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OPEN-ENDED AD HOC WORKING GROUP OF
LEGAL AND TECHNICAL EXPERTS ON
LIABILITY AND REDRESS IN THE CONTEXT OF
THE CARTAGENA PROTOCOL ON BIOSAFETY

Third meeting

Montreal, 19-23 February 2007

Item 4 of the provisional agenda*

SYNTHESIS OF PROPOSED OPERATIONAL TEXTS ON APPROACHES, OPTIONS AND ISSUES IDENTIFIED (SECTIONS I TO III) PERTAINING TO LIABILITY AND REDRESS IN THE CONTEXT OF ARTICLE 27 OF THE BIOSAFETY PROTOCOL

Note by the Co-Chairs

Addendum

INTRODUCTION

The present document presents the synthesis of operational texts proposed in the context of sections I to III of annex II to the report of the second meeting of the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress (UNEP/CBD/BS/COP-MOP/3/10). It reproduces the operational texts submitted at the second meeting of the Working Group followed by further proposals received by the Secretariat for the purpose of the present meeting. Each operational text from the second meeting of the Working Group is identified only by numbering as agreed by the meeting, whereas the latest text submissions indicate the country or organization that made the proposals.

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**SYNTHESIS OF PROPOSED OPERATIONAL TEXTS ON APPROACHES,
OPTIONS AND ISSUES RELEVANT TO LIABILITY AND REDRESS IN THE
CONTEXT OF ARTICLE 27 OF THE CARTAGENA PROTOCOL ON BIOSAFETY**

A Working Draft

(sections I to III)

*For the consideration of the third meeting of the Open-ended Ad Hoc Working Group of
Legal and Technical Experts on Liability and Redress under the Cartagena Protocol on
Biosafety*

19-23 February 2007

**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

Operational text 1

1. This decision applies to shipments, transit, handling and use of living modified organisms (LMO), provided that these activities find their origin in a transboundary movement.
2. With respect to intentional transboundary movements, this decision applies to damage resulting from any authorized use of the LMO, as well as to any use in violation of such authorization.
3. This decision applies to LMOs that are:
 - (a) Intended for direct use as food and feed or for processing;
 - (b) Destined for contained use; and
 - (c) Intended for intentional introduction into the environment.
4. This decision applies to unintentional transboundary movements. The point where they begin should be the same as for an intentional transboundary movement, *paragraphs 3 to 5 of OT 1 of Section I.C(d) apply mutatis mutandis*.
5. This decision applies to transboundary movements in contravention of domestic measures to implement the Protocol.

Operational text 2

This Protocol shall apply to damage resulting from the transport, transit, handling and/or use of living modified organisms and products thereof resulting from transboundary movements of living modified organisms and products thereof, including unintentional and illegal transboundary movements of living modified organisms and products thereof, or in the case of preventive measures, is threatened to be so caused.

Operational text 3

1. Damage resulting from transboundary movement of LMOs, including transit to the extent that a Party causes damage in a State of transit.

2. In respect of an LMO for intentional introduction into the environment, damage caused by an LMO would be within the scope of the rules and procedures adopted under Article 27 only if the importing State has complied with the conditions of use of the LMO consistent with the AIA for that LMO.
3. The scope of the rules and procedures should not be limited to the first transboundary movement of an LMO.
4. In a situation in which an exporter has complied with the risk assessment requirements of an importing State pursuant to the AIA procedure, damage which occurs in the importing State and which is established to be as a result of inadequacies in the importing State's risk assessment process should be outside the scope of the rules and procedures adopted under Article 27.

Operational text 4

Any damage resulting from, but not limited to, transport, transit, handling and/or use of LMOs that finds its origin in transboundary movement as well as unintentional transboundary movement of LMOs.

Operational text 5

The Protocol shall apply to any damage resulting from an intentional, unintentional or illegal transboundary movement, from the point where the living modified organism leaves an area which is under the national jurisdiction of one Party to the Protocol, through to the point where the living modified organism enters an area which is under the national jurisdiction of a Party to the Protocol for its use within that Party's jurisdiction.

Operational text 6

The instrument shall apply to damage caused by living modified organisms that were originally either imported or unintentionally released across the border. The damage must be a result of the genetic modification.

Operational text 7

The liability regime covers damage resulting from transboundary movement of LMOs.

Operational text 8

Damage resulting from transboundary movement of living modified organisms.

Operational text 9

1. The following definitions are used for the purpose of this document:
 - (a) Intentional transboundary movements: It is understood that the rules and procedures described in this instrument not only cover authorized movements but also all non-authorized movements and any unauthorized use of any kind.
 - (b) Illegal transboundary movements: are movements which contravene national legal provisions, as long as the affected State is a Party to the Cartagena Protocol.
2. This legally-binding instrument will apply to damages resulting from intentional or unintentional transboundary movement of any LMO, including transport, use, and placing on the market.

3. This instrument takes into account equally the right of States regardless of whether they are importing or transit States.

Operational text 10

1. These rules and procedures shall apply to damage to biological diversity resulting from transboundary movements of living modified organisms.
2. “Biological diversity” -- as defined in Article 2 of the Convention on Biological Diversity.
3. “Living modified organism” -- as defined in Article 2 of the Cartagena Protocol on BioSafety
4. “Transboundary movement” means the intentional movement of LMOs from the territory of a Party to the Protocol to the point of entry at which customs formalities take place within the territory of another Party to the Protocol.
5. “Resulting from” means that the damage:
 - (a) would not have occurred but for the transboundary movement of the LMO; and
 - (b) that the transboundary movement was the proximate cause of the damage without any superseding or intervening causes.

Operational text 11

1. These rules and procedures shall apply to:
 - (a) any damage resulting from the packaging, transport, transit, handling and/or use of a living modified organism resulting from a transboundary movement of a living modified organism, and from failure to provide accurate information about the LMO or its movement;
 - (b) any unintentional or illegal transboundary movement of a living modified organism;
 - (c) in the case of preventive measures, any damage threatened to be caused;
 - (d) any damage described by paragraphs (a),(b) or (c) wherever suffered.

Ethiopia:

Scope of Application

This Protocol shall apply to damage due to any occurrence, or series of occurrences having the same origin that causes damage or creates a grave and imminent threat of causing damage during transboundary movement, transit, handling and use of LMOs, including illegal traffic from the point where the LMOs are loaded on the means of transport in an area under the national jurisdiction of a Party of export.

Norway:

This instrument applies to transport, transit, handling and use of living modified organisms (LMO) that finds its origin in a transboundary movement. It applies to all LMOs covered by the Cartagena Protocol.

With respect to intentional transboundary movements, this instrument applies to damage resulting from any authorized use of the LMO, as well as any use in violation of such authorization.

This instrument also applies to unintentional transboundary movements and transboundary movements in contravention of domestic measures to implement the Protocol.

Greenpeace International:

Scope of Application

1. (a) This Protocol shall apply to damage resulting from the transport, transit, handling and/or use of living modified organisms resulting from transboundary movements of living modified organisms, including unintentional and illegal transboundary movements of living modified organisms,

Public Research and Regulation Initiative:

This instrument shall apply to adverse effects of living modified organisms resulting from intentional or unintentional transboundary movement on the conservation and sustainable use of biodiversity

<i>B. Optional components for geographical scope</i>	
(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.

Operational text 1

This decision applies to areas under the jurisdiction or control of the Parties to the Cartagena Protocol.

Operational text 2

1. 'Area under national jurisdiction' shall mean the territory of a Contracting Party and any other areas over which the Contracting Party has sovereignty or jurisdiction according to international law.
2. This Protocol shall apply to any damage described by paragraph (a) wherever suffered including in areas:
 1. within limits of national jurisdiction or control of Contracting Parties;
 2. within the limits of national jurisdiction or control of non-Contracting Parties; or
 3. beyond the limits of national jurisdiction or control of States.
3. Nothing in the Protocol shall affect in any way the sovereignty of States over their territorial seas and their jurisdiction and the right in their respective exclusive economic zones and continental shelves in accordance with international law.

Operational text 3

The rules and procedures adopted under Article 27 apply to damage caused by a Party which occurs/manifests in areas within the limits of national jurisdiction of another Party or non-Party.

Operational text 4

1. Any damage in areas within the limits of national jurisdiction or control of Parties;
2. Any damage caused in areas within limits of national jurisdiction or control of non-Parties;
3. Any damage caused in areas beyond the limits of national jurisdiction or control of States.

Operational text 5

1. The Protocol shall apply to damage resulting from an incident as referred to in paragraph 1 in an area which is under the national jurisdiction of a Party.
2. Notwithstanding paragraph 2, the Protocol shall also apply to damage which occurs in an area of a State of transit where such State is not a Party to the Protocol, but has however acceded to a multilateral, bilateral or regional agreement which concerns the transboundary movement of living modified organisms and is in force at the time of the occurrence of the damage.
3. Nothing in the Protocol shall be read or construed to affect in any way the Sovereignty of States, whether a Party to the Protocol or not, over their territorial seas and their jurisdiction and right in their respective exclusive economic zones and continental shelves in accordance with international law.

Operational text 6

1. This decision encourages regional and international agreements and organizations to address damage in areas outside national jurisdiction that these entities may presently strive to manage.
2. This decision encourages Parties to cooperate with regional and international agreements and organizations in an effort to address damage in areas outside of national jurisdiction.

Operational text 7

Damage that is caused within the limits of national jurisdiction or control of Parties.

Operational text 8

1. Damage suffered in areas within the limits of national jurisdiction of Parties;
2. Damage suffered in areas within the limits of non-Parties;
3. Damage suffered in areas beyond the limits of national jurisdiction of States.

Operational text 9

1. The following definition is used for the purpose of this document: area within the limits of national jurisdiction: Territory and Exclusive Economic Zone within the limits of jurisdiction of a State Party and any other over which said State Party has sovereignty or exclusive jurisdiction under international legislation.
2. This instrument will apply to damage suffered in areas within the jurisdiction or control of a State Party to the Cartagena Protocol on Biosafety and in areas beyond their jurisdiction that are recognized as international areas.
3. The provisions of this instrument do not apply to damage suffered within the territorial limits of non-Parties to the Cartagena Protocol.

Operational text 10

This instrument shall apply to any damage wherever suffered.

Ethiopia:

The Protocol shall apply only to damage suffered in an area under the national jurisdiction of a Contracting Party or in areas beyond any national jurisdiction arising from an incident referred under subarticle 1 of this Article.

Norway:

1. This instrument applies to:

- a) Damage caused by a transboundary movement and suffered within an area under national jurisdiction or control of Parties to the instrument, and
- b) Damage caused an operator of a State party to this instrument by a transboundary movement and suffered beyond areas of national jurisdiction or control, provided that it is caused by a transboundary movement of LMOs originating from an area covered by Point 1.

2. This instrument does not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to jurisdiction.

Greenpeace International:

‘Area under national jurisdiction’ shall mean the territory of a Contracting Party and any other areas over which the Contracting Party has sovereignty o jurisdiction according to international law.

Article 3.

Scope of Application

1. (b) This Protocol shall apply to any damage described by paragraph (a) wherever suffered including in areas

- (i) within limits of national jurisdiction or control of Contracting Parties;
- (ii) within the limits of national jurisdiction or control of non-Contracting Parties; or
- (iii) beyond the limits of national jurisdiction or control of States

3. In any other case, this Protocol shall apply when there is a movement of a Living Modified Organism from within an area under national jurisdiction of a Contracting Party.

4. Nothing in the Protocol shall affect in any way the sovereignty of States over their territorial seas and their jurisdiction and the right in their respective exclusive economic zones and continental shelves in accordance with international law.

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.

- (b) Limitation in time ~~(related to section V on limitation of liability)~~

Operational text 1

This decision applies to damage resulting from a transboundary movement of LMOs when that transboundary movement was commenced after this decision became operational.

Operational text 2

Unless a different intention appears from this Protocol, or is otherwise established, the provisions of this Protocol do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that Contracting Party.

Operational text 3

There should be a five (5) year time limit between the transboundary movement which causes damage and the commencement of a process to establish liability in respect of that damage.

Operational text 4

The Protocol shall not apply to damage arising from a transboundary movement of a living modified organism that commenced prior to the entry into force of the Protocol for the Party under whose national jurisdiction the damage is said to have occurred.

Operational text 5

Any decisions made in relation to article 27 shall only apply from the time the decision takes effect.

Operational text 6

Liability rules and procedures should be prospective in nature and not retroactive, in order to ensure that fair notice of behavioural expectations has been given.

Operational text 7

These rules and procedures shall apply only to damage resulting from transboundary movements that occur following adoption of these rules.

