Greenpeace International
Explanatory Documents on the
Biosafety Liability and Redress Negotiations

Preparation for the
Fifth meeting of the *Ad Hoc* Open-ended Working Group of Legal and Technical Experts on Liability and Redress in the context of the Cartagena Protocol

Brief Backgrounder for the Fifth Meeting

Introduction

This briefing document[1] sets out some central issues for the fifth meeting to be held in Cartagena from March 12-19. It is accompanied by two more detailed documents:

- an analysis and summary table which analyses the Working Draft released in February. The table is an updated version of the table distributed last October, and sets out the issues and suggests some answers, in an effort to clarify the document and the process, and to serve as a resource during the meeting, and
- a compilation document, which puts all the suggested optional texts together into one document, so readers can get an overview of the work done so far.

Also we refer to the Backgrounder and the Frequently Asked Questions (FAQ) documents prepared for the Fourth meeting in Montreal.

Brief Background to the Liability and Redress Negotiations

In 1995, CBD Decision II/5 started a negotiation process to develop a protocol on biosafety to address the safe transfer, handling and use of living modified organisms (LMOs), specifically focusing on transboundary movement, and to address adverse effects on the conservation and sustainable use of biological diversity.[2] Socio-economic issues, liability and compensation were then listed as issues supported by many delegations.[3] What is now Article 27 of the Biosafety Protocol first emerged from the discussions of the Fifth Meeting of the Working Group on Biosafety in 1998,[4] and was finalised at the Sixth Meeting in 1999,[5] amid concerns expressed by a

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[1] This backgrounder was written by Duncan E.J. Currie, LL.B. (Hons.) LL.M. Greenpeace International gratefully acknowledges the research and findings of Sarah Lawson-Stopps.

[2] CBD Decision II/5 (1995), at http://www.biodiv.org/decisions/default.asp?lg=0&m=cop-02&d=05, paragraph 1.

[3] Report of the Open-Ended Ad Hoc Group of Experts on Biosafety (UNEP/CBD/COP/2/7) 3 August 1995, (1995 Ad Hoc Experts Report) Annex I, Section III, paragraph 18 (b), at http://www.biodiv.org/doc/meetings/cop/cop-02/official/cop-02-07-en.pdf.

[4] See the Report of the Fifth meeting of the Open-Ended Ad Hoc Working Group on Biosafety, UNEP/CBD/BSWG/5/3, 3 September 1998, at http://www.biodiv.org/doc/meetings/bs/bswg-05/official/bswg-05-03-en.pdf. See para.40, Annex, and negotiating text on page 42-43.

[5] Report of the Sixth Meeting of the Open-Ended Ad Hoc Working Group on Biosafety, UNEP/CBD/ExCOP/1/2, 15 February 1999, at http://www.biodiv.org/doc/meetings/cop/excop-01/official/excop-01-02-en.pdf.

number of developing States that omitting substantive provisions on liability and redress resulted in a draft Protocol that was heavily slanted towards trade rather than protection of the environment.[6] Consistently with this, the COP-MOP1 decision BS-I/8[7] read that "[t]he Ad Hoc Group on Liability and Redress shall present its final report, **together with the proposed international rules and procedures** in the field of liability and redress pursuant to Article 27 of the Protocol, to the Conference of the Parties serving as the meeting of the Parties to the Protocol."

Why are Liability and Redress Rules and Procedures Needed?

