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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)

Terms of reference for the Open-Ended Ad Hoc Group of Legal and Technical Experts on Liability and Redress in the context of the Cartagena Protocol on Biosafety: synthesis report of submissions received from Parties, other Governments and organizations

Note by the Executive Secretary

INTRODUCTION

1. Article 27 of the Protocol provides that the Conference of the Parties serving as the meeting of the Parties to the Protocol shall, at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the ongoing processes in international law on these matters, and shall endeavour to complete this process within four years.
2. In accordance with the work plan of the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP), adopted by the Conference of the Parties to the Convention at its fifth meeting (decision V/1, annex, section B, item 5), the issue of liability and redress was considered at the second and third meetings of ICCP.
3. ICCP at its second meeting had prepared a draft decision, in which it recommended that an open-ended ad hoc group of legal and technical experts on liability and redress be established by the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol to carry out the process pursuant to Article 27 of the Protocol (ICCP recommendation 2/1, annex).

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4. ICCP further recommended that the terms of reference for the ad hoc group be defined by the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. In this context, ICCP, in its recommendation 3/1, invited Parties to the Convention and Governments to submit their views on this matter and requested the Executive Secretary to compile the views submitted and prepare a synthesis report based on these views for consideration by the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol.

5. The submissions from the following Parties and other Governments were received as of 22 October 2003: Argentina, Australia, Canada, European Union, India, Republic of Korea ^{1/}, Slovenia ^{1/} and United States of America. Two submissions were received from organizations: the Global Industry Coalition and WWF International. These submissions have been compiled in an information document (UNEP/CBD/BS/COP-MOP/1/INF/7).

6. The present note contains a synthesis of views submitted by the Governments and organizations mentioned above, and consists of three sections. Section I recalls the negotiation history of Article 27 of the Protocol; section II highlights views expressed by Governments; and section III includes recommendations for the action to be taken by the first meeting of Conference of the Parties serving as the meeting of the Parties to the Protocol. The annex to this note contains the draft decision for the Conference of the Parties serving as the meeting of the Parties to the Protocol, which reproduced the ICCP recommendation as mentioned in paragraph 3 above; the appendix to that annex contains draft terms of reference for the open-ended ad hoc group of legal and technical experts on liability and redress in the context of the Cartagena Protocol on Biosafety, which were prepared, on the basis of the submissions, by the Secretariat to facilitate the discussion on this matter.

I. THE NEGOTIATION HISTORY OF ARTICLE 27 OF THE PROTOCOL

7. Before discussing terms of reference for the ad hoc group of legal and technical experts on liability and redress (hereinafter referred to as the expert group), it may be useful to recall briefly the negotiation history on Article 27 of the Protocol in order to have a better understanding on the context and substance embedded in that article.

8. During the negotiation of the Protocol, the issue of liability and redress gave rise to considerable debate and disagreement. Developed and developing countries in general advanced opposing views. Some developed countries expressed concern about the length of time that had been spent in developing liability regimes under other international agreements, and others suggested that the matter could be dealt with by domestic frameworks on product liability. Most developing countries stressed the importance of a substantive provision on liability and redress. It was suggested that it would be illogical to develop a regulatory framework to ensure safety without considering the consequences of accidents. Other developing countries noted the absence of a general international law of liability and called for a tailor-made regime. The options on to how deal with this issue under the Protocol ranged from no article, to consideration at the first meeting of the Parties, to the inclusion of an article on liability and redress. ^{2/}

9. As a compromise, a middle ground was sought between polarized positions, resulting in an enabling provision calling for adopting a process for appropriate elaboration of international rules and procedures in the field of liability and redress. All substantive issues, including the outcome of the process, are open, leaving them to that process for further discussion.

^{1/} The submissions from Republic of Korea and Slovenia were originally made for the purpose of the third meeting of the ICCP.

^{2/} *The Cartagena Protocol on Biosafety: A Record of the Negotiations* (technical paper prepared by FIELD for the Secretariat of the Convention on Biological Diversity, pages 82-84, in press).

II. SYNTHESIS OF VIEWS

10. With the background of negotiation history in mind, the elaboration of Article 27 would include defining the process itself and the pertinent issues to be addressed by that process. Most submissions focus on the following items:

- (a) Establishment and composition of the expert group;
- (b) Mandate for the expert group;
- (c) Operation of the expert group; and
- (d) Timeframe.