Operational text 8

This instrument applies to damage caused, existing or arising on or after the date of entry into force of these rules and procedures/this Protocol/date this decision becomes operational.

Norway:

This instrument applies to damage caused by a transboundary movement of LMOs that started after the entry into force of this instrument.

Global Industry Coalition:

These rules and procedures shall apply only to damage to biodiversity resulting from transboundary movements that occur following entry into force of these rules.

Greenpeace International:

Article 3.

Scope Of Application

Unless a different intention appears from this Protocol, or is otherwise established, the provisions of this Protocol do not bind a Contracting Party in relation to any act or fact which took place or any situation

which ceased to exist before the date of the entry into force of the treaty with respect to that Contracting Party.

(c) Limitation to the authorization at the time of the import of the LMOs

Operational text 1

This decision applies to intentional transboundary movement only in relation to the use for which LMOs are destined and for which authorization has been granted prior to the transboundary movement.

Operational text 2

If an importing State uses an LMO for a purpose different to that specified at the time of the transboundary movement of the LMO, damage caused a result of that different use should not be within the scope of the rules and procedures adopted under Article 27.

Operational text 3

Activities taken in accordance with the provisions of the Protocol or activities taken pursuant to a permit issued by an appropriate authorized official are outside the scope of these rules and procedures.

Operational text 4

Damage shall only relate to activities that have been authorized in accordance with terms of the Biosafety Protocol.

Operational text 5

This instrument shall apply to all damage resulting from the transboundary movement of a living modified organism and any different or subsequent use of the living modified organism or any characteristics and/or traits of or derived from the living modified organism.

(d) Determination of the point of the import and export of the LMOs.

Operational text 1

1. This decision applies to damage of a LMO if:

- (a) That LMO has been subject to a transboundary movement, as defined in *paragraphs 2 to 5 below and OT 1 under Section I.C(c)*;
- (b) The first use for which the LMO has been destined and authorized is covered by the rules and procedures under Article 27 of the CPB, namely the uses set out in *paragraph 3 of OT 1 under Section I.A* above.

2. For the purpose of this decision, the definition of “transboundary movement” in Article 3(k) of the CPB is elaborated to provide further precision.

3. With respect to sea borne transport, the commencement of a transboundary movement is the point where a LMO leaves the exclusive economic zone of the State, or in the absence of such zone, the territorial sea of a State.
4. With respect to land borne transport, the commencement of a transboundary movement is the point at which a LMO leaves the territory of a State.
5. With respect to air borne transport, the commencement of a transboundary movement will depend on the route and could be the point where a LMO leaves the exclusive economic zone, the territorial sea or the territory of the State.

Operational text 2

1. Whenever a transboundary movement is effected by transport:
 - (a) When the State of export is a Contracting Party to this Protocol this Protocol shall apply with respect to damage arising from an occurrence which takes place from the point where the living modified organisms are loaded on the means of transport in an area under the national jurisdiction of the State of export.
 - (b) When the State of import, but not the State of export, is a Contracting Party to this Protocol, this Protocol shall apply with respect to damage arising from an occurrence which takes place after the time at which the importer has taken possession of the living modified organism.
2. In any other case, this Protocol shall apply when there is a movement of a Living Modified Organism from within an area under national jurisdiction of a Contracting Party to an area outside its national jurisdiction.

Operational text 3

1. An intentional transboundary movement of an LMO starts at the point at which the LMO leaves the national jurisdiction of the Party of export (*classification required for air/sea/terrestrial*) and stops at the point at which responsibility for the carriage of the LMO transfers to the importing State.
2. An unintentional transboundary movement starts at the point at which the LMO leaves the national jurisdiction of a Party of export and stops at the point at which it enters the jurisdiction of another State.

Operational text 4

A transboundary movement commences when the LMO leaves the territorial jurisdiction of a State (*to be clarified for different forms of transport*), and ends when the LMO enters the jurisdiction of the other State.

Operational text 5

The rules and procedures should cover “transboundary movement” defined in Article 3(k) of the Protocol as “the movement of a living modified organism from one Party to another Party”.

Operational text 6

1. ‘Territory’ shall mean the territory of a Contracting Party, the internal and territorial waters and the airspace over the territory.

2. A “Transboundary Movement” commences either:
 - (a) when a living modified organism is prepared for export within the territory of a State by the preparation, handling, or packaging of the living modified organism for export by transport;
 - (b) In any other case, when an LMO leaves the territory of the State.

Norway:

For the purposes of this instrument, a transboundary movement starts from the following points;

- a) In cases of sea borne transport, where a LMO leaves the exclusive economic zone of the State, or in the absence of such zone, the territorial sea of a State.
- b) In cases of land borne transport, where a LMO leaves the territory of a State
- c) In cases of air borne transport, where a LMO leaves the exclusive economic zone, the territorial sea or the territory of the State, depending on the route.

Global Industry Coalition:

“Transboundary movement” means the intentional movement of LMOs from the territory of a Party to the Protocol to the point of entry at which customs formalities take place within the territory of another Party to the Protocol.

Greenpeace International:

Article 3.

Scope of Application

2. Whenever a transboundary movement is effected by transport:
 - a) When the State of export is a Contracting Party to this Protocol this Protocol shall apply with respect to damage arising from an occurrence which takes place from the point where the living modified organisms are loaded on the means of transport in an area under the national jurisdiction of the State of export.

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.

Operational text 1

1. “Environment” includes:

- (a) the conservation and sustainable use of biological diversity or its components;
- (b) natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors.

2. ‘Impaired’ in relation to the environment’ shall include any adverse effects on the environment.

3. 'Damage' shall include:

- (a) Damage to human health including:
 - (i) Loss of life or personal injury;
 - (ii) Impairment of health;
 - (iii) Loss of income;
 - (iv) Public health measures.
- (b) damage to, or impaired use or loss of, property;
- (c) damage to the environment, including, loss of income derived from an economic interest in any use of the environment incurred as a result of impairment of the environment;
- (d) Loss of income, loss of cultural, social and spiritual values, loss of food security, or economic loss, loss of competitiveness or other damage to indigenous or local communities.

Operational text 2

The instrument shall apply to:

- (a) damage to environment, conservation and sustainable use of biological diversity and its components as defined in Article 2 of the Convention of Biological Diversity including impairment of soil, water and air quality;
- (b) damage to human health which shall include loss of life or personal injury; loss of income; impairment of health and costs of public health measures taken;
- (c) socio-economic damage, which shall include but not be limited to:
 - (i) loss of income
 - (ii) loss of cultural, social, traditional and spiritual values
 - (iii) loss of food security
 - (iv) loss of economic markets
- (d) *Actio legis aquiliae*, *Actio ex contractu* (Cartagena Protocol on Biosafety), *Actio damni injuriae*;
- (e) Cost of response and preventative measures including remedial costs.

Operational text 3

For the purposes of these Rules:

- (a) "Abiotic components" shall include air, soil and water;
- (b) "Biotic components" include flora and fauna, damage to which shall be assessed from kingdom to genetic levels;
- (c) "Damage" shall mean:
 - (i) Loss of life or personal injury;
 - (ii) Loss of or damage to property: provided that the property is not held by the person to be held liable in accordance with the Protocol;

- (iii) Loss of income which was directly derived from an economic interest in any use of the environment within the scope of the Protocol and which loss has incurred as a result of the impairment of the environment, taking into account loss of savings and costs;
- (iv) Loss of cultural, social and spiritual values;
- (v) Loss of the security of provision of food which is a staple or contains a socio-economic value to an indigenous or local community;
- (vi) The costs of measures to respond to the damage caused or of reinstatement of the impaired environment, with such costs to be limited to the measures actually undertaken or which are deemed as necessary to be undertaken;
- (vii) Loss of biological diversity and its components;
- (viii) Loss of abiotic and biotic components of the environment; and
- (ix) Impairment of the interactions and interrelationships between abiotic and biotic components of the environment.

Operational text 4

1. "Damage" means:

- (a) Loss of life or personal injury;
- (b) Loss of, or damage to, property other than property held by the person liable in accordance with the rules and procedures under article 27 of the Protocol;
- (c) Loss of income directly deriving from an economic interest in the sustainable use of biological diversity, incurred as a result of impairment of the biological diversity, taking into account savings and costs;
- (d) The cost of measures of reinstatement of the impaired biological diversity, limited to the costs of measures actually taken or to be undertaken; and
- (e) The cost of response measures, including any loss or damage caused by such measures, to the extent that the damage was caused by living modified organisms due to the genetic modification.

2. "Measures of reinstatement" means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the biological diversity. Domestic law may indicate who will be entitled to take such measures;

3. "Response measures" means any reasonable measures taken by any person, including public authorities, following a damage, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up. Domestic law may indicate who will be entitled to take such measures.

Operational text 5

This instrument covers damage to conservation and sustainable use of biological diversity and to human health. For the purpose of this instrument;

- (a) damage to the conservation of biological diversity means any measurable significant change in the quantity or quality of organisms within species, of species as such or ecosystems;
- (b) damage to the sustainable use of biological diversity means any quantitative or qualitative reduction of the components of biological diversity which negatively affect the continued use of

those components in a sustainable way and thereby leads to loss of, or damage to property, loss of income, disruption of the traditional way of life in a community or hinders, impedes or limits exercising of the right of common;

(c) damage to human health means any personal injury whether or not it leads to loss of life.

Operational text 6

Damage to conservation and sustainable use of biological diversity, taking into account the definitions of ‘sustainable use’ and ‘biological diversity’ in article 2 of the Convention on Biological Diversity.

Operational text 7

1. Damage covered under the rules and procedures is restricted to damage to the conservation and sustainable use of biological diversity.

2. To constitute damage to the conservation and sustainable use of biological diversity, there must be a change to the conservation and sustainable use of biological diversity that is adverse, significant and measurable, within a timescale meaningful in the particular context, from a baseline established by a competent national authority that takes into account natural variation and human-induced variation.

Operational text 8

“Damage” means impacts on biological diversity that are:

- (a) adverse;
- (b) significant;
- (c) measurable using objective scientific criteria (to be developed); and clearly caused by a specific LMO.

Operational text 9

1. ‘Environment’ includes all natural resources, including (i) air, water, soil, fauna and flora, and the interaction between the same factors, (ii) ecosystems and their constituent parts, (iii) biodiversity, (iv) amenity values, (v) indigenous or cultural heritage, and (vi) social, economic, aesthetic, and cultural conditions which are affected by the matters stated in paragraphs (i) to (v) of this definition.

2. ‘Impaired’ shall include any adverse effect and shall include contamination.

3. ‘Damage’ shall include:

- (a) Damage to human health, including:
 - (i) Loss of life, personal injury, loss of wellbeing, and impairment of health; and medical costs including the cost of diagnosis and treatment and associated costs;
 - (ii) Loss or reduction of income;
 - (iii) Public health measures;
- (b) damage to, impaired use or reduction of value of property;

- (c) loss or reduction of income derived from environmental impairment;
- (d) damage to the environment, including:
 - (i) the cost of measures of reinstatement or remediation of the impaired environment, where possible, as measured by the cost of action actually taken or to be undertaken, including the introduction or re-introduction of original components; and
 - (ii) where reinstatement or remediation to the original state is not possible, the introduction of equivalent components at the same location, for the same use, or on another location for other types of use; and
 - (iii) the costs of response measures, including any loss or damage caused by such measures; and
 - (iv) the costs of preventive measures, including any loss or damage caused by such measures; and
 - (v) the costs of any interim measures; and
 - (vi) any other damage to or impairment of the environment, taking into account any impact on the environment;
- (e) Loss or reduction of income, loss of or damage to cultural, social and spiritual values, loss of or reduction to food security, damage to agricultural biodiversity used by local and indigenous communities, loss of competitiveness or other economic loss or other loss or damage to indigenous or local communities.

