UNEP

CBD

CONVENTION ON BIOLOGICAL DIVERSITY

Distr.
GENERAL

UNEP/CBD/BS/WG-L&R/2/INF/1
12 January 2006

ENGLISH/SPANISH ONLY

OPEN-ENDED AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY
Second meeting
Montreal, 20-24 February 2006
Item 4 of the provisional agenda*

LIABILITY AND REDRESS

Compilation of submissions of further views with respect to approaches, options and issues identified as regards matter covered by Article 27 and proposals for texts **

The Executive Secretary is circulating herewith, for the information of participants in the second Open-ended Working Group of Legal and technical Experts on Liability and Redress in the context of the Cartagena Protocol on Biosafety, a compilation of further views with respect to approaches, options and issues identified as regards matter covered by Article 27 and proposals for texts.

* UNEP/CBD/WG-L&R/2/1.

** The submissions are reproduced in the form and the language in which they were received by the Secretariat.

CONTENTS

SUBMISSIONS FROM PARTIES AND OTHER GOVERNMENTS

ARGENTINA

[29 NOVEMBER 2005]
[SUBMISSION: SPANISH]

Protocolo de Cartagena

Grupo de Trabajo Especial de Composición Abierta de Expertos jurídicos y técnicos en Responsabilidad y Compensación

Durante su Primera Reunión (Montreal, 25-27 de mayo de 2005), el Grupo de Trabajo Especial de Composición Abierta de Expertos jurídicos y técnicos en Responsabilidad y Compensación invitó a las Partes y otros Gobiernos a compartir sus experiencias y opiniones sobre:

- criterios para la evaluación de cualesquiera normas y procedimientos a los que se refiere el articulo 27
- los enfoques, opciones y cuestiones mencionadas en el Anexo al Informe del Grupo (UNEP/CBD/BS/COP-MOP/2/11) de ser posible en forma de propuestas de texto

Introducción:

El movimiento tranfronterizo, el tránsito, la manipulación y la utilización de OVM son actividades licitas. El Protocolo de Cartagena dispone una serie de obligaciones para las Partes, orientadas a garantizar que las actividades relacionadas con los movimientos tranfronterizos de OVMs se realicen con un nivel de protección adecuado. En estate sentido, dado que estas actividades son generalmente llevadas a cabo por agentes privados –notificador, exportador, importador-, son éstos quienes se hallan en mejor situación para tomar los recaudos necesarios que garanticen la bioseguridad de los movimientos transfronterizos.

Uno de los puntos más importantes en relación con la responsabilidad por los movimientos transfronterizos de OVMs parece tener que ver con el nivel de riesgo que tales actividades engendran.

Tal como fue planteado par la CDI en su proyecto de articulos sobre la "Responsabilidad por las consecuencias perjudiciales de actos no prohibidos por el derecho internacional", para que sea posible justificar un régimen de responsabilidad objetiva resulta necesario que el nivel de riesgo implicado en las actividades licitas sea significativo.

En la Argentina, los productos derivados de la biotecnología, antes de ser liberados, son sometidos a estrictos protocolos de evaluación, para lo cual se cumple con un exhaustivo análisis de riesgo, considerando todas las etapas de la cadena alimentaria.

En el caso de OVMs, se considera que no existen evidencias suficientes para considerar que se trata de sustancias peligrosas en general. Por lo demás, el riesgo que podría implicar el movimiento transfronterizo de OVMs variaria con las características de dichos organismos y con el uso que se les de, complicando las posibilidades de imponer un régimen severo de responsabilidad.

Per otro lado, la CDI en 2004 teminó la primera lectura de otro instrumento, un "Proyecto de principios sobre la asignación de la pérdida en caso de daño transfronterizo resultante de actividades peligrosas". En ese documento se consideró el concepto de riesgo con dos componentes:

1. la probabilidad (alta) de que cierto impacto negativo ocurra
2. la magnitud (sensible o significativa) del daño eventual

Teniendo en cuenta tales componentes, para que una actividad pueda ser considerada de riesgo y por ende ser sometida a un régimen gravoso de prevención y de responsabilidad objetiva (liability, en inglés) que exija la contratación de seguros, la canalización hacia ciertas personas o entidades privadas, etc, debe existir una probabilidad alta de daño significativo resultante de los movimientos transfronterizos de OVMs, situación que no se presenta en el escenario actual.

Por lo tanto, se considera apropiado apoyar un régimen de responsabilidad derivada: a) del incumplimiento de 1as obligaciones que surgen del Protocolo de Cartagena y b) de actos u omisiones culpables en violación del deber de debido cuidado por parte de quienes se encuentre en mejor posición para prevenir el riesgo.

EI Protocclo de Bioseguridad reconoce el balance de responsabilidades entre el exportador y el importador en el proceso del movimiento transfronterizo. Por lo tanto, se considera pertinente que se conserve ese equilibrio en el esquema de responsabilidad que se acuerde en el marco del artículo 27.

Por su parte, el concepto de responsabilidad objetiva se halla en un creciente número de tratados internacionales; sin embargo, no deja de llamar la atención la falta de interés de los Estados en aprobarlos. De un total de 19 acuerdos internacionales sobre responsabilidad y reparación adoptados, só1o nueve entraron en vigor. De aquel total, ocho instrumentos poseen disposiciones para cubrir el daño ambiental (con diversas variantes en cuanto a la compensación cubierta), pero de éstos apenas dos lograron el número de aprobaciones necesario para su entrada en vigor1. Ambos casos se ocupan de sustancias reconocidas por su alta peligrosidad.

Enfoques, opciones y cuestiones relacionadas con el artículo 27 (Annexo al Informe del Grupo de Trabajo. Doc. UNEP/CBD/BS/COP-MOP/2/11)

I. Ambito de los "daños resultantes de los movimientos transfronterizos de OVM"

A. Ambito furncional

Opción 1: Daño resultante del transporte de OVM, incluyendo el tránsito.

Esta opción es la que más se ajusta al alcance del artículo 27 del Protocolo. Este se refiere a la responsabilidad y reparación por daños resultantes de movimientos transfronterizos de OVMs, y el artículo 3 inciso k) define "movimiento transfronterizo" como el "movimiento de un organismo vivo modificado de una Parte a otra Parte, con la excepción de que a los fines de los articulos 17 y 24, el movimiento transfronterizo incluye también el movimiento entre Partes y los Estados que no son Partes.

1/ El Protocolo de enmienda de Viena (1992), y la Convención Internacional sobre Responsabilidad Civil por Daños causados por Contaminación de la OMI (1996), que reemplaza al Convenio de 1969.

Si bien el Protocolo se refiere a un rango más amplio de actividades, que incluyen además del movimiento transfronterizo, el tránsito, manipulación y utilización de los OVMs, el artículo 27 sólo comprende el movimiento transfronterizo.

Al respecto, cualquier daño fuera del movimiento transfronterizo quedaría a cargo de las respectivas legislaciones locales.

A fin de clarificar el significado de los términos "resultantes de", se propone interpretar la frase daños resultantes de movimientos transfronterizos de OVMs en el sentido de “daños que resulten de incidentes ocurridos durante el transporte transfronterizo de OVMs”, abarcando también los daños producidos en un Estado Parte de tránsito y que se deriven de ese movimiento.

En cambio, para el caso de que el Estado de tránsito fuera una no Parte, no existiría la posibilidad de quedar cubierto en caso de daño, salvo que la no Parte celebrase un acuerdo especial como los que prevé el inciso 2) del artículo 24.

B. Componentes opcionales para fines geográficos

a) Daño causado en áreas dentro de los limites de la jurisdicción nacional o bajo el control de las Partes.
Se entiende que el ámbito de aplicación del régimen de responsabilidad se extendería desde que el OVM sale de la jurisdicción nacional del Estado de exportación hasta el punto de transferencia de responsabilidad en el territorio del Estado importador.

b) Daños causados en áreas dentro de los limites de la jurisdicción nacional o control de no Partes.
No es aceptable ya que los estados no Partes no podrían invocar el régimen de responnabilidad.

c) Daños causados en áreas que están más allá de los límites de la jurisdicción nacional o control de los Estados.
Considerando que el alcance del régimen de responsabilidad debería referirse a la conservación y uso sostenible de la diversidad bio1ógica y no al daño tradicional, se estima que en áreas fuera de la jurisdicción nacional no existirian damnificados que tuvieran derecho a reclamar por daño a la conservación y uso sostenible de la biodiversidad.

C. Aspectos para mayor consideración

a) Limitación con base en finalidad geográfica

b) Limitación en el tiempo.
Debe fijarse un tiempo prudencial de prescripción de la acción para reclamar por daños.

c) Limitación de la autorización al tiempo de la importación de los OVMs.

d) Determinación del punto de importación y exportación de los OVMs.
Desde el punto fuera de la jurisdicción territorial del Estado de exportación hasta el momento de transferencia de la responsibilidad sobre la carga en el Estado de importación.

II. Daños

A. Componentes opcionales para la definición del daño.

(a) Daños a la conservación y la utilización sostenible de la diversidad biológica o a sus componentes:

El tipo y alcance del daño no están especificados en el artículo 27. Debe recurrirse a los artículos 1 (Objetivo) y 4 (Ambito) del Protocolo, que se refieren a los "efectos adversos para la conservación y uso sustentable de la diversidad biológica, teniendo también en cuenta los riesgos para la salud humana", para dotar de contenido a los daños mencionados en el artículo 27. En consecuencia, se considera que el daño al que se refiere el artículo 27 es el "daño a la conservación y utilización sostenible de la diversidad biológica"

El Protocolo no define la "conservación y utilización sostenible de la diversidad biológica". La CBD provee en su artículo 2 una definición de diversidad biológica, que abarca, además de especies, hábitats y ecosistemas, los cuales bien pueden cubrirse desde una perspectiva legal, la "variabilidad entre los organismos vivos". Por lo tanto, es necesario conocer cuáles serian los efectos adversos/daños a la variabilidad de los organismos vivos, cómo podrían cuantificarse y cuál sería el umbral de daño que implique una responsabilidad (UNEP/CBD/ICCP/2/3).

Teniendo en cuenta que no puede considerarse a los OVMs de manera genérica como sustancias peligrosas, porque no hay riesgos comprobados asociados, se necesitaria mayor información sobre daños a la diversidad biológica producidos por OVMs, y en particular sobre los tipos de incidentes que podrian dar lugar a daños significativos a la diversidad biológica. Dado que del alcance del daño dependen otros elementos necesarios para la elaboración de reglas y procedimientos internacionales sobre responsabilidad y reparación, es menester avanzar en estas cuestiones.

En este sentido, resulta indispensable contar con criterios de evaluación para analizar el daño acontecido a los fines de configurar la responsabilidad y los costos de restauración apropiados a ese daño.

(b) Daño al ambiente:
El Protocolo de Cartagena trata la conservación y uso sostenible de la diversidad bio1ógica. Por lo tanto, el alcance de cualesquiera reglas de responsabilidad que puedan desarrollarse debe incumbir a la conservación y uso sostenible de la diversidad biológica, y no al "ambiente" en términos generales.

(c) Daño a la salud hurnana:

En el artículo 4 del Protocolo de Bioseguridad, referido al ámbito de aplicación señala 1a expresión:".. teniendo también en cuenta los riesgos para la salud humana". Esta mención surte sus efectos al momento de realizar la evaluación de riesgos en la que deben tenerse en cuenta tales tipos de daños.

No obstante ello, el objeto central del Protocolo se refiere al daño a la conservación y uso sostenible de la diversidad biológica, por lo que cabría interpretar que el alcance del Artículo 27 no contemplaría el daño directo a 1a salud.

La protección de la salud humana está cubierta por otras normas internacionales pertinentes (Codex Alimentarius). En este sentido, los daños a la salud por causa de los alimentos transgénicos deberían saguir las normas generales aplicables a los alimentos convencionales.

En relación con el tratamiento de este tema en el Codex Alimentarius, se remite a la consideración de los siguientes documentos, adoptados por la Comisión del Codex en su 26°Período de sesiones (2003);
Acuerdo sobre principios para la evaluación de alimentos obtenidos por medios biotecnológicos modernos (FAO/OMS 2003a)
Acuerdo sobre directrices para la evaluación de la inocuidad de los alimentos derivados de plantas de ADN recombinante (FAO/OMS 2003b)
Acuerdo sobre directrices para la evaluación de la inocuidad de los alimentos producidos utilizando organismos de ADN recombinante (FAO/OMS 2003c)
Estas directrices del Codex indican que el proceso de evaluación de la inocuidad de un alimento GM debe realizarse comparándolo con su homólogo convencional, que generalmente se considera inocuo debido a su largo historial de uso. Cuando se identifique un problema de inocuidad, deberá caracterizarse el riesgo asociado al mismo a fin de determinar su relevencia para la salud humana.

(d) Daño socioeconómico:
Por las razones antes mencionadas, el daño socioeconómico *per se* no se halla dentro del alcance del Protocolo. Las consideraciones socioeconómicas sólo aparecen en el Artículo 26 y el Protocolo sólo autoriza a las Partes a tenerlas en cuenta en el proceso de adopción de una decisión previa al primer movimiento transfronterizo de un determinado OVM.

