



# Secretariat of the Convention on Biological Diversity

INTERNATIONAL DAY FOR BIODIVERSITY  
PROTECT BIODIVERSITY IN DRYLANDS

**22 May  
2006**



ACHIEVING THE 2010 TARGET!

Ref.: SCBD/BS/WDY/jh/54737

5 May 2006

## NOTIFICATION

### **Request for Submissions of Further Views in the form of Operational Texts with respect to Approaches, Options and Issues Identified as Regards Matter Covered by Article 27 on Liability and Redress**

Madam/Sir,

I am pleased to convey to you the conclusions of the second meeting of the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (BSWG-L&R-2) held in Montreal from 20 to 24 February 2006. The Conference of the Parties serving as the meeting of the Parties to the Protocol considered, at its third meeting held in Curitiba, Brazil, from 13 to 17 March 2006, the report of the Working Group, including its conclusions, and welcomed the progress made so far by the Working Group.

I would like, in particular, to draw your attention to paragraph 5 of the 'Conclusions' section of the report where Parties, other Governments, relevant international organizations and stakeholders are invited to submit further views on the matter covered by Article 27 of the Protocol, in particular with respect to approaches, options and issues identified in sections IV to XI of the working draft, contained in annex II of the report, preferably in the form of proposals for operational texts. Furthermore, the Working Group has requested its Co-Chairs to synthesize, with the assistance of the Secretariat, the proposed operational texts and produce a working draft for consideration at its third meeting.

The Secretariat is preparing to organize the third meeting of the Working Group early next year. In view of that, I would like to invite you to submit your views on the elements contained in annex II of the report of the second meeting of the Working Group, in particular on sections IV to XI of the annex, in the form of proposals for operational texts, to the Secretariat as soon as possible, but **not later than 29 September 2006**. The copy of annex II (containing only the elements) of the report as adjusted by the Working Group is attached herewith for use in the preparation of your proposals. The text of the Conclusions and Annex I of the report of the second meeting of the Working Group are also attached for your information and ease of reference. The text of the full report i.e. document UNEP/CBD/BS/COP-MOP/3/10 is available on the website of the CBD Secretariat at <http://www.biodiv.org/doc/meeting.aspx?mtg=MOP-03>

I wish to take this opportunity to thank you for your support to the work of the Cartagena Protocol on Biosafety and look forward to our continued cooperation.

Accept, Madam/Sir, the assurances of my highest consideration.

Ahmed Djoghlaif  
Executive Secretary

To: Cartagena Protocol on Biosafety (CPB) National Focal Points  
CBD National Focal Points (where CPB focal points have not yet been designated)  
Relevant international organizations and stakeholders



United Nations  
Environment  
Programme

Tel.: (1-514) 288-2220  
Fax: (1-514) 288-6588

website: [www.biodiv.org](http://www.biodiv.org)  
e-mail: [secretariat@biodiv.org](mailto:secretariat@biodiv.org)

World Trade Centre Building  
413 Saint-Jacques Street, Suite 800  
Montréal, Québec, Canada H2Y 1N9

**Second meeting of the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (20-24 February 2006, Montreal)**

**Conclusions**

The Working Group:

1. *Requests* the Secretariat to make available, at its third meeting, documents of the Convention on Biological Diversity relating to the application of tools for valuation of biodiversity and biodiversity resources and functions; and to arrange for an expert presentation on the matter;
2. *Requests* the Secretariat to gather and make available, at its third meeting, information on:
  - (a) Financial security to cover liability resulting from transboundary movements of living modified organisms, including information from Parties and other Governments on national experiences in this respect; and to arrange, if possible, for an expert presentation on this matter at its third meeting;
  - (b) Recent developments in international law relating to liability and redress, including the status of international environment-related liability instruments; and
  - (c) How damage suffered in areas beyond the limits of national jurisdiction or control of States is being addressed in other international instruments and forums;
3. *Requests* the Secretariat to arrange for an expert presentation on transnational procedures at its third meeting;
4. *Invites* Parties, other Governments relevant international organizations and stakeholders to take into account the indicative list of criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Protocol, contained in annex I to the present report, in elaborating options for elements for rules and procedures referred to Article 27 of the Protocol;
5. *Invites* Parties, other Governments, relevant international organizations and stakeholders to submit further views on the matter covered by Article 27 of the Protocol, in particular with respect to approaches, options and issues identified in sections IV to XI of the working draft, contained in annex II of the present report, preferably in the form of proposals for operational text, no later than three months before the third meeting of the Working Group; and requests the Secretariat to make the submissions available for its third meeting;
6. *Requests* the Co-Chairs, with the assistance of the Secretariat, to synthesize the proposed operational texts submitted pursuant to paragraph 5 above, and produce a working draft for consideration at its third meeting.