Colombia:

- (a) Damage to conservation and sustainable use of biological diversity or its components;
 - (i) Determination of biodiversity loss: [...]
 - (ii) Formulation of a qualitative threshold of damage to conservation and sustainable use of biological diversity;
- (b) Damage to environment;
 - (i) Impairment of soil quality;
 - (ii) Impairment of water quality;
 - (iii) Impairment of air quality;
- (c) Damage to human health;
 - (i) Impairment of health;
 - (ii) Loss of life or personal injury;
- (d) Socio-economic damage, especially in relation to indigenous and local communities;
 - (i) Loss of income;
 - (ii) Economic loss;
 - (iii) Impairment of cultural, social and spiritual values;
 - (iv) Impairment of food security;
 - (v) Reduction or loss of competitiveness;
 - (vi) Impairment of private property;

Ethiopia:

Civil Claims for Damage

For the purpose of this protocol damage means

- (a) loss of life or personal injury
- (b) loss of or damage to property other than property held by the person liable in accordance with this Protocol

- (c) loss of income directly deriving from economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs
- (d) the costs of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken

Norway:

Alternative 1

This instrument covers damage to conservation and sustainable use of biological diversity and to human health as follows:

1. Damage to the conservation of biological diversity means any measurable significant change in the quantity or quality of organisms within species, of species as such or ecosystems.
2. Damage to the sustainable use of biological diversity means any quantitative or qualitative reduction of the component of biological diversity which negatively affect the continued use of those components in a sustainable way and thereby leads to economic loss, loss of, damage to, or impaired use of property, loss of income, disruption of the traditional way of life in a community or hinders, impedes or limits exercising of the right of common.
3. Damage to human health, including loss of life, personal injury, impairment of health, loss of income and public health measures.

Alternative 2

1. "Damage" means:
 - a) Loss of life or personal injury;
 - b) Loss of or damage to property;
 - c) Loss of income directly deriving from an economic interest in the use of biological diversity, incurred as a result of impairment of the biological diversity, taking into account savings and costs;
 - d) The costs of measures of reinstatement or remediation of the impaired biological diversity actually taken or to be undertaken;
 - e) The costs of preventive measures, including any loss or damage caused by such measures
2. "Measures of reinstatement" means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of biological diversity. Domestic law may indicate who will be entitled to take such measures;
3. "Preventive measures" means any reasonable measures taken by any person, in response to an incident, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up.

Global Industry Coalition:

Damage covered under these rules and procedures is limited to damage to biodiversity

Greenpeace:

1. 'Damage' includes
 - (i) Damage to human health including:
 - (a) Loss of life or personal injury or disease together with medical costs including costs of diagnosis and treatment and associated costs ;
 - (b) Impairment of health;
 - (c) Loss of income;
 - (d) Public health measures;
 - (ii) damage to or impaired use of or loss of property;
 - (iii) loss of income derived from an economic interest in any use of the environment, incurred as result of impairment of the environment;

- (iv) Loss of income, loss of or damage to cultural, social and spiritual values, loss of or reduction of food security, damage to agricultural biodiversity, loss of competitiveness or other economic loss or other loss or damage to indigenous or local communities.
- (v) damage to the environment, including
 - (a) the costs of reasonable measures of reinstatement or remediation of the impaired environment, where possible, measured by the costs of measures actually taken or to be undertaken, including introduction of original components;
 - (b) where reinstatement or remediation to the original state is not possible, the value of the impairment of the environment, taking into account any impact on the environment, and the introduction of equivalent components at the same location, for the same use, or on another location for other types of use, and
 - (c) the costs of response measures, including any loss or damage caused by such measures; and
 - (d) the costs of preventive measures, including any loss or damage caused by such measures;
 - (e) the costs of any interim measures; and
 - (f) any other damage to or impairment of the environment, taking into account any impact on the environment;

Provided that the damage was caused directly or indirectly by living modified organisms during or following a transboundary movement of the living modified organisms, or in the case of preventive measures, is threatened to be so caused

- 2. 'Impaired' in relation to the environment' shall include any adverse effects on the environment.
- 3. 'Measures of reinstatement' means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment.
- 4. 'Compensation' shall include compensation for damage, restoration and remediation and other amounts payable under this Protocol.

Public Research and Regulation Initiative:

Damage to biodiversity is any damage that has significant adverse effects on the conservation of biodiversity in a particular place, but does not include damage resulting from those actions expressly authorized or required by a relevant national authority.

Except where national law extends this instrument, damage to private property shall not be within the scope of this instrument

- (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.

Operational text 1

- 1. For the purposes of this decision, damage to the conservation of biological diversity means an adverse effect on biological diversity that:
 - (a) Is a result of human activities involving LMO's; and

- (b) relates in particular to species and habitats protected under national law or international law; and
 - (c) Is measurable or otherwise observable taking into account, wherever available, baseline conditions; and
 - (d) Is significant as set out in paragraph 3 below.
2. For the purposes of this decision, damage to the sustainable use of biological diversity means an adverse effect on biological diversity that:
- (a) Is related to a sustainable use of biodiversity; and
 - (b) Has resulted in loss of income; and
 - (c) Is significant as set out in paragraph 3 below.
3. A “significant” adverse effect on the conservation and sustainable use of biological diversity is to be determined on the basis of factors, such as:
- (a) The long term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonably short period of time; and/or
 - (b) A qualitative or quantitative reduction of components of biodiversity, and in relation to sustainable use of biodiversity, their potential to provide goods and services.

Operational text 2

1. For purposes of the valuation of damages for ascertaining the loss of biodiversity, account must be taken of the baseline conditions obtaining before the damage, including the natural and human induced variations other than those caused by LMOs.
2. The baseline conditions may be proved by statistical, traditional, historical, or such other evidence as may be considered appropriate.

Operational text 3

For the purpose of this document:

- (a) Damage to biological diversity means any measurable change that result in adverse effect, considering the definition of “biological diversity” in article 2 of the Convention on Biological Diversity.
- (b) Damage to sustainable use of biological diversity means any decrease in the potential of the use of any of the components of the biological diversity, to meet the needs and aspirations of the present and future generation.

Operational text 4

1. Damage means an adverse or negative change in the conservation and sustainable use of biological diversity or its components, as well as any socio-economic considerations arising from damage to biological diversity consistent with Article 26 of the Protocol. The adverse or negative change in biological diversity must be present over a period of time and cannot be redressed through natural recovery within a reasonable period of time.

2. (a) In order for compensation to be available, a threshold of significant or substantial damage must be exceeded, as measured against a baseline of the condition or conditions that would have existed had the incident not occurred.
- (b) As part of this determination, both natural processes and those that result from human activities must be taken into account.

Operational text 5

1. Valuation of damage shall be measured in relation to established scientific baselines.
2. Damage to conservation and sustainable use of biological diversity will need to be 'significant' or 'serious'.

Operational text 6

To constitute damage to the conservation and sustainable use of biological diversity, there must be a change to the conservation and sustainable use of biological diversity that is adverse, significant and measurable, within a timescale meaningful in the particular context, from a baseline established by a competent national authority that takes into account natural variation and human-induced variation.

Operational text 7

1. When valuing damage, damage to biodiversity may take into account any baseline information that the Competent National Authority took into account pursuant to any risk assessment required by the Protocol and any applicable national laws.
2. There shall be no threshold applicable to the assessment of damage.

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

- | |
|---|
| <ol style="list-style-type: none">(a) Costs of reasonable measures taken or to be taken to restore the damaged components of biological diversity/environment:<ol style="list-style-type: none">(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. |
|---|

Operational text 1

1. In the valuation of the damage to the environment the following, amongst other matters, shall be taken into account:
 - (a) costs of reasonable measures of reinstatement or remediation of the impaired environment, where possible, measured by the costs of measures actually taken or to be undertaken, including introduction of original components;

- (b) where reinstatement or remediation to the original state is not possible, the value of the impairment of the environment, taking into account any impact on the environment, and the introduction of equivalent components at the same location, for the same use, or on another location for other types of use;
- (c) costs of response measures, including any loss or damage caused by such measures;
- (d) costs of preventive measures, including any loss or damage caused by such measures;
- (e) a monetary value for the loss during the period when the damage occurs and the environment is restored as required in (a) and (b);
- (f) a monetary value representing the difference in the value of the environment as reinstated under (a) or (b), and the value of the environment in its undamaged or impaired state; and
- (g) any other matters not referred to in (a) – (f).

2. Any monetary damages recoverable in respect of the restoration of the environment shall, wherever possible, be applied for that purpose and aimed at returning the environment to its baseline condition.

Operational text 2

1. In the valuation of the damage to the conservation of biological diversity the following, among other, shall take into account:

- (a) exchange value (relative price in the market);
- (b) utility (the use value, which can be very different from the market price);
- (c) importance (appreciation or emotional value attached).

2. Damage to conservation of biological diversity shall be valued case by case on the cost of restoration and monetary compensation, taking into account the complexity of the biological systems.

Operational text 3

1. The primary mechanism for valuation of damage is to determine the cost of measures taken to restore the damage to biological diversity or its components to its baseline conditions.

2. After restoration is addressed, additional monetary compensation may be considered where baseline conditions cannot be restored. Where baseline conditions cannot be restored, alternative mechanisms for evaluating further monetary conditions may be considered, including market valuation or value of replacement services.

Operational text 4

Damage to conservation of biological diversity shall be valued on the cost of restoration only.

Operational text 5

The primary mechanism for the evaluation of damage shall take into account costs of reasonable measures taken or to be taken to restore the damaged components of biological diversity through:

- (a) Introduction of original components; or
- (b) Introduction of equivalent components on the same location, for the same use, or on another location for other types of use.

Ethiopia:

Financial Limit

In the case of harm to the environment or biological diversity, compensation shall include the costs of reinstatement, rehabilitation or clean-up measures which actually are being incurred and, where applicable, the costs of preventive measures.

Norway:

In the valuation of the damage to conservation of biological diversity, the costs of measures of reinstatement or remediation of the impaired biological diversity actually taken or to be undertaken shall be taken into account, including introduction of original components or introduction of equivalent components on the same location, for the same use, or on another location for other types of use

<i>C. Issues for further consideration with respect to valuation of damage</i>
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(a) Obligations to take response and restoration measures
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Operational text 1

1. In the event of damage, the liable person should take response measures.
2. The liable person should be required by domestic law to take such response measures. This is without prejudice to a primary and general obligation of affected persons to minimise damage as far as possible and feasible.
3. For the purposes of this decision, response measures are actions to minimise, contain or remedy damage, as appropriate.
4. The damage to conservation and sustainable use of biodiversity is valued on the basis of the costs of response measures, eventually undertaken or to be undertaken, to remedy it.

Operational text 2

1. The Contracting Party where the damage occurs may require any legal person or entity responsible for the damage to take response measures as may be required to abate, reinstate, or remediate the impaired environment.
2. The legal person or entity shall take the measures required.
3. If the legal person or entity fails to take the response measures as required, the Contracting Party where the damage occurs may undertake, or propose to undertake, the measures; in such an event, the legal person or entity shall pay the reasonable costs of these measures.

Operational text 3

1. Operators responsible for activities covered by this instrument that may cause or has caused damage as defined above, shall take the necessary measures to prevent, minimize, mitigate or repair the damage.
2. Such measures shall comprise assessment, reinstatement or restoration through the introduction of original components of biological diversity or, if this is not possible, introduction of equivalent components on the same location for the same use, or on another location for other types of use.
3. If the necessary measures are not taken by the operator responsible, the affected individuals, communities or the authorities of the State in which the damage occurs, may, in accordance with domestic law, take such measures at the cost of the responsible operator.

Operational text 4

Any obligation to take response and restoration measures shall be limited to reasonable measures.

Operational text 5

National law shall require that any person in operational control of LMOs at the time of an incident shall take all reasonable measures to mitigate the damage arising therefrom.

Operational text 6

1. Operators responsible for activities covered by this instrument that may cause or has caused damage as defined above, shall take the necessary measures to prevent, minimize, mitigate or repair the damage.
2. Such measures shall comprise assessment, reinstatement or restoration through the introduction of original components of biological diversity or, if this is not possible, introduction of equivalent components on the same location, for the same use, or on another location for other types of use.
3. If the necessary measures are not taken by the operator responsible, the affected individuals, communities or the authorities of the State in which the damage occurs, may, in accordance with domestic law, take such measures at the cost of the responsible operator.

Operational text 7

Any competent Court or Tribunal may issue an injunction or declaration or take such other appropriate interim or other measure as may be necessary or desirable with respect to any damage or threatened damage.

Ethiopia:

Cessation, Restitution And Compensation

1. Each Contracting party shall in conformity with the Cartagena Protocol and other relevant international law cease activities that might cause significant damage and shall, as far as practicable, re-establish the situation that would have existed if the damage had not occurred.
2. Where restoration is not possible as provided under subarticle one of this Article, the Contracting Party which is responsible for the origin of the damage shall provide other remedies or substitutes deemed equivalent or relevant to make good the damage.

3. Contracting Parties shall cooperate to develop and improve means to remedy damage resulting from transboundary movements of LMOs, including measures for rehabilitation, restoration or reinstatement of habitats of particular conservation concern.

Norway:

The Party affected by an intentional or unintentional transboundary movement of living modified organisms may require the person responsible for the movement to take reasonable preventive measures and measures of reinstatement.

