



**CBD**



## **Convention on Biological Diversity**

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### **GROUP OF THE FRIENDS OF THE CO-CHAIRS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY**

Fourth meeting

Nagoya, Japan, 6-8 October 2010

Item 3 of the provisional agenda\*

#### **LIABILITY AND REDRESS**

*Draft texts for further negotiations (Appendices I and II to the report of the third meeting of the Group of the Friends of the Co-Chairs)<sup>1</sup>*

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\* UNEP/CBD/BS/GF-L&R/4/1.

<sup>1</sup> The text of the appendices have been translated in all UN languages as part of the report of the third meeting of the Group and are available at : <http://bch.cbd.int/protocol/meetings/documents.shtml?eventid=3647>.

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*Appendix I*

***Draft decision BS-V/--***

***International rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms***

*The Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety,*

*Recalling* Article 27 of the Cartagena Protocol on Biosafety,

*Recalling* its decision BS-I/8 by which it established an Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety, with the terms of reference set out in the annex to the decision, to carry out the process pursuant to Article 27 of the Cartagena Protocol on Biosafety,

*Noting with appreciation* the work of the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety, as contained in the reports of its five meetings,

*Recalling also* its decision BS-IV/12 by which it established a Group of the Friends of the Co-Chairs to further negotiate international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms in the context of the Cartagena Protocol on Biosafety on the basis of the annex to the decision,

*Noting with appreciation* the work of the Group of the Friends of the Co-Chairs, as contained in the reports of its meetings,

*Noting* the valuable work carried out by the two Co-Chairs of the Working Group, Ms. Jimena Nieto (Colombia) and Mr. René Lefeber (Netherlands), over the past six years in steering the process in the context of Article 27 of the Cartagena Protocol on Biosafety, through both formal and informal ways,

*Recalling* Article 22 of the Cartagena Protocol on Biosafety, which calls upon Parties to cooperate in the development and/or strengthening of human resources and institutional capacities in biosafety,

*Recognizing* the need to facilitate the implementation of this decision through complementary capacity building measures,

*[[Welcoming]][Noting]* the private-sector initiative to provide for a contractual compensation mechanism concerning recourse in the event of damage to biological diversity caused by living modified organisms,]

**A. SUPPLEMENTARY PROTOCOL ON LIABILITY AND REDRESS  
TO THE CARTAGENA PROTOCOL ON BIOSAFETY**

1. *Decides* to adopt the Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, as contained in annex I to the present decision (hereinafter referred to as “the Supplementary Protocol”);

2. *Requests* the Secretary-General of the United Nations to be the Depositary of the Supplementary Protocol and to open it for signature at the United Nations Headquarters in New York from 7 March 2011 to 6 March 2012;

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3. *Encourages* Parties to the Cartagena Protocol on Biosafety to implement the Supplementary Protocol pending its entry into force;

4. *Calls upon* the Parties to the Cartagena Protocol on Biosafety to sign the Supplementary Protocol on 7 March 2011 or at the earliest opportunity thereafter and to deposit instruments of ratification, acceptance or approval or instruments of accession, as appropriate, as soon as possible;

**[B. GUIDELINES ON CIVIL LIABILITY AND REDRESS [IN THE FIELD OF] [FOR] DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS**

5. *Decides* to adopt the Guidelines on Civil Liability and Redress [in the Field of][for] Damage Resulting from Transboundary Movements of Living Modified Organisms, as contained in annex II to the present decision;]

**[C. ADDITIONAL AND SUPPLEMENTARY COMPENSATION MEASURES]**

6.

**Option 1**

1. Where the costs of response measures to redress damage to the conservation and sustainable use of biological diversity have not been redressed by response measures as defined in the Supplementary Protocol or by any other applicable supplementary compensation scheme, additional and supplementary compensation measures aimed at ensuring adequate and prompt compensation may be taken.

2. These measures may include a supplementary collective compensation arrangement whose terms of reference will be decided upon by the Conference of the Parties serving as the meeting of the Parties.

3. [Parties, other Governments as well as governmental, intergovernmental and non-governmental organizations, the private sector and other sources will be invited to contribute to such supplementary collective compensation arrangement in accordance with their national capacity to contribute.][Parties shall consider who should contribute to such a supplementary collective compensation arrangement.]