*Annex I*

**INDICATIVE LIST OF CRITERIA FOR THE ASSESSMENT OF THE EFFECTIVENESS OF ANY RULES AND PROCEDURES REFERRED TO IN ARTICLE 27 OF THE PROTOCOL**

- All elements of the rules and procedures including scope and damage under Article 27 are clearly defined.
- Possible damages can be identified and quantified consistent with the rules and procedures.
- It is possible to remedy the damage or compensate accordingly.
- Appropriate and effective access to justice is available.
- The activities, entities and individuals to which the rules and procedures will apply are clearly determined and understood.
- The rules and procedures are meaningful, easy to implement and to apply.
- It is clear how Parties would implement the rules and procedures domestically.
- The relationship between the rules and procedure and the existing law (domestic and international) on liability and redress is clear.
- Financial securities to provide compensation and redress are available.
- The rules and procedures provide an incentive to act with caution and care and encourage therefore precaution.

*Annex II*

**I. SCOPE OF “DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LMOs”**

**A. *Functional scope***

*Option 1*

Damage resulting from transport of LMOs, including transit

*Option 2*

Damage resulting from transport, transit, handling and/or use of LMOs that finds its origin in transboundary movements of LMOs, as well as unintentional transboundary movements of LMOs

**B. *Optional components for geographical scope***

- (a) Damage caused in areas within the limits of national jurisdiction or control of Parties;
- (b) Damage caused in areas within the limits of national jurisdiction or control of non-Parties;
- (c) Damage caused in areas beyond the limits of national jurisdiction or control of States.

**C. *Issues for further consideration***

- (a) ~~Limitation on the basis of geographical scope, i.e. protected areas or centres of origin;~~
- (b) ~~Limitation in time (related to section V on limitation of liability);~~
- (c) Limitation to the authorization at the time of the import of the LMOs;
- (d) Determination of the point of the import and export of the LMOs.

**II. DAMAGE**

**A. *Optional components of the definition of damage***

- (a) Damage to conservation and sustainable use of biological diversity or its components;
- (b) Damage to environment;
  - (i) Damage to conservation and sustainable use of biological diversity or its components;
  - (ii) Impairment of soil quality;
  - (iii) Impairment of water quality;
  - (iv) Impairment of air quality;
- (c) Damage to human health;

- (i) Loss of life or personal injury;
  - (ii) Loss of income;
  - (iii) Public health measures;
  - (iv) Impairment of health;
- (d) Socio-economic damage, especially in relation to indigenous and local communities;
- (i) Loss of income;
  - (ii) Loss of cultural, social and spiritual values;
  - (iii) Loss of food security;
  - (iv) Loss of competitiveness;
- (e) Traditional damage:
- (i) Loss of life or personal injury;
  - (ii) Loss of or damage to property;
  - (iii) Economic loss;
- (f) Costs of response measures.

- (a) Damage to conservation and sustainable use of biological diversity or its components:
- (i) Determination of biodiversity loss: it is essential to have baselines to measure loss, taking into account natural variations and human-induced variations other than those caused by LMOs;
  - (ii) Formulation of qualitative threshold of damage to conservation and sustainable use of biological diversity.

**B. Possible approaches to valuation of damage to conservation of biological diversity/environment**

- (a) Costs of reasonable measures taken or to be taken to restore the damaged components of biological diversity/environment:
- (i) Introduction of original components;
  - (ii) Introduction of equivalent components on the same location, for the same use, or on another location for other types of use;
- (b) Monetary compensation to be determined on the basis of criteria to be developed.