If the person responsible fails to take the measures as required, the Contracting Party may undertake the measures at his expense.

Greenpeace International:

‘Preventive measures’ means any reasonable measures taken by any person in response to an occurrence, to prevent, minimize, or mitigate loss or damage, or to address damage or threatened damage to biodiversity, or to effect environmental clean-up.

Article 6.

Preventive Measures Required

Subject to any requirement of domestic law, any person in operational control of living modified organisms at the time of an occurrence shall take all reasonable measures to mitigate damage arising therefrom.

(b) Special measures in case of damage to centres of origin and centres of genetic diversity to be determined

Operational text 1

If any damage is caused to centres of origin or centres of genetic diversity, then and without prejudice to any rights or obligations hereinbefore stated:

- (a) additional monetary damage shall be payable representing the cost of the investment in the centres;
- (b) any other monetary damage shall be payable representing the unique value of the centres;
- (c) any other measures may be required to be taken, taking into account the unique value of the centres.

Operational text 2

Valuation of damage will relate to the conservation and sustainable use of biological diversity, with no special measures for centres of origin and centres of genetic resources.

Operational text 3

Any competent Court or Tribunal shall pay particular regard to any relevant centre of origin or centre of genetic diversity.

(c) Valuation of damage to sustainable use of biological diversity, human health, socio-economic damage and traditional damage

Operational text 1

1. In determining damages for any socio - economic damage, the following:

(a) shall be taken into account:

(i)

(ii) etc.

(b) may be taken into account:

(i)

(ii) etc.

Operational text 2

Compensation for damage shall cover the costs of the necessary measures taken or to be taken to assess, reduce or repair the damage, and any loss of or damage to property and loss of income.

Ethiopia:

Civil Claims for Damage

3. In the case of harm to human health, compensation shall include:

- a) all costs and expenses incurred in seeking and obtaining the necessary and appropriate medical treatment;
- b) compensation for any disability suffered, for diminished quality of life, and for all costs and expenses incurred in reinstating, as far as possible, the quality of life enjoyed by the person before the harm was suffered;
- c) compensation for loss of life and all costs and expenses incurred and other related expenses;

4. Liability shall also extend to harm or damage caused directly or indirectly by the LMO or its product to:

- a) the livelihood or indigenous knowledge systems of local communities,
- b) technologies of a community or communities,
- c) damage or destruction arising from incidence of public disorder triggered by the LMO or its product,
- d) disruption or damage to production or agricultural systems,
- e) reduction in yields,
- f) soil contamination,
- g) damage to the biological diversity,
- h) damage to the economy of an area or community, and

any other consequential economic, social or cultural damages

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.

Operational text 1

1. When considering evidence of the causal link between the LMO or the activity in relation to the LMO and the damage/adverse effect, due account shall be taken of the increased danger of causing such damage/adverse effect inherent in the LMO or the activity.

or

1. To establish the causal link between the LMO or the activity in relation to the LMO and the damage, it shall be shown that the LMO or the activity in relation to the LMO materially increased the risk of danger of causing the damage/producing the adverse effect.
2. The effect referred to in (1) may be direct or indirect, temporary or permanent, chronic or acute, past, present or future, cumulative, arises over a period of time or is continuing.
3. Upon proof of the damage/adverse effect and the presence of the LMO by the legal person or entity making the claim, the evidentiary burden of disproving the causal link shall be on the person or entity alleged to have caused the damage/adverse effect.

Operational text 2

If the rules and procedures adopted under Article 27 are guidelines for the development of national liability rules: each State may apply its own definition of causation consistent with best international practice.

or

If the rules and procedures adopted under Article 27 are to be applied as an international regime, whether through national courts or an international entity: common test for causation based on principle

that it should be established that the affected entity/individual would not have suffered the damage but for the actions of the entity/individual that is purported to be responsible for the damage.

Operational text 3

1. Causation could be considered at international or national levels.
2. Any adverse effects that may have resulted from the introduction of a living modified organism that finds its origin in a transboundary movement shall be sufficient in the establishment of a causal link.
3. There shall be a presumption that the operator is liable for harm or damage caused by a living modified organisms which finds its origin in transboundary movement. Therefore the burden of proof for any damages reasonably resulting from transboundary movement of living modified organisms, shall be shifted to the operator.

Operational text 4

1. Any operator that causes damage that alone or in combination with other causes may have caused the damage, shall be recognized as having caused such damage unless it is established that another cause is more likely.
2. Any operators responsible for activities covered by this instrument which individually or together are sufficient to cause the damage, shall be severally liable.
3. If it can be established that other causes of damage have predominantly contributed to the damage, liability for a less significant cause of damage may cease or be proportionately reduced to the extent reasonable. In evaluating the contribution of the operator causing such damage, the type and extent of the operators activity and other relevant circumstances shall be taken into account.

Operational text 5

The entity seeking redress for a claim of damage bears the burden of demonstrating all of the following:

- (a) proximate causation between the transboundary movement of an LMO and claimed damage;
- (b) a causal link between an act or omission on the part of the persons involved with the transboundary movement and the claimed damage;
- (c) that the parties alleged to have caused the harm acted wrongfully, intentionally, recklessly, or otherwise committed negligent or grossly negligent acts or omissions, (i.e., violated the accepted standard of care).

Operational text 6

1. States shall decide whether to establish regulation at the national level only.
2. A causal link between the damage and the activity based on scientific evidence shall be required.
3. The burden of proof shall be on the entity alleging that damage has been suffered.

Operational text 7

1. There must be a causal link established between the activity/incident and the damage incurred.
2. When considering the causal link between an incident and the damage, the following must be taken into account, *inter alia*:
 - (a) Cumulative effects;
 - (b) Intervening events;
 - (c) Self-regeneration of ecosystems;
 - (d) Complexity of the interaction of LMOs with the receiving environment and timescales involved.

Operational text 8

Liability shall attach only on the establishment of both cause-in-fact and proximate cause of the damage alleged. The claimant shall bear the burden of proof.

Operational text 9

1. "Effect" includes (a) any direct or indirect effect, (b) any temporary or permanent effect, (c) any chronic or acute effect, (d) any past, present, or future effect; and (e) any cumulative effect which arises over time or in combination with other effects.
2. "Occurrence" means any occurrence or incident, or series of occurrences or incidents having the same origin, that causes damage or creates a serious threat of damage; and includes any act, omission, event or circumstance, foreseen or unforeseen, resulting from or following any transboundary movement of any living modified organism.
3. Damage shall include direct or indirect damage.
4. There shall be presumption that:
 - (a) the living modified organism which was the subject of a transboundary movement caused the damage where there is a reasonable possibility that it could have done so; and
 - (b) that any damage caused by a living modified organism which was the subject of a transboundary movement was the result of its biotechnology-induced characteristics.
5. To rebut the presumption, a person must prove to the standard required by the procedural law applied that the damage was not due to the characteristics of the living modified organism resulting from the genetic modification, or in combination with other hazardous characteristics of the living modified organism.

Norway:

All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the instrument shall be governed by the law of that court, including any rules of such law relating to conflict of laws, in accordance with generally accepted principles of law.

Public Research and Regulation Initiative:

There should be considered a causal link between the damage and the act or omission of a person with operational control of the LMO if he fails to fulfil his obligations set by the applicable laws or approval procedures, unless he can prove otherwise.



CONVENTION ON BIOLOGICAL DIVERSITY

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OPEN-ENDED AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY

Third meeting

Montreal, 19-23 February 2007

Item 4 of the provisional agenda*

SYNTHESIS OF PROPOSED OPERATIONAL TEXTS ON APPROACHES, OPTIONS AND ISSUES IDENTIFIED (SECTIONS IV TO XI) PERTAINING TO LIABILITY AND REDRESS IN THE CONTEXT OF ARTICLE 27 OF THE BIOSAFETY PROTOCOL

Note by the Co-Chairs

I. INTRODUCTION

1. 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 (the 'Working Group', hereinafter) held its second meeting from 20 to 24 February 2006 in Montreal. The Working Group analysed issues and elaborated options for elements of rules and procedures referred to in Article 27 of the Protocol for damage resulting from the transboundary movements of living modified organisms. It considered submissions of proposed texts and views on approaches, options and issues identified pertaining to liability and redress in the context of Article 27 of the Protocol. The proposed texts submitted during the meeting focused on elements covered in sections I to III of the working draft that was before the Working Group. The Working Group also reviewed information relating to liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs).

2. In its conclusions, the second meeting of the Working Group has, among other things, invited 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 in sections IV to XI of the working draft annexed to its report. It indicated its preference for submissions made in the form of proposals for operational text, which the Co-Chairs of the Working Group were requested to synthesize, with the assistance of the Secretariat, and produce a working draft for consideration at its third meeting.

3. Accordingly, the Secretariat had received, by 1 November 2006, submissions from Argentina, Colombia, Ethiopia, European Union, and Thailand. Submissions were also received from the following international organizations and stakeholders: Global Industry Coalition, Greenpeace International, International Grain Trade Coalition, and Public Research and Regulation Initiative.

* UNEP/CBD/BS/WG-L&R/3/1

4. The present document puts together operational text proposed through the submissions received by the Secretariat. It covers sections IV to XI of annex II of the report of the second meeting of the Working Group (UNEP/CBD/BS/COP-MOP/3/10). Submissions made with reference to elements under sections I to III are synthesized in a separate document, UNEP/CBD/BS/WG-L&R/3/2/Add.1. This document also includes the operational texts proposed at the second meeting of the Working Group.

5. In accordance with item six of the conclusion in the report of the second meeting of the Working Group, the present synthesis contains only submissions made in the form of proposals for operational text. Texts such as preambular paragraphs, objectives or final clauses are not included. Furthermore, explanatory notes, annexes and footnotes accompanying proposals for operational text are also not included, with the exception of footnotes that appear to constitute proposals for operational text. Proposals made in some submissions for the deletion of any of the elements of annex II or proposals that indicate that a provision was not necessary are also not reflected in the synthesis.

6. Finally, minor editing of a non-substantive nature has been done on some of the submissions. Numbering and lettering that appear in the original submissions have been removed for the purpose of this working draft except where they were justified as in the case of enumeration and paragraphs of a legal text. However, most of the numberings of articles that appear in the submission of Greenpeace International have been retained, once again, so that the cross-referencing that exists at several places in their submission would not be lost.

7. The full texts of the submissions have been compiled and made available in an information document (UNEP/CBD/BS/WG-L&R/3/INF/1).

**SYNTHESIS OF PROPOSED OPERATIONAL TEXTS ON APPROACHES,
OPTIONS AND ISSUES RELEVANT TO LIABILITY AND REDRESS IN THE
CONTEXT OF ARTICLE 27 OF THE CARTAGENA PROTOCOL ON BIOSAFETY**

A Working Draft

(sections IV to XI)

*For the consideration of the third meeting of the Open-ended Ad Hoc Working Group of
Legal and Technical Experts on Liability and Redress under the Cartagena Protocol on
Biosafety*

19-23 February 2007

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.

(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.

Argentina:

This regime shall not affect the rights and obligations of the [Contracting Parties] under the rules of general international law with respect to State responsibility.

EU:

The rules and procedures should not affect the rights and obligations of the Parties under international law with respect to the responsibility of States, as reflected by General Assembly resolution 56/83, “Responsibility of States for internationally wrongful acts”.

Norway:

This instrument shall not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to State responsibility.

Global Industry Coalition:

A Party shall be liable for damage to biodiversity resulting from any breach of its obligations under the Protocol.

A Party shall be liable for failure to exercise reasonable care in carrying out its responsibilities pursuant to the Biosafety Protocol and national implementing legislation where such failure results in damage to biodiversity. Where another person also is at fault, liability shall be apportioned based on degree of fault.

Greenpeace International:

Article 49.

State Responsibility

The Protocol shall not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to State responsibility.

Public Research and Regulation Initiative:

A Party shall be liable for damage to the conservation and sustainable use of biodiversity due to LMOs resulting from any breach of its obligations under the Protocol

(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

Argentina:

No State liability could be alleged.

Ethiopia:**General Obligations**

1. Each Contracting Party shall take due care and measures with a view to ensuring that transboundary movement, transit, handling and use of LMOs by its nationals or persons under its jurisdiction or control are carried out in conformity with the provisions of this and the Cartagena Protocol.

2. The granting of an advance agreement by the Party of import does not exonerate the Party of export from being answerable for any damage resulting during transboundary movement, transit, handling and use of LMOs, including illegal traffic.

3. The contracting Parties shall ensure that any person in operational control of LMOs or its product at the time of emergency or incident occurring within its jurisdiction has implemented the risk management plan specifically approved for the use, handling and transboundary movement of the LMOs in question.