**Option 2**

No provision

**Option 3**

The Parties may consider the necessity of any solidarity arrangement for cases of damage which are not redressed through this decision in light of the experience gained through the implementation of the rules and procedures set out in this decision.

**D. COMPLEMENTARY CAPACITY-BUILDING MEASURES**

7.

**Option 1**

*Invites* Parties to take into account, as appropriate, in 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, this decision by (a) considering notions, such as “contributions in kind”, “model legislation”, or “packages of capacity-building measures”, and (b)

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including capacity-building measures, such as the provision of assistance in the implementation and application of these rules and procedures, including assistance to (i) develop domestic liability rules and procedures, (ii) foster inter-sectoral coordination and partnership among regulatory organs at the domestic level, (iii) ensure [appropriate][effective] public participation, and (iv) enhance the skills of the judiciary in handling issues pertaining to liability and redress.

## **Option 2**

1. Recognizing the crucial importance of building capacities in biosafety, the Parties are encouraged to strengthen their efforts in implementing relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Protocol on capacity-building under Article 22 of the Biosafety Protocol.

2. Parties are invited to take into account this decision in formulating bilateral, regional and multilateral assistance to developing country Parties that are in the process of developing their domestic law relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms.

## **Option 3**

The Conference of the Parties serving as the meeting of the Parties to the Protocol decides that, under its overall guidance, [the Parties shall cooperate in the development and/or strengthening of human resources and institutional capacities related to liability and redress on the Cartagena Protocol on Biosafety, including through existing global, regional, subregional and domestic institutions and organizations and, as appropriate, through facilitating private sector involvement.][Activities performed by experts selected from the roster of experts may include, upon request of the interested Party, the provision of advice:] [the Committee has the following functions:]

- (a) Parties on their domestic legislation in draft or existing form;
- (b) Capacity building workshops on legal issues relating to liability and redress;
- (c) [Identification of best practices related to national legislation on liability and redress;]
- (d) [Support to national capacity's self-assessment activities;]
- (e) [Advice on providers of adequate technology and procedures to access it].

*Annex I*

**SUPPLEMENTARY PROTOCOL ON LIABILITY AND REDRESS TO THE CARTAGENA  
PROTOCOL ON BIOSAFETY**

*The Parties to this Supplementary Protocol,*

*Being Parties to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, hereinafter referred to as “the Protocol”,*

*Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development,*

*Recognizing the need to provide for appropriate response measures where there is damage or sufficient likelihood of damage, consistent with the Protocol,*

*Recalling Article 27 of the Protocol,*

*Have agreed as follows:*

**Article 1 (adopted)**

**Objective**

The objective of this Supplementary Protocol is to contribute to the conservation and sustainable use of biological diversity, taking also into account risks to human health, by providing international rules and procedures in the field of liability and redress related to living modified organisms.

**Article 2 (adopted)**

**Use of terms**

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 the Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety;

(b) “Convention” means the Convention on Biological Diversity;

(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 authority that takes into account any other human induced variation and natural variation; and

(ii) Is significant as set out in paragraph 3 below;

(d) “Operator” means any person in direct or indirect control of the living modified organism which could, as appropriate and as determined by domestic law, include, *inter alia*, the permit holder, person who placed the living modified organism on the market, developer, producer, notifier, exporter, importer, carrier or supplier;

(e) “Protocol” means the Cartagena Protocol on Biosafety to the Convention on Biological Diversity;

(f) “Response measures” means reasonable actions to:

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- (i) Prevent, minimize, contain, mitigate, or otherwise avoid damage, as appropriate;
- (ii) Restore biological diversity through actions to be undertaken in the following order of preference:
  - a. Restoration of biological diversity to the condition that existed before the damage occurred, or its nearest equivalent; and where the competent authority determines this is not possible,
  - b. Restoration by, *inter alia*, replacing the loss of biological diversity with other components of biological diversity for the same, or for another type of use either at the same or, as appropriate, at an alternative location.

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.

### **Article 3**

#### **Scope**

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 living modified organisms [and products thereof] which 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.

5. This Supplementary Protocol applies to damage that occurred in areas within the limits of the national jurisdiction of Parties.

6. Parties may use criteria set out in their domestic law to address damage that occurs within the limits of their national jurisdiction.

