

24 April 2010

Dear Friends,

Following the request made by you at the conclusion of the second meeting of the Group (paragraph 15(e), UNEP/CBD/BS/GF-L&R/2/3), we prepared draft Guidelines on civil liability and redress in the field of damage resulting from the transboundary movements of living modified organisms.


We prepared the draft Guidelines taking into account:

- (i) The text of Appendix II of the report of our last meeting (UNEP/CBD/BS/GF-L&R/2/3);
- (ii) Annex I of Appendix I of the report of the last meeting of the Group (Supplementary Protocol); and
- (iii) UNEP's Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment (UNEP/GCSS.XI/8/Add.1).

We have also prepared, with a view to facilitate your review of the draft Guidelines, a matrix that shows the existing text in Appendix II of the report of our last meeting, the corresponding text in the Supplementary Protocol, UNEP's Guidelines, and the draft Guidelines.

We are pleased to circulate these draft Guidelines to you all, for your comments. We would appreciate receiving your comments as soon as possible but not later than 28 May 2010. Our plan is to revise the draft Guidelines, taking into account your comments, and make them available during the third meeting of the Group in Kuala Lumpur from 15 to 19 June 2010 for further consideration.

Kind regards,



René Lefebvre



Jimena Nieto

Co-Chairs of the Group of Friends on Liability and Redress

# **DRAFT GUIDELINES ON CIVIL LIABILITY AND REDRESS IN THE FIELD OF DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS**

## **Proposal of Co-Chairs<sup>1</sup>**

### **Guideline 1 Objective**

The objective of these Guidelines is to provide guidance to Parties regarding domestic rules and procedures on civil liability for damage resulting from transboundary movements of living modified organisms, taking also into account risks to human health.

### **Guideline 2 Use of Terms**

1. The terms used in Article 2 of the Convention, Article 3 of the Protocol and Article 2 of the Supplementary Protocol apply to these Guidelines except as otherwise defined in paragraph 2 below.
2. In addition, for the purposes of these Guidelines:
  - (a) “Damage” means;
    - (i) Loss of life or personal injury [incidental to damage to the conservation and sustainable use of biological diversity];
    - (ii) Loss of or damage to property [incidental to damage to the conservation and sustainable use of biological diversity];
    - (iii) Pure economic loss;
    - (iv) Costs of response measures;
    - (v) Damage to the conservation and sustainable use of biological diversity not redressed under the Supplementary Protocol.
  - (b) “Damage to the conservation and sustainable use of biological diversity” means damage as defined in Article 2, paragraph 2(c), of the Supplementary Protocol;
  - (c) “Pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the conservation and sustainable use of biological diversity;
  - (d) “Supplementary Protocol” means [Supplementary Protocol on [Liability and Redress for] Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety].

### **Guideline 3 Scope**

1. These Guidelines apply to damage resulting from transport, transit, handling and use of living modified organisms [and products thereof] provided that these [living modified organisms][activities] find their origin in a transboundary movement. The living modified organisms referred to are those:
  - (a) Intended for direct use as food or feed, or for processing;
  - (b) Destined for contained use;
  - (c) Intended for intentional introduction into the environment.
2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1 above.
3. These Guidelines also apply to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.

---

<sup>1</sup> The use of brackets appearing in the proposed text of the Guidelines is related to outstanding issues in the draft text of the Supplementary Protocol.

#### **Guideline 4**

##### **Liability**

1. The standard of liability should be strict where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous.
2. In cases where the standard of liability is strict, liability should be channelled to the operator.
3. In cases where the standard of liability is strict and two or more operators have caused the damage, their liability should be joint and several.
4. In cases where the standard of liability is strict, the right of recourse or indemnity that an operator may have against another person should not be limited or restricted.

#### **Guideline 5**

##### **Exemptions**

Parties should consider the application of exemptions from liability, in particular:

- (a) Act of God or *force majeure*;
- (b) Act of war or civil unrest.

#### **Guideline 6**

##### **Time Limits**

Parties should consider the application of relative and/or absolute time limits, including the commencement of the period to which a time limit applies.

#### **Guideline 7**

##### **Financial Limits**

Parties should consider the application of financial limits in cases where the standard of liability is strict.