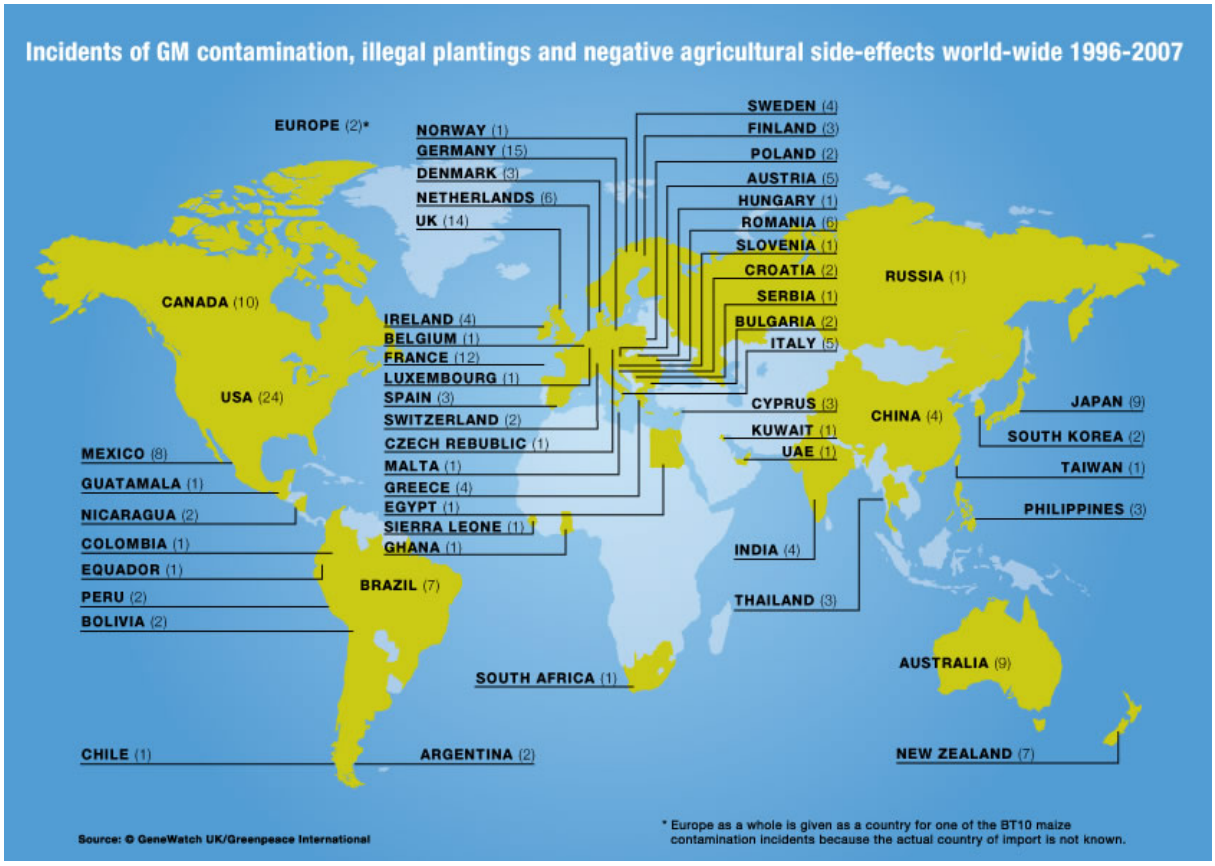
As noted in the last briefing, the transboundary nature of the production of and trade in LMOs requires a comprehensive and effective international regime which addresses risks inherent in the many potential damage scenarios, the difficulties inherent in obtaining compensation and redress for LMOs, current gaps in national laws and international law, and the mandate from the international community to develop such rules set out in the Biosafety Protocol.

Such a regime is needed to:

- put in place a scheme to ensure that victims can gain compensation for damage suffered due to LMOs;
- put in place a system to achieve redress (fix the damage), to ensure that preventative measures and response, remediation and restoration measures are taken for damage from LMOs
- ensure that risks to the environment, human health and the socio-economic effects of damage resulting from the transboundary movement of LMOs are covered;
- promote the prevention of damage to the environment by internalizing the cost to operators of LMOs and implementing the polluter-pays principle;
- create a consistent level of responsibility and predictability for LMO exporters, consistent with the precautionary approach; and
- provide assurance and confidence for developing countries when considering the import and use of biotechnology.

[6] See for instance interventions by India, at para. 61 of the Sixth Meeting report, and similar comments by Panama, at para. 77.

[7] COP-MOP 1 Decision BS-I/8, Establishment of an Open-Ended Ad Hoc Working Group of legal and technical experts on liability and redress in the context of the Protocol, Kuala Lumpur, 23 - 27 February 2004, at http://www.cbd.int/decisions/?m=MOP-01&id=8290&lg=0.



The GM contamination register at www.gmcontaminationregister.org last year showed 107 incidents of contamination. It now shows 165, and 44 illegal release and 8 negative agricultural side effects.

Should a Regime be Legally Binding or Advisory?

Article 27 is very much an integral part of the Protocol, and it would amount to an exercise in bad faith to fail to implement this Article now. Liability and redress is needed to balance the Protocol. Without such rules and procedures the Protocol leaves compensation and liability for damage caused by trade that is governed by the Protocol unaddressed.

Article 27 reads:

LIABILITY AND REDRESS

> The Conference of the Parties serving as the meeting of the Parties to this 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.

There are two important points to draw from Article 27.

1. 'International rules and procedures' are clearly called for in Article 27. 'Guidance' in no way qualifies as 'international rules and procedures'. Nor does a system which aims at harmonizing national laws. 'International' means just that: they must be international in nature, as are the other elements of the Protocol. The Protocol itself sets up the Biosafety

Clearing House, which is itself an international institution. The Protocol does not aim simply at harmonizing national import and export procedures, or putting into place advisory recommendations.

2. 'Liability and redress' are the subject of Article 27. These are separate issues. Liability answers the question of who should pay and how much. Redress addresses the question of how to fix the problem – i.e., prevention measures, response, remediation and restoration measures.