7. Domestic law implementing this Supplementary Protocol shall also apply to damage resulting from the transboundary movements of living modified organisms from non-Parties.

8. 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.

#### **Article 4 (adopted)** **Causation**

A causal link shall be established between the damage and the living modified organism in question in accordance with domestic law.

#### **Article 5 (adopted)** **Response measures**

1. Parties shall require the appropriate operator or operators, in the event of damage, subject to any requirements of the competent authority, to:

- (a) Immediately inform the competent authority;
- (b) Evaluate the damage; and
- (c) Take appropriate response measures.

2. The competent authority shall:

- (a) Identify the operator which has caused the damage;
- (b) Evaluate the damage and determine which response measures should be taken by the operator.

3. Where relevant information, including available scientific information or information available in the Biosafety Clearing-House, indicates that there is a sufficient likelihood that damage will result if timely response measures are not taken, the operator shall be required to take appropriate response measures so as to avoid such damage.

4. The competent authority may implement appropriate response measures including in particular when the operator has failed to do so.

5. The competent authority has the right to recover from the operator the costs and expenses of, and incidental to, the evaluation of the damage and the implementation of any such appropriate response measures. Parties may provide, in their domestic law, for other situations in which the operator may not be required to bear the costs and expenses.

6. Decisions of the competent authority requiring the operator to take response measures should be reasoned. Such decisions should be notified to the operator. Domestic law shall provide for remedies, including the opportunity for an administrative or judicial review of such decisions. The competent authority shall, in accordance with domestic law, also inform the operator of the available remedies. Recourse to such remedies shall not impede the competent authority from taking response measures in appropriate circumstances, unless otherwise provided by domestic law.

7. In implementing this Article and with a view to defining the specific response measures to be required or taken by the competent authority, Parties may, as appropriate, assess whether response measures are already addressed by their domestic law on civil liability.

8. Response measures shall be implemented in accordance with domestic law.

**Article 6 (adopted)**

**Exemptions**

1. Parties may provide, in their domestic law, for the following exemptions:

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

2. Parties may provide, in their domestic law, for any other exemptions or mitigations as they may deem fit.

**Article 7 (adopted)**

**Time limits**

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.

**Article 8 (adopted)**

**Financial limits**

Parties may provide, in their domestic law, for financial limits for the recovery of costs and expenses related to response measures.

**Article 9 (adopted)**

**Recourse**

This Supplementary Protocol shall not limit or restrict any right of recourse or indemnity that an operator may have against any other person.

**Article 10**

**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, including financial mechanisms in case of insolvency, with the aim of enabling operators to obtain financial security, including insurance, to cover their responsibilities under this Supplementary Protocol.]

**Article 11 (adopted)**

**Internationally wrongful acts**

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.



## **Article 12 (adopted)**

### **Implementation and relation to civil liability**

1. Parties shall provide, in their domestic law, for rules and procedures that address damage. To implement this obligation, Parties shall provide for response measures in accordance with this Supplementary Protocol and may, as appropriate:

- (a) Apply their existing domestic law, including where applicable general rules and procedures on civil liability;
- (b) Apply or develop civil liability rules and procedures specifically for this purpose; or
- (c) Apply or develop a combination of both.

2. Parties shall, with the aim of providing adequate rules and procedures in their domestic law on civil liability for material or personal damage associated with the damage as defined in Article 2, paragraph 2 (c):

- (a) Continue to apply their existing general law on civil liability;
- (b) Develop and apply or continue to apply civil liability law specifically for that purpose; or
- (c) Develop and apply or continue to apply a combination of both.

3. When developing civil liability law as referred to in subparagraphs (b) or (c) of paragraphs 1 or 2 above, Parties shall, as appropriate, address, *inter alia*, the following elements:

- (a) Damage;
- (b) Standard of liability including strict or fault-based liability;
- (c) Channelling of liability, where appropriate;
- (d) Right to bring claims.

## **Article 13 (adopted)**

### **Assessment and review**

The Conference of the Parties serving as the meeting of the Parties to the Protocol shall undertake a review of the effectiveness of this Supplementary Protocol five years after its entry into force and every five years thereafter, provided information requiring such a review has been made available by Parties. The review shall be undertaken in the context of the assessment and review of the Protocol as specified in Article 35 of the Protocol, unless otherwise decided by the Parties to this Supplementary Protocol. The first review shall include a review of the effectiveness of Article 12.