En particular, el Artículo 26 establece que "Las partes, al tomar una decisión de importación bajo el Protocolo (…) pueden tomar en cuenta las consideraciones socioeconómicas resultantes del impacto de OVMs sobre la conservación y utilización sostenible de la diversidad biológica, especialmente en relación con el valor de la diversidad biológica para las comunidades indigenas y locales".

(e) Daño tradicional (pérdida de la vida, daño personal, pérdida o daño a la propiedad y lucro cesante):
No se halla dentro del alcance del Protocolo. Ni éste ni la Convención proveen ninguna base legal para cubrir el daño tradicional. El objetivo de un régimen de responsabilidad está dirigido a contemplar exclusivamente el daño a la conservación y al uso sostenible de la biodiversidad, conforme al objeto del Protocolo de Cartagena, que abarcaría el daño a la conservación y uso sostenible de la diversidad biológica.
El daño tradicional está cubierto por las legislaciones nacionales.

B. Possibles enfoques para la valuación del daño a la conservación de la diversidad biológica.

(a) Costos de las medidas de restablecimiento de los componentes dañados de la diversidad biológica.

i) Introducción de componentes originales
ii) Introducción de componentes equivalentes, en el mismo sitio y para el mismo uso, o en otro sitio para otros tipos de uso

(b) Compensación monetaria a ser determinada sobre criterios que serán desarrollados.

Cuando la restitución por equivalente no sea posible, se podrá aceptar subsidiariamente la compensación monetaria y en este caso se deberá fijar un límite financiero máximo.

C. Temas para mayor consideración con respecto a la valuación del daño

(a) Determinación de pérdida de biodiversidad: resulta indispensable contar con lineas de base para medir la pérdida, tomando en cuenta las variaciones naturales y las inducidas por el ser humano además de las que son causadas por OVM.

(b) Obliagaciones de adoptar medidas de respuesta o restablecimiento. En la reparación se estima conveniente apoyar medidas razonables y posibles de restablecimiento de la biodiversidad dañada.

(c) Medidas especiales en casos de daños a centros de origen o centros de diversidad genética

Se considera que no resulta necesario adoptar medidas especiales para tales casos. Se entiende que las medidas de prevención deberán ser proporcionales al riesgo de conservación y uso sostenible de la diversidad biológica y que mientras más grande sea la entidad del daño producido, mayor será la obligación de reparar.

(d) Umbral de daño:

A partir de la definición de la diversidad biológica del Artículo 2 de la CDB, el daño no puede ser entendido como un mero cambio en la diversidad biológica. Si bien el articulo 27 no especifica un umbral de daño, deberian abarcarse los efectos sobre la conservación y utilización sostenible de la diversidad biológica que surjan por encima de un nivel mínimo. La terminología habitual adoptada en varios instrumentos sobre responsibilidad y reparación se refiere a “daño sensible” o “significativo”.

Asimismo, el daño debe ser mensurable. Para medir si ha ocurrido un daño y de qué tipo de daño se trata, el concepto de líneas de base es una condición esencial, puesto que será el punto de partida para cualquier técnica de medición. Dado que se refiere a la biodiversidad, la cual fluctúa permanentemente y es influenciada por una multitud de factores naturales e inducidos por el hombre.

Por último, el daño debe ser permanente o a largo plazo, puesto que la biodiversidad tiene mecanismos para restaurarse a sí misma. En consecuencia, un cambio adverso só1o podrá ser considerado daño si las capacidades naturales de restauración no se verifican o tardan un tiempo muy prolongado en hacerlo. En caso contrario, se estarían creando “daños artificiales” cuya reparación no es necesaria debido a que están sujetos al proceso de restauración natural, el que ocurrirá de todas maneras.

Deberá trabajarse en una definición de qué alcance temporal tendría del cancepto de “largo plazo”.

La evaluación del daño requiere tener puntos de referencia (lineas de base) contra los cuales contrastar y medir el daño. Se deberá trabajar sobre indicadores del status de la biodiversidad, para poder determinar cuándo existe un daño a la conservación y uso sostenible de la biodiversidad y cuál sería el nexo causal con el uso de OVMs.

Adicionalmente, el régimen debiera reconocer el umbral de daño a la diversidad biológica que supere el daño que puede ser causado por cualquier cultivo que no sea OVM. Puesto que un nivel

de protección adecuado debe evitar la discriminación de los OVMs cuando un producto que no lo sea pudiera causar un impacto similar en un determinado ecosistema.

Las CDB produjo una definición de pérdida de biodiversidad y elaboró una serie de indicadores para evaluar el progreso hacia el Objetivo del Milenio de reducir significativamente la pérdida de biodiversidad hacia 2010. No obstante, si bien este trabajo puede proveer elementos de utilidad, se reconoce que el enfoque en cuanto al alcance geográfico, resolución temporal, líneas de base, valoración del daño, etc, de los indicadores elaborados impiden su aplicación para medir el daño al que se refiere el articulo 27 (UNEP/CBD/B5/AHWEG-L&R/1/INF/2).

III. Causalidad

(b) Establecimiento del nexo causal entre el daño y la actividad del movimiento transfronterizo.

Se considera que un vínculo de causalidad claro es un componente esencial en cualquier régimen de responsabilidad. Generalmente, tanto las legislaciones nacionales sobre responsabilidad como el derecho internacional establecen los siguientes requisitos:

1) acreditar efectivamente el daño
2) que el daño haya sido efectivamente causado por la acción u omisión ("causa de hecho")
3) que la acción u omisión esté reconocida en la legislación como causa del daño (“causa legal”)

(c) Por lo tanto, se debe establecer un vínculo causal claro entre el daño alegado, el movimiento transfronterizo y el incumplimiento de las obligaciones derivadas del Protocolo de Cartagena y el deber de debido cuidado por los operadores individuales. Deberá mantenerse el requisito estricto de demostrar el vínculo de causalidad (causa de hecho y causa próxima).

Cuando el daño alegado sea de carácter difuso -no atribuible a fuentes u operadores identificables, no podrá imponerse la responsabilidad. Los operadores debieran ser responsables por los riesgos que pudieran haber razonablemente sido previstos. En iqual sentido, los operadores debieran actuar de acuerdo con un standard de debida diligencia a la luz de la infornación que debieran conocer acerca de los riesgos de la actividad en la cual se encuentran involucrados.

c) Carga de la prueba en relación con el nexo causal
La regla en los sistemas legales es que la persona que alegue el daño lo pruebe. En el caso de un régimen de responsabilidad por culpa o negligencia, esto incluye probar que: 1) la persona contra la cual se reclama tenia el deber de cuidado y ha incumplido ese deber o una obligación legal derivada del Protocolo de Cartagena y 2) la prueba del vínculo causal.
Por lo tanto, se propone incluir una cuarta opción: iv) carga de la prueba en el afectado.

IV. Canalización de la responsabilidad, roles de las Partes de importación y de exportación y tipo de responsabilidad (liability)

A. Posibles enfoques:

(a) Responsabilidad del Estado por hecho ilícito.

El estado actual an la materia se halla expresado, en gran parte, en la Resolución 56/83 AGNU, que adopta el proyecto sobre Responsabilidad del Estado por Hechos Internacionales Ilícitos elaborado por la Comisión de Derecho Internacional de las Naciones Unidas (CDI).

(b) Responsabilidad objetiva del Estado, por actos no prohibidos por el derecho internacional, incluyendo casos donde un Estado Parte ha cumplido con todas las obligaciones del Protocolo.

El único caso en el cual se asigna directamente responsabilidad objetiva al Estado es el de la Convención sobre responsabilidad por daños causados por objetos espaciales, y se explica debido a las especiales circunstancias que rodearon la sanción del convenio, puesto que los Estados preveian y querían, por razones politicas inherentes a las actividades espacíales, que ellas fueran desarrolladas por los Estados, con exclusión de los particulares.

Conforme a los informes desarrollados por la CDI, ni la práctica de los Estados ni la jurisprudencia internacional dan un fundamento claro y expreso a la indemnización por actividades de riesgo, que producen daño a través de accidentes, cuando éstos se han producido no obstante haberse tomado todas las precauciones aconsejables.

Por lo tanto, se apoya la Opción (3) Ninguna responsabilidad objetiva del Estado.

B. Cuestiones relacionadas con la responsabilidad civil:

l. Posibles factores para deteminar el tipo de responsabilidad y la identificación de la persona responsable:

a) Tipo de daño: se considerará exclusivamente el daño a la conservación y uso sostenible de la diversidad bio1ógica.

b) Lugares en los que ocurre el daño (no se considera necesario prever reglas especiales para ciertos tipos de lugares)

c) Grado de riesgo implicado en un tipo especifico de OVM identificado en la evaluación de riesgo. Deberá ser considerado teniendo en cuenta que un determinado OVM no posea potencialidad de producir daño en un determinado país, pero sí en otro.

d) Efectos adversos inesperados. Los efectos que razonablemente y de acuerdo con el estado del arte no han podido ser previstos deberían generar responsabilidad.

e) Control operacional sobre los OVM: debería ser considerado a los efectos de determinar quien se encuentra

2. Canalización de la responsabilidad y tipo de responsabilidad

(a) Responsibilidad basada en la culpa: Este tipo de responsabilidad es el que más se ajusta al estado del conocimiento cientifico actual sobre los riesgos de los movimientos transfronterizos de OVMs. Requiere que el daño sea causado por un acto u omisión voluntario o negligente de la persona responsable. La responsabilidad se canaliza hacia la persona responsable del incumplimiento del deber de cuidado o de obligaciones derivadas del Protocolo. La responsabilidad podría ser concurrente.

La opción (ii) podría coincidir con la opción i) y también con la v), y estas opciones podrían concurrir con la iii). Sería una cuestión de prueba verificar en el caso concreto a quién le cabría la responsabilidad.

No se considera apropiada la opción iv, por no verificarse necesariamente un nexo causal con la producción del daño.

Puede tenerse en cuenta el estado del arte como causal de exclusión de responsabilidad (una acción no generaría responsabilidad si no pudo haber sido tenida como peligrosa al tiempo de ser llevada a cabo)

(c) Responsabilidad objetiva (*sine delicto*). Como se ha expuesto precedentemente, este tipo de regímenes se reserva sólo para sustancias generalmente reconocidas como peligrosas.

3. Possibles exenciones o mitigación de la responsibilidad:

Opción 2:

Se consideran adecuadas las siguientes opciones:

a) Fuerza mayor
b) Acto de guerra o guerra civil
c) Intervención por una tercera Parte
d) Cumplimiento con medidas compulsivas impuestas por autoridad nacional competente
f) La defensa del "estado del arte", por actividades que no eran consideradas perjudiciales de acuerdo al estado del conocimiento cientifico en el momento en que fueron llevadas a cabo.

No parece apropiado incluir (e) Permiso de la actividad por medio de la legislación aplicable por una autorización especifica expedida por el operador, puesto que este mecanismo no se condice con la responsabilidad por culpa o negligencia.

Roles de las Partes de importación y de exportación

El Protocolo reconoce el balance de responsibilidades entre el exportador y el importador en el proceso de movimiento transfronterizo. Por lo tanto, se considera que debe conservarse ese equilibrio también en el contexto del Artículo 27.

V. Limitación de la responsabilidad

a) Limitación en el tiempo: debería preverse un plazo para la prescripción de la acción.

Sería necesaria la fijación de un límite máximo para el caso de compensación y un plazo de prescripción de la acción para reclamar la reparación.

Se apoyarán ambas opciones: a) Limitación en el tiempo, y opción b) Limitación en monto, incluyendo topes máximos y posible mitigación del monto de compensación por daño bajo circunstancias especificas, a ser determindadas.

VI. Mecanismos de seguridad financiera

Estos mecanismos son elementos habituales de los esquemas de responsabilidad objetiva (sine delito), reservados para sustancias peligrosas, y no son de aplicación en el contexto de la responsabilidad basada en la culpa.

Dado que cuando se produce un daño ambiental existen más personas legitimadas a actuar, pues se afectan bienes de titularidad pública, y dada la complejidad del daño ambiental (que se refleja no sólo en la afectación del medio ambiente en sí, sino también en los daños propagados a través de éste), la cobertura del daño ambiental resulta poco atractiva para las compañias aseguradoras.

En la Argentina, los modelos de póliza aprobados por la Superintendencia de Seguros de la Nación son los clásicos modelos de Responsabilidad Civil. Hasta la fecha, este organismo no ha autorizado ninguna cláusula de contenido ambiental que permita hablar de una exigencia razonable al momento de solicitar por ejemplo, al transportista de residuos peligrosos, una cobertura por daños al medio ambiente. Adicionalmente, salvo las grandes multinacionales que cuentan con reaseguros propios, las aseguradoras nacionales carecen de reaseguros que les permitan afrontar, en una medida aceptable, la cobertura de los riesgos por daños al medio ambiente.

VII. Resolución de controversias

Es prematuro avanzar en estos procedimientos hasta tanto no se definan otros elementos, entre ellos, el tipo de instrumento.