A. *Establishment and composition of the expert group*

11. Some submissions indicated that the threshold issue in defining the process under Article 27 is for the Conference of the Parties serving as the meeting of the Parties to the Protocol to decide whether or not an ad hoc group on liability and redress should be established, which, in turn, depends on the elaboration of its terms of reference and composition. While it is true that these issues are closely related, the issue on establishment had been singled out as a matter of priority for the discussion at the second meeting of ICCP. As a result, ICCP recommended that the Conference of the Parties serving as the meeting of the Parties to the Protocol establish, at its first meeting, an open-ended ad hoc group of legal and technical experts to carry out the process pursuant to Article 27 of the Protocol.

12. Regarding the composition of this group, one submission suggested that the open-ended ad hoc group of legal and technical experts should be composed of representatives, including experts nominated by Governments and regional economic integration organizations. According to another submission, the group should include representatives of Parties, Governments, industry and relevant international organizations. Moreover, it was stated that the group should not only include legal experts but also a significant number of individuals with scientific expertise in order to understand fundamental scientific and legal issues concerning the interaction of living modified organisms with the environment and application and development of liability rules and procedures.

13. Establishing an ad hoc body under the Protocol would have financial implications. It was therefore indicated that budgetary limitation should be taken into account in the organisation of the activities of the expert group.

B. *Mandate for the expert group*

14. According to one submission, while the size of the expert group is open-ended, its mandate should not be construed without focus. In this regard, most submissions have presented sources of information and specific issues to be considered by the expert group. Almost all the submissions agreed that a sound and comprehensive information basis is vital to the process. It was suggested that, in order to establish better understanding on the issue of liability and redress, the expert group should :

- (a) Examine the information on liability and redress provided by Parties, Governments and relevant international organizations throughout the ICCP process, the synthesis of that information by the Secretariat, as well as information provided to date in the context of liability under Article 14, paragraph 2 of the Convention on Biological Diversity;

(b) Examine the information and initial understanding submitted by Parties, Governments and relevant international organizations on the basis of the questionnaire on liability and redress for damage resulting from transboundary movements of living modified organisms as well as further views submitted by them on the matter covered under Article 27 of the Protocol;

(c) Take into account the report of the Workshop on Liability and Redress in the Context of the Cartagena Protocol on Biosafety that was held in Rome from 2 to 4 December 2002;

(d) Request any further information that may be required, such as information on available environmental liability insurance, and the types of rules and procedures that might be available to address liability and redress issues under Article 27; and

(e) Monitor on-going processes in international law on the matters covered by Article 27.

15. On the basis of the foregoing information, the expert group would analyse substantive issues relating to liability and redress. The submissions show that the issues identified by Governments are, to some extent, overlapping, though divergent views were expressed regarding at which stage those issue should be addressed. These issues include:

(a) Potential and/or actual damage scenarios of concern that may be covered under the Protocol in order to identify the situations for which international rules and procedures referred to in Article 27 of the Protocol may be needed;

(b) Scope of “damage resulting from transboundary movements”;

(c) Definition of damage;

(d) Level of significance of the damage that should be addressed;

(e) Valuation of damage to biodiversity;

(f) Causation;

(g) Channelling of liability;

(h) Roles of Party of import and Party of export under the Protocol;

(i) Standard of liability;

(j) Insurance;

(k) Nature and scope of redress;

(l) Standing/right to bring claims;

(m) Options for the mode of adoption and format for any possible outcome from Article 27.

16. In addition to identify the issues to be discussed by the expert group, a few submissions further elaborate the rationality behind those elements. For example, one submission emphasized the importance of maintaining the balance of rights and obligations in the Protocol. It proposed that the expert group assess how any liability rules and procedures would reflect such balance and identify in what ways

importers and exporters would share responsibility of redress for damage resulting from transboundary movements of living modified organisms.

17. It was also proposed that the expert group aim at developing model laws and model clauses that could be introduced into national biosafety legislation and into international commercial contracts on the transboundary movements of living modified organisms. Specifically, model laws and clauses should aim towards channelling liability for damage to biodiversity to those entities that are in a better position to prevent such damages by managing and controlling risks.