## **Article 14 (adopted)**

### **Conference of the Parties serving as the meeting of the Parties to the Protocol**

1. Subject to paragraph 2 of Article 32 of the Convention, the Conference of the Parties serving as the meeting of the Parties to the Protocol shall serve as the meeting of the Parties to this Supplementary Protocol.

2. The Conference of the Parties serving as the meeting of the Parties to the Protocol shall keep under regular review the implementation of this Supplementary Protocol and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Supplementary Protocol and, *mutatis mutandis*, the functions assigned to it by paragraphs 4 (a) and (f) of Article 29 of the Protocol.

**Article 15 (adopted)**  
**Secretariat**

The Secretariat established by Article 24 of the Convention shall serve as the secretariat to this Supplementary Protocol.

**Article 16 (adopted)**  
**Relationship with the Convention and the Protocol**

1. This Supplementary Protocol shall supplement the Protocol and shall neither modify nor amend the Protocol.
2. Nothing in this Supplementary Protocol shall derogate from the rights and obligations of the Parties to this Supplementary Protocol under the Convention and the Protocol.
3. Except as otherwise provided in this Supplementary Protocol, the provisions of the Convention and the Protocol shall apply, *mutatis mutandis*, to this Supplementary Protocol.
4. Without prejudice to paragraph 3 above, this Supplementary Protocol shall not affect the rights and obligations of a Party under international law.

**Article 17 (adopted)**  
**Signature**

This Supplementary Protocol shall be open for signature by Parties to the Protocol at the United Nations Headquarters in New York from 7 March 2011 to 6 March 2012.

**Article 18 (adopted)**  
**Entry into force**

1. This Supplementary Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Protocol.
2. This Supplementary Protocol shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves it 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 the date on which the Protocol 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.

**Article 19 (adopted)**  
**Reservations**

No reservations may be made to this Supplementary Protocol.

**Article 20 (adopted)**  
**Withdrawal**

1. At any time after two years from the date on which this Supplementary Protocol has entered into force for a Party, that Party may withdraw from this Supplementary Protocol by giving written notification to the Depositary.
2. Any such withdrawal shall take place upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.
3. Any Party which withdraws from the Protocol in accordance with Article 39 of the Protocol shall be considered as also having withdrawn from this Supplementary Protocol.

**Article 21 (adopted)**  
**Authentic texts**

The original of this Supplementary Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Supplementary Protocol.

DONE at Nagoya on this fifteenth day of October two thousand and ten.

*Annex II*

**CONSOLIDATED TEXT**

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

*Guideline 1*

**[PURPOSE AND] OBJECTIVE**

[1. The purpose of the present Guidelines is to highlight core issues that the Parties to the Cartagena Protocol on Biosafety (hereinafter “Parties”) will have to resolve should they choose to draft domestic laws and regulations on civil liability for damage resulting from transboundary movements of living modified organisms. The present Guidelines will be of assistance to, in particular, developing Parties and Parties with economies in transition, in devising, as they deem appropriate, domestic legislation or policy in this field.]

2. The objective of [these][the present voluntary] Guidelines is to provide [general] guidance to Parties [as they deem appropriate,] [intending to introduce][regarding] [domestic] [rules and procedures][law] on civil liability for damage resulting from [transboundary movements of] living modified organisms [and products thereof], taking also into account risks to human health.

*Guideline 2*

Option 1

**USE OF TERMS**

1. The [definition of the] terms used in Article 2 of the Convention [on Biological Diversity (hereinafter referred to as “the Convention”)], [and] Article 3 of the [Cartagena] Protocol [on Biosafety (hereinafter referred to as “the Protocol”)] [and Article 2 of the Supplementary Protocol [on [Liability and Redress for] Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety (hereinafter referred to as “the Supplementary Protocol”)] apply to [the terms used in the present][these] Guidelines except as otherwise defined in [other provisions of the present Guidelines][paragraph 2 below].