**C. *Issues for further consideration ~~with respect to valuation of damage~~***

- (a) Obligations to take response and restoration measures

- (b) Special measures in case of damage to centres of origin and centres of genetic diversity to be determined
- (c) Valuation of damage to sustainable use of biological diversity, human health, socio-economic damage and traditional damage

### **III. CAUSATION**

#### **Issues for further consideration:**

- (a) Level of regulation (international/or domestic level);
- (b) Establishment of the causal link between the damage and the activity:
  - (i) Test (e.g. foreseeability, direct/indirect damage, proximate cause, vulnerability clause);
  - (ii) Cumulative effects;
  - (iii) Complexity of interaction of LMOs with the receiving environment and time scales involved;
- (c) Burden of proof in relation to establishing the causal link:
  - (i) Relaxation of burden of proof;
  - (ii) Reversal of burden of proof;
  - (iii) Burden of proof on exporter and importer.

#### **IV. CHANNELLING OF LIABILITY, ROLE OF PARTIES OF IMPORT AND EXPORT, STANDARD OF LIABILITY**

##### ***A. Possible approaches to channelling of liability***

- (a) State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol);
  - (i) There is no need to develop special rules for State responsibility;
  - (ii) There is a need to clarify in any rules and procedures under Article 27 of the Protocol that the general rules of international law for State responsibility continue to apply.
- (b) State liability (for acts that are not prohibited by international law, including cases where a State Party is in full compliance with its obligations of the Protocol).
  - ~~Option 1~~
  - Primary State liability
  - Option 2
  - Residual State liability in combination with primary liability of operator
  - Option 3
  - No State liability
- (c) Civil liability (harmonization of rules and procedures);
- (d) Administrative approaches based on allocation of costs of response measures and restoration measures.

##### ***B. Issues relating to civil liability***

- 1. Possible factors to determine the standard of liability and the identification of the liable person**
  - (a) Type of damage;
  - (b) Places where damage occurs (e.g. centres of origin and centres of genetic diversity);
  - (c) Degree of risk involved in a specific type of LMO as identified in risk assessment
  - (d) Unexpected adverse effects;
  - (e) Operational control of LMOs (stage of transaction involving LMOs).
- 2. Standard of liability and channelling of liability**
  - (a) Fault-based liability:
    - (i) Any person who is in the best position to control the risk and prevent the damage;
    - (ii) Any person who has operational control;

- (iii) Any person who does not comply with the provisions implementing the Biosafety Protocol;
- (iv) Any entity who has the responsibility to put in place the provisions for implementing the Protocol.;
- (v) Any person to whom intentional, reckless or negligent acts or omissions can be attributed;

(b) Strict liability:

*Option 1*

Liability to be channelled to one or more of the following persons, including persons acting on his or her behalf, on the basis of prior identification:

- (a) The developer
- (b) The producer
- (c) The notifier
- (d) The exporter
- (e) The importer
- (f) The carrier
- (g) The supplier

*Option 2*

Liability to be channelled on the basis of establishment of a causal link.

### **3. Exemptions to or mitigation of strict liability**

*Option 1*

No exemptions.

*Option 2*

Possible exemptions to or mitigations of strict liability:

- (a) Act of God/force majeure;
- (b) Act of war or civil unrest;
- (c) Intervention by a third party (including intentional wrongful acts or omissions of the third party);
- (d) Compliance with compulsory measures imposed by a competent national authority;
- (e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator;
- (f) The “state-of-the-art” in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.



#### **4. Additional tiers of liability in situation where:**

- (a) The primary liable person cannot be identified;
- (b) The primary liable person escape liability on the basis of a defence;
- (c) A time limit has expired;
- (d) A financial limit has been reached;
- (e) Financial securities of the primary liable person are not sufficient to cover liabilities; and
- (f) The provision of interim relief is required.

#### **5. Issues for further consideration**

- (a) Combination of fault liability and strict liability;
- (b) Recourse against third party by the person who is liable on the basis of strict liability;
- (c) Joint and several liability or apportionment of liability
- (d) Vicarious liability.