Strict Liability

1. The Party of export that has notified to and obtained an advance informed agreement from the Party of import in accordance with Article 8 and 10 of the Cartagena Protocol shall be strictly liable for damage resulted in the Party of import, other states or areas beyond the limits of national jurisdictions until the

importer has taken possession of the LMOs or its product. Thereafter the Party of import shall be liable for damage.

2. The Party of export shall be strictly liable for damage resulting from LMOs referred under article 7 (4) of the Cartagena Protocol only if the State of import or state of transit has categorized those LMOs as likely to have adverse effects on the conservation and sustainable use of biological diversity, entail risks to animal and human health and the environment, and if same is notified to other Parties through the Biosafety Clearing-House.

3. Should the LMOs be repatriated in accordance with Article 25 of the Cartagena Protocol, the Party that re-imports such LMOs shall be held strictly liable for damage until it has taken possession of the LMOs in question, if applicable, or by the disposer assigned to dispose of the said LMOs by the Party of import or transit.

4. The Contracting Parties shall not, oppose, hinder or prevent the return of the LMOs destined for repatriation to the Party of export in accordance with subarticle three of this Article.

5. No Contracting Party can be held liable under this Article if without their being any fault on its part the damage occurred:

(a) directly due to an act of armed conflict or a hostile activity except an armed conflict initiated by the Contracting Party that is responsible for the damage;

(b) directly due to a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or

(c) wholly by an act of third party; or wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage.

Contributory Fault

Compensation may be reduced or disallowed if the victim or a person for whom he is responsible under the domestic law, by his own fault, has caused or contributed to the damage having regard to all circumstances.

(d) Administrative approaches based on allocation of costs of response measures and restoration measures.

EU:

In case civil liability is complemented by an administrative approach, the operator/importer should be required to take all necessary preventive and remedial measures and to bear their costs. Competent public authorities should establish which operator/importer has caused the damage (or the imminent threat of damage). They should assess the significance of the damage and determine which remedial measures should be taken. Competent authorities may themselves also take the necessary preventive or remedial measures and then recover the costs from the operator/importer.

Public Research and Regulation Initiative:

The Party in which the damage occurs shall assume responsibility for any necessary restoration or other remedial action in accordance with its obligations under the Convention on Biological Diversity where necessary and may then recover the costs of such action from the person(s) responsible.

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.

(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;

Argentina:

- a. Liability regime shall cover damage caused only by an intentional or negligent act of omission on the part of the liable person.
- b. Liability shall be attributed as a consequence of the failure to comply with the duty of care or with obligations under the Protocol.
- c. Liability shall be attributed to the person who is in operational control of the LMO or in the best position to prevent/control damage.

Ethiopia:

1. Any person that commits fault either intentionally or by negligence during the transboundary movement, transit, handling and use of LMOs shall be liable for damage resulting from an incident other than those specified under Article 4 of this Protocol. This Article shall not affect the domestic law of the Contracting Parties governing liability of servant and agents.

2. A person that takes or fails to take action required under this Protocol or other relevant international laws with full knowledge or being aware of that its act or omission may cause damage shall be deemed to have committed an intentional fault if, with full knowledge of the consequences of the incident, it takes or fails to take action regardless of that such damage may follow.

3. A person is proved negligent when, in the circumstances of the case, it fails to take such precautions as might reasonably be expected or it acts without consideration or in disregard of the possible consequences of its act or omission during a transboundary movement, transit, handling and use of LMOs, including illegal traffic.

Global Industry Coalition:

Liability shall be established where a person:

- (i) has operational control of the relevant activity;
- (ii) has breached a legal duty of care though intentional, reckless or negligent conduct, including acts or omissions; and
- (iii) such breach has resulted in actual damage to biodiversity; and
- (iv) Causation is established in accordance with section XX of these rules.

Greenpeace International:

Article

5

Fault-Based Liability

Without prejudice to article 4., any person shall be liable for damage caused or contributed to by that person's lack of compliance with the provisions implementing the Convention or the Protocol or by that person's wrongful intentional, reckless or negligent acts or omissions.

Public Research and Regulation Initiative:

Liability shall be established if a person has breached a legal duty of care through intentional or negligent conduct that results in damage that could have been foreseen (including acts or omissions) and the breach has resulted in actual damage.

(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.

Argentina:

No strict liability could be alleged by the affected party.

EU:

The operator/importer of a transboundary movement of LMOs should be liable for the damage resulting from such a transboundary movement.

Norway:

The person responsible for intentional or unintentional transboundary movements of living modified organisms shall be liable for damages resulting from transport, transit, handling and/or use of living modified organisms that finds its origin in such movements, regardless of any fault on his part.

Global Industry Coalition:

Liability shall be assigned on the basis of the establishment of a causal link between the damage to biodiversity and the intentional, reckless or negligent conduct of the person with operational control of the activity. Persons shall be held strictly liable for damage to biodiversity that results from acts or omissions in violation of national law or in violation of the written conditions of any approval.

Greenpeace International:

‘Notifier’ means the person who notifies the competent national authority of the Party of import prior to the intentional transboundary movement of a living modified organism that falls within the scope of Article 7, paragraph 1 of the Cartagena Protocol.

Article

4.

Absolute Liability

1. The exporter and notifier of any living modified organism shall be liable for all damage caused by the living modified organism from the time of export of the living modified organism.
2. Without prejudice to paragraph 1, the importer of the living modified organism shall be liable for all damage caused by the living modified organism from the time of import.
3. Without prejudice to paragraphs 1 and 2, should the living modified organism be re-exported from the state of import, the second and subsequent exporter and notifier of the living modified organism shall be liable for all damage caused by the living modified organism from the time of re-export of the living modified organism and the second and subsequent importer shall be liable for all damage caused by the living modified organism from the time of import.
4. Without prejudice to the preceding paragraphs, from the time of import of the living modified organism, any person intentionally having ownership or possession or otherwise exercising control over the imported living modified organism shall be liable for all damage caused by the living modified organism. Such persons shall include any distributor, carrier, and grower of the living modified organism and any person carrying out the production, culturing, handling, storage, use, destruction, disposal, or release of the living modified organism, with the exception of a farmer.
5. In the case of unintentional or illegal transboundary movement of a living modified organism, any person intentionally having ownership or possession or otherwise exercising control over the living modified organism immediately prior to or during the movement shall be liable for all damage caused by the living modified organism.
6. Any exporter, notifier and any person having ownership or possession or otherwise exercising control shall be liable for during the case of transit of living modified organisms through States other than the Party of export or Party of import.
7. All liability under this article shall be joint and several. If two or more persons are liable according to this article, the claimant shall have the right to seek full compensation for the damage from any or all of the persons liable.
8. If an occurrence consists of a continuous occurrence, all persons successively exercising the control of the living modified organism immediately before or during that occurrence shall be jointly and severally liable.
9. In the case of a person liable under this article being financially unable fully to meet the compensation for damages, together with costs and interest, as provided in this Protocol, or otherwise fails to meet such compensation, the liability shall be met by the State of which the person is a national.

Public Research and Regulation Initiative:

The legal or natural person(s) that can be shown to have caused damage to the conservation or sustainable use of biodiversity due to the handling and use of living modified organisms which have been subject to transboundary movement shall be held liable.

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.

Argentina:

Liability shall be excluded/mitigated when damage was caused under the following circumstances:

- a. Act of God/force majeure; or
- b. Act of war or civil unrest; or
- c. Intervention by a third party; or
- d. Compliance with compulsory measures imposed by a competent national authority; or
- e. The damage could not reasonably have been foreseen, according to the “state-of-the-art” at the time that the activities were carried out.

Ethiopia:

General Obligations

The granting of an advance agreement by the Party of import does not exonerate the Party of export from being answerable for any damage resulting during transboundary movement, transit, handling and use of LMOs, including illegal traffic.

Strict Liability

No Contracting Party can be held liable under this Article if without their being any fault on its part the damage occurred:

- (a) directly due to an act of armed conflict or a hostile activity except an armed conflict initiated by the Contracting Party that is responsible for the damage;
- (b) directly due to a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or
- (c) wholly by an act of third party; or wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage.

Contributory Fault

Compensation may be reduced or disallowed if the victim or a person for whom he is responsible under the domestic law, by his own fault, has caused or contributed to the damage having regard to all circumstances.

EU:

The operator/importer should not be liable to the extent that the damage was caused by an act of God/force majeure, an act of war or civil unrest, the intervention by a third party or compliance with compulsory measures imposed by a public national authority.

Where appropriate, the operator/importer may not have to bear the costs of remedial action when he proves that he was not at fault or negligent and the damage was caused: 1) by an activity expressly authorised by and fully in conformity with an authorisation given under national law; 2) by an activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out.

Norway:

Liability may be limited in cases where the person referred to in paragraph 1 above proves that the damage was:

1. The result of an act of armed conflict, hostilities, civil war or insurrection; or
2. The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character.

Global Industry Coalition:

Liability shall not be established where the damage to biodiversity is a result of:

- (i) Act of God/force majeure;
- (ii) Act of war or civil unrest; and/or
- (iii) Intervention by a third party

Liability shall not attach to damage which results from conduct that occurs at the direction and/or under the mandate of any governmental authority with jurisdiction over the person and/or the relevant conduct.

For purposes of these rules, damage does not include previously identified adverse effects which result from an act by an operator which was expressly authorized by the relevant authorities in accordance with national law.

For purposes of these rules, liability shall not attach to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out as determined by the risk assessments undertaken in conjunction with approval or authorization of the activity

Public Research and Regulation Initiative:

Liability shall not attach to activities that where harm could not have been foreseen given scientific and technical knowledge at the time they were carried out as determined by the risk assessments undertaken in conjunction with approval or authorisation of the activity under national law of both the exporting and importing country. Where information becomes available after approval or authorisation which indicates a possible adverse effect, operators would need to take such action as may be necessary in order to minimise the effects, and to inform national authorities

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.

Global Industry Coalition:

If liability for damage to biodiversity cannot be established because (a) no person can be identified; (b) a complete defence applies; or (c) the claim is time-barred, the Party in which the damage exists shall be responsible for any necessary restoration or other remedial action in accordance with its obligations under the Convention on Biological Diversity.

Where liability is assigned to a person but the financial limit provided for in Rule XX has been reached, the Party in which the damage exists shall be responsible for any additional remedial action that may be necessary in accordance with its obligations under the Convention on Biological Diversity.

National corporate and other applicable laws concerning financial insufficiencies in the Party where the damage exists shall apply.

Interim relief may be granted by a competent court only in the case of an imminent, significant and likely irreversible damage to biodiversity. The defendant's costs and losses shall be paid by the claimant in any case where interim relief is granted but liability is not established subsequently in the case.

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.

- (b) Recourse against third party by the person who is liable on the basis of strict liability;

EU:

Nothing in this decision shall prejudice any right of recourse of the operator/importer against the exporter.

Greenpeace International:

Article 7

Right of recourse

1. Any person liable under the Protocol shall be entitled to a right of recourse in accordance with the rules of procedure of the competent court:
 - (a) against any other person also liable under the Protocol; and
 - (b) as expressly provided for in contractual arrangements.

2. Nothing in the Protocol shall prejudice any rights of recourse to which the person liable might be entitled pursuant to the law of the competent court.

(c) Joint and several liability or apportionment of liability

Ethiopia:

Combined Cause of Damage

1. Where damage is caused by LMOs subject to the Advance informed agreement and LMOs identified as being not likely to have adverse effects pursuant Article 7(4) of the Cartagena Protocol, a person otherwise liable shall only be liable according to the Protocol in proportion to the contribution made by the LMOs covered under the Advance informed agreement.

2. In respect of damage where it is not possible to distinguish between the contribution made by LMOs covered by and LMOs identified as being not likely to have adverse effects pursuant Article 7(4) of the Cartagena Protocol, all damage shall be covered under this Protocol.

3. If there is more than one person responsible for the damage, injury or loss, the claimant shall have the right to seek full compensation from any or all of the persons liable for the damage, injury or loss.

EU:

If two or more operators/importers are liable according to this decision, the claimant should have the right to seek full compensation for the damage from any or all operators/importers i.e. the latter should be liable jointly and severally without prejudice to domestic provisions concerning the rights of contribution or recourse.

The operator/importer who proves that only part of the damage was caused by the transboundary movement of LMOs should only be liable for that part of the damage.

Norway:

Any persons responsible for transboundary movements referred to [in paragraph 1] above shall be jointly and severally liable for damages referred to in the same paragraph.