VIII. Derecho a presentar demandas

El derecho a presentar demandas, tanto en el derecho nacional como internacional, se limita a aquellos afectados por el daño. Esta limitación asegura que quien inicia la acción judicial tiene un interés directo y significativo.
Adicionalmente, en ninguna instancia internacional se ha aceptado hasta la fecha la presentación de demandas por daño ambinetal por parte de grupos con un interés especifico en la materia.

IX. Opción de instrumentos

Se considera que hasta tanto no se avance en los principales contenidos de las reglas referidas en el Artículo 27, no estarán dadas las condiciones para evaluar cuál es el tipo de instrumento más adecuado.

XI. Limitaciones a la responsabilidad

Sería necesaria la fijación de un límite financiero máximo para el caso de la compensación y un plazo de prescripción de la acción para reclamar la reparación.

Se consideran válidas ambas opciones: (a) Limitación en el tiempo, y opción (b) Limitación en monto, incluyendo topes máximos y posible mitigación del monto de compensación por daño bajo circunstancias especificas, a ser determinadas.

Apéndice. ESCENARIOS

Los escenarios identificados en el Anexo al documento UNEP/CBD/BS/COP-MOP/2/11 plantean interrogantes, debido a la baja probabilidad de daños a la conservación y uso sustentable de la biodversidad derivadas de los movimientos transfronterizos de OVMs. Cada escanario debe ser analizado sobre una base caso por caso.

No obstante, no es posible asignar responsabilidad sin haber constatado, sobre la base de la prueba, si hubo incumplimiento de las obligaciones que surgen del Protocolo de Cartagena, y/o actos u omisiones culpables en violación del deber de debido cuidado por parte de quienes se encuentran en mejor posición para prevenir el daño.

CANADA

[21 NOVEMBER 2005]
[SUBMISSION: ENGLISH]

Canada's Comments on Issues identified in the Report of the Open Ended Working Group on Liability and Redress

Further views with respect to the approaches options and issues identified in the report of the first meeting of the Open ended ad hoc Working Group on liability and redress.

Canada is of the view that meaningful discussion of the legal aspects of rules and procedures in the field of liability and redress for damage resulting from transboundary movement of LMOs is not productive in the absence of clarity and agreement on several issues identified in the report of the first meeting as these issues significantly impact on the legal aspects of any discussion. Canada will therefore restrict its comments to those issues that need clarity at this time, specifically issues I, II and III, scope, damage and causation.

Views on issues identified in the Annex to the Report of the 1st Meeting of the working Group:

I: Scope:

The scope of Article 27 of the Protocol is "international rules of procedure in the field of liability and redress for damage resulting from transboundary movement of LMOs." Expanding the scope of the mandate to include handling or use implies the joint responsibility of the importer and the exporter. This would require an examination of domestic legislation, institutions, decisions and operations that are the responsibility of the party of import, export or transit.

Geographical scope:

The Protocol and any instrument under the Protocol only applies to Parties, therefore it is not possible to include non-Parties in the scope, either as entities nor in terms of applicability. The Protocol identifies transboundary movement as between two Parties.

It is a valid consideration to identify special areas of interest such as centres of origin or diversity, protected or endangered species or areas. Canada would support a time limitation based on the biology of the LMO and the biology of the affected species of biodiversity.

II. Definition of damage:

Canada considers the definition of damage as a critical element of the negotiation

Canada believes that the definition of damage should be linked to the objective of the Protocol, an adequate level of protection against adverse effects on the conservation and sustainable use of biodiversity" resulting from the transboundary movement of LMO, and would be the appropriate base for consideration. Risks to human health resulting from adverse impacts to biodiversity are to be taken into account under the Protocol. Similarly, the Protocol refers to the use of socioeconomic considerations in a decision following the identification of a risk to the conservation and sustainable use of biological diversity. This establishes the conditions under which the elements of human health and socioeconomic considerations could be considered.

It should also be kept in mind that the definition of must be compatible with both the Convention on biological diversity and also with any domestic instrument relating to biodiversity. The parameters of damage to biodiversity are *de facto* defined in the domestic and international instruments that address risk assessment. The elements of the risk assessment developed by a country define those aspects of biodiversity considered to be at risk of damage on the basis of current understanding of both living modified organisms and of biodiversity.

To measure damage to the conservation and sustainable use of biological diversity it is first necessary to have agreement on two issues i) what constitutes damage to biological diversity and ii) what constitutes the biological diversity of the receiving country, and agreement on a comparator of the sustainable use of that biological diversity. Initial criteria of the baseline state of biological diversity of a country could be based on work on national and international indices such as the IUCN index of protected species, related work under the CBD on identification and monitoring (Article 7, Annex 1), and national biodiversity indices.

As indicated above, Canada is of the view that socioeconomic considerations of damage must be viewed in the context set out by the Protocol, that is, as a result of an adverse impact on biodiversity. Given that there must be an adverse impact on biological diversity, and that at this time there is extremely limited information on what constitutes socioeconomic impacts it is not clear how they would differ from the traditional concept of damage.

It is worth noting that socioeconomic considerations have never been included in a civil liability regime to date.

III Causation:

Causation is a fundamental requirement in establishing responsibility for damage and consequential liability. In the absence of a causal link between LMOs and damage to the conservation or sustainable use of biodiversity there can be no basis for liability. In the event that a regime is considered that is specific to living modified organisms it is neither practical nor realistic to avoid the issue of causality. In this respect, it seems unlikely that an entity could claim liability and seek redress for damage before either a domestic court or international tribunal in the absence of proof that the LMO did actually cause the damage.

Causation is a difficult issue. An example of the complexity of the issue and the requirement to address causality can be considered where there is an unintentional release of several living modified organisms from a contained facility in a recipient country. Some of these were developed in situ and some were imported for research purposes and are therefore a consequence of transboundary movement. In the event of an adverse impact on biodiversity resulting from this release it would be necessary to link the imported living modified organisms to the damage, and, identify the degree of damage associated with the imported organisms. In addition the findings of causality and damage would have to be consistent with the treatment of domestically developed living modified organisms.

Causation is linked to the determination of what constitutes damage, which is in turn linked to indicators or baseline values for biodiversity. The simplest indicator of damage, relative to the conservation of biological diversity is the disappearance of species, but this could be due to many or several causes and it would be necessary to assign scaled impacts to the living modified organism. Damage relative to the sustainable use of biological diversity should also be considered.

Causation in terms of damage to biological diversity needs to be based on direct scientific evidence that the damage results from the living modified organism, for example by displacement of an existing

community of organisms, direct toxic effect, secondary effect through displacement of a critical food or change in habitat through changes in the biological diversity of the habitat. These are amenable to testing and evidence gathering.

In general the burden of proof should rest with the entity claiming damage. In most cases this entity will be in the country where the damage occurred. The government or body with responsibility for permitting the import/use of the living modified organism should bear the burden of proving that an LMO is not responsible for the damage since this is the body that made the determination that the LMO would not cause damage.

ETHIOPIA [19 NOVEMBER 2005]
[SUBMISSION: ENGLISH]

PROTOCOL ON LIABILITY AND REDRESS FOR DAMAGE RESULTING FROM A LMO

The Parties to this Protocol have agreed as follows:

1) USE OF TERMS

For the purpose of this Protocol:

1. "Contracting Party" means a Party to this Protocol.
2. “damage” includes any harm to:

    a) environment, including

        1. loss of biological diversity or its components;
        2. impairment of soil quality;
        3. impairment of water quality;
        4. impairment of air quality.

    b) human health, including

        1. loss of life or personal injury;
        2. loss of income;
        3. costs of public health measures;
        4. impairment of health.

    c) socio-economic, especially in relation to indigenous and local communities;

        1. loss of income;
        2. loss of cultural, social and spiritual values;
        3. loss of knowledge or technologies of local communities
        4. loss of food security;
        5. loss of competitiveness;
        6. loss of or damage to property;

(d) Costs of response measures.

2) OBJECTIVE OF THE PROTOCOL

The objective of this Protocol is to provide a regime for liability as well as for adequate and prompt redress for damage resulting from a LMO, specifically focusing on transboundary movement, transit, handling or use.

3) SCOPE OF APPLICATION

This Protocol shall apply to any damage suffered in an area under the national jurisdiction of a Contracting Party or damage suffered in areas beyond the limits of national jurisdiction as a result of a LMO.

4) GENERAL MEASURES TO PREVENT DAMAGE

1. Each Contracting Party shall ensure that any person under its jurisdiction or control who has been engaged in any transboundary movement, transit, handling or use of a LMO has carried out his activity in conformity with the provisions of this Protocol.
2. The granting of an Advance Informed Agreement by the Party of import does not exonerate the Party of export or the exporter from being answerable for any damage caused by a LMO.
3. The Party of export shall ensure the availability of an effective and adequate compensation for damage caused by acts or omissions of any one of its organs or its nationals or persons under its jurisdiction or control in the transboundary movement, transit, handling or use of any LMO.

5) STRICT LIABILITY

1. In the case of LMO that has been commercialized, the holder of the permit to commercialize, and in the case of a LMO that has not been commercialized, the developer shall be liable for any damage caused by that LMO in the Party of import, in other states or areas beyond the limits of national jurisdiction.
2. The Party of export shall be liable for any damage caused by a LMO in the Party of import, in other states or areas beyond the limits of national jurisdiction if the person liable under subarticle 1 of this Article is no longer in existence.
3. The Party of export shall be liable for damage caused by its failure to act in accordance with the obligations under this Protocol or the Cartagena Protocol on Biosafety.

6) EXTENT OF REDRESS

1. Any damage shall be fully redressed or restored. Where complete restoration is not possible, the person that has caused or is liable for the damage shall provide equivalent compensation.

2. The extent of redress under subarticle 1 of this Article may be reduced if the damage occurred:

a. directly due to an act of armed conflict or a hostile activity, except for any armed conflict initiated by that Contracting Party itself;
b. directly due to a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or
c. as a result of a wrongful act of a third party, including the victim.

3. Subarticle 3 (c) of this Article shall not apply if the nature of the damage caused is different from what the Advance Informed Agreement had stated as likely to occur in cases of mishandling or accidental release.

4. Contracting Parties shall cooperate to harmonize their respective national system for assessing damage resulting from the transboundary movement, handling and use of LMOs or their products, and for rehabilitation or restoration of damaged ecosystems.

7) TIME LIMIT OF LIABILITY

1. No claim for compensation under this Protocol shall be admissible unless it is brought within 10 years from the date when the incident that caused it was first noticed, or within 10 years from the date on which the victim could reasonably be expected to have learned of the damage, taking due account of the time the damage may take to manifest itself or the time needed to correlate the damage with the incident.
2. Where the incident that caused damage consists of a series of occurrences having the same origin, the time limit established pursuant to subarticle 1 of this Article shall start from the date of the last of such occurrences. Where the incident consists of a continuous occurrence, such time limit shall start at the end of that continuous occurrence.

8) BILATERAL, MULTILATERAL OR REGIONAL AGREEMENTS

1. Whenever the provisions of this Protocol and the provisions of a bilateral, multilateral or regional agreement apply to liability and redress for damage, this Protocol shall not apply where the bilateral, multilateral or regional agreement or arrangement has been notified in accordance with Article 14 of the Cartagena Protocol, and if:

    a) the damage occurred only in an area under the national jurisdiction of any of the Parties to the said agreement or arrangement;
    b) it fully meets or provides a higher level of protection than is provided under this Protocol;
    c) the Contracting Party to such an agreement or arrangement has declared the non-application of this Protocol to damage occurring in an area under its jurisdiction; and
    d) the parties to such an agreement or arrangement have declared that this Protocol shall not be applicable.

2. Subarticle 1 of this Article shall not affect any of the rights or obligations under this Protocol of any Contracting Party which is not a party to the said bilateral, regional or multilateral agreement or arrangement.

9) INSURANCE AND OTHER FINANCIAL GUARANTEES

1. For the purpose of fulfilling its obligation under Article 4 and 5 of this Protocol, the Party of export shall ensure the establishment and maintenance of bonds or other financial guarantees or arrangements that shall be no less than the minimum limit fixed by a decision of the Conference of the Parties serving as the Meeting of the Parties to this Protocol.

2. Proof of coverage of the liability of the persons referred under Article 5 of this Protocol shall be delivered to the Competent Authorities of the Party of import, and the same shall be notified to Parties through the Biosafety Clearing-House.

3. Any claim under this Protocol may be made directly against any person providing bond or other financial guarantees.

10. FINANCIAL MECHANISMS

1. A sustainable and predictable financial mechanism for the implementation of this Protocol shall be established.

2. The financial mechanism shall be used to channel the financial resources necessary to compensate damage in cases where the entity being liable for the damage is entitled to mitigation measures pursuant to Article 4(5), or is no longer in existence, the time limit set under Article 12 has lapsed, or the financial guarantees under Article 8 (1) of this Protocol are insufficient.

3. The Conference of the Parties serving as the Meeting of the Parties to this Protocol shall keep under review the need for and possibility of improving the financial mechanism referred to under subarticle 1 of this Article.

11. A RIGHT TO RECOURSE

1. The victim or the Contracting Party whose citizen is a victim of damage or any person or group of persons is entitled to bring a claim and seek redress in:

    a) that person's or group or class of persons' interest;
    b) the interest of a person who is unable to institute such a claim; or
    c) the interest of protecting the environment or biological diversity.