#### **Guideline 8**

##### **Financial Security**

1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]
2. [Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities.]

#### **Guideline 9**

##### **Claims for Compensation**

1. Any person or group of persons, including public authorities, should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage resulting from the transboundary movement of living modified organisms in addition to, where appropriate, the reimbursement of the costs of response measures.
2. Parties may allow claims for compensation of damage to the conservation and sustainable use of biological diversity.

#### **Guideline 10**

##### **Settlement of Claims**

1. Parties should provide for civil law procedures to settle claims for compensation of damage.
2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

## **Guideline 11**

### **Access to Information**

Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent authority in possession of such information, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties.

## WORKING TOWARDS NON-LEGALLY BINDING PROVISIONS ON CIVIL LIABILITY

APPENDIX II OF GFCC 2 REPORT	SUPPLEMENTARY PROTOCOL	UNEP GUIDELINES	CO-CHAIRS' PROPOSAL
<b>Objective</b>	<b>Article 1</b> [The objective of this Supplementary Protocol is to contribute to ensuring that prompt, adequate and effective response measures are taken in the event of damage or imminent threat of damage to the conservation and sustainable use of biological diversity resulting from living modified organisms that finds its origin in transboundary movements.]	<b>Guideline 1: Objective</b> The objective of the present guidelines is to provide guidance to States regarding domestic rules on liability, response action and compensation for damage caused by activities dangerous to the environment, taking into account the polluter pays principle.	<b>Objective</b> The objective of these Guidelines is to provide guidance to Parties regarding domestic rules and procedures on civil liability for damage resulting from transboundary movements of living modified organisms, taking also into account risks to human health.
<b>Use of terms</b>	<b>Article 2</b> 1. The terms used in Article 2 of the Convention and Article 3 of the Protocol shall apply to this Supplementary Protocol. 2. In addition, for the purposes of this Supplementary Protocol: (a) "Conference of the Parties serving as the meeting of the Parties to the Protocol" means; (b) "Convention" means; (c) "Damage" means; [(d) "Imminent threat of damage" is;] [(e) "Incident" means;] (f) "Operator" means; (g) "Protocol" means; (h) "Response measures" means.	<b>Guideline 2: Definitions</b> 1. The term "activity dangerous to the environment" means. 2. The term "damage" means. 3. The term "environmental damage". 4. The term "operator" means any person or persons, entity or entities in command or control of the activity, or any part thereof at the time of the incident. 5. The term "incident" means. 6. The term "preventive measures" means. The term "pure economic loss" means 8. The term "reinstatement measures" means. 9. The term "response action" means.	<b>Use of Terms</b> 1. The terms used in Article 2 of the Convention, Article 3 of the Protocol and Article 2 of the Supplementary Protocol apply to these Guidelines except as otherwise defined in paragraph 2 below. 2. In addition, for the purposes of these Guidelines: (a) "Damage" means; (b) "Damage to the conservation and sustainable use of biological diversity" means; (c) "Pure economic loss" means; (d) "Supplementary Protocol" means.
<b>I. State Responsibility</b> <i>Operational text</i> These rules and procedures shall not affect the rights and obligations of States under the rules of general international law with respect to the responsibility of States for internationally wrongful acts. <i>Preambular text</i> Recognizing that these rules and procedures would not affect the rights and obligations of States under the rules of general international law with respect to	<b>Article 15 (adopted)</b> This Supplementary Protocol shall not affect the rights and obligations of States under the rules of general international law with respect to the responsibility of States for internationally wrongful acts.		