### **V. LIMITATION OF LIABILITY**

#### ***Issues for further consideration***

- (a) Limitation in time (relative time-limit and absolute time-limit);
- (b) Limitation in amount including caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined, and to be considered in conjunction with section VI on mechanisms of financial security .

### **VI. MECHANISMS OF FINANCIAL SECURITY**

#### ***A. Coverage of liability***

##### *Option 1*

Compulsory financial security.

##### *Option 2*

Voluntary financial security.

#### ***B. Supplementary collective compensation arrangements***

##### *Option 1*

Fund financed by contributions from biotechnology industry to be made in advance on the basis of criteria to be determined.

*Option 2*

Fund financed by contributions from biotechnology industry to be made after the occurrence of the damage on the basis of criteria to be determined.

~~*Option 3*~~

~~Public fund.~~

*Option 4*

Combination of public and private funds.

***B. Issues for further consideration***

- (a) Modes of financial security (insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees).
- (b) Institutional modalities for the operation of a fund.

**VII. SETTLEMENT OF CLAIMS**

***Optional procedures***

- (a) Inter-State procedures (including settlement of disputes under Article 27 of the Convention on Biological Diversity);
- (b) Civil procedures:
  - (i) Jurisdiction of courts or arbitral tribunals;
  - (ii) Determination of the applicable law;
  - (iii) Recognition and enforcement of judgments or arbitral awards.
- (c) Administrative procedures;
- (d) Special tribunal (e.g. Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment).

**VIII. STANDING/RIGHT TO BRING CLAIMS**

***Issues for further consideration***

- a) Level of regulation (international and/or domestic level);
- b) Distinction between inter-State procedures and civil procedures;
- c) Level of involvement in the transboundary movement of living modified organisms as a requirement of standing/right to bring claims;
- d) Type of damage:
  - (i) Traditional damage: affected person, dependents, or any other person acting on behalf or in the interest of that person;

- (ii) Costs of response measures: person or entity incurring the costs;
- (iii) Damage to environment/conservation and sustainable use of biodiversity:
  - Affected State
  - Groups acting in vindication of common interests;
  - Person or entity incurring the costs of restoration measures;
- (iv) Damage to human health:
  - Affected State;
  - Affected person or any other person entitled to act on behalf of that person;
- (v) Socio-economic damage:
  - Affected State;
  - Groups acting in vindication of common interests or communities.

## **IX. NON- PARTIES**

### *Issues for further consideration*

Possible special rules and procedures in the field of liability and redress in relation to LMOs imported from non-Parties (e.g. bilateral agreements requiring minimum standards).

## **X COMPLEMENTARY CAPACITY BUILDING MEASURES**

### *Possible approaches*

- (a) Use of measures adopted under Article 22 of the Protocol, including use of roster of experts and the Action Plan for Building Capacities for Effective Implementation of the Protocol, e.g. exchange of best practices in the design and implementation of national rules and procedures on liability and redress, cooperation at the regional level in the use of available expertise, and training in all relevant fields;
- (b) Development of specific complementary capacity building measures, based on national needs and priorities, for the design and implementation of national rules and procedures on liability and redress, e.g. establishment of baseline conditions and monitoring of changes in the baseline conditions.

## **XI. CHOICE OF INSTRUMENT**

### *Option 1*

One or more legally binding instruments.

- (a) A liability Protocol to the Biosafety Protocol;
- (b) Amendment of the Biosafety Protocol;
- (c) Annex to the Biosafety Protocol;
- (d) A liability Protocol to the Convention on Biological Diversity.

### *Option 2*

One or more legally binding instruments in combination with interim measures pending the development and entry into force of the instrument(s).

*Option 3*

One or more non-binding instruments:

(a) Guidelines;

(b) Model law or model contract clauses.

*Option 4*

Two-stage approach (initially to develop one or more non-binding instruments, evaluate the effects of the instrument(s), and then consider to develop one or more legally binding instruments)

*Option 5*

Mixed approach (combination of one or more legally binding instruments, e.g. on settlement of claims, and one or more non-binding instruments, e.g. on the establishment of liability).

*Option 6*

No instrument.