Anything falling short of these standards is simply not complying with Article 27.

Therefore, a regime needs then to:

- address both liability and redress;
- ensure that the risks to the environment, human health and the socio-economic effects of damage resulting from the transboundary movement of LMOs are addressed;
- create a consistent level of responsibility and predictability for LMO exporters;
- provide assurance and confidence for developing countries when considering the import and use of biotechnology;
- ensure that victims have the right to recourse for damage suffered due to biotechnology;
- promote the prevention of damage to the environment by internalizing the cost to operators of LMOs and implementing the polluter-pays principle; and
- ensure that preventative measures and response, remediation and restoration measures are taken for damage to the environment or biodiversity.

Mechanisms for Compensation

The Chairs have suggested some innovative solutions. We would suggest that these, and other suggestions, be tested against some key criteria:

- There must be a mechanism for farmers and other victims of LMO damage to be compensated promptly, simply and cheaply.
- Financial security or insurance must be present to ensure that money is available for compensation if, for example, importers are undercapitalized.
- Importing countries should not be unduly burdened, such as by being required to amend their legislation and put in place administrative remedies but without being provided any funds for compensation and cleanup.
- The financial burden of clean up and associated costs should not be placed on the importing country. Exporters and other liable parties should bear the burden.

The Nature of Rules and Procedures Adopted

> The Co-Chairs invited experts to reflect, during the inter-sessional period, on the feasibility and desirability of:
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> (a) The adoption of a legally binding instrument on private international law in combination with a non-legally binding instrument on substantive rules and procedures relating to civil liability;

(b) The adoption of a legally binding instrument on the administrative approach in combination with a non-legally binding instrument on civil liability;

(c) The introduction in domestic law of a requirement making it incumbent on the importer to establish, at the time of import of a living modified organism, and to maintain thereafter financial security to cover any damage to the conservation and sustainable use of biological diversity that such living modified organism may cause; and

(d) The adoption of a non-legally binding instrument on the administrative approach and/or civil liability in combination with a supplementary collective compensation arrangement which is open to states that have implemented the non-legally binding instrument.

These options are neither mutually exclusive nor comprehensive. They are simply matters on which the co-chairs have requested reflections on feasibility and desirability.

Option (c) is probably best seen as an option if option (d) fails or is not applicable to a particular State. As a stand alone option (c) is in general a far inferior option to a collective arrangement. However it may be useful as a supplementary arrangement for certain instances, such as when an importing State is not party to the collective compensation arrangement (fund) for some reason. Option (a) is not feasible in light of discussions in the 4th meeting. Option (b) is not preferred as an instrument on civil liability should be binding for the reasons given above.

So option (d) is preferable, and indeed in our view essential, except that the instrument on liability and redress (civil liability and administrative approach) should be binding.

The International Law Commission (ILC) Draft Principles themselves support a binding regime, with an accompanying fund. The ILC Draft Principles provide that:[8]

1. Where, in respect of particular categories of hazardous activities, specific global, regional or bilateral agreements would provide effective arrangements concerning compensation, response measures and international and domestic remedies, all efforts should be made to conclude such specific agreements.

2. Such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.

This is an implementation of Principle 22 of the Stockholm Declaration[9] and Principle 13 of the Rio Declaration.[10] Such a regime is also an implementation of the polluter-pays principle:

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[8] ILC Draft Principles, Principle 7.

[9] Principle 22 of the Stockholm Declaration reads that: States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

[10] Rio Declaration, Principle 13: States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

"internalizing the true economic costs of pollution control, clean-up, and protection measures within the costs of the operation of the activity itself."[11]

Other Financial Considerations

If a fund is not able to be established, then a financial guarantee could be lodged and linked to the AIA procedure. If there is no security, there shall be no export.

Claims on securities could be made under the administrative system, with simple rules and procedures, on a no fault basis, to the maximum extent of the security. Reimbursement could made by the financial security.

Settlement of Claims

Claims above the threshold could be heard, either directly or through a State, at an international Tribunal for the Protection of Biodiversity, being a standing court with specialist Judges appointed, etc. This would mean smaller countries could afford to bring a case. International arbitration is far too expensive for all but the largest of claims so is not suitable for this context. The tribunal may also be used a sort of court of appeal.

Conclusion

This background document has set out some central issues that are likely to be discussed at the 5th Meeting in Cartagena in March. More detail is provided in the accompanying two other documents, the analysis and summary of the Working Draft and the compilation document.

[11] ILC Commentary on the Purposes, para. 11 See Principle 16 of the Rio Declaration.

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Backgrounder on the

Biosafety Liability and Redress Discussions

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