the responsibility of States for internationally wrongful acts.			
<b>II. Scope</b> <b>A. Functional Scope</b> <i>Operational text 1</i> 1. These rules and procedures apply to transport, transit, handling and use of living modified organisms [and products thereof], provided that these activities find their origin in a transboundary movement. The living modified organisms referred to are those: (a) Intended for direct use as food or feed, or for processing; (b) Destined for contained use; (c) Intended for intentional introduction into the environment. 2. With respect to intentional transboundary movements, these rules and procedures apply to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1. 3. These rules and procedures also apply to unintentional transboundary movements as referred to in Article 17 of the Protocol as well as illegal transboundary movements as referred to in Article 25 of the Protocol.	<b>Article 3</b> 1. This Supplementary Protocol applies to damage to the conservation and sustainable use of biological diversity, taking also into account risks to human health. 2. This Supplementary Protocol applies to damage resulting from transport, transit, handling and use of living modified organisms [and products thereof] provided that these [living modified organisms][activities] find their origin in a transboundary movement. The living modified organisms referred to are those: (a) Intended for direct use as food or feed, or for processing; (b) Destined for contained use; (c) Intended for intentional introduction into the environment. 3. With respect to intentional transboundary movements, this Supplementary Protocol applies to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 2. 4. This Supplementary Protocol also applies to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.	<b>Guideline 3: Scope of application</b> 1. The present guidelines apply to liability, response action and compensation for damage caused by activities dangerous to the environment. 2. They are not intended to apply to damage caused by activities dangerous to the environment that are covered by other domestic laws establishing special liability regimes or that principally relate to national defence, international security or natural disaster management.	<b>Scope</b> 1. These Guidelines apply to damage resulting from transport, transit, handling and use of living modified organisms [and products thereof] provided that these [living modified organisms][activities] find their origin in a transboundary movement. The living modified organisms referred to are those: (a) Intended for direct use as food or feed, or for processing; (b) Destined for contained use; (c) Intended for intentional introduction into the environment. 2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1 above. 3. These Guidelines also apply to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.

<p><b>B. Geographical Scope</b>  <i>Operational text 2</i>  These rules and procedures apply to areas within the limits of its national jurisdiction[, including the exclusive economic zone,] [or control] of the Parties to the Protocol.</p>	<p><b>Article 4 (adopted)</b>  1. This Supplementary Protocol applies to damage that occurred in areas within the limits of the national jurisdiction of Parties resulting from activities as referred to in Article 3.  2. Parties may use criteria set out in their domestic law to address damage that occurs within the limits of their national jurisdiction.</p>		
<p><b>C. Limitation in Time</b>  <i>Operational text 3</i>  These rules and procedures apply to damage resulting from a transboundary movement of living modified organisms when that transboundary movement was commenced after their implementation by Parties into domestic law.  <i>Operational text 3 alt</i>  These rules and procedures apply to damage resulting from a transboundary movement of living modified organisms that started after the entry into force of these rules and procedures.</p>	<p><b>Article 5 (adopted)</b>  This Supplementary Protocol applies to damage resulting from a transboundary movement of living modified organisms that started after the entry into force of this Supplementary Protocol for the Party into whose jurisdiction the transboundary movement was made.</p>		
<p><b>D. Limitation to the authorization at the time of the import of the living modified organisms</b>  <i>Operational text 4</i>  [These rules and procedures apply to intentional transboundary movement in relation to the use for which living modified organisms are destined and for which authorization has been granted prior to the transboundary movement. If, after the living modified organisms are already in the country of import, a new authorization is given for a different use of the same living modified organisms, such use will not be covered by these rules and procedures.]</p>			