2. No cost shall be awarded against any of the persons who fail in any action taken under subarticle 1 of this Article.

3. The burden of proving that an action was not instituted under subarticle 1 of this Article rests on the person claiming that the case was instituted otherwise.

12. ACCESS TO JUSTICE

1. Each Contracting Party shall ensure that the victim or any person referred to under Article 13 of this Protocol is given access to effective administrative and judicial procedure.

2. Claims for compensation under this Protocol may be brought before the competent court where either the damage or the incident occurred or the victim has his principal residence or the defendant has his principal place of business.

3. Each Contracting Party shall ensure that its courts have the necessary capacity to deal with claims for compensation instituted under this Protocol.

4. Nothing in this Protocol shall affect the rights of persons who have suffered damage, or be considered as limiting the protection or restoration of the environment, which may be provided under domestic law.

13. MUTUAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS

A judgment awarded by a competent court of a Contracting Party shall be enforced by other Contracting Parties, except where the judgment is irreconcilable with an earlier judgment validly pronounced in another Contracting Party with regard to the same incident and the same litigants.

14. IMPLEMENTATION

1. The Contracting Parties shall adopt the legislative measures necessary to implement this Protocol.
2. Each Contracting Party shall inform other Contracting Parties through the Biosafety Clearing-House of the measures it has taken to implement this Protocol.

15. CONFERENCE OF THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO THIS PROTOCOL

1. The Conference of the Parties to the Convention on Biological Diversity serving as the Meeting of the Parties to the Cartagena Protocol shall serve as the meeting of the Parties to this Protocol.

2. Parties to the Convention on Biological Diversity or the Cartagena Protocol that are not Parties to this Protocol may participate as observers in the proceedings of any meeting of the Conference of the Parties serving as the meeting of the Parties to this Protocol. When the Conference of the parties serves as the meeting of the Parties to this Protocol, decisions under this Protocol shall be taken only by those that are Parties to it.

3. When the Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol serves as the meeting of the Parties to this Protocol, any member of the bureau of the Conference of the parities representing a Party to the Convention on Biological Diversity or to the Cartagena Protocol but, at that time, not a party to this Protocol, shall be substituted by a member to be elected by and from among the Parties to this Protocol.
4. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall keep under regular review the implementation of this Protocol and shall make the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Protocol and shall.

    a) Make recommendations on any matters necessary for the implementation of this Protocol;
    b) Establish such subsidiary bodies as are deemed necessary for the implementation of this Protocol;
    c) Seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies;
    d) Establish the form and the intervals for transmitting the information to be submitted in accordance with the relevant provisions of this Protocol and consider such information as well as reports submitted by any subsidiary body;
    e) Consider and adopt amendments to this Protocol as deemed necessary for the implementation of this Protocol; and
    f) Exercise such other functions as may be required for the implementation of this Protocol.

5. The rules of procedure of the Conference of the Parties serving as the Meeting of the Parties and financial rules of the Cartagena Protocol shall be applied, *mutatis mutandis*, under this Protocol,

except as may be otherwise decided by the Conference of the Parties serving as the meeting of the Parties to this Protocol.

6. The first meeting of the Conference of the Parties serving as the meeting of the Parties to this Protocol shall be convened by ------ that is scheduled after the date of the entry into force of this Protocol. Subsequent ordinary meetings of the Conference of the Parties serving as the meeting of the Parties to this Protocol shall be held ----------, unless otherwise decided by the Conference of the Parties serving as the meeting of the Parties to this Protocol.

7. Extraordinary meetings of the Conference of the Parties serving as the meeting of the Parties to this Protocol shall be held at such other times as may be deeded necessary by the Conference of the Parties serving as the meeting of the Parties to this Protocol, or at the written request of any Party, provided that, within six months of the request being communicated to the Parties by --------, it is supported by at least one third of the Parties.

8. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not party to the Convention, may be represented as observers at meetings of the Conference of the Parties serving as the meeting of the Parties to this Protocol. Any body or agency, whether national or international, governmental or non-governmental, that is qualified in matters covered by this Protocol and that has informed the -------- of its wish to be represented at a meeting of the Parties to this Protocol as an observer, may be so admitted, unless at least one third of the Parties present object. Except as otherwise provided in this Article, the admission and Participation of observers shall be subject to the rules of procedure, as referred to under subarticle 5 of this Article.

16. SUBSIDIARY BODIES

1. Any subsidiary body established by or under the Cartagena Protocol may, upon a decision by the Conference of the Parties serving as the meeting of the Parties to this Protocol, serve this Protocol, in which case the meeting of the Parties shall specify which functions that body shall exercise.
2. Parties to the Convention on Biological Diversity or the Cartagena Protocol that are not Parties to this Protocol may participate as observers in the Proceedings of any meeting of any such subsidiary bodies.
3. When a subsidiary body of the Convention on Biological Diversity or the Cartagena Protocol serves as a subsidiary body representing a party to the Convention on Biological Diversity or the Cartagena Protocol but, at that time, not a Party to this Protocol, shall be substituted by a member elected by and from among the Parties to this Protocol.

17. SECRETARIAT

1. The Secretariat established by Article 24 of the Convention on Biological Diversity shall serve as the secretariat to this Protocol.
2. Article 24, paragraph 1, of the Convention on Biological Diversity on the functions of the Secretariat shall apply, mutatis mutandis, to this Protocol
3. To the extent that they are distinct, the costs of the secretariat services for this Protocol shall be met by the Parties hereto. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting decide on the necessary budgetary arrangements to this end.

18. RELATIONSHIP WITH THE CONVENTION ON BIOLOGICAL DIVERSITY

The provisions of the Convention on Biological Diversity relating to its protocols shall apply to this protocol except as otherwise provided in this Protocol.

19. MONITORING AND REPORTING

Each Party shall monitor the implementation of its obligations under this Protocol, and shall, at intervals to be determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol, report to the Conference of the Parties serving as the meeting of the Parties to this protocol on measures that it has taken to implement the Protocol.

20. COMPLIANCE

The conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, consider and approve procedures and institutional mechanisms to promote compliance with the provisions of this Protocol and to address cases of non-compliance. These procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate.

21. ASSESSMENT AND REVIEW

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall undertake, five years after the entry into force of this Protocol and at least every five years thereafter, an evaluation of the effectiveness of this Protocol, including an assessment of its procedures and annexes.

22. SIGNATURE

This Protocol shall be open for signature at the United Nations Office at Nairobi by States and regional economic integration organizations from ----------, and at United Nations Headquarters in New York from ----------.

23. ENTRY INTO FORCE

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

2. This Protocol shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves this Protocol or accedes thereto after its entry into force pursuant to subarticle 1 of this Article, on the ninetieth day after the date on which that State or regional economic integration organization deposits its instrument of ratification, acceptance, approval or accession, or on the date on which the Cartagena Protocol enters into force for that State or regional economic integration organization, whichever shall be the later.

3. For the purposes of subarticles 1 and 2 of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

24. RESERVATIONS

No reservations may be made to this Protocol.

25. WITHDRAWAL

1. At any time after tow years from the date on which this Protocol has entered into force for a party, that Party may withdraw form the 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.

26. AUTHENTIC TEXTS

The original of this 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 WHEROF the undersigned, being duly authorized to that effect, have signed this Protocol.
DONE at ---------- on this ---------- day of ------, -------- thousand.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

[8 NOVEMBER 2005]
[SUBMISSION: ENGLISH]

EU Submission on Liability and Redress under the Biosafety Protocol

In response to the invitation set out at paragraph 44 of the Report of the First Open Ended Ad Hoc Group of Legal and technical Experts on Liability and Redress under the Cartagena Protocol on Biosafety, the European Union's views and perspectives on the approaches, options and issues identified in the Annex to the abovementioned Report are contained in the attached submission.

The submission is based on the European Union's preferred two stage approach, as set out in option 4 of Section XII. We note that the choice of instrument and the possible elements of any liability and redress regime are closely interlinked and that changes to one element would impact on other elements. Furthermore, we recognise that negotiations are in their early stages and not all pertinent aspects and elements, while interlinked, can be discussed at once. In that light, the EU views set out below remain subject to reconsideration in light of the elaboration of other aspects and elements.

Given the complexity of the issue, we thought it would be useful to set out our views in some detail. However, this cover notes highlights and summarises some of the key elements, which are further developed in the submission, as follows:

- **Scope**

  The scope of the rules and procedures should not be limited to "shipments" of living modified organisms but should extend to transit, handling and use of such organisms, as long as these activities find their origin in a transboundary movement.

- **Damage and valuation of damage**

Damage to conservation and sustainable use of biological diversity should be the point of departure when considering the types of damage covered by the rules and procedures under Article 27 of the Biosafety Protocol. This position is without prejudice to further consideration of the other types of damage referred to in Section II.

Valuation of damage to the conservation and sustainable use of biological diversity should be based on the costs of reasonable measures to reinstate the damaged components of biological diversity through the introduction of the original components if the damage is reversible (primary restoration) or the introduction of equivalent components that could be on the same location, for the same use, or another location or other types of use if the damage is irreversible (complementary restoration).

The rules and procedures should not only provide for the recovery of costs of reinstatement measures, but should also impose obligations on the operator to actually take such re-statement measures.

- Standard of liability and channelling of liability

There is no need to formulate special rules and procedures on state responsibility under Article 27. Furthermore, the EU does not see merit in establishing primary or residual state liability in the rules and procedures under Article 27.

With respect to civil liability, we consider that strict liability should be the point of departure. Liability should be clearly channelled to one person, noting that a differentiated approach may need to be taken for different activities relating to living modified organisms. Furthermore, we support the inclusion of a range of exemptions/mitigations.

As regards the issue of limitation of liability, we believe that it would be useful to include both relative and absolute time limits in a regime. In addition, we believe that we need to further consider the limitation of the amount of liability, with a view to including such a limitation in a regime.

- **Financial Security**

The EU does not exclude exploring supplementary approaches, in exceptional cases of major accidents or disasters, to compensate for certain damages that could not be redressed otherwise.

- **Complementary Capacity Building arrangements**

An important consideration is the relationship between the respective national regimes and international rules and procedures in the field of liability and redress. Such national regimes should provide the framework for the implementation of international rules and procedures. It is through capacity building that the respective national regimes could be initiated or further developed. Consideration should therefore be given to the development of international rules and procedures that contribute to that end. The EU is open to considering the range of measures identified in Section XI, with a view to including the most suitable measures within the regime under Article 27

- **Choice of Instrument**

The EU supports a two-stage approach, that is initially to develop one or more non-legally binding instruments, evaluate the effects of the instrument or instruments and then consider developing a legally binding instrument.

EU Submission on Article 27 of the Cartagena Protocol on Biosafety: Liability and Redress

INTRODUCTION

1. The EU has developed this paper on the basis of our preferred choice of instrument, namely the 2 stage approach set out in Option 4 of Section XII. We note that the choice of instrument and the possible elements of any liability and redress regime are closely interlinked and that changes to one element would impact on other elements.

2. The negotiations on Article 27 are in their early stages and not all pertinent aspects and elements, while interlinked, can be discussed at once. In that light, the EU views set out below remain subject to reconsideration in light of the elaboration of other aspects and elements, and are without prejudice to the final and overall EU position.

I.SCOPE OF "DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LMOS"

A. Functional scope

Option 1

Damage resulting from transport of LMOs, including transit

Option 2

Damage resulting from transport, transit, handling and/or use of LMOs that finds its origin in transboundary movements of LMOs, as well as unintentional transboundary movements of LMOs

EU views on section I. A (Functional scope)

1. The scenarios that have been developed so far are indicative of cases that could be covered by the rules and procedures on liability and redress. These scenarios have guided the European Union (EU) in concluding that the scope of rules and procedures under Article 27 of the Cartagena Protocol on Biosafety (CPB) should be broad. Accordingly, the rules and procedures under Article 27 CPB should not only include 'shipments' of living modified organisms, but also 'transit', 'handling' and 'use' of such organisms, as long as these activities find their origin in a transboundary movement.[1] Therefore the EU supports Option 2. This, however, does not necessarily mean that all rules and procedures under Article 27 CPB should apply to all transboundary movements and all uses of living modified organisms.

1/ See submission of the European Union of February 2005 and Council conclusions adopted on 10 March 2005.

2. Intentional transboundary movements. In the case of an intentional transboundary movement, in principle the rules and procedures under Article 27 CPB should not only cover damage resulting from any authorised use of the LMO, but also any use in violation of such authorisation. Furthermore, the rules and procedures under Article 27 CPB should cover LMOs that are intended for direct use as food or feed or for processing, LMOs that are destined for contained use and LMOs that are intended for intentional introduction into the environment.

B. Optional components for geographical scope

(a) Damage caused in areas within the limits of national jurisdiction or control of Parties;
(b) Damage caused in areas within the limits of national jurisdiction or control of non-Parties;
(c) Damage caused in areas beyond the limits of national jurisdiction or control of States.

C. Issues for further consideration

(a) Limitation on the basis of geographical scope, i.e. protected areas or centres of origin;
(b) Limitation in time (related to section V on limitation of liability);
(c) Limitation to the authorization at the time of the import of the LMOs;
(d) Determination of the point of the import and export of the LMOs.

