

Texts adopted by consensus, except III “Element 3”

At 18:40, 2 February 2008

## **TEXTS**

**This instrument is non-legally binding guide for Parties to refer to when they draft their national laws dealing with liability for damage resulting from transboundary movements of LMOs.**

### **I Scope**

#### **(1) Functional Scope**

1. This instrument applies to any damage resulting from an intentional 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.
2. This instrument also applies to shipments, transit, handling and use of living modified organisms (LMOs), provided that these activities find their origin in a transboundary movement.

#### **(2) Geographical Scope**

This instrument applies to damage resulting from transboundary movements of living modified organisms, which occurred within the limits of national jurisdiction or control of Parties and to response measures taken to avoid, minimize or contain impact of such damage.

### **II Definitions**

#### **(1) Damage**

1. Damage covered under this instrument is restricted to measurable loss or damage caused by the transboundary movements of living modified organisms that have adverse and significant impact upon the conservation and sustainable use of biological diversity, including human health as a consequence of damage to the 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 and includes the costs of response measures



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.
3. The damage resulting from unintentional transboundary movements should be given adequate consideration to address the damage that occurred.

## **(2) Operator**

“Operator” means any person in operational control of intentional transboundary movements of living modified organisms, including developer, producer, notifier, exporter, importer, carrier, or supplier.

## **III Liability Scheme: Elements of Administrative Approach**

### **Element 1.**

In the event of an incident that cause damage or threatens to cause damage, an operator should notify competent authority of the incident.

### **Element 2.**

In the event of an incident that cause damage or threatens to cause damage, an operator should, in consultation with the competent authority, take all reasonable response and restoration measures.

- (a) The response measures are actions to avoid, minimize and contain the damage.
- (b) The restoration measures are action to assess and reinstate 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 in another location for other types of use.

### **Element 3.** *Voted 12 in favor of keeping this, 1 opposed to have this text, 2 abstained.*

In the event that the operator does not take the required measures as provided above, the competent authority within whose territory damage occurs may take reasonable response and restoration measures, and may recover the costs and expenses of the taking of any such measures from the operator.



## **IV Liability Scheme: Civil Liability**

### **(1) Standard**

#### **Option 1: Mitigated Strict Liability**

1. A fault-based standard of liability should be used except for the following two cases in which a strict liability standard be used:
  - (1) where a risk-assessment under the Protocol and domestic law has identified an LMO as hazardous; and/or
  - (2) where the damage results from acts or omission in violation of domestic law.
2. In cases where a fault based standard of liability is applied, liability should be channeled to the operator as defined in this instrument.
3. In cases where a strict liability standard has been determined to be applicable, liability should be channeled to the operator as defined in this instrument regardless of any fault on his part.

#### **Option 2: Strict Liability**

The Operator shall be liable for damages, regardless of any fault on his part, as long as causation is established in accordance with this instrument.

#### **Option 3: Fault Liability**

In a civil liability system, liability is established where:

- (1) An operator has breached a legal duty of care through intentional, reckless or negligent conduct, including acts or omissions;
- (2) Such breach has resulted in actual damage as defined in this instrument; and
- (3) Causation is established in accordance with this instrument.

### **(2) Exemptions for Strict Liability**

Liability should not attach in the following circumstances:

- (1) *Force majeure*;
- (2) Act of war or civil unrest;
- (3) Intervention by a third party is responsible for causing the damage;
- (4) Activities taken in compliance with compulsory measures issued by a competent national authority cause the damage;
- (5) The activities causing the damage were taken in accordance with permission of an activity by means of an applicable law or a specific authorization issued to the operator; or



(6) The damage was caused by an activity not considered likely to cause damage according to the state of scientific and technical knowledge at the time when the activity was carried out.

### **(3) Procedures**

1. Claims for compensation under this Instrument may be brought in the competent courts in accordance with the domestic laws of relevant Parties.
2. In principle, the specific procedures for pursuing the liability of the operator should be regulated in accordance with the domestic law of the relevant Parties.
3. The following may be referred to as a guide for developing domestic laws of the Parties:
  - (1) Claim for compensation under this Instrument may be brought to 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. 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.
  - (2) Each contracting Party should ensure that its courts possess the necessary competence to entertain such claims for compensation.
  - (3) Subject to provisions above, nothing in this instrument should 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.
  - (4) The claim for compensation for damage should be made in accordance with this instrument.
  - (5) Any judgment of a court having jurisdiction, which is enforceable in the State of origin, should be recognized in any 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.