<p><b>E. Non-Parties</b>  <i>Operational text 5</i>  1. National rules on liability and redress implementing these rules and procedures should also cover damage resulting from the transboundary movements of living modified organisms from non-Parties, in accordance with Article 24 of the Protocol.  2. These rules and procedures apply to “transboundary movements” of living modified organisms, as defined in Article 3(k) of the Protocol.</p>	<p><b>Article 4 (adopted)</b>  3. Domestic law implementing this Supplementary Protocol shall also apply to damage resulting from the transboundary movements of living modified organisms from non-Parties.</p>		
<p><b>III. Damage</b>  <b>A. Definition of damage</b>  <i>Operational text 1</i>  [1. These rules and procedures apply to damage [resulting from the transboundary movement of living modified organisms] as provided for by domestic law.]  [2. For the purposes of these rules and procedures, damage [resulting from the transboundary movement of living modified organisms] as provided for by domestic law may, inter alia, include:  (a) Damage to the conservation and sustainable use of biological diversity not redressed through the administrative approach {<i>For operational texts, see sub-section III.A of section 1.A, above</i>};  (b) Damage to human health, including loss of life and personal injury;  (c) Damage to or impaired use of or loss of property;  (d) Loss of income and other economic loss [resulting from damage to the conservation or sustainable use of biological diversity];  [(e) Loss of or damage to cultural, social and spiritual values, or other loss or damage to indigenous or local communities, or loss of or reduction of</p>	<p><b>Article 2</b>  2(c) “Damage” means an adverse effect on the conservation and sustainable use of biological diversity, taking also into account risks to human health, that:  (i) Is measurable or otherwise observable taking into account, wherever available, scientifically-established baselines recognized by a competent national authority that takes into account any other human induced variation and natural variation; and  (ii) Is significant as set out in paragraph 3 below;  3. A “significant” adverse effect 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 reasonable period of time;  (b) The extent of the qualitative or quantitative changes that adversely affect the components of biological diversity;  (c) The reduction of the ability of components of biological diversity to provide goods and services;  (d) The extent of any adverse effects on human health in the context of the Protocol.</p>	<p><b>Guideline 2: Definitions</b>  2. The term “damage” means:  (a) Loss of life or personal injury arising from environmental damage;  (b) Loss of or damage to property arising from environmental damage;  (c) Pure economic loss;  (d) Costs of reinstatement measures, limited to the costs of measures actually taken or to be undertaken;  (e) Costs of preventive measures, including any loss or damage caused by such measures;  (f) Environmental damage.  3. The term “environmental damage” means an adverse or negative effect on the environment that:  (a) Is measurable taking into account scientifically established baselines recognized by a public authority that take into account any other human-induced variation and natural variation;  (b) Is significant, which is to be determined on the basis of factors such as:  (i) Long-term or permanent change, to be understood as change that may not be redressed through natural recovery within a reasonable period of time;  (ii) Extent of the qualitative or quantitative</p>	<p><b>Use of Terms</b>  2. In addition, for the purposes of these Guidelines:  (a) “Damage” means:  (i) Loss of life or personal injury [incidental to damage to the conservation and sustainable use of biological diversity];  (ii) Loss of or damage to property [incidental to damage to the conservation and sustainable use of biological diversity];  (iii) Pure economic loss;  (iv) Costs of response measures;  (v) Damage to the conservation and sustainable use of biological diversity not redressed under the Supplementary Protocol.  (b) “Damage to the conservation and sustainable use of biological diversity” means damage as defined in Article 2, paragraph 2(c), of the Supplementary Protocol;  (c) “Pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the</p>



food security.]]		<p>changes that adversely or negatively affect the environment;</p> <p>(iii) Reduction or loss of the ability of the environment to provide goods and services, either of a permanent nature or on a temporary basis;</p> <p>(iv) Extent of any adverse or negative effect or impact on human health;</p> <p>(v) Aesthetic, scientific and recreational value of parks, wilderness areas and other lands.</p> <p>7. The term “pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of the environment and incurred as a result of environmental damage.</p>	conservation and sustainable use of biological diversity.
<p><b>B. Valuation of Damage</b></p> <p><i>Operational text 2</i></p> <p>[1. Damage [resulting from the transboundary movement of living modified organisms] [shall][should] be valued in accordance with domestic laws and procedures, including factors such as:]</p> <p>(a) The costs of response measures [in accordance with domestic law and [procedures] [regulations]];</p> <p>[(b) The costs of loss of income related to the damage during the restoration period or until the compensation is provided;]</p> <p>[(c) The costs and expenses arising from damage to human health including appropriate medical treatment and compensation for impairment, disability and loss of life;]</p> <p>[(d) The costs and expenses arising from damage to cultural, social and spiritual values, including compensation for damage to the lifestyles of indigenous and/or local communities.]</p>			