18. The need to elaborate relationship between rules and procedures on liability and redress and the mechanism on compliance was also mentioned by some submissions. In this regard, it may be noted that the draft decision on liability and redress recommended by ICCP states “the process with respect to liability and redress under Article 27 of the Protocol is also distinct and different from the compliance procedures and mechanisms under Article 34 of the Protocol”.

19. In spite of emerging convergence in identifying substantive issues for consideration by the expert group, divergent views have been expressed regarding to what extent the mandate of the expert group should be left open to be further defined by the expert group itself. One submission suggested that the expert group, instead of having a full list of issues for consideration, should be given a general mandate to elaborate options for elements of rules and procedures referred to in Article 27 of the Protocol in order to identify such rules and procedure.

20. The different views were also presented as to which issues would be in priority for discussion and what would be the appropriate approach to address them. In this regard, one submission reminded the group that it should avoid leaping directly to legal solutions before identifying problems and that legal solutions should be tailored to address identified problems.

21. Following this approach, this submission indicated that before entering into discussion of those issues listed in paragraph 15 above, the group should first of all address a number of threshold issues, including: whether there is any need for the elaboration of international rules and procedures for liability and redress for damage resulting from transboundary movements of living modified organisms; whether the risk from those transboundary movements is any different from the risk from transboundary movements of other; and how the existing liability regimes to deal with damage from such transboundary movements would be applied to the transboundary movements of living modified organisms; and how damage resulting from transboundary movements of living modified organisms is redressed through existing national liability regimes or the national liability regimes that could be developed.

22. The different views on priority of the mandate for the expert group are further reflected in the approach with respect to how expert group would operate.

C. Operation of the expert group

23. As a subsidiary body of the Conference of the Parties serving as the meeting of the Parties to the Protocol, the expert group, should it be established, will report periodically on its activities and progress to, and seek further guidance from that body. All submissions highlight the importance of such procedure, but the difference lies with whether the expert group should operate in stages with further mandate for each stage. The submissions present three options.

(a) The expert group would be mandated to review the relevant information specified in paragraph 14 and analyse pertinent issues relating to liability and redress reflected in paragraph 15 in order to build consensus on the nature and content of international rules and procedures referred to in

Article 27. It would seek further guidance from the Conference of the Parties serving as the meeting of the Parties to the Protocol in 2006 and then present its final report, including specific and detailed recommendations for the rules and procedures referred to in Article 27, to the Conference of the Parties serving as the meeting of the Parties to the Protocol in 2008; or

(b) The expert group would be mandated to review the relevant information specified in paragraph 14 and analyse pertinent issues relating to liability and redress reflected in paragraph 15. On the basis of the analysis, the expert group would make recommendations to the Conference of the Parties serving as the meeting of the Parties to the Protocol on any international rules and procedures that may be appropriate pursuant to Article 27 of the Protocol. The expert group would then further develop rules and procedures for the purposes of Article 27 if directed by Conference of the Parties serving as the meeting of the Parties to the Protocol; or

(c) The expert group would start with an initial stage to address whether there is a need for the elaboration of international rules and procedures. Only should the Conference of the Parties serving as the meeting of the Parties to the Protocol agree with the need to develop those rules and procedures, the group would then focus on substantive issues raised in paragraph 15 above.

D. Timeframe

24. Article 27 of the Protocol indicates a four-year timeframe to endeavour to complete the process of elaboration of rules and procedures on liability and redress. Assuming the group would be established at the first meeting of Conference of the Parties serving as the meeting of the Parties to the Protocol, in 2004, one submission provides a work plan that covers a period of four years from 2004 to 2007, with the following schedule:

- 2004 *1st meeting* (5 days);
- 2005 *2nd meeting* (3days, directly preceding the second meeting of the Conference of the Parties serving as the meeting of the Parties: expected progress report to the second meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol)
3rd meeting during the fourth quarter of the year (5 days);
- 2006 *4th meeting* (5 days during the fourth quarter of the year, with further policy guidance from the third meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol);
- 2007 *5th meeting* (3 or 5 days)
6th meeting (5 days during the fourth quarter of the year: expected final report to submit to the meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol in 2008).

III. RECOMMENDATIONS

25. The Protocol requires that a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms be adopted at the first meeting of Conference of the Parties serving as the meeting of the Parties to the Protocol. ICCP recommended that an open-ended ad hoc group of legal and technical experts be established to carry out the process pursuant to Article 27 of the

Protocol (see annex), but leaving the terms of reference for the expert group to be defined at the first meeting of Conference of the Parties serving as the meeting of the Parties to the Protocol.