[2. In addition, [for the purposes] [under] of these Guidelines:

(a) “Damage” [means][includes]:

- [(i) [Impairment of health,] Loss of life[, loss of health] or [any]personal injury [incidental to damage to the conservation and sustainable use of biological diversity];]
- [(ii) [Impairment of use of,] Loss of or damage to property [incidental to damage to the conservation and sustainable use of biological diversity];]
- [(iii) [Loss of income or other][Pure] economic loss;]
- (iv) Costs of response measures;

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- (v) Damage to the [environment and the] conservation and sustainable use of biological diversity [, taking into account human health,] [not redressed [or not comprehensively addressed] under the Supplementary Protocol];
- [(vi) 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 food security] [Socio-economic losses];

[Damage may also extend to pure economic loss.]

[(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;]

[(b)bis “Personal injury” means any violation to any individual rights other than his or her rights to property and not restricted to physical harm;]

[(c) “[Pure] economic loss” means loss of income, [directly deriving from an economic interest in any use of components of biological diversity, where the loss is] [unaccompanied by personal injury] or damage to property, [directly deriving from an economic interest in any use of components of biological diversity and [is] incurred as a result of damage to the conservation and sustainable use of biological diversity][or damage to socio-economic goods and services relevant to indigenous and local communities];]

(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].]

## Option 2

### Damage

1. Parties should define in their domestic law the term “damage.” The damage, in their domestic law, may, *inter alia* include:

- (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};
- (iv) Costs of response measures as defined in Article 2, paragraph 2 (h) of the Supplementary Protocol and being limited to the costs of measures actually taken or to be undertaken; and/or;
- (v) Damage to the conservation and sustainable use of biological diversity that has been determined by the competent authority of the Party to be not fully redressed under the Supplementary Protocol.

2. “Damage to the conservation and sustainable use of biological diversity” means damage as defined in Article 2, paragraph 2 (c), of the Supplementary Protocol;

### ***Guideline 3***

#### **SCOPE**

1. [These][The present] Guidelines [should] [apply][address] [, where a causal link between damage and the transboundary movement of living modified organisms has been established in accordance with domestic law,] to damage resulting from transport[, transit, handling and[/or] 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][may be] 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][the present] Guidelines [should also] [apply to][address] damage resulting from any [authorized] [or unauthorized] use of the living modified organisms [and products thereof] referred to in paragraph 1 above.]

3. [These][The present] Guidelines [should] also [apply to][address] damage resulting from:

[(i)] 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;

[(ii)] Transboundary movement from non-Parties].

[4. These Guidelines also apply to damage resulting from the transboundary movements from non-Parties, in accordance with Article 24 of the Protocol.]

#### ***[Guideline 3bis***

#### **Causation**

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 should be established.]

#### ***[Guideline 3ter***

#### **Use of the Guidelines**

Each Party should analyse its domestic legal system to determine whether there are gaps in that system related to potential damages resulting from damage to biological diversity, then to define what those gaps are, and finally examine the range of options to address each of those gaps with appropriate elements of liability so that each Party can adopt provisions to supplement its existing domestic civil liability laws consistent with that existing law and legal system.]

#### ***Guideline 4***

#### **LIABILITY**

##### Option 1

1. The standard of liability [should][could] be strict [only] [where the damage has been caused by a living modified organism [or products thereof] that a risk assessment [under Article 15 of the Protocol] has identified as [hazardous][highly probable to generate damage]].

[Alt1. Each Party should analyze its domestic legal system to determine the appropriate standard of liability for damage resulting from damage to biological diversity.]

[Alt1 *bis*. Where the appropriate standard is strict liability, then the standard should apply 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 [only] to the [relevant] operator [or operators].]

3. [In cases where the standard of liability is strict and][Where] two or more operators have caused the damage, their liability should be joint and several. [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.]

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.]

[5. Without prejudice to paragraphs 1 to 4 above, persons who caused damage intentionally or negligently may be held liable.]

##### Option 2

Parties should establish, under their domestic law, the standard of liability that could be either fault-based liability, strict liability or mitigated strict liability.

#### ***Guideline 5***

#### **EXEMPTIONS**

1. Parties [should][could][may] consider the application of exemptions [or mitigation] from [strict] liability, in particular:

(a) Act of God or *force majeure* [that is uncontrollable by any human resource][of an exceptional, inevitable and uncontrollable nature];

[(b) Act of war or civil unrest][, except in the case of the hostile use of living modified organisms].