<p>2. In the case of centres of origin and/or genetic diversity, their unique value should be considered in the valuation of damage, including incurred costs of investment.</p> <p>3. For the purposes of these rules and procedures, response measures are reasonable actions to:</p> <p>(i) [Prevent,] minimize or contain damage, as appropriate;</p> <p>[(ii) Restore to the condition that existed before the damage or the nearest equivalent, by the replacement of the loss by other components of the biological diversity at the same location or for the same use or at another location or for another type of use.]]</p>			
<p><b>C. Causation</b></p> <p><b>Operational text 3</b></p> <p>A causal link between the damage and the activity in question as well as the related allocation of the burden of proof to either the claimant or the respondent needs to be established in accordance with domestic law.</p>	<p><b>Article 6 (adopted)</b></p> <p>A causal link shall be established between the damage and the activity in question in accordance with domestic law.</p>		
<p><b>IV. Primary Compensation Scheme</b></p> <p><b>A. Civil liability</b></p> <p><i>Operational text 4</i></p> <p>Parties [may][shall][should] have civil liability rules and procedures for damage [resulting from the transboundary movement of living modified organisms] in accordance with domestic law. Parties [should consider the inclusion of][shall include][may include] the following [minimum] elements and procedures.</p>			
<p><b>1. Standard of liability and channelling of liability</b></p> <p><i>Operational text 5</i></p> <p>[The standard of liability, whether fault-based liability, strict liability or mitigated</p>	<p><b>Article 2</b></p> <p>2(f) “Operator” [in relation to response measures] means any person in [direct or indirect] [operational] control of [the activity at the time of the incident causing</p>	<p><b>Guideline 5: Liability</b></p> <p>1. The operator should be strictly liable for damage caused by activities dangerous to the environment.</p> <p>2. Without prejudice to paragraph 1, any</p>	<p><b>Liability</b></p> <p>1.The standard of liability should be strict where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous.</p>

<p>strict liability, needs to be established in accordance with domestic law.]</p> <p><b><u>Option 1: Strict liability</u></b></p> <p><i>Operational text 6</i></p> <p>[The operator [shall][should] be liable for damage [under these rules and procedures][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.] <i>{For operational texts on “operator”, see sub-section IV.A of section 1.A in the annex to decision BS-IV/12}</i></p> <p><b><u>Option 2: Mitigated strict liability</u></b></p> <p><b>Operational text 7</b></p> <p>[1. A fault-based standard of liability [shall][should][may] be used except a strict liability standard [should][shall] be used in cases [such as] where[:]</p> <p>[(a) a risk-assessment has identified a living modified organism as ultra-hazardous; and/or]</p> <p>[(b) acts or omissions in violation of national law have occurred; and/or]</p> <p>[(c) violation of the written conditions of any approval has occurred.]</p> <p>2. In cases where a fault-based standard of liability is applied, liability [shall][should] be channelled to the [entity having operational control][operator] of the activity that is proven to have caused the damage, and to whom intentional, reckless, or negligent acts or omissions can be attributed.</p> <p>3. In cases where a strict liability standard has been determined to be applicable, pursuant to paragraph 1 above, liability shall be channelled to the [entity that has operational control][operator] over the activity that is proven to have caused the</p>	<p>damage resulting from the transboundary movement of living modified organisms][the living modified organism at the time that the condition giving rise to the damage arose] [and could include, as appropriate and as determined by domestic law, the permit holder, person who placed the living modified organism on the market, developer, producer, notifier, exporter, importer, carrier or supplier];</p>	<p>person should be liable for damage caused or contributed to by not complying with applicable statutory or regulatory requirements or through wrongful, intentional, reckless or negligent acts or omissions. A violation of a specific statutory obligation should be considered fault per se.</p>	<p>2. In cases where the standard of liability is strict, liability should be channelled to the operator.</p>
---	--	---	---