Global Industry Coalition:

In the case of liability of more than one person, liability shall be apportioned on the basis of relative degrees of fault.

Public Research and Regulation Initiative:

In the case of liability with multiple causes, liability shall be apportioned on the basis of relative degrees of fault where possible

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 .

- (a) Limitation in time (relative time-limit and absolute time-limit)

Argentina:

1. No liability could be alleged after [10] years from the date of the incident.
2. Liability shall be admissible within [3] years from the date the claimant knew or ought reasonably to have known of the damage provided that the time limits established pursuant to the previous paragraph.

Ethiopia:

TIME LIMIT OF LIABILITY

1. Claims for compensation under this Protocol shall not be admissible unless they are brought within ten years from the date of incident.
2. Claims for compensation under the Protocol shall not be admissible unless they are brought within five years from the date the claimant knew or ought reasonably to have known of the damage provided that the time limits established pursuant to subarticle one of this Article is not exceeded.
3. Where the incident consists of a series of occurrences having the same origin, time limits established pursuant to this Article shall run from the date of the last of such occurrences. Where the incident consists of continuous occurrences, such time limits shall run from the end of that continuous occurrence.
4. The right to bring civil action in respect of harm caused by any LMO or its product shall commence from the date on which the affected person(s) or the community or communities could reasonably be expected to have learned of the harm, taking due account of:
 - (a) The time the harm may take to manifest itself; and,
 - (b) The time that it may reasonably take to correlate the harm with the LMO or its product, taking into consideration the situation or circumstance of the person(s) or community or communities affected.

EU:

1. A claim for damages under these rules and procedures should be exercised within [x] years from the date by which the claimant knew or ought reasonably to have known of the damage and the person liable, in any event not later than [x] years from the date of the transboundary movement of LMOs.
2. Where the transboundary movement of LMOs consists of a series of occurrences having the same origin, time limits under this rule should run from the date of the last such occurrence. Where the effect of the transboundary movement consists of a continuous occurrence, such time limits should run from the end of the continuous occurrence.

Norway:

Claims for compensation under the Protocol shall not be admissible unless they are brought within 3 years from the date the claimant knew or ought reasonably to have known of the damage and the person responsible, and at the latest 20 years from the date on which the activity causing the damage ceased.

Global Industry Coalition:

Any claim for damage to biodiversity shall be brought within three years from the date the damage is known or reasonably could have been known but shall in no case be recognized if not brought within twenty years of the conduct alleged to have caused the damage occurred.

Greenpeace International:

Article 14

Time Limitation of Liability

1. Claims for compensation under this Protocol shall not be admissible unless they are brought within ten years from (a) the date of the occurrence of the damage, or (b) from the date the damage becomes known or reasonably should have become known by the claimant and is known by the claimant to be attributable to the occurrence or should reasonably have been known to be so by the claimant, whichever occurs later.
2. Where the occurrence consists of a series of occurrence having the same origin, the date of occurrence under this article shall be the date of the last of such occurrence. Where the occurrence consists of continuous occurrence, such time limit shall run from the end of that continuous occurrence.

Public Research and Regulation Initiative:

Any claim for damage to biodiversity shall be brought within three years from the date the damage is identified or reasonably could have been identified but shall in no case be recognized if not brought within twenty years of the transboundary movement that caused the damage occurred unless it can be shown that the damage could not have been identified within the twenty year period.

(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 .

Argentina:

Financial limits for liability shall be specified by agreement of [Contracting Parties] through the mechanism considered appropriate.

Ethiopia:

Financial limit

There shall be no upper financial limit of liability and thus the damage shall be fully compensated.

Global Industry Coalition:

Total costs of compensation and redress measures shall not exceed ____XXX __USD.

VI. MECHANISMS OF FINANCIAL SECURITY

A. Coverage of liability

Option 1

Compulsory financial security.

Option 2

Voluntary financial security.

Ethiopia:

General Obligations

1. Each Contracting Party shall, in respect to its nationals or persons under its jurisdiction or control, ensure the availability of adequate compensation for damage resulting from the failure to discharge the obligations contained in this or other relevant international laws during transboundary movement, transit, handling and use of any LMOs, including illegal traffic.

2. The Party of export shall ensure the availability of effective remedies for any damage ensued in other states or areas beyond the limits of national jurisdictions as a result of its activities or of acts or omissions of any one of its organs during transboundary movement, transit, handling and use of LMOs, including illegal traffic.

Insurance And Other Financial Guarantees

1. The Party of export or any other person that will be strictly liable pursuant Article ----- herein shall establish and maintain during the period of the time of liability, insurance, bonds or other financial guarantees covering their liability for amounts not less than the minimum limits specified herein.

2. The Party of export may, by notifying a declaration of self insurance through the Biosafety clearing-House, fulfill its obligation provided under subarticle one of this Article.

3. Insurance, bonds or other financial guaranties provided under subarticle one of this Article shall only be drawn upon to provide compensation for damage.

4. Proof of coverage of the liability of the Party of export or any other person shall be delivered to the competent authorities of the state of import, and same shall be notified to parties through the Biosafety Clearing-House.

5. Any claim under this Protocol may be asserted directly against any person providing insurance, bonds or other financial guarantees. The insurer or the person providing the financial guarantee shall have the right to require the person liable under this Protocol to be joined in the proceedings. Insurer and persons providing financial guarantees may invoke the defenses which the person liable under this Protocol would be entitled to invoke.

Norway:

The persons liable [under Article X] shall establish and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability in accordance with requirements set out in the regulatory framework of the party of import or the decision on the import of

living modified organisms taken by a Party of import pursuant to Articles 10-12 of the Cartagena Protocol. The requirements shall take into account inter alia the likelihood, seriousness and possible costs of damage and the possibilities to offer financial security.

Global Industry Coalition:

National corporate and other applicable laws concerning financial security for the conduct of commercial and research and development activities in the Party where the damage exists shall apply.

Greenpeace International:

Article 18.

Insurance and Other Financial Guarantees

1. Exporters, notifiers, importers, distributors, growers, carriers, and other persons liable under article 4 shall establish and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability under article 4 of this Protocol for amounts not less than the minimum limits specified in paragraph [] of Annex I according to the terms and conditions established by the Regulations passed by the Conference of the Parties serving as the meeting of the Parties to this Protocol.
2. A document reflecting the coverage of the liability of the exporter and the notifier under article 4 paragraph 1, of this Protocol or of the importer under article 4, paragraph 2, of this Protocol shall accompany the notification referred to in article 8 or Annex II of the Cartagena Protocol. Proof of coverage of the liability of the exporter and the notifier shall be delivered to the competent national authorities of the State of import.
3. Any claim under this Protocol may be asserted directly against any person providing insurance, bonds or other financial guarantees. The insurer or the person providing the financial guarantee shall have the right to require the person liable under article 4 to be joined in the proceedings.

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.

Ethiopia:

1. Where compensation under this Protocol does not cover the costs of damage, additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using existing mechanisms.

2. The Meeting of the Parties to the Cartagena Protocol shall keep under review the need for and possibility of improving existing mechanisms or establishing a new mechanism.

Greenpeace International:

Article 19.

Fund Established

1. An International Fund for compensation for damage, to be named “The International Living Modified Organism Compensation Fund” and hereinafter referred to as “The Fund”, is hereby established with the following aims:
 - (a) to provide compensation for and prevention, remediation or reinstatement of damage to the extent that the protection afforded by this Protocol is inadequate;
 - (b) to provide legal aid to claimants;
 - (c) to give effect to the related purposes set out in this Convention.
2. The Fund shall in each Contracting Party be recognized as a legal person capable under the laws of that State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State. Each Contracting Party shall recognize the Director of the Fund (hereinafter referred to as “The Director”) as the legal representative of the Fund.

Article 20.

Applicability of Fund

This Part shall apply with regard to compensation according to article 21 to damage caused in areas under the national jurisdiction of a Contracting Party or in areas beyond the limits of national jurisdiction, and to preventive measures taken to prevent or minimize such damage or for reinstatement or remediation of the environment following such damage.

Article 21.

Payment of Compensation and Remediation

1. The Fund shall pay compensation to any person suffering damage if such person has been unable to obtain full and adequate compensation for the damage under this Protocol, either
 - (a) because no liability for the damage arises under this Protocol;
 - (b) because the party liable for the damage under this Protocol is financially incapable of meeting his obligations in full and any financial security that may be provided under this Protocol does not cover or is insufficient to satisfy the claims for compensation for the damage; a person being treated as financially incapable of meeting that person’s obligations and a financial security being treated as insufficient if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under this Protocol after having taken all reasonable steps to pursue the legal remedies available to him;
2. The Fund shall pay the costs of prevention, remediation or reinstatement of the environment where payment for such remediation or reinstatement was not available under this Protocol.
3. The aggregate amount of compensation and prevention, remediation and reinstatement payable by the Fund under this article shall in respect of any one occurrence be limited, so that the total sum of that amount and the amount of compensation actually paid under this Protocol for an occurrence, shall not exceed the amount specified in Annex IV.
4. Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under this Protocol shall be the same for all claimants.
5. The Assembly of the Fund (hereinafter referred to as “the Assembly”) may, having regard to the experience of incidents which have occurred and in particular the amount of damage resulting therefrom and to changes in the monetary values, decide that the amount referred to in paragraph 2, shall be increased; provided, however, that this amount shall in no case be decreased. The changed amount shall apply to incidents which occur after the date of the decision effecting the change.

6. The Fund shall, at the request of a Contracting Party, use its good offices as necessary to assist that State to secure promptly such personnel, material and services as are necessary to enable the State to take measures to prevent or damage arising from an occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol.
7. The Fund may on conditions to be laid down in Regulations provide credit facilities with a view to the taking of preventive measures against damage arising from a particular occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol.

Article 22.

Time Limitations

Rights to compensation under article 21 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 23, paragraph 6, within ten years from the date when the damage occurred or from when the damage is discovered.

Article 23.

Jurisdiction

1. Subject to the subsequent provisions of this article, any action against the Fund for compensation under article 21 of this Protocol shall be brought only before a court competent under article 8 of this Protocol in respect of actions against a person who is or who would be been liable for damage caused by the relevant occurrence.
2. Each Contracting Party shall ensure that its courts possess the necessary jurisdiction to entertain such actions against the Fund as are referred to in paragraph 1.
3. Where an action for compensation for damage has been brought before a court competent under article 8 of this Protocol, such court shall have exclusive jurisdictional competence over any action against the Fund for compensation under the provisions of article 21 of this Convention in respect of the same damage.
4. Each Contracting State shall ensure that the Fund shall have the right to intervene as a party to any legal proceedings before a competent court of that State against a person who may be liable under article 4 of this Protocol.
5. Except as otherwise provided in paragraph 6, the Fund shall not be bound by any judgment or decision in proceedings to which it has not been a party or by any settlement to which it is not a party.
6. Without prejudice to the provisions of paragraph 4, where an action under this Protocol for compensation for damage has been brought before a competent court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgment rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgment was given, become binding upon the Fund in the sense that the facts and findings in that judgment may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.

Article 24.

Enforcement

Subject to any decision concerning the distribution referred to in article 21, paragraph 4, any judgment given against the Fund by a court having jurisdiction in accordance with article 23, paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in article 12 of this Protocol.

Article 25.

Subrogation

1. The Fund shall, in respect of any amount of compensation for damage paid by the Fund in accordance with article 21, paragraph 1, of this Protocol, acquire by subrogation the rights that the person so

compensated may enjoy under the Protocol against any person who may be liable under article 4 of this Protocol.

2. Nothing in this Convention shall prejudice any right of recourse or subrogation of the Fund against persons other than those referred to in the preceding paragraph. In any event the right of the Fund to subrogation against such person shall not be less favourable than that of an insurer of the person to whom compensation or indemnification has been paid.
3. Without prejudice to any other rights of subrogation or recourse against the Fund which may exist, a Contracting Party or agency thereof which has paid compensation for damage in accordance with provisions of national law shall acquire by subrogation the rights which the person so compensated would have enjoyed under this Protocol.

Article 26.

Assessment of Contributions

1. Contributions to the fund shall be made in respect of each Contracting Party by any person who, in the calendar year referred to in article 27, paragraph 1, as regards initial contributions and in article 28, paragraphs 2 (a) or (b), as regards annual contributions, has exported living modified organisms in total quantities exceeding the amount specified in Annex II.
2. For the purposes of paragraph 1, where the value of living modified organisms exported by any person in a calendar year when aggregated with the value of living modified organisms by any associated person or persons exceeds the amount specified in Annex II, such person shall pay contributions in respect of the actual quantity received by him notwithstanding that that value did not exceed the amount specified in Annex II.
3. "Associated person" means any subsidiary or commonly controlled entity. The question whether a person comes within this definition shall be determined by the national law of the Party concerned.