[(c) Intervention by a third party;

(d) Compliance with compulsory measures imposed by a public authority;

(e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;

- (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;
- (g) National security exceptions;
- (h) Where the operator could not have reasonably foreseen the damage.]

[2. Parties may provide, in their domestic law, for any other exemptions or mitigations as they may deem fit.]

[Alt2. Parties may provide for the additional exemptions or mitigations, including but not limited to:

- (a) Intervention by a third party;
- (b) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;
- (c) An activity expressly authorized by and fully in conformity with an authorization given under domestic law; and
- (d) 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.]

#### ***Guideline 6***

#### **TIME LIMITS**

[With regard to the institution of claims, ]Parties [should][could][may] consider the application of relative and/or absolute time limits, including the commencement of the period [and the life cycle of the living modified organism] to which a time limit applies.

#### ***[Guideline 7***

#### **FINANCIAL LIMITS**

1. Parties [should][could] consider the application of [minimum] financial limits [in cases where the standard of liability is strict]. [Parties may consider the application of maximum financial limits.]

[2. There should be no financial limit on liability in cases where the standard of liability is fault-based.]]



*[Guideline 8*

**FINANCIAL SECURITY**

1. [Where the standard of liability is strict (because a risk assessment has identified the living modified organism as hazardous),] [Parties [should][shall][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].] [Financial security may include:

- (a) Insurance;
- (b) Self-insurance;
- (c) Establishment of Fund.]

2. [[Parties are urged to take measures to encourage the development of][Measures should be taken to develop] 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 [affected] person or group of persons, including public authorities [and institutions], [sustaining damage] [who suffered damage] should be entitled to claim compensation for [such damage.] [loss of life or personal injury, loss of or damage to property and [if appropriate,] pure economic loss in consequence of the occurrence of] damage resulting from [and caused by] the [transboundary movement of] living modified organisms [and products thereof] [in addition to, where appropriate, the reimbursement of the costs of response measures].]

2. [[Parties [, where appropriate and meeting relevant requirements under domestic law,] [may][shall] allow claims][Only directly affected natural or legal persons may be allowed to present claims] for compensation of damage to the conservation and sustainable use of biological diversity[, including socio-economic considerations relevant to indigenous and local communities and also taking into account human health].]

[3. The present Guidelines do not prevent Parties from adopting appropriate measures, such as the prohibition of double recovery of costs, in relation to situations where double recovery could occur as a result of concurrent action by a competent authority under the Supplementary Protocol and by a person or a group of persons suffering damage under the present Guidelines.]

*Guideline 10*

**SETTLEMENT OF CLAIMS**

1. Parties should provide for civil law procedures to [bring claims in national courts and] settle claims for compensation of damage [and shall ensure that appropriate dispute resolution facilities are available].

[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**

[[Subject to reasonable limitations as regards confidentiality of information,] Any person or group of persons[, including public authorities and institutions,] [sustaining][incurring][claiming compensation for] damage][Those persons entitled to present claims] [or affected thereby] should be entitled to [request] any information directly relevant to the presentation of a claim for compensation of damage from the operator [through reasoned court order] or [from] the competent authority in possession of such information[, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by [domestic] law or violates the legally protected interests of third parties].]

***[Guideline 11bis***

**INTERIM RELIEF**

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.]

***[Guideline 11ter***

**VALUATION OF DAMAGE**

[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:]

[(a) The costs of loss of income related to the damage during the restoration period or until the compensation is provided;]

[(b) The costs and expenses arising from damage to human health including appropriate medical treatment and compensation for impairment, disability and loss of life;]

[(c) 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.]

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.

3. For the purposes of these rules and procedures, response measures are reasonable actions to:

(i) [Prevent,] minimize or contain damage, as appropriate;

[(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.]]

*Appendix II*

**3.     *Other Provisions***

**I.     SUPPLEMENTARY COMPENSATION SCHEME**

**A.     *Residual State liability***

*Operational text 1*

[Where a claim for damages has not been satisfied by an operator, the unsatisfied portion of that claim shall be fulfilled by the State where the operator is domiciled or resident.]

*Operational text 1 alt*

[For damage resulting from transboundary movement of living modified organisms, primary liability shall be that of the operator with residual State liability [to the State of the operator]].

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