<p>damage.]</p> <p><b><u>Option 3: Fault-based liability</u></b></p> <p><i>Operational text 8</i></p> <p>[In a civil liability system, liability is established where a person:</p> <p>(a) Has operational control of the relevant activity;</p> <p>(b) Has breached a legal duty of care through intentional, reckless or negligent conduct, including acts or omissions;</p> <p>[(c) Such breach has resulted in actual damage to biological diversity; and]</p> <p>(d) Causation is established in accordance with section [] of these rules.]</p>			
<p><b>2. The provision of interim relief</b></p> <p><i>Operational text 9</i></p> <p>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 imminent threat of damage.</p>			
<p><b>A bis. Additional elements of civil liability</b></p> <p><b>1. Exemptions or mitigation</b></p> <p><b>Operational text 10</b></p> <p>[Domestic law may provide for] exemptions or mitigations [that] may be invoked by the operator in the case of strict liability. Exemptions or mitigations [may be][are] based on [any one or more elements of] the following [exhaustive] list:</p> <p>(a) Act of God or <i>force majeure</i>;</p> <p>(b) Act of war or civil unrest;</p> <p>[(c) Intervention by a third party [that caused damage despite the fact that appropriate safety measures were in place];]</p> <p>[(d) Compliance with compulsory measures imposed by a public authority;]</p>	<p><b>Article 8 (adopted)</b></p> <p>1. Parties may provide, in their domestic law, for the following exemptions:</p> <p>(a) Act of God or <i>force majeure</i>;</p> <p>(b) Act of war or civil unrest.</p> <p>2. Parties may provide, in their domestic law, for any other exemptions or mitigations as they may deem fit.</p>	<p><b>Guideline 6: Exoneration from liability</b></p> <p>1. Without prejudice to additional exonerations provided for in domestic law, the operator should not be liable, or in the case of (c) below not liable to the degree not apportioned to him or her, if the operator proves that the damage was caused:</p> <p>(a) By an act of God/force majeure (caused by natural phenomena of an exceptional, inevitable and uncontrollable nature);</p> <p>(b) By armed conflict, hostilities, civil war, insurrections or terrorist attacks;</p> <p>(c) Wholly or in part by an act or omission by a third party, notwithstanding safety measures appropriate to the type of activity concerned but in the case of claims for compensation, only if the damage caused was wholly the result of wrongful</p>	<p><b>Exemptions</b></p> <p>Parties should consider the application of exemptions from liability, in particular:</p> <p>(a) Act of God or <i>force majeure</i>;</p> <p>(b) Act of war or civil unrest.</p> <p>.</p>

<p>[(d alt) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;]</p> <p>[(e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;]</p> <p>[(f) 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;]</p> <p>[(g) National security exceptions [or international security];]</p> <p>[(h) Where the operator could not have reasonably foreseen the damage.]</p>		<p>intentional conduct of a third party, including the person who suffered the damage;</p> <p>(d) As a result of compliance with compulsory measures imposed by a competent public authority.</p> <p>2. In relation to paragraph 4 of guideline 4, exonerations additional to those referenced in subparagraphs 1 (a)–(d) above or mitigating factors may include:</p> <p>(a) That the activity was expressly authorized and fully in conformity with an authorization given under domestic law, that allows the effect on the environment;</p> <p>(b) That the damage was caused by an activity which was not likely to cause damage according to the state of scientific and technical knowledge at the time that the activity was carried out.</p> <p>3. The operator may be exonerated wholly or in part towards a claimant if the operator proves that the damage resulted from the claimant’s act or omission done with intent to cause damage, or that the damage resulted wholly or in part from the claimant’s negligence.</p>	
<p><b>2. Recourse against third party by the person who is liable on the basis of strict liability</b></p> <p><i>Operational text 11</i></p> <p>These rules and procedures do not limit or restrict any right of recourse or indemnity that an operator may have against any other person.</p>	<p><b>Article 9 (adopted)</b></p> <p>This Supplementary Protocol shall not limit or restrict any right of recourse or indemnity that an operator may have against any other person.</p>		<p><b>Liability</b></p> <p>4. In cases where the standard of liability is strict, the right of recourse or indemnity that an operator may have against another person should not be limited or restricted.</p>

<p><b>3. Joint and several liability or apportionment of liability</b>  <i>Operational text 12</i>  In case two or more operators have caused the damage, joint and several liability or apportionment of liability may, as appropriate, apply in accordance with domestic law.  <i>Operational text 12 alt</i>  1. If two or more operators [are][may be] liable according to these rules and procedures, the claimant [should][shall] have the right to seek full compensation for the damage from any or all such operators, i.e., may be liable jointly and severally [without prejudice] [in addition][subject] to domestic laws providing for the rights of contribution or recourse.  2. If damage results from an incident that consists of a continuous occurrence, all operators involved successively in exercising the control of the activity during that occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence during the period when he was exercising the control of the activity caused only a part of the damage shall be liable for that part of the damage only.  [3. If damage results from an incident that consists of a series of occurrences having the same origin, the operators at the time of any such occurrence shall be jointly and severally liable. However, any operator who proves that the occurrence at the time when he was exercising the control of the activity caused only a part of the damage shall be liable for that part of the damage only.]  4. Where the claim for damage has not</p>		<p><b>Guideline 7: Joint and several liability</b>  In the event of multiple operators their liability should be joint and several, or apportioned, as appropriate.</p>	<p><b>Liability</b>  3. In cases where the standard of liability is strict and two or more operators have caused the damage, their liability should be joint and several.</p>
---	--	---	---