26. The Conference of the Parties serving as the meeting of the Parties to the Protocol may wish to use the draft terms of reference contained in the appendix as a basis in its discussion on this matter, taking into account the information contained in the note by the Executive Secretary providing an update on developments in national, international and regional legal instruments on liability and redress (UNEP/CBD/BS/COP-MOP/1/9/Add.1) and the information document containing a compilation of information on national, regional and international measures and agreements in the field of liability and redress for damage resulting from the transboundary movements of living modified organisms (UNEP/CBD/BS/COP-MOP/1/INF/5), as well as the information document containing responses to the questionnaire on liability and redress for damage resulting from transboundary movement of living modified organisms (UNEP/CBD/BS/COP-MOP/1/INF/6).

27. This appendix is structured in light of the main components that construe the terms of reference. It should be noted that square brackets and the listing of options are employed in the areas where submissions show different approaches on some issues. This is, however, by no means, intended to suggest that the rest of the text be agreed as it is.

28. The Conference of the Parties serving as the meeting of the Parties to the Protocol may wish to consider and adopt the draft decision prepared by ICCP together with the terms of reference for an open-ended ad hoc group of legal and technical experts, in order to fulfil the requirement under Article 27 of the Protocol.

29. Should the Conference of the Parties serving as the meeting of the Parties to the Protocol decide to establish the expert group, it may wish to invite Parties, Governments and relevant international organizations that have not done so, to submit their views or understandings to the Executive Secretary on the questionnaire annexed to recommendation 3/1 of ICCP (UNEP/CBD/ICCP/3/10, annex). It may further invite the Secretariat to compile and synthesize the submissions received, including those submitted for the first meeting of Conference of the Parties serving as the meeting of the Parties to the Protocol (UNEP/CBD/BS/COP-MOP/1/INF/6), and make them available for the first meeting of the expert group.

*Annex***RECOMMENDATION OF THE ICCP TO THE CONFERENCE OF THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO THE PROTOCOL FOR A DRAFT DECISION BY THE CONFERENCE OF THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO THE PROTOCOL ^{3/}**

The Conference of the Parties serving as the meeting of the Parties to the Protocol,

Recalling Article 27 of the Protocol, which requires the Conference of the Parties serving as the meeting of Parties to adopt, at its first meeting, a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the on-going processes in international law on these matters, and to endeavour to complete this process within four years,

Recognizing that the appropriate elaboration of international rules and procedures regarding liability and redress pursuant to Article 27 of the Protocol is crucial for the effective implementation of the Protocol,

Emphasizing that the process with respect to liability and redress under the Protocol is distinct from the process with respect to liability and redress under Article 14, paragraph 2, of the Convention, while acknowledging the need to identify and promote synergies and cross-fertilization between the two processes,

Recognizing that the process with respect to liability and redress under Article 27 of the Protocol is also distinct and different from the compliance procedures and mechanisms under Article 34 of the Protocol,

1. *Decides* 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;
2. *Decides* that the terms of reference for the open-ended ad hoc group of legal and technical experts established by paragraph 1 above shall be those contained in the appendix to this decision;
3. *Requests* the Executive Secretary to convene the open-ended ad hoc group of legal and technical experts established by paragraph 1 above as soon as possible, at least once before the second meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol.

^{3/} The text is the reproduction of the annex attached to recommendation 2/1 of ICCP (UNEP/CBD/ICCP/2/15, annex).

*Appendix***DRAFT TERMS OF REFERENCE FOR THE OPEN-ENDED AD HOC GROUP OF LEGAL AND TECHNICAL EXPERTS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY**