EU views on section I.B (Optional components for geographical scope) and I.C (Issues for further consideration)

1. To determine that damage is caused in the course of shipment or transit of a living modified organism, it is necessary to identify where the transboundary movement begins and where it ends. Article 3(k) CPB provides a definition of 'transboundary movement' that is not sufficiently precise for the determination of the scope of rules and procedures on liability and redress. With respect to the point where it begins, it is necessary to distinguish between various modes of transport. In the case of sea-borne transport, it should be the point where a living modified organism leaves the exclusive economic zone of a state or, in the absence of such a zone, the territorial sea of a state; in the case of land-borne transport, the point where a living modified organism leaves the territory of a state; in the case of airborne transport, it would depend on the route and could be the point where a living modified organism leaves the exclusive economic zone, the territorial sea, or the territory of a state. Thus, the rules and procedures under Article 27 CPB would cover damage caused in transit states, areas beyond the limits of national jurisdiction, and the state of import. With respect to the point where the transboundary movement ends, the destined use of the living modified organism should be the decisive factor.

2. To determine that damage is caused in the course of the handling or the use of a living modified organism and that such damage results from a transboundary movement, two factors would seem to be decisive: (1) that the living modified organism has been subject to a transboundary movement; and (2) the use it was destined for. It can either be destined for contained use, intentional introduction into the environment, or for direct use as food, feed, or for processing. The use for which it has been destined and authorized would be covered by the rules and procedures under Article 27 CPB. Thus, if a living modified organism is destined for contained use, a subsequent introduction into the environment should not be covered by the rules and procedures under Article 27 CPB, if this subsequent introduction into the environment has been authorized by

the authorities of the importing state after the transboundary movement. In the framework of the transboundary movement, only the risks relating to the contained use of the living modified organism have been analysed and assessed. Any alternate use would be subject to the domestic regulatory framework of the state of import, including provisions on a new risk analysis and risk assessment for such alternate use and also including national rules and procedures on liability and redress.

3. In accordance with the wording of Article 27 CPB, the scope of the rules and procedures under Article 27 CPB should not be limited to the first transboundary movement of a living modified organism.

4. Unintentional transboundary movements. These movements should be covered by the rules and procedures under Article 27 CPB. In this respect, the standard of liability will play a crucial role (see below). As for an unintentional transboundary movement, the point where it begins should be the same as for an intentional transboundary movement. The point where it ends can, however, not be determined as it cannot be related to the destined use of the living modified organism.

5. Illegal transboundary movements. These movements are carried out in contravention of domestic measures to implement the Protocol and should be covered by the rules and procedures under Article 27 CPB. In contrast, an internal misuse not resulting from an illegal transboundary movement should only be subject to national law. Accordingly, if a shipment of LMO-FFPs does not comply with national documentation provisions implementing the requirements of Article 18 CPB and, as a consequence of the incorrect documentation, the LMO-FFPs are cultivated causing a damage, this scenario would be covered by the rules and procedures under Article 27 CPB.

6. Repatriation. If a living modified organism is repatriated to the country of origin, the re-import is a new intentional transboundary movement and the rules and procedures under Article 27 CPB should apply accordingly.

II. DAMAGE

A. Optional components for the definition of damage

(a) Damage to conservation and sustainable use of biological diversity or its components;

(b) Damage to environment;

- (i) Damage to conservation and sustainable use of biological diversity or its components;
- (ii) Impairment of soil quality;
- (iii) Impairment of water quality;
- (iv) Impairment of air quality;

(c) Damage to human health;

- (i) Loss of life or personal injury;
- (ii) Loss of income;
- (iii) Public health measures;
- (iv) Impairment of health;

(d) Socio-economic damage, especially in relation to indigenous and local communities;

(i) Loss of income;
(ii) Loss of cultural, social and spiritual values;
(iii) Loss of food security;
(iv) Loss of competitiveness;

(e) Traditional damage:

(i) Loss of life or personal injury;
(ii) Loss of or damage to property;
(iii) Economic loss;

(f) Costs of response measures.

EU views on section II.A (Optional components for definition of damage)

(a) Damage to conservation and sustainable use of biological diversity

1. Having regard to the objective and purpose of the Convention and the Protocol, we believe that damage to conservation and sustainable use of biological diversity, should be the point of departure when considering the types of damage covered by the rules and procedures under Article 27 CPB. We should focus on this category.

2. Defining 'damage to conservation and sustainable use of biological diversity' requires that a distinction is made between 'damage to conservation' and 'damage to sustainable use'.

3. Damage to conservation of biological diversity. This component should be covered by the rules and procedures under Article 27 CPB. In further developing the definition of this type of damage the following elements and considerations should be taken into account:

a) the definition of biodiversity under the Convention,
b) the notion of biodiversity loss as set out in decision COP/VII/30[2]
c) costs of reinstatement measures as set out in paragraph (f) below

4. With respect to this component, we note the approach taken in the European Community *acquis*, notably the EC Directive on environmental liability. Accordingly, this component of damage should encompass damage to 'protected species and natural habitats', but not necessarily extend to all species and natural habitats. For the definition of 'protected species and habitats', national as well as international standards would seem the appropriate point of reference.

5. Damage to sustainable use of biological diversity. This component should be covered by the rules and procedures under Article 27 CPB, but predominantly features within the context of the

2/ Decision COP/VII/30 defines "biodiversity loss" as the long-term or permanent qualitative or quantitative reduction in components of biodiversity and their potential to provide goods and services, to be measured at global, regional and national levels.

discussion on traditional damage. The definition of damage to use requires the identification of the different forms of sustainable use of biodiversity, such as sustainable usage through agriculture, horticulture, forestry, stockbreeding, hunting, gathering, and recreational exploitation. Damage to these forms of usage may result in, for example, loss of income (is also traditional damage) and/or loss of traditional knowledge.

6. With respect to loss of traditional knowledge, the EU is ready to hear proposals from indigenous and local communities who, as holders of traditional knowledge, are the ones who are directly affected by possible liability and redress rules on this topic. It is also suggested to take into account the work (being) undertaken in the CBD and WIPO, and the work that still needs to be done.

7. With respect to any other forms, it requires further consideration to determine the extent to which these losses should be eligible for restoration or compensation (See also II.B). In this context it is noted that rules and procedures could, for example, be developed to address loss of income resulting from damage to crops by LMOs.

(b) Damage to environment

8. The EU does not consider it opportune to enter into a protracted discussion of this component, or how it may relate to damage to conservation and use of biological diversity – is there an overlap, is it complementary, is one a subset of the other?, etc. Instead, *as stated above*, we wish to focus the deliberations on the terminology of the Protocol, and thus on the above component of damage, i.e. 'conservation and sustainable use of biological diversity'.

(c) Damage to human health

9. Having regard to the objective of the Protocol set out in Article 1 to "contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health, and specifically focussing on transboundary movements"**,** the EU recognises there is a need to consider whether and how to include this category of damage within a regime. However, we also note that in considering the inclusion of damage to human health many of the aspects fall with traditional damage and so there is an overlap with paragraph (e).

10. In considering the issue of damage to human health we consider it useful to distinguish between:

a) sub-paragraphs (i), (ii) and (iv) (Loss of life or personal injury, loss of income and impairment of health (is also traditional damage));and
b) subparagraph (iii) (Public health measures and related costs).

11. Loss of life or personal injury, loss of income and impairment of health. This manifestation of damage could not only cover personal medical costs (costs of medical assistance and medical products), but also loss of income of the injured person and dependent relatives, and loss of quality of life and life expectancy.

12. Public health measures and related costs. In response to an incident involving a living modified organism, e.g. the accidental release of a LMO virus, public authorities may decide to take

measures to protect public health. Such measures may include medical screening of part of the population, a vaccination program or even the evacuation of part of the population from a certain area. This manifestation of damage could be addressed in the context of the costs of response measures (see paragraph (f)).

13. It might be appropriate to address this type of damage at the national level, or, alternatively, to distinguish between types of damage to human health to be covered by rules and procedures under Article 27 CPB and types of damage to human health only to be governed by national liability rules and procedures (see also paragraph (15) below, on traditional damage, and section XII on choice of instrument)

(d) Socio-economic damage

14. The incorporation of socio-economic damage as a separate component in the definition of damage would result in overlap with other components of damage. It appears that this type of damage can be dealt with in adequate manner through various manifestations of damage to sustainable use of biological diversity, and, if applicable, traditional damage, notably loss of income and loss of traditional knowledge.

(e) Traditional damage

15. Certain manifestations of traditional damage overlap with other components of damage namely damage to sustainable use of biological diversity and damage to human health. The rules and procedures under Article 27 CPB should only address traditional damage to the extent that these manifestations of damage are also covered by other components of damage, recognizing that further consideration of whether and how such damage could be incorporated in international rules, is required.

(f) Costs of response measures

16. Response measures are not a category of damage in themselves, but are relevant to all the categories of damage identified above. Response measures encompass first and foremost action(s) to minimise, contain or clean-up damage to conservation of biological diversity. This component should be covered by the rules and procedures under Article 27 CPB. Furthermore, this component could include measures that relate to the protection of public human health (see paragraph (c) above).

17. The rules and procedures under Article 27 CPB should not only provide for the recovery of the costs of response measures, but should also impose obligations on the operator to actually take such response measures.

18. The above is without prejudice to the inclusion in the regime of a primary and general obligation of affected persons to minimise the damage as far as possible and feasible.

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

(a) Costs of reasonable measures taken or to be taken to restore the damaged components of the environment/biological diversity:

(i) Introduction of original components;
(ii) Introduction of equivalent components that could be on the same location, for the same use, or on another location for other types of use;

(b) Monetary compensation to be determined on the basis of criteria to be developed.

EU views on Section II.B (Possible approaches to valuation to the conservation of biological diversity)

Valuation of damage to the conservation of biological diversity

1. The valuation of damage to the conservation of biological diversity should be based on the costs of reasonable measures to reinstate the damaged components of biological diversity through the introduction of the original components if the damage is reversible (primary restoration) or the introduction of equivalent components that could be on the same location, for the same use, or on another location for other types of use if the damage is irreversible (complementary restoration).

2. The rules and procedures under Article 27 CPB should not only provide for the recovery of the costs of reinstatement measures, but should also impose obligations on the operator to actually take such reinstatement measures.

Valuation of damage to the sustainable use of biological diversity

3. Valuation of damage to the sustainable use of biological diversity requires further consideration, in particular with regard to financial losses which only indirectly result from damage to the sustainable use of biological diversity. It will also have to be considered to what extent future developments, i.e. potential use of biological diversity, should be part of the damage to be compensated, bearing in mind the definition of sustainable use under Article 2 of the CBD.

4. In developing our thinking, we took into account the CLC/Fund Conventions of the IMO, where considerable practice and case law have been developed as regards the extent to which loss of income and/or economic loss may be compensated or how they may be calculated. The examples provided in paragraph 5 below, are based on and inspired by that IMO (CLC/Fund) practice and case law.

5. Loss of income. This component of damage consists, for example, of the economic loss that results from the decreased market value of conventional crops and organic crops that have been damaged by living modified organisms, or a reduction in revenue for a nature reserve which charges the public for admission, or a reduction in catches of commercial species or nature products directly affected by the damage, or economic loss in the tourist sector. For example, with respect to the tourist sector, a distinction can be made between economic loss that results from the reduction of sales of goods and services directly to tourists and economic loss that results from the provision of goods and services to other businesses in the tourist sector but not directly to tourists.

C. Issues for further consideration with respect to valuation of damage

(a) Determination of biodiversity loss (baseline conditions or other means to measure the loss, taking into account natural variations and human-induced variations other than those caused by LMOs);
(b) Obligations to take response and restoration measures;
(c) Special measures in case of damage to centres of origin and centres of genetic diversity to be determined;
(d) Formulation of qualitative threshold of damage to conservation and sustainable use of biological diversity;
(e) Valuation of damage to the environment, sustainable use of biological diversity, human health, socio-economic damage and traditional damage.

EU views on Section II.C (Issues for further consideration with respect to valuation of damage)

With respect to paragraph (b), we believe that the rules and procedures under Article 27 CPB should impose obligations on the operator to actually take such reinstatement measures.

III. CAUSATION

Issues for further consideration:

(a) Level of regulation (international/or domestic level);

(b) Establishment of the causal link between the damage and the activity:

(i) Test (e.g. foreseeability, direct/indirect damage, proximate cause, vulnerability clause);
(ii) Cumulative effects;
(iii) Complexity of interaction of LMOs with the receiving environment and time scales involved;

(c) Burden of proof in relation to establishing the causal link:

(i) Relaxation of burden of proof;
(ii) Reversal of burden of proof;
(iii) Burden of proof on exporter and importer.

IV. CHANELLING OF LIABILITY, ROLE OF PARTIES OF IMPORT AND EXPORT, STANDARD OF LIABILITY

A. Possible approaches to channelling of liability

a) State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol);
b) State liability (for acts that are not prohibited by international law, including cases where a State Party is in full compliance with its obligations of the Protocol).

Option 1

Primary State liability

Option 2
Residual State liability in combination with primary liability of operator

Option 3
No State liability

c) Civil liability (harmonization of rules and procedures);
d) Administrative approaches based on allocation of costs of response measures and restoration measures.