<p>been satisfied, the unsatisfied portion shall be fulfilled by any other person[, identified by the operator,] whose activity has contributed to the occurrence of the damage resulting from the transboundary movement.</p>			
<p><b>4. Limitation of liability</b>  <b>a. Limitation in time</b>  <i>Operational text 13</i>  Domestic law may provide for relative and/or absolute time limits for the submission of claims in the case of civil liability[, provided that such limits shall not be less than:  (a) [Three] years from the date the claimant knew or reasonably could have known of the damage and its origin; and/or  (b) [Fifteen] years from the date of the occurrence of the damage].</p>	<p><b>Article 10 (adopted)</b>  Parties may provide, in their domestic law, for relative and/or absolute time limits including for actions related to response measures and the commencement of the period to which a time limit applies.</p>	<p><b>Guideline 12: Time limits for presentation of claims</b>  1. Domestic law should establish that claims for compensation are inadmissible unless they are brought within a certain period of time from the date the claimant knew or ought to have known of the damage and the identity of the operator. In addition, claims should be inadmissible unless they are brought within a certain period of time following the occurrence of the damage.  2. Where the damage-causing incident is a series of occurrences having the same origin, the time limits established under the present guideline should run from the last of such occurrences. Where the damage-causing incident consists of a continuous occurrence, such time limits should run from the end of that continuous occurrence.</p>	<p><b>Time Limits</b>  Parties should consider the application of relative and/or absolute time limits, including the commencement of the period to which a time limit applies.</p>
<p><b>b. Limitation in amount</b>  <i>Operational text 14</i>  [Domestic law may provide for financial limits for strict liability[, provided that such limits shall not be less than [z] special drawing rights].]</p>	<p><b>Article 11 (adopted)</b>  Parties may provide, in their domestic law, for financial limits for the recovery of costs and expenses related to response measures.</p>	<p><b>Guideline 10: Financial limits</b>  1. Liability pursuant to guideline 5, paragraph 1, may be limited in accordance with criteria established under any applicable domestic classification scheme for activities dangerous to the environment.  2. Given that the operator might be unable to meet his or her liability or that actual damages might exceed the operator's limit of liability, domestic law may provide for closure of potential compensation gaps by way of special funding or collective</p>	<p><b>Financial Limits</b>  Parties should consider the application of financial limits in cases where the standard of liability is strict.</p>

		<p>compensation mechanisms.</p> <p>3. There should be no financial limit on liability arising under guideline 5, paragraph 2.</p>	
<p><b>5. Coverage</b></p> <p><i>Operational text 15</i></p> <p>1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of the time limit of liability, financial security, including through self-insurance.]</p> <p>2. [Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic measures implementing these rules and procedures.]</p>	<p><b>Article 12</b></p> <p>1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]</p> <p>2. [Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic law implementing this Supplementary Protocol.]</p>	<p><b>Guideline 11: Financial guarantees</b></p> <p>1. The operator should, taking into account the availability of financial guarantees, be encouraged or required to cover liability under guideline 5, paragraph 1, for amounts not less than the minimum specified by law for the type of activity dangerous to the environment concerned and should continue to cover such liability, during the period of the time limit of liability, by way of insurance, bonds or other financial guarantees.</p> <p>2. The competent public authority should periodically review the availability of and the minimum limits for financial guarantees, taking into account the views of relevant stakeholders, including the specialized and general insurance industry.</p>	<p><b>Financial Security</b></p> <p>1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]</p> <p>2. [Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities.]</p>
<p><b>V. Settlement of Claims</b></p> <p><b>A. Civil procedures</b></p> <p><i>Operational text 1</i></p> <p>Civil law procedures should be available at the domestic level to settle claims for damage between claimants and defendants. 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] [place where the damage occurred]. Alternative grounds of jurisdiction may be provided for well-defined cases according to national legislation, 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.</p>		<p><b>Guideline 13: Claims with foreign elements: applicable law</b></p> <p>1. Subject to domestic laws on jurisdiction and in the absence of special rules established by contract or international agreement, any claim for compensation that raises a choice-of-law issue should be decided in accordance with the law of the place in which the damage occurred, unless the claimant chooses to base the claim on the law of the country in which the event giving rise to the damage occurred.</p> <p>2. The timing of the claimant's choice pursuant to paragraph 1 should be determined by the law of the forum.</p>	<p><b>Settlement of Claims</b></p> <p>1. Parties should provide for civil law procedures to settle claims for compensation of damage.</p>