- (6) A judgment recognized under the provisions above should be enforceable in each Party as soon as the formalities required in that Party have been completed. The formalities should not permit the merit of the case to be re-opened.
- (7) These provisions should not apply between 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.

#### **(4) Supplementary Collective Compensation Scheme**

1. Where compensation under this instrument does not cover the costs of damage, additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using the process established here under.
2. Under this process, measures should be taken for:
  - (a) establishing a fund independent from this instrument for compensation for damage in the context of the instrument within a reasonable period of time;
  - (b) the fund is to be created on the basis of guarantees and contributions put forward by operators, including biotechnology industry. The amount of such a guarantee and contribution can be determined on the basis of identified criteria; and
  - (c) encouraging the development of financial security instruments and markets by the appropriate economic and financial operators, with the aim of enabling operators to use financial guarantees to cover their responsibilities.
3. The Meeting of the Parties should keep under review the need for and possibility of improving this mechanism.

#### **V Complementary Capacity-Building Measures**

1. A Committee for implementation is hereby established to assist the Conference of the Parties in the assessment and review of the effective implementation of the instrument. This body should be open to participation by all Parties and comprise government representatives and the Secretariats who are experts on matters related to this instrument. It shall report regularly to the Conference of the Parties on all aspects of its work. The Committee is responsible for the facilitation of the



implementation of the instrument.

2. Parties that are in the process of developing their domestic legislative, regulatory and administrative measures relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms to submit on a voluntary basis, through the Secretariat, draft measures for advice to the Committee.
3. The Committee performs, associated with the Secretariat, the following functions:
  - (a) to provide, at the request of a Party, advice to that Party on any draft domestic measure relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms submitted to it in accordance with paragraph 4;
  - (b) to provide, at the request of a Party, advice to that Party on questions relating to the implementation of this instrument;
  - (c) to provide, at the request of a Party, following programmes for the capacity building measures;
    - (i) financial assistance
    - (ii) technology transfer
    - (iii) institutional building
    - (iv) training programme
    - (v) public awareness;
  - (d) to report to each ordinary meeting of the COP/MOP on its activities;
  - (e) to report to the meetings of the COP/MOP on the implementation and effectiveness of this instrument on the basis, *inter alia*, of the information available in the Biosafety Clearing House and from Parties' reports in accordance with Article 33 of the Protocol. The report of the Committee should include any recommendations for further action in this field, including in relation to the development of a legally binding instrument, taking into account best practices.
4. For the further implementation of this instrument, the Parties should take into account of Article 20 of the Convention. All the parties to this Instrument should provide on a voluntary basis additional financial resource to enable the Committee to implement those measures, through the establishment of the Fund for Capacity Building of Liability Regime on transboundary movement of living modified organisms. The Fund shall be managed by the Committee.
5. The Fund should function under the guidance of and be accountable to the Committee,



which should by consensus decide on its policies, programme priorities and eligibility criteria related provisions in this instrument.

6. As to the contribution to the Fund, the Parties should take into account of Article 20 of the Convention. Considering common but different responsibility, the financial mechanism should have an equitable and balanced representation of all Parties within a transparent system of governance.
7. Based on the report of the Committee, the COP/MOP should decide process to develop the instrument into the next stage, including legally binding instrument.
8. Regarding the capacity building measures, the Committee should take into account the need for financial resources by developing country Parties, in particular the least developed and the small island developing States among them, and of the Parties with economies in transition, in their efforts to identify and implement their capacity-building requirements for the purposes of the implementation of this instrument.
9. The guidance to the Committee of this instrument in relevant decisions of the Conference of the Parties, including those agreed before the adoption of this instrument, should apply, *mutatis mutandis*, to the provisions of this instrument.
10. The developed country Parties may also provide, and the developing country Parties and the Parties with economies in transition avail themselves of, financial and technological resources for the implementation of the provisions of this instrument through bilateral, regional and multilateral channels.