EU views on Section IV.A (Channelling)

1. The EU fully acknowledges the applicability of the concept of state responsibility for internationally wrongful acts, including breach of obligations of the Protocol. There is no need to formulate special rules and procedures on state responsibility under Article 27 CPB. The concept of state responsibility by itself, however, does not suffice in addressing the pertinent issues related to Article 27 CPB.

2. The EU does not see merit in establishing primary or residual state liability in the rules and procedures under Article 27 CPB.[3] Therefore the EU favours Option 3 – no State liability. All activities should internalise all their costs, in accordance with the polluter pays principle, and activities related to the transboundary movement of living modified organisms should not become an exception to this. Accordingly, liability for damage should primarily be vested in the person or persons responsible for the carrying out of an action related to the transboundary movement of living modified organisms that may be directly or indirectly at the origin of damage.

3. Section IV.B (issues relating to civil liability) provides further elements with respect to the concept of a civil liability regime. However, in order to provide more information on the administrative approach set out in above, we thought it would be useful to provide an example of the EC Environmental Liability Directive (ELD), which does not provide for a classic 'civil liability regime' by which an injured party can claim compensation before a court of law (art. 3.3). Instead the ELD puts forward the concept of 'environmental liability' and focuses on the prevention and remediation of environmental damage by establishing a number of obligations on operators and on public authorities.

    - The ELD is based on the "polluter pays principle": it stresses the need for the operator[4] to take all necessary preventive and remedial measures and to bear their costs (Articles 5, 6). A different allocation of the costs is possible under the ELD but only under specific circumstances (Article8).
    - "Competent (public) authorities" play a fundamental role in order to ensure that environmental damage is prevented and repaired and have specific duties under the ELD.

---

[3] See submission of the European Union of February 2005 and Council conclusions adopted on 10 March 2005.

[4]/ For the purpose of the Directive 'Operator means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity" (art 2.6)

These include the duty to establish which polluter has caused the damage (or the imminent threat of damage), to assess the significance of the damage, to determine which remedial measures should be taken (art 11). Competent authorities may also take themselves the necessary preventive or remedial measures on a subsidiary basis (Arts. 5.4 and 6.3) and then recover the costs from the operator.

B. Issues relating to civil liability

1. **Possible factors to determine the standard of liability and the identification of the liable person**

(a) Type of damage;
(b) Places where damage occurs (e.g. centres of origin and centres of genetic diversity);
(c) Degree of risk involved in a specific type of LMO as identified in risk assessment
(d) Unexpected adverse effects;
(e) Operational control of LMOs (stage of transaction involving LMOs).

2. **Standard of liability and channelling of liability**

a) Fault-based liability:

(i) Any person who is in the best position to control the risk and prevent the damage;
(ii) Any person who has operational control;
(iii) Any person who does not comply with the provisions implementing the Biosafety Protocol;
(iv) Any entity who has the responsibility to put in place the provisions for implementing the Protocol;
(v) Any person to whom intentional, reckless or negligent acts or omissions can be attributed;

(b) Strict liability:

Option 1

Liability to be channelled to one or more of the following persons, including persons acting on his or her behalf, on the basis of prior identification:

- The developer
- The producer
- The notifier
- The exporter
- The importer
- The carrier
- The supplier

Option 2

Liability to be channelled on the basis of establishment of a causal link.

3. **Exemptions to or mitigation of strict liability**

Option 1
No exemptions.

Option 2
Possible exemptions to or mitigations of strict liability

(a) Act of God/force majeure;
(b) Act of war or civil unrest;
(c) Intervention by a third party (including intentional wrongful acts or omissions of the third party);
(d) Compliance with compulsory measures imposed by a competent national authority;
(e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator;
(f) The "state-of-the-art" in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

4. **Additional tiers of liability in situation where:**

(a) The primary liable person cannot be identified;
(b) The primary liable person escape liability on the basis of a defence;
(c) A time limit has expired;
(d) A financial limit has been reached;
(e) Financial securities of the primary liable person are not sufficient to cover liabilities; and,
(f) The provision of interim relief is required.

5. **Issues for further consideration**

(a) Combination of fault liability and strict liability;
(b) Recourse ourse against third party by the person who is liable on the basis of strict liability;
(c) Joint and several liability or apportionment of liability
(d) Vicarious liability.

<u>EU views on Section IV.B (Issues relating to civil liability)</u>

1. The views on issues relating to civil liability are without prejudice to the view of the EU on the approaches mentioned in Section IV.A.

<u>B. (2): Standard of liability and channelling of liability</u>

1. The EU's deliberations on this issue has been guided by a number of considerations. We have already made reference to the polluter pays principle at paragraph 2 under Section IV.A. We also believe that any regime should be workable and effective, in particular there should be an effective remedy where damage occurs.

2. The above considerations lead the EU to consider that strict liability should be the point of departure. This position is without prejudice to the allocation of the burden of proof, in respect of

establishing the causal link, to either the applicant or defendant (see Section III(c)). Liability should be clearly channelled to one person, noting that a differentiated approach may need to be taken for different activities relating to LMOS. The liable person should be in a position to pay, either directly or be able to seek recourse against another person or entity, so that the damage may be rectified.

3. In ensuring that there is an effective remedy, we consider that there is a close link to the issue of financial securities, which will be discussed further in Section VI

4. We recognise that it may be necessary to differentiate the different kinds of activities relating to LMOs and identify the person liable accordingly.

B(3): Exemptions to or mitigation of strict liability

5. The EU recognises that most liability regimes contain a series of exemptions to and/or mitigation of strict liability and thus we favour Option 2 above.

6. By way of an example, the EU notes that in the EC Environmental Liability Directive the concepts in paragraphs (a) to (b) are classified as exemptions. The concepts in the remaining paragraphs are included in the EC Environmental Liability Directive but are not characterised as exemptions: paragraphs (c) and (d) are defences while (e) and (f) are optional defences.

B(4): Additional tiers of liability

7. The issue of additional tiers of liability is closely linked to channelling. We recognise a second tier may be necessary but that further consideration is required.

B(5): Issues for further consideration

8. With respect to (a), the EU notes that if Country sets up a regime of strict liability then any existing national laws would co-exist. These existing laws may be applicable depending on the circumstances of a case. However, we recognise that not all Countries may have such national laws in place and so we are open discussing whether and/or how a regime addresses this issue. Furthermore, we consider that in some situations a differentiated approach may be required and are open to exploring this issue further.
9. With respect to (b), we think that recourse to a third Party by the person who is liable on the basis of strict liability is important to ensure the effective operation of a regime.

V. LIMITATION OF LIABILITY

A. Issues for further consideration

(a) Limitation in time (relative time-limit and absolute time-limit);
(b) Limitation in amount including caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined, and to be considered in conjunction with section VI on mechanisms of financial security.

EU views on Section V. (Limitation of Liability)

1. With respect to (a), limitation of liability in time is a common feature of liability and redress regimes.

2. In considering an absolute time limit, i.e. the time limit within which an action may be brought, for damage caused by LMOS, it should be taken into consideration that harmful effects may only manifest themselves after a long period of time, and damages due to biological activity of LMOs, or due to the fact that the organisms themselves are living and may reproduce, may only appear after several generations from the (intentional or unintentional) release of LMO. Absolute time limits are distinct from relative time limit, i.e. to the period during which a victim should be allowed to bring a claim after identification of the damage and the person liable. We believe it would be useful to include both relative time limits and absolute time limits in a regime.

3. With respect to (b), the EU notes that there has been a mixed practice with regard to limitation of liability of amount, some regimes include such a limitation and some do not. Where a limit is include, these are in the form of a fixed limit, which would provide for total harmonisation of national financial limits, or minimum limits, which would only provide for partial harmonisation of national financial limits (a floor).

4. During our consideration of why certain liability instruments have not come into force, we note that providing for unlimited liability in amount is an issue of concern as it is difficult to find insurers willing to cover such unlimited liability. In this regard we note the paper "Status of Third Party Liability Treaties and Analysis of Difficulties Facing Their Entry into Force" (UNEP/CBD/BS/WG-L&R/1/INF/3) presented at the first Open-Ended Working Group on Liability and Redress noted the problems associated with insurability and the high or unlimited liability in amount. In particular, an issue raised with respect to the UNECE Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods By Road, Rail and Inland Navigation Vessels was that the limits of financial liability were too high thus having an impact on insurability.

5. We believe that the issue of limitation of liability is important and should be carefully considered, with a view to including this concept within the regime under Article 27 in order to ensure its effectiveness and workability.

VI.MECHANISMS OF FINANCIAL SECURITY

A. Coverage of liability

Option 1
Compulsory financial security.

Option 2
Voluntary financial security.

EU views on Section VI.A (Coverage of Liability)

1. As noted above, we think it useful to examine the paper "Status of Third Party Liability Treaties and Analysis of Difficulties Facing Their Entry into Force" (UNEP/CBD/BS/WG-L&R/1/INF/3) which was presented at the first Open-Ended Working Group on Liability and Redress. In this

paper, issues related to insurability were suggested as a reason for why the Basel Protocol on Liability and Compensation and the UNECE Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods By Road, Rail and Inland Navigation Vessels have not entered into force.

2. In the case of the Basel Protocol, the issue of lack of insurance policies, bonds and financial guarantees to cover the risks associated with transboundary movements of hazardous waste was cited. Along with the comment that many countries indicated that there is no appropriate domestic mechanism to address the financial guarantee/insurance requirements.

3. Again, the EU 's position is driven by the desire to create a regime that is effective and workable and so we favour Option 2 above. We consider it important to learn the lessons from previous attempts to deal with the complex and difficult issue of liability so that we avoid similar difficulties.

B. Supplementary collective compensation arrangements

Option 1
Fund financed by contributions from biotechnology industry to be made in advance on the basis of criteria to be determined.

Option 2
Fund financed by contributions from biotechnology industry to be made after the occurrence of the damage on the basis of criteria to be determined.

Option 3
Public fund.

Option 4
Combination of public and private funds.

EU views on Section VI.B (Supplementary collective compensation arrangements)
The EU does not exclude exploring supplementary approaches, in exceptional cases of major accidents or disasters, to compensate for certain damages that could not be redressed otherwise.[5]

C. Issues for further consideration

(a) Modes of financial security (insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees).
(b) Institutional modalities for the operation of a fund.

VII. SETTLEMENT OF CLAIMS

[5] See submission of the European Union of February 2005 and Council conclusions adopted on 10 March 2005.

A. Optional procedures

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

(i) Jurisdiction of courts or arbitral tribunals;
(ii) Determination of the applicable law;
(iii) Recognition and enforcement of judgments or arbitral awards.

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

EU views on Section VII (Settlement of Claims, paragraph (b)(iii))

By way of an example, it might be useful to share experience of the EC Regulation on jurisdiction, recognition and enforcement of judgements on civil and commercial matters, whose objectives are to determine the international jurisdiction6 of the courts in the Member States which are bound by it and to facilitate recognition and enforcement of judgments issued in another Member State by creating a simple and uniform procedure and by limiting the grounds on which recognition and enforcement of a foreign judgment can be refused.

VIII.STANDING/RIGHT TO BRING CLAIMS

A. Issues for further consideration

(a) Level of regulation (international and/or domestic level);
(b) Distinction between inter-State procedures and civil procedures;
(c) Level of involvement in the transboundary movement of living modified organisms as a requirement of standing/right to bring claims;
(d) Type of damage:

(i) Traditional damage: affected person, dependents, or any other person acting on behalf or in the interest of that person;
(ii) Costs of response measures: person or entity incurring the costs;
(iii) Damage to environment/conservation and sustainable use of biodiversity:

- Affected State
- Groups acting in vindication of common interests;
- Person or entity incurring the costs of restoration measures.

(iv) Damage to human health:

- Affected State;

6/ Under Regulation 44/2001 the competent jurisdiction is generally based on principle of the defendants' domicile, alternative grounds of jurisdiction are provided for well-defined cases* i.e. for the place where an harmful event occurred (art 5.3). Special rules for jurisdiction are also laid down for specific matters i.e. relating to insurance and consumer contracts.

- Affected person or any other person entitled to act on behalf of that person;

(v) Socio-economic damage:

- Affected State;
- Groups acting in vindication of common interests or communities.

EU views on Section VIII (Standing/Right to bring claims)

The issue of standing is usually the preserve of national legal systems. However, it might be useful to share experience of the EC Environmental Liability Directive, which we have already referred to in Section IV.A paragraph 3 above, by way of an example of a different approach. This Directive relies largely on the competent public authorities to implement its liability scheme, and does not enable legal or natural persons affected by environmental damage to sue polluters directly. However, it provides natural and legal persons, in certain prescribed circumstances, with a right to require the competent authority to act according to the obligations set under the Directive and to challenge through a review procedure the competent authority's decisions, acts or failures to act.

IX. NON-PARTIES

A. Issues for further consideration

(a) Possible special rules and procedures in the field of liability and redress in relation to LMOs imported from non-Parties (e.g. bilateral agreements requiring minimum standards).