Article 27.

Quantum of Contributions

1. In respect of each Contracting Party initial contributions shall be made of an amount which shall for each person referred to in article 26 be calculated on the basis of a fixed sum proportionate to the value of the living modified organisms exported during the calendar year preceding that in which this Convention entered into force for that State.
2. The sum referred to in paragraph 1 shall be determined by the Assembly within three months after the entry into force of this Protocol. In performing this function the Assembly shall, to the extent possible, fix the sum in such a way that the total amount of initial contributions would, if contributions were to be made in respect of 90 per cent of the quantities of living modified organisms exported throughout the world, equal ____ million SDR.
3. The initial contributions shall in respect of each Contracting Party be paid within three months following the date at which the Protocol entered into force for that Party.

Article 28.

Budget

1. With a view to assessing for each person referred to in article 26 the amount of annual contributions due, if any, and taking account of the necessity to maintain sufficient liquid funds, the Assembly shall for each calendar year make an estimate in the form of a budget of:
 - (i) Expenditure
 - (a) costs and expenses of the administration of the Fund in the relevant year and any deficit from operations in preceding years;
 - (b) payments to be made by the Fund in the relevant year for the satisfaction of claims against the Fund due under article 21, including repayment on loans previously taken by the Fund for the satisfaction of such claims, to the extent that the aggregate amount of such claims in respect of any one incident does not exceed the amount specified in Annex I;

(ii) Income

- (a) surplus funds from operations in preceding years, including any interest;
 - (b) initial contributions to be paid in the course of the year;
 - (c) annual contributions, if required to balance the budget;
 - (d) any other income.
2. For each person referred to in article 26 the amount of his annual contribution shall be determined by the Assembly and shall be calculated in respect of each Contracting Party.
 3. The sums referred to in paragraph 2 above shall be arrived at by dividing the relevant total amount of contributions required by the total amount of living modified organisms exported by all Contracting States in the relevant year.
 4. The Assembly shall decide the portion of the annual contribution which shall be immediately paid in cash and decide on the date of payment. The remaining part of each annual contribution shall be paid upon notification by the Director.
 5. The Director may, in cases and in accordance with conditions to be laid down in the Regulations of the Fund, require a contributor to provide financial security for the sums due from him.
 6. Any demand for payments made under paragraph 4 shall be called rateably from all individual contributors.

Article 29.

Assessment of Contributions

1. The amount of any contribution due under article 28 and which is in arrear shall bear interest at a rate which shall be determined by the Assembly for each calendar year provided that different rates may be fixed for different circumstances.
2. Each Contracting Party shall ensure that any obligation to contribute to the Fund arising under this Protocol in respect of living modified organisms exported from the territory of that State is fulfilled and shall take any appropriate measures under its law, including the imposing of such sanctions as it may deem necessary, with a view to the effective execution of any such obligation; provided, however, that such measures shall only be directed against those persons who are under an obligation to contribute to the Fund.
3. Where a person who is liable in accordance with the provisions of articles 27 and 28 to make contributions to the Fund does not fulfil his obligations in respect of any such contribution or any part thereof and is in arrear for a period exceeding three months, the Director shall take all appropriate action against such person on behalf of the Fund with a view to the recovery of the amount due. However, where the defaulting contributor is manifestly insolvent or the circumstances otherwise so warrant, the Assembly may, upon recommendation of the Director, decide that no action shall be taken or continued against the contributor.

C. 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.

Global Industry Coalition:

National corporate and other applicable laws concerning financial security for the conduct of commercial and research and development activities in the Party where the damage exists shall apply.

Greenpeace International:*Article 30.**Fund Bodies*

1. The Fund shall have an Assembly, a Secretariat headed by a Director and an Executive Committee.
2. The Assembly shall consist of all Contracting States to this Protocol.

*Article 31**Assembly Functions*

The functions of the Assembly shall be:

1. to elect at each regular session its Chair and two Vice-Chairmen who shall hold office until the next regular session;
2. to determine its own rules of procedure, subject to the provisions of this Protocol;
3. to adopt Internal Regulations necessary for the proper functioning of the Fund;
4. to appoint the Director and make provisions for the appointment of such other personnel as may be necessary and determine the terms and conditions of service of the Director and other personnel;
5. to adopt the annual budget and fix the annual contributions;
6. to appoint auditors and approve the accounts of the Fund;
7. to approve settlements of claims against the Fund, to take decisions in respect of the distribution among claimants of the available amount of compensation in accordance with article 21, paragraph 3, and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of damage are compensated as promptly as possible;
8. to elect the members of the Assembly to be represented on the Executive Committee.
9. to establish any temporary or permanent subsidiary body it may consider to be necessary;
10. to determine which non-Contracting States and which inter-governmental and international non-governmental organizations shall be admitted to take part, without voting rights, in meetings of the Assembly, the Executive Committee, and subsidiary bodies;
11. to give instructions concerning the administration of the Fund to the Director, the Executive Committee and subsidiary bodies;
12. to review and approve the reports and activities of the Executive Committee;
13. to supervise the proper execution of the Convention and of its own decisions;
14. to perform such other functions as are allocated to it under the Convention or are otherwise necessary for the proper operation of the Fund.

*Article 32.**Sessions of Assembly*

1. Regular sessions of the Assembly shall take place once every calendar year upon convocation by the Director; provided, however, that if the Assembly allocates to the Executive Committee the functions specified in article 31, paragraph 5, regular sessions of the Assembly shall be held once every two years.
2. Extraordinary sessions of the Assembly shall be convened by the Director at the request of the Executive Committee or of at least one-third of the members of the Assembly and may be convened on the Director's own initiative after consultation with the Chairman of the Assembly. The Director shall give members at least thirty days' notice of such sessions.

*Article 33.**Quorum*

A majority of the members of the Assembly shall constitute a quorum for its meetings.
[other mechanical provisions as necessary]

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).

- (a) Inter-State procedures (including settlement of disputes under Article 27 of the Convention on Biological Diversity)

Global Industry Coalition

Any Party claiming damage under these rules shall seek settlement of its claim pursuant to the inter-state dispute resolution process under Article 27 of the CBD. Any Party claiming damage that is not satisfactorily resolved under the procedure set forth in Article 27 of the CBD shall submit its claim for resolution to the Permanent Court of Arbitration (PCA) subject to the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment. Any claim for damage to biodiversity under these rules shall be cognizable by a competent court only after applicable CBD and PCA procedures have been exhausted.

Greenpeace International:

Part V

Settlement of Disputes

SECTION 1: GENERAL PROVISIONS

Article 34.

Obligation to Settle Disputes by Peaceful Means

Contracting Parties shall settle any dispute between them concerning the interpretation or application of this Protocol by peaceful means in accordance with article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in article 33, paragraph 1, of the Charter

Article 35.

Settlement of Disputes by any Peaceful Means Chosen by the Parties

Nothing in this Part impairs the right of any Contracting Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Protocol by any peaceful means of their own choice.

Article 36.

Procedure where no Settlement has been reached by the Parties

1. If the Contracting Parties which are parties to a dispute concerning the interpretation or application of this Protocol have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
2. If the parties have also agreed on a time limit, paragraph 1 applies only upon the expiration of that time-limit.

Article 37.

Obligation to Exchange Views

1. When a dispute arises between Contracting Parties concerning the interpretation or application of this Protocol, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Article 38.

Conciliation

1. A Contracting Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation under Annex II.
2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.
3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.
4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.

Section 2: Compulsory Procedures Entailing Binding Decisions

Article 39.

Application of Procedures under this Section

Subject to section 3 of this Part, any dispute concerning the interpretation or application of this Protocol shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Article 40.

Choice of Procedure

1. When signing, ratifying or acceding to this Protocol or at any time thereafter, a Contracting Party shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
 - (a) the International Tribunal for the Protection of Biodiversity established in accordance with Annex III.
 - (b) the International Court of Justice;
 - (c) an arbitral tribunal constituted in accordance with Annex IV;
 - (d) a special arbitral tribunal constituted in accordance with Annex IV for one or more of the categories of disputes specified therein.
2. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted the International Tribunal for the Protection of Diversity in accordance with Annex III.
3. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

4. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to the International Tribunal for the Protection of Biodiversity in accordance with Annex III, unless the parties otherwise agree.
5. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.
6. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.
7. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

Article 41.

Jurisdiction

1. A court or tribunal referred to in article 40 shall have jurisdiction over any dispute concerning the interpretation or application of this Protocol which is submitted to it in accordance with this Part.
2. A court or tribunal referred to in article 40 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.
3. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Article 42.

Experts

In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or proprio motu, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex V, to sit with the court or tribunal but without the right to vote.

Article 43.

Provisional Measures

1. If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to biodiversity, pending the final decision.
2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.
3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.
4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other Contracting Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.
5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Protection of Biodiversity may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.
6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

*Article 44.**Access*

1. All the dispute settlement procedures specified in this Part shall be open to Contracting Parties.
2. The dispute settlement procedures specified in this Part shall be open to entities other than States Parties as specifically provided for in this Protocol or as provided in Rules passed by the Assembly under article 31.

*Article 45.**Applicable Law*

1. A court or tribunal having jurisdiction under this section shall apply this Protocol and other rules of international law not incompatible with this Protocol.
2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.

*Article 46.**Preliminary Proceedings*

1. A court or tribunal provided for in article 40 to which an application is made in respect of a dispute referred to in article 39 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case.
2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time limit within which they may request it to make a determination in accordance with paragraph 1.
3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure.

*Article 47.**Exhaustion of Local Remedies*

Any dispute between Contracting Parties concerning the interpretation or application of this Protocol may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.

*Article 48.**Finality and Binding Force of Decisions*

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.
2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

- | | |
|-------|--|
| (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. |

Ethiopia:*Access to justice*

1. Each Contracting Party shall ensure that any person in another Contracting Party who is adversely affected has the right of access to administrative and judicial procedure equal to that afforded to nationals of the Contracting Party of origin in case of domestic environmental harm.

2. Each Contracting Party shall ensure that adversely affected persons due to damage resulted during transboundary movement, transit, handling and use of LMOs, including illegal traffic, have a right of recourse for the wrongful act of that person or entity associated with the Party of export.

3. Claims for compensation under this Protocol may be brought in the courts where either the damage was suffered or the incident occurred or the plaintiff has his habitual residence or the defendant has his principal place of business.

4. Each contracting Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.

Relation with the law of the competent court

1. Subject to subarticle two of this Article, nothing in the Protocol shall not affect any rights of persons who have suffered damage, or considered as limiting the protection or reinstatement of the environment which may be provided under domestic law.

2. No claims for compensation for damage based on the strict liability of the notifier or the exporter shall be made otherwise than in accordance with the Protocol.

Mutual recognition and enforcement of judgments

1. Any judgment of a court having jurisdiction in accordance with Article --- herein, which is enforceable in the State of origin, shall be recognized in any Contracting Party, except where the judgment was obtained by fraud, the defendant was not given reasonable notice and a fair opportunity to present his case, the judgment is irreconcilable with an earlier judgment validly pronounced in another Contracting Party with regard to the same cause of action and same parties, or the judgment is contrary to the policy of the Contracting Party from which this recognition is sought.

2. A judgment recognized under subarticle one of this Article shall be enforceable in each Contracting Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merit of the case to be re-opened.

3. The provisions of subarticle one and two of this Article shall not apply between Contracting Parties that are Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgments under which the judgment would be recognizable and enforceable.

EU:

Civil law procedures should be available at the domestic level to settle claims between operators/importers and victims. In cases of transboundary disputes, the general rules of private international law will apply as appropriate. The competent jurisdiction is generally identified on the basis of the defendants' domicile. Alternative grounds of jurisdiction may be provided for well-defined cases, e.g. in relation to the place where a harmful event occurred. Special rules for jurisdiction may also be laid down for specific matters, e.g. relating to insurance contracts.

Norway:

Competent courts

1. Claims for compensation may be brought in the courts of a Party only where either:

- a) The damage was suffered; or
- b) The incident occurred; or
- c) The defendant has his habitual residence or principal place of business.

2. Each Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.

Related actions

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Parties, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.
2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.
3. Where related actions are brought in the courts of different Parties, any court other than the court first seized may stay its proceedings.
4. Where these actions are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.
5. For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.

Applicable law

All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the instrument shall be governed by the law of that court, including any rules of such law relating to conflict of laws, in accordance with generally accepted principles of law.