1. The Open-ended Ad Hoc Group of Legal and Technical Experts on Liability and Redress (hereinafter referred to as Ad Hoc Group on Liability and Redress) established pursuant to Article 27 of the Biosafety Protocol shall be composed of legal and technical experts nominated by Governments and regional economic integration organizations. The Ad Hoc Group on Liability and Redress shall be open to the participation of international organizations, non-governmental organizations and industry.
2. The Ad Hoc Group on Liability and Redress shall review the information relating to liability and redress for damage resulting from transboundary movements of living modified organisms, and shall:
 - (a) Examine the information provided by Parties, Governments and relevant international organisations pursuant to recommendations 2/1, paragraph 2, and 3/1, paragraph 1, of the Intergovernmental Committee for the Cartagena Protocol on Biosafety the synthesis of that information by the Secretariat, as well as information provided to date by the Secretariat in the context of liability and redress under Article 14, paragraph 2, of the Convention on Biological Diversity;
 - (b) Examine the information and initial understandings submitted by Parties, Governments and relevant international organizations on the basis of the questionnaire on liability and redress for damage resulting from transboundary movements of living modified organisms annexed to recommendation 3/1 of the Intergovernmental Committee on Cartagena Protocol, as well as further views submitted by them on the matter covered under Article 27 of the Protocol;
 - (c) Take into account the report of the Workshop on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (UNEP/CBD/BS/COP-MOP/1/INF/8) that was held in Rome from 2 to 4 December 2002;
 - (d) Request any information that may be required to assist the work on Article 27 of the Protocol; and
 - (e) Take due account of the ongoing processes in international law on the matters covered under Article 27 of the Protocol.
3. The Ad Hoc Group on Liability and Redress shall, on the basis of foregoing information, analyse the issues relevant to liability and redress [with a view to building understanding and consensus on the nature and contents of international rules and procedures referred to in Article 27 of the Protocol], and in doing so, it shall:
 - (a) Analyse general issues relating to
 - (i) What would be the potential and/or actual damage scenarios of concern that may be covered under the Protocol in order to identify the situations for which international rules and procedures referred to in Article 27 of the Protocol may be needed;

(ii) [How the existing liability regimes to deal with damage from non-living modified organisms transboundary movements would be applied to the transboundary movement of living modified organisms;] and

(iii) [How damage resulting from transboundary movements of living modified organisms is redressed through existing national liability regimes or the national liability regimes that could be developed.]

(b) Clarify the meaning of Article 27 of the Protocol, including the basic concepts embodied in that article such as the scope of “damage resulting from transboundary movements of living modified organisms”;

(c) Elaborate specific elements that may be relevant to Article 27 of the Protocol, including:

Option 1

(i) Definition of damage;

(ii) Valuation of damage to biodiversity;

(iii) Threshold of damage;

(iv) Causation;

(v) Channelling of liability;

(vi) Roles of Parties of import and export of the Protocol;

(vii) Standard of liability;

(viii) Insurance; and

(ix) Standing/right to bring claims;

Option 2

Options for elements of rules and procedures referred to in Article 27, with a view to the identification of such rules and procedures;

(d) Examine options for the mode of adoption and format for any possible outcome from Article 27.

4. The Ad Hoc Group on Liability and Redress shall report on its activities and progress to each subsequent meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. It shall

Option 1

two years after convening of its first meeting, seek further guidance from the Conference of the Parties serving as the meeting of the Parties to the Protocol, with a view to finalizing its work by year 2008.

Option 2

make recommendations to the Conference of the Parties serving as the meeting of the Parties to the Protocol on any international rules and procedures that may be appropriate pursuant to Article 27 of the Protocol. It shall develop rules and procedures for the purpose of Article 27 of the Protocol if directed by the Conference of the Parties serving as the meeting of the Parties.

Option 3

make recommendations to the Conference of the Parties serving as the meeting of the Parties to the Protocol on the need for the elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms. It may develop rules and procedures for the purpose of Article 27 of the Protocol should the Conference of the Parties serving as the meeting of the Parties to the Protocol decide that elaboration of those rules and procedure is appropriate.

5. The Ad Hoc Group on Liability and Redress shall endeavour to complete its work within four years after its establishment by the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. Subject to review at each meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol, the following arrangements may be used as an indicative work plan for the Ad Hoc Group on Liability and Redress, taking into account availability of financial resources:

Indicative work plan of the Ad Hoc Group on Liability and Redress

Time	Meetings	Length
2004	First meeting	5 days
2005 (directly preceding COP-MOP/2)	Second meeting	3 days
2005 (fourth quarter of the year)	Third meeting	5 days
2006 (fourth quarter of the year)	Fourth meeting	5 days
2007	Fifth meeting	3 or 5 days
2007 (fourth quarter of the year)	Sixth meeting	5 days