EU views on Section IX Non-Parties

Conscious of Article 24 CPB, which requires that transboundary movements of LMOs between Parties and non-Parties shall be consistent with the Protocol and that Parties are required to encourage non-Parties to adhere to the Protocol, the EU considers that any regime should not provide an incentive to non-Parties to fail to ratify or adhere to the Protocol.

X. USE OF TERMS

A. Issues for further consideration

(a) Definition of terms for the purpose of international rules and procedures on liability and redress under Article 27 of the Biosafety Protocol, e.g. use, response measures, restoration measures and reasonable.

XI. COMPLEMENTARY CAPACITY-BUILDING MEASURES

A. Possible approaches

(a) Use of measures adopted under Article 22 of the Protocol, including use of roster of experts and the Action Plan for Building Capacities for Effective Implementation of the Protocol, e.g. exchange of best practices in the design and implementation of national rules and procedures on liability and redress, cooperation at the regional level in the use of available expertise, and training in all relevant fields;

(b) Development of specific complementary capacity building measures, based on national needs and priorities, for the design and implementation of national rules and procedures on liability and redress, e.g. establishment of baseline conditions and monitoring of changes in the baseline conditions.

EU views on Section XI (Complementary Capacity Building)

1. An important consideration is the relationship between the respective national regimes and international rules and procedures in the field of liability and redress. Such national regimes should provide the framework for the implementation of international rules and procedures. It is through capacity building that the respective national regimes could be initiated or further developed. Consideration should therefore be given to the development of international rules and procedures that contribute to that end. The EU is open to considering the range of measures identified in paragraphs (a) and (b) above, with a view to including the most suitable measures within the regime under Article 27.

XII. CHOICE OF INSTRUMENT

Option 1
One or more legally binding instruments.

- A liability Protocol to the Biosafety Protocol;
- Amendment of the Biosafety Protocol;
- Annex to the Biosafety Protocol
- A liability Protocol to the Convention on Biological Diversity.

Option 2
One or more legally binding instruments in combination with interim measures pending the development and entry into force of the instrument(s).

Option 3
One or more non-binding instruments:
(a) Guidelines;
(b) Model law or model contract clauses.

Option 4

Two-stage approach (initially to develop one or more non-binding instruments, evaluate the effects of the instrument(s), and then consider to develop one or more legally binding instruments)

Option 5

Mixed approach (combination of one or more legally binding instruments, e.g. on settlement of claims, and one or more non-binding instruments, e.g. on the establishment of liability).

Option 6
No instrument.

EU views on Section XII (Choice of instrument)

The EU thinking on the preferred choice of instrument is driven by the aspiration to design a liability and redress regime that is promptly operational and which would apply to all Parties to the Protocol. These two objectives are best accommodated by taking a two-staged approach. That is to develop a regime by way of a COPMOP decision, which would take effect, for all Parties, immediately upon adoption. This first stage would subsequently be evaluated, on the basis of which the development of a legally binding instrument could then be considered. 7 Therefore we support Option 4.

INDONESIA

[6 OCTOBER 2005]
[SUBMISSION: ENGLISH]

1. Indonesia's position with regard to definitions of terms is in line with The Cartagena Protocol on Biosafety to The Convention on Biological Diversity. It is also in line with The Government Regulation (GR) No. 21/2005 regarding Biosafety of Genetically Engineering Products, and other laws and regulations relevant to the release of new varieties of plant, new races of animal and fish before being utilized by farmers.

- International transboundary movements of LMOs is an those defined in Article 3 (k) of the Protocol.
- Unintentional transboundary movements of LMOs is as those stated in Article 17 of The Protocol.
- Illegal transboundary movements of LMOs is as those stated in Article 25 of The Protocol
- LMOs in transit through the territory of a Party is as those stated in Article 4, 6 of The Protocol.

2. According to The Indonesia's GR on Biosafety of Genetically Engineering Products, The Government (responsible for in agriculture, environment, and food) carries out inspections and control the disseminated and utilized LMOs in The State's territory. The government is legitimate to issue guidance to monitor the impacts and risk management of LMOs by considering suggestions from Biosafety Committee designated by The President.

- - Everyone who produces, imports, and/or disseminates LMOs knowing the presence of adverse effects to the environment, human, and/or animal health shall report the occurrence to the government,
- - Having received the report, the government orders the Committee to inspect and collect evidence relating to the report,
- - Should there be any evidence proven that such LMOs causing adverse effects to the environment, human and/or animal health the government has the power to revoke the decision of releasing or disseminating such LMOs,
- - The proponent shall be responsible to retrieve and take other measures to combat organisms within a specified time, including measures to restore the environment to its previous state as far as possible.

3. As to allocation of damage, we agree with that proposed by European Community, that liability for damage should primarily be vested in the person(s) responsible for the carrying out of an action related to the transboundary movement of LMOs that may be directly or indirectly at the origin of damage (polluter-pays-principle).

7/ See submission of the European Union of February 2005 and Council conclusions adopted on 10 March 2005.

It is also possible that there may be other persons responsible depending on the nature of the measures to be taken and upon their role in LMO related activities causing damage to biological diversity or human and animal health.

4. We agree with the notion of a fault based regime, so that any accusation to a person deemed liable for damage caused by LMO shall be proven. Besides, it should be some exemptions in cases of natural disasters, war, hostilities, and/or lawful reasons.

5. In regard to dispute settlement, we fully agree with the provision of Article 27 CBD.

6. We disagree with the notion of State liability and State responsibility stated in liability and redress regime, because it contradicts to our national laws and regulations concerned. The one who has the right to make claims for damage resulting from transboundary movements of LMOs is the government and or a provate organization or an association if the laws and regulations so provide.

MADAGASCAR

[1 NOVEMBER 2005]
[SUBMISSION: ENGLISH]

The 1st meeting of the Working Group held in May 2005 requested Parties, other governments, relevant international organizations and stakeholders to submit views, in particular with respect to approaches, options and issues in the annex to the report, no later than 3 months before the 2nd meeting of the Working Group.

The introduction of GMOs into the environment remains the main preoccupation of countries with high endemism such as Madagascar. Liability rules and clear framework for compensation should harm occur need to be set up at the international and national levels for that.

There is not yet special law concerning liability and redress for damage caused by GMOs but it is our views that the contribution to the development of international liability and redress regime can help Madagascar building on its own rules.

NORWAY

[16 DECEMBER 2005]
[SUBMISSION: ENGLISH]

Norwegian submission on Article 27 of the Cartagena Protocol on Biosafety: Liability and redress

This annex includes options, approaches, issues, as well as an appendix containing scenarios, for further consideration. It is not meant to be exhaustive nor does it reflect a preference for any of the options or approaches listed. The choice of instrument and possible elements for international rules and procedures on liability and redress are closely interlinked and changes to one element could impact on other elements.

I. Scope of "damage resulting from transboundary movements of LMOs"

1.1 A. Functional scope

Option 1

Damage resulting from transport of LMOs, including transit

Option 2

Damage resulting from transport, transit, handling and/or use of LMOs that finds its origin in transboundary movements of LMOs, as well as unintentional transboundary movements of LMOs

The point of departure should be the protocol provisions which refer to four types of transboundary movements of LMOs:

- **Intentional transboundary movements of LMOs namely: LMOs for intentional introduction into the environment of the Party of import; LMOs intended for direct use as food, feed or processing; and LMOs for contained use (*inter alia* Articles 4, 6, 7, 11)**
- **Unintentional transboundary movements, for example when LMOs cross national boundaries unintentionally. Such movements should include accidental releases of LMOs (Article 17)**
- **Illegal transboundary movements (Article 25)**
- **LMOs in transit through the territory of a Party (Articles 4 and 6)**

Therefore Norway supports option 2.

B. Optional components for geographical scope

(a) Damage caused in areas within the limits of national jurisdiction or control of Parties;
(b) Damage caused in areas within the limits of national jurisdiction or control of non-Parties;
(c) Damage caused in areas beyond the limits of national jurisdiction or control of States.

It will be necessary to define the beginning and the end of a transboundary movement. According to Article 3(k) transboundary movement is defined as "the movement of living modified organisms from one Party to another Party, save that for the purposes of Article 17 and 24 transboundary movements extend to movement between Parties and non-Parties." A narrow definition would seem to imply only the actual shipment or transport. A broader definition on the other hand would go beyond the actual shipment and include activities at the national level such as handling and use of LMOs. Norway is in favour of the latter approach since the potential damage from LMOs may be shown a long period after the completion of a shipment.

This would mean that the rules under the CPB Article 27 should cover damage caused in transit states, areas beyond the limits of national jurisdiction, and the state of import. With respect to the point where the transboundary movement ends, the destined use of the living modified organisms should be decisive.

C. Issues for further consideration

(a) Limitation on the basis of geographical scope, i.e. protected areas or centres of origin;
(b) Limitation in time (related to section V on limitation of liability);

(c) Limitation to the authorization at the time of the import of the LMOs;
(d) Determination of the point of the import and export of the LMOs.

II. Damage

A. Optional components for the definition of damage

(a) Damage to conservation and sustainable use of biological diversity or its components;
(b) Damage to environment;
  (i) Damage to conservation and sustainable use of biological diversity or its components;
  (ii) Impairment of soil quality;
  (iii) Impairment of water quality;
  (iv) Impairment of air quality;
(c) Damage to human health;
  (i) Loss of life or personal injury;
  (ii) Loss of income;
  (iii) Public health measures;
  (iv) Impairment of health;

(d) Socio-economic damage, especially in relation to indigenous and local communities;
  (i) Loss of income;
  (ii) Loss of cultural, social and spiritual values;
  (iii) Loss of food security;
  (iv) Loss of competitiveness;

(e) Traditional damage:
  (i) Loss of life or personal injury;
  (ii) Loss of or damage to property;
  (iii) Economic loss;

(f) Costs of response measures.

Damage resulting from transboundary movements of LMOs should as a minimum cover damage to biological diversity and human health. This is in accordance with Article 4 stating that the Protocol should apply to LMOs that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health.

The term damage in the Norwegian Gene Technology Act covers damage to persons, objects and property. Also damage in relation to sustainable use of biological diversity such as economic loss due to the presence of LMOs in agriculture or plant production may be covered under the Norwegian Gene Technology Act. This means i.e. that organic or conventional farmers could get compensated as a result of GMO contamination of their crops. The Gene Technology Act is also intended to apply to changes in the ecological environment that occur, for example when a new organism supplants an indigenous species (see preparatory work for the Gene Technology Act contained in Proposition No. 8 to the Odelsting (1992-93).

With regard to subpara. F) Costs of response measures, see answer to next question B (Possible approaches to valuation of damage to conservation of biological diversity).

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

(a) Costs of reasonable measures taken or to be taken to restore the damaged components of the environment/biological diversity:

(i) Introduction of original components;

(ii) Introduction of equivalent components that could be on the same location, for the same use, or on another location for other types of use;

(b) Monetary compensation to be determined on the basis of criteria to be developed.

According to the Norwegian Gene Technology Act, the supervisory authority may impose measures on the person who is liable for damage, for example measures to retrieve or take other measures to combat organisms within a specified time, including measures to restore the environment to its previous state, as far as possible.

The order to restore the environment to its previous state presupposes that the discharge has altered the state of the environment, for example, the occurrence of or the stock or stand of particular animals or plants, or the general state of the environment, for example adverse changes in the ecosystem. The extent of restoration would depend on the changes that have occurred in the environment, and would have to be assessed in each particular case. For example an impact or risk assessment carried out pursuant to the Law would contain a description of the environment before the deliberate release or discharge. Restoration may be carried out by replanting of cultivated or wild plants, by release of fish or by building up a stock of wild animals. In some cases, complete restoration will not be possible, or not within the foreseeable future.

The rules and procedures under the CPB Article 27 should impose obligations on the operator to actually take such reinstatement measures.

C. Issues for further consideration with respect to valuation of damage

(a) Determination of biodiversity loss (baseline conditions or other means to measure the loss, taking into account natural variations and human-induced variations other than those caused by LMOs);

(b) Obligations to take response and restoration measures;

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

(d) Formulation of qualitative threshold of damage to conservation and sustainable use of biological diversity;

(e) Valuation of damage to the environment, sustainable use of biological diversity, human health, socio-economic damage and traditional damage.

See answer to subpara B. above.

III. Causation

Issues for further consideration:

(a) Level of regulation (international/or domestic level);

(b) Establishment of the causal link between the damage and the activity:
  (i) Test (e.g. foreseeability, direct/indirect damage, proximate cause, vulnerability clause);
  (ii) Cumulative effects;
  (iii) Complexity of interaction of LMOs with the receiving environment and time scales involved;

(c) Burden of proof in relation to establishing the causal link:
  (i) Relaxation of burden of proof;
  (ii) Reversal of burden of proof;
  (iii) Burden of proof on exporter and importer.

IV. ChannelLing of liability, Role of Parties of import and export, Standard of liability

A. Possible approaches to channelling of liability

(a) State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol);

(b) State liability (for acts that are not prohibited by international law, including cases where a State Party is in full compliance with its obligations of the Protocol).