<p><i>Operational text 1 alt</i> All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in these rules and procedures 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.</p> <p><i>Operational text 1 second alt</i> No provision.</p>			
<p><b>B. Special procedure</b></p> <p><i>Operational text 2</i> 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.</p> <p><i>Operational text 2 alt</i> Parties may also avail dispute settlement through civil/administrative procedures and special tribunals such as the Permanent Court of Arbitration's Optional Rules for the Arbitration of Disputes relating to Natural Resources and/or the Environment.</p> <p><i>Operational text 2 second alt</i> In the event of a dispute between persons claiming for damage pursuant to these rules and procedures and persons liable under these rules and procedures, and where agreed by both or all parties, the dispute may be submitted to [final and binding] arbitration [in accordance with] [including through] the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment including in specific cases such as when a</p>			<p><b>Settlement of Claims</b></p> <p>2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.</p>

large number of victims are affected. <i>Operational text 2 third alt</i> No provision.			
<p><b>C. Standing/Right to bring claims</b> <i>Operational text 3 (civil liability)</i> 1. Subject to domestic law, Parties should provide for a right to bring claims by [affected] natural and legal persons [with a legal interest in the matter] [, including those with an interest in [the conservation and sustainable use of biological diversity] [environmental [and socio-economic] matters and meeting relevant requirements under domestic law]]. Those persons should have access to remedies in the State of export that are no less prompt, adequate and effective than those available to victims that suffer damage from the same incident within the territory of that State.</p> <p>2. States should guarantee appropriate access to information relevant for the pursuance of remedies, including claims for compensation.</p> <p><i>Operational text 3 alt (civil liability)</i> All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in these rules and procedures [shall][should] 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.</p> <p><i>Operational text 4 (administrative approach)</i> [Natural and legal persons[, including [those] non-governmental organizations promoting environmental protection and meeting relevant requirements under domestic law,] should have a right to [require][request] the competent authority to act according to [domestic law, or in the</p>		<p><b>Guideline 8: Claims for compensation</b> 1. Any person or group of persons, including public authorities, should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage caused by activities dangerous to the environment in addition to, where appropriate, the reimbursement of the costs of preventive measures and reinstatement measures.</p> <p>2. Domestic law may allow claims for compensation for environmental damage.</p> <p><b>Guideline 9: Other claims</b> 1. Any person or group of persons should be entitled to seek response action by competent public authorities if neither the operator nor the competent public authorities concerned are taking prompt and effective measures to redress environmental damage, provided that the person or group of persons has a sufficient interest or suffers the impairment of a right if so required by domestic law.</p> <p>2. Any person or group of persons within the meaning of paragraph 1 above should have the right to challenge in administrative or judicial proceedings the legality of any act or omission by private persons or public authorities that contravenes domestic laws or regulations relating to damage caused by activities dangerous to the environment.</p> <p>3. Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation</p>	<p><b>Claims for Compensation</b> 1. Any person or group of persons, including public authorities, should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage resulting from the transboundary movement of living modified organisms in addition to, where appropriate, the reimbursement of the costs of response measures.</p> <p>2. Parties may allow claims for compensation of damage to the conservation and sustainable use of biological diversity.</p> <p><b>Access to Information</b> Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent public authority in possession of such information, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties.</p>

absence thereof,] these rules and procedures [and to challenge], through a review procedure, the competent authority's decisions, acts or omissions as appropriate under domestic law.]		from the operator or the competent public authority in possession of such information, unless such disclosure is specifically prohibited by law or violates the legally protected interests of third parties.	
---	--	---	--