATIONS

63. The Conference of the Parties serving as the meeting of the Parties to the Protocol may wish to use the information contained in this note to facilitate its work on elaborating terms of reference for the open-ended ad hoc group of legal and technical experts on liability and redress at its first meeting. Upon eventual establishment of the ad hoc working group on liability and redress, this document, together with documents prepared for the ICCP process on the issue of liability and redress, 25/ could be further used as an information basis for the working group.

25/ UNEP/CBD/ICCP/2/3, UNEP/CBD/ICCP/3/3, UNEP/CBD/ICCP/3/INF/1 and UNEP/CBD/BS/WS-L&R/1/3.

Annex

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

Notes

Nothing in this questionnaire is intended to prejudge the decision of the Conference of the Parties serving as the meeting of the Parties with respect to the process to be adopted pursuant to Article 27 of the Protocol.

The list in this questionnaire is not exhaustive. Parties, Governments and relevant international organizations are invited to raise or answer any other questions or issues that are deemed appropriate.

Questionnaire

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?
2. What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?
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?
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, that is, should it be fault-based, strict or absolute?
6. Should there be any exemptions from liability? If so, under what circumstances?
7. Should the liability be limited in time and, if so, to what period?
8. Should the liability be limited in amount and, if so, to what amount?
9. How would judgments given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?
10. What would be the relevance of arbitration in 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?
12. Who should have the right to make claims for damage resulting from transboundary movements of LMOs?