Relationship between the instrument and the law of the competent court

The instrument is without prejudice to any rights of persons who have suffered damage or to any measures for the protection or reinstatement of the environment that may be provided under applicable domestic law.

Mutual recognition and enforcement of judgements

1. Any judgement of a court having jurisdiction in accordance with Article X on competent courts which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms of review, shall be recognized in any Party as soon as the formalities required in that Party have been completed, except:
 - a) Where the judgement was obtained by fraud;
 - b) Where the defendant was not given reasonable notice and a fair opportunity to present his case;
 - c) Where the judgement is irreconcilable with an earlier judgement validly pronounced in another Party with regard to the same cause of action and the same parties; or
 - d) Where the judgement is contrary to the public policy of the Party in which its recognition is sought.
2. A judgement recognized under paragraph 1 of this Article shall be enforceable in each Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be re-opened.
3. The provisions of paragraphs 1 and 2 shall not apply between Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgements under which the judgement would be recognizable and enforceable.

Global Industry Coalition:

Following exhaustion of inter-state procedures under CBD Article 27 and pursuant to the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment of the Permanent Court of Arbitration, a Party may submit a claim for damage covered by these rules to a competent court as determined by international law.

Determination of applicable law shall be in accordance with international law.

Recognition and enforcement of judgements or awards shall be in accordance with international law.

Greenpeace International:

Article 8

Jurisdiction and Applicable Law

1. Primary jurisdiction over actions under this Protocol shall lie with the courts of the Contracting Party where the damage occurs.
2. If the damage occurs only beyond the limits of national jurisdiction, primary jurisdiction over actions under this Protocol shall lie with the courts of the State of import or the intended State of import, or, if the transboundary movement was unintended, with the courts of the State most closely connected with the damage.
3. Jurisdiction over actions under this Protocol shall also lie with the courts of the Contracting Party where the occurrence took place, where the defendant has his habitual residence or has his principal place of business.
4. All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in this Protocol shall be governed by procedural and substantive law of that court. The nature, form and extent of the compensation, as well as the equitable distribution thereof, shall be governed by that law, and shall be consistent with this Protocol.
5. Each Contracting Party shall (a) ensure that its courts possess the necessary competence to entertain claims for compensation under this Protocol and (b) shall adopt the legislative measures necessary to ensure that the laws provide for compensation according to this Protocol and according to any harmonizing recommendations made by the Assembly under article 15.

Article 9

Court Powers and Procedures

1. Courts shall have the power to order remediation and restoration as well as compensation and may order costs and interest.
2. The Court shall presume that (a) the living modified organism which was the subject of a transboundary movement caused the damage where there is a reasonable possibility that it could have done so and (b) that any damage caused by a living modified organism which was the subject of a transboundary movement is the result of its biotechnology-induced characteristics rather than any natural characteristics. ^{1/} To rebut the presumption a person must prove to the standard required by the procedural law applied pursuant to article 8 that the damage is not due to the characteristics of the living modified organism resulting from the genetic modification, or in combination with other hazardous characteristics of the living modified organism.
3. When considering evidence of the causal link between the occurrence and the damage, the court shall take due account of the increased danger of causing such damage inherent in undertaking the transboundary movement of or exercising ownership, possession or control over the living modified organism. ^{2/}
4. Orders for compensation for damage shall fully compensate affected persons and shall pay the cost of preventive measures and costs of reinstatement or remediation of the environment.
5. The Court shall have the power to order interim or preliminary measures to order any person to take or abstain from any act where necessary or desirable to prevent significant damage, to mitigate or avoid further damage.

Article 10

Lis Pendens

1. Where proceedings involving the same or similar cause of action and between the same or substantially the same parties are brought in the courts of another Contracting Party or Parties, any

^{1/} Cf. Austrian law on genetic engineering (UNEP/CBD/ICCP/3/3, para. 27).

^{2/} From the Lugano Convention.

court other than the court described in paragraphs 1 and 2 of article 8 shall of its own motion stay its proceedings unless and until the court described in paragraphs 1 and 2 article 8 rules that it does not have jurisdiction under this Protocol.

2. Where the jurisdiction of the court described in paragraphs 1 and 2 is established by that court, any court other than that court shall decline jurisdiction in favour of that court.
3. When there are two or more courts described in paragraphs 1 and 2 of article 8, then any court other than the court described in paragraphs 1 and 2 of article 8 and first seized of the case shall of its own motion stay its proceedings unless and until the court first seized of the case rules that it does not have jurisdiction under this Protocol. Where the jurisdiction of the court first seized of the case is established by that court, any court other than that court shall decline jurisdiction in favour of that court.

Article 11

Related Actions

1. Where related actions are brought in the different courts described in article 8, any court other than the court described in paragraphs 1 and 2 of article 8 shall, while the actions are pending at first instance, stay its proceedings upon the motion of a party to any of the proceedings.
2. A court other than the court described in paragraphs 1 and 2 of article 8 shall, on the application of one of the parties, decline jurisdiction if the law of that court the court described in paragraphs 1 and 2 of article 8 permits the consolidation of related actions and the court first seized has jurisdiction over both or all actions.
3. When related actions are brought in the courts of different Parties, and all courts are described in article 8, then any court other than the court first seized of the case may of its own motion stay its proceedings until the court first seized of the case rules whether it has jurisdiction under this Protocol. Where the jurisdiction of the court first seized of the case is established by that court, any court other than that court may decline jurisdiction in favour of that court.
4. For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 12

Enforcement

1. Judgments entered by the competent court under article 8 after trial, or by default or by consent, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory of any of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgments.
2. The foregoing provisions shall not apply if (a) a decision was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence, or (b) the judgment was obtained by fraud.
3. If an action is brought against a Contracting Party under this Convention, such Contracting Party may not, except in respect of measures of execution, invoke any jurisdictional immunities before the court competent in accordance with this article.

(c) Administrative procedures;

EU:

In case civil liability is complemented by an administrative approach, decisions of public authorities imposing preventive or remedial measures should be motivated and notified to the addressees who should be informed of the legal remedies available to them and of their time limits.

(d) Special tribunal (e.g. Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment).

EU:

Resorting to special tribunals, such as the Permanent Court of Arbitration and its Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, may be considered in specific cases such as when a large number of victims are affected.

Global Industry Coalition:

Any Party claiming damage that is not satisfactorily resolved under the procedure set forth in Article 27 of the CBD shall submit its claim for resolution to the Permanent Court of Arbitration subject to the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment. Any claim for damage to biodiversity under these rules shall be cognizable by a competent court only after applicable PCA procedures have been exhausted.

VIII. STANDING/RIGHT TO BRING CLAIMS
<p><i>Issues for further consideration</i></p> <ul style="list-style-type: none"> 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: <ul style="list-style-type: none"> (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: <ul style="list-style-type: none"> o Affected State o Groups acting in vindication of common interests; o Person or entity incurring the costs of restoration measures; (iv) Damage to human health: <ul style="list-style-type: none"> o Affected State; o Affected person or any other person entitled to act on behalf of that person; (v) Socio-economic damage: <ul style="list-style-type: none"> o Affected State; o Groups acting in vindication of common interests or communities.

Argentina:

Claims shall be brought by the affected person only.

Ethiopia:

Civil claims for damage

Any person who has suffered loss or harm during a transboundary movement, transit, handling and use of any LMOs, including illegal traffic, may institute a civil claim for damages in court, which may include a claim for:

- (a) economic loss resulting from the release of LMOs and its products or from activities undertaken to prevent, mitigate, manage, clean up or remediate any harm from such incident;
- (b) costs incurred in any inspection, audit or investigation undertaken to determine the nature of any release of LMO or to investigate risk management options.

A right to standing

1. Any person, group of persons, or any private or state organization is entitled to bring a claim and seek redress in respect of the breach or threatened breach of any provision of this Protocol, including any provision relating to damage to human health, biological diversity, the environment, or to socio-economic or cultural conditions of local communities or to the economy of the country:
 - (a) in that person's or group or class of persons' interest;
 - (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
 - (c) in the interest of, or on behalf of, a group or class of persons whose interests are affected;
 - (d) in the public interest; and
 - (e) in the interest of protecting the environment or biological diversity.
2. No costs shall be awarded against any of the above persons who fail in any action as aforesaid if the action was instituted reasonably out of concern for the public interest or in the interest of protecting human health, biological diversity or the environment.
3. The burden of proving that an action was not instituted out of public interest or in the interest of protecting human health, biological diversity or environment, rests on the person claiming that the case is otherwise.

EU:

1. Parties should provide for a right to bring claims by affected natural or legal persons as appropriate under domestic law.
2. In case civil liability is complemented by an administrative approach, natural and legal persons, including NGOs promoting environmental protection and meeting relevant requirements under domestic law, should have a right to require the competent authority to act according to this decision and to challenge, through a review procedure, the competent authority's decisions, acts or omissions as appropriate under domestic law.

Norway:

Applicable law

All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the instrument shall be governed by the law of that court, including any rules of such law relating to conflict of laws, in accordance with generally accepted principles of law.

Global Industry Coalition:

Following exhaustion of dispute resolution and arbitration requirements (see section XX), a Party to the Cartagena Protocol on Biosafety may bring a claim for damage to biodiversity in a competent court.

Greenpeace International:

Article 9

Court Powers and Procedures

6. The principle of wide access to justice shall be implemented. To this end, persons and groups with a concern for or interest in environmental, social or economic matters, persons and groups representing communities or business interests and local, regional and national governmental authorities, shall have standing to bring a claim under this Protocol.
7. Nothing in the Protocol shall be construed as limiting or derogating from any rights of persons who have suffered damage, or as limiting the protection or reinstatement of the environment which may be provided under domestic law.
8. Financial and other barriers to justice shall not impede access to justice under this article and Contracting Parties shall take appropriate steps to remove or reduce such barriers.

IX. NON- PARTIES

<i>Issues for further consideration</i>

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).
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Ethiopia:

The Protocol shall not apply when neither the state of export nor the state of import is a contracting party.

EU:

National rules on liability and redress implementing this decision should also cover damage resulting from the transboundary movements of LMOs from non-Parties, in accordance with Article 24 of the Cartagena Protocol and COP/MOP decisions BS-I/11 and III/6.

Greenpeace International:

Article 3.

Scope of Application

2. (b) When the State of import, but not the State of export, is a Contracting Party to this Protocol, this Protocol shall apply with respect to damage arising from an occurrence which takes place after the time at which the importer has taken ownership or possession of the living modified organism.

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.

EU:

1. The next review of the Updated Action Plan for Building Capacities for the Effective Implementation of the Cartagena Protocol on Biosafety, as contained in the annex to decision BS-III/3 should, as appropriate, take into account the present decision including capacity building measures such as assistance in the development of domestic “liability rules” and considerations such as “contributions in kind”, “model legislation”, or “packages of capacity building measures”.
2. When Parties are in the process of developing their domestic legislative arrangements relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs, they may submit, through the Secretariat, draft legislative arrangements for advice to the [*Committee responsible for the facilitation of the implementation of this decision*].
3. Parties should submit to the Secretariat their domestic legislative arrangements relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs upon their adoption. The Secretariat shall bring all domestic legislative arrangements so received to the attention of the [*Committee responsible for the facilitation of the implementation of this decision*].
4. The [*Committee responsible for the facilitation of the implementation of this decision*] will:
 - (a) Provide, at the request of a Party, advice to that Party on draft domestic legislation relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs submitted to it in accordance with paragraph 2;
 - (b) Provide, at the request of a Party, advice to that Party on questions relating to the implementation of this decision.
 - (c) Report to each ordinary meeting of the COP/MOP on its activities;
 - (d) Report to the seventh meeting of the COP/MOP on the implementation and effectiveness of this decision, including any recommendations for further action in this field, taking into account best practices.

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.

EU:

1. The COP/MOP recommends the implementation of this decision by the Parties to the Cartagena Protocol in their domestic law. The international rules and procedures should be adjusted to the specific needs of each of the Parties, taking into account their different situations.
2. An evaluation of the effectiveness of this decision should take place at COP/MOP-7. It should be based on the experience gained with the liability systems adopted at the domestic level to implement this decision, with a view to strengthen the protection of potential victims and of biodiversity.

Greenpeace International:

Article 53

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the [fiftieth] instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Convention.

2. This Protocol shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves this Protocol or accedes thereto after its entry into force pursuant to paragraph 1 above, on the ninetieth day after the date on which that State or regional economic integration organization deposits its instrument of ratification, acceptance, approval or accession, or on the date on which the Convention enters into force for that State or regional economic integration organization, whichever shall be the later.
3. For the purposes of paragraphs 1 and 2 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.