Option 1

Primary State liability

Option 2

Residual State liability in combination with primary liability of operator

Option 3

No State liability

(c) Civil liability (harmonization of rules and procedures);

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

Norway is in favour of option 3, namely civil liability. This is in line with the polluter pays principle and entails that all activities should internalise their costs, including activities related to transboundary movements of LMOs.

B. Issues relating to civil liability

1. Possible factors to determine the standard of liability and the identification of the liable person

(a) Type of damage;
(b) Places where damage occurs (e.g. centres of origin and centres of genetic diversity);
(c) Degree of risk involved in a specific type of LMO as identified in risk assessment
(d) Unexpected adverse effects;
(e) Operational control of LMOs (stage of transaction involving LMOs).

2. Standard of liability and channelling of liability

(a) Fault-based liability:
  (i) Any person who is in the best position to control the risk and prevent the damage;
  (ii) Any person who has operational control;

(iii) Any person who does not comply with the provisions implementing the Biosafety Protocol;

(iv) Any entity who has the responsibility to put in place the provisions for implementing the Protocol;

(v) Any person to whom intentional, reckless or negligent acts or omissions can be attributed;

(b) Strict liability:

Norway is in favour of strict liability, namely regardless of any fault on the person liable. This is also the principle applied in the Norwegian Gene Technology Act.

Option 1

Liability to be channelled to one or more of the following persons, including persons acting on his or her behalf, on the basis of prior identification:

- The developer
- The producer
- The notifier
- The exporter
- The importer
- The carrier
- The supplier

Norway is in favour of option 1. According to the Norwegian Gene Technology Act the duty to implement measures lies with "the person responsible for the activity", who is defined as the person who produces or uses GMOs within the meaning of the Act. "The person responsible" is a physical or legal person who operates the activity ("operator") from which the GMOs are discharged. In general the person with the duty to provide information or to obtain approval under the Act may be subject to orders under the Act. This is also in line with the polluter-pays-principle.

It is also possible that there may be other persons responsible depending on the nature of the measures to be taken. For example, a transporter would be responsible for taking immediate measures if GMOs escape by accident during transport. However, it is normally the owner or sender who has to pay for measures. Likewise several persons may be held liable for damage resulting from GMOs under the Cartagena Protocol for example the producer; the notifier; the exporter; the importer, the user, the State etc. depending upon their role in LMO related activities causing damage to biological diversity or human health.

Option 2

Liability to be channelled on the basis of establishment of a causal link.

3. Exemptions to or mitigation of strict liability

Option 1

No exemptions.

Option 2

Possible exemptions to or mitigations of strict liability

(a) Act of God/force majeure;

(b) Act of war or civil unrest;
(c) Intervention by a third party (including intentional wrongful acts or omissions of the third party);
(d) Compliance with compulsory measures imposed by a competent national authority;
(e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator;
(f) The "state-of-the-art" in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

Norway is in favour of option 2 meaning that some exemptions to or mitigations of strict liability should be allowed, in particular Acts of God/force majeure, Acts of war or hostilities etc.

4. Additional tiers of liability in situation where:
(a) The primary liable person cannot be identified;
(b) The primary liable person escape liability on the basis of a defence;
(c) A time limit has expired;
(d) A financial limit has been reached;
(e) Financial securities of the primary liable person are not sufficient to cover liabilities; and
(f) The provision of interim relief is required.

5. Issues for further consideration
(a) Combination of fault liability and strict liability;
(b) Recourse against third party by the person who is liable on the basis of strict liability;
(c) Joint and several liability or apportionment of liability
(d) Vicarious liability.

V. Limitation of liability

A. Issues for further consideration
(a) Limitation in time (relative time-limit and absolute time-limit);
(b) Limitation in amount including caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined, and to be considered in conjunction with section VI on mechanisms of financial security .

Both absolute and relative time-limits should be considered. For example Norwegian legislation (Act No. 18 of 18 May 1979 relating to Statutory Limitation) has imposed the following time limits:

A statutory limitation which comes into force when the first of the time limits consisting of 3 or 20 years expires. The relative three year time limit expires three years from the day the injured party obtained or should have obtained the necessary information about the damage and the person responsible. The claim becomes time-barred in any case at the latest 20 years after the damaging action or other grounds for liability ceased.

VI. Mechanisms of financial security

A. Coverage of liability

Option 1

Compulsory financial security.

Option 2

Voluntary financial security.

According to the Norwegian Gene Technology Act a duty to take insurance or provide financial security for liability may be imposed as <u>a condition</u> in the approval for deliberate release or contained use of LMOs. There is thus a third option to be considered, namely the possibility to pose the requirement of financial security as a condition in the approval of GMOs. This option could take into consideration the likelihood, seriousness and possible costs of damage and the possibilities to offer financial security.

B. Supplementary collective compensation arrangements

Option 1

Fund financed by contributions from biotechnology industry to be made in advance on the basis of criteria to be determined.

Option 2

Fund financed by contributions from biotechnology industry to be made after the occurrence of the damage on the basis of criteria to be determined.

Option 3

Public fund.

Option 4

Combination of public and private funds.

Norway does not oppose consideration of possible supplementary approaches to be applied under certain circumstances.

C. Issues for further consideration

(a) Modes of financial security (insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees).

(b) Institutional modalities for the operation of a fund.

VII. Settlement of claims

A. Optional procedures

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

(b) Civil procedures:

(i) Jurisdiction of courts or arbitral tribunals;

(ii) Determination of the applicable law;

(iii) Recognition and enforcement of judgments or arbitral awards.

(c) Administrative procedures;

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

Like any civil liability regime, also the Cartagena Protocol regime should contain provisions with regard to recognition and enforcement of judgments in relation to damage caused by transboundary movements of LMOs. The issue of jurisdiction has two aspects: a) determining the competent court to entertain claims for compensation and b) ensuring the recognition and enforcement of judgments arrived at by such a competent court in the territories of the contracting Parties. Examples of relevant provisions can be found in *inter alia* the Basel Protocol dealing with liability for transboundary movements of hazardous waste, which leaves to the victim the choice of which competent court to seize. Once judgment is delivered it should be recognised as binding in the respecting territories of Parties, and a victim should be able to enforce it in any of those Parties.

VIII. Standing/right to bring claims

A. Issues for further consideration

(a) Level of regulation (international and/or domestic level);

(b) Distinction between inter-State procedures and civil procedures;

(c) Level of involvement in the transboundary movement of living modified organisms as a requirement of standing/right to bring claims;

(d) Type of damage:

(i) Traditional damage: affected person, dependents, or any other person acting on behalf or in the interest of that person;

(ii) Costs of response measures: person or entity incurring the costs;

(iii) Damage to environment/conservation and sustainable use of biodiversity:

- Affected State
- Groups acting in vindication of common interests;
- Person or entity incurring the costs of restoration measures.

(iv) Damage to human health:

- Affected State;
- Affected person or any other person entitled to act on behalf of that person;

(v) Socio-economic damage:

- Affected State;
- Groups acting in vindication of common interests or communities.

IX. Non-Parties

A. Issues for further consideration

(a) Possible special rules and procedures in the field of liability and redress in relation to LMOs imported from non-Parties (e.g. bilateral agreements requiring minimum standards).

Article 24 requires that transboundary movements of LMOs between Parties and non-Parties shall be consistent with the Protocol and that Parties are required to encourage non-Parties to adhere to the Protocol. Consequently, a liability and redress regime should not provide an incentive for non-Parties not to ratify or adhere to the Protocol.

X Use of terms

A. Issues for further consideration

(a) Definition of terms for the purpose of international rules and procedures on liability and redress under Article 27 of the Biosafety Protocol, e.g. use, response measures, restoration measures and reasonable.

XI Complementary capacity-building measures

A. Possible approaches

(a) Use of measures adopted under Article 22 of the Protocol, including use of roster of experts and the Action Plan for Building Capacities for Effective Implementation of the Protocol, e.g. exchange of best practices in the design and implementation of national rules and procedures on liability and redress, cooperation at the regional level in the use of available expertise, and training in all relevant fields;

(b) Development of specific complementary capacity building measures, based on national needs and priorities, for the design and implementation of national rules and procedures on liability and redress, e.g. establishment of baseline conditions and monitoring of changes in the baseline conditions.

Norway agrees that capacity building measures are needed in countries to develop national liability and redress regimes.

XII. Choice of instrument

Option 1

One or more legally binding instruments.

- A liability Protocol to the Biosafety Protocol;
- Amendment of the Biosafety Protocol;
- Annex to the Biosafety Protocol
- A liability Protocol to the Convention on Biological Diversity.

Option 2

One or more legally binding instruments in combination with interim measures pending the development and entry into force of the instrument(s).

Option 3

One or more non-binding instruments:

(a) Guidelines;

(b) Model law or model contract clauses.

Option 4

Two-stage approach (initially to develop one or more non-binding instruments, evaluate the effects of the instrument(s), and then consider to develop one or more legally binding instruments)

Option 5

Mixed approach (combination of one or more legally binding instruments, e.g. on settlement of claims, and one or more non-binding instruments, e.g. on the establishment of liability).

Option 6

No instrument.

Norway supports option 2, namely one or more legally binding instruments in combination with interim measures pending the development and entry into force of the instruments. The interim

instrument could be in the form of guidelines/Codes of conduct to countries in order to enable them to develop national legislation.

Appendix

No comments to the appendix.

SCENARIOS

The following scenarios have been elaborated with a view to identifying the situations for which international rules and procedures referred to in Article 27 of the Protocol may be needed. They are non-exhaustive.

A. LMO plants/animals/micro-organisms – field trial or commercial growing or breeding

(a) An intentional transboundary movement takes place from Party A to Party B with the consent of Party B for the purpose of a field trial or for commercial growing or breeding of LMO plants/animals/micro-organisms in Party B, including field trials or commercial growing or breeding as part of development assistance. This is an intentional introduction into the environment of LMOs under the Protocol.

(i) The presence of an LMO causes damage (e.g.contamination of organic crops or loss of wild relatives) in Party B;

(ii) The presence of an LMO leads to an unintentional transboundary movement to Party C and causes damage in Party C.

(b) Field trial or commercial growing of LMO plants/animals/micro-organisms in Party A leads to an unintentional transboundary movement (the presence of an LMO) that causes damage in Party B;

(c) Transboundary movement from Party A to Party B is illegal and causes damage in Party B or Party C;

(d) An intentional or unintentional transboundary movement takes place from non-Party A to Party B and causes damage in Party B (or from Party B to non-Party A and causes damage in non-Party A).

B. LMO virus – laboratory test

(a) An intentional transboundary movement takes place from Party A to Party B with the consent of Party B for the purpose of testing a LMO virus in a laboratory. This is a contained use of LMOs under the Protocol;

(i) There is an accidental release during the test that causes damage in Party B;

(ii) The accidental release in Party B leads to an unintentional transboundary movement to Party C and causes damage in Party C.

(b) Laboratory test with LMO virus in Party A leads to an unintentional transboundary movement that causes damage in Party B or Party C;

(c) Transboundary movement from Party A to Party B is illegal and causes damage in Party B;

(d) An intentional or unintentional transboundary movement takes place from non-Party A to Party B and causes damage in Party B (or from Party B to non-Party A and causes damage in non-Party A).

C. Placing on the market of products containing LMOs

(a) An intentional transboundary movement takes place from Party A to Party B with the consent of Party B for the purpose of placing products on the market (e.g. LMO seeds and LMO-FFPs that enter into the food chain) or for the purpose of food aid and causes damage in Party B;

(b) Transboundary movement from Party A to Party B is illegal and causes damage in Party B;

(c) An intentional or unintentional transboundary movement takes place from non-Party A to Party B and causes damage in Party B (or from Party B to non-Party A and causes damage in non-Party A)..

D. Transport of LMOs

There is an accidental release of LMOs while they are passing through a transit Party (T) in connection with a transboundary movement from Party A to Party B for the purpose of contained use, introduction into the environment or placing on the market. Following the accidental release, there is damage in Party T. Due to an unintentional transboundary movement from Party T to Party C, there is damage in Party C.

E. Repatriation of LMOs

There is an accidental release of LMOs while they are being repatriated to the State of origin that causes damage in the Party from which it is being repatriated or in a transit Party.

F. Transboundary movement of LMOs that causes damage to global commons

SRI LANKA

[6 JANUARY 2005]
[SUBMISSION: ENGLISH]

LIABILITY AND REDRESS
Amendments and Comments

I. SCOPE OF "DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LMOSs"

A. Functional scope

Option 2 *changed to,*
Damage resulting from transport, transit, handling and/or use of LMOs that finds its origin in transboundary movements as well as unintentional transboundary movements

B. Optional components for geographical scope

(a) and (c) selected with changes in (a)

(a) Damage caused in areas within **or outside** the limits of national jurisdiction or control of Parties **and non parties**;

C. Issues for further consideration

No limitation

II. DAMAGE

A. Optional components for the definition of damage

All taken with out (a)
Traditional damage mentioned in (e) is not clear

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

(a) and (b) All taken

C. Issues for further consideration with respect to valuation of damage

(a), (b), (c), (d) and (e) all taken

III. CAUSATION

Issues for further consideration:

(a), (b) and (c) all taken
In (c) i and ii taken

IV. CHANELLING OF LIABILITY, ROLE OF PARTIES OF IMPORT AND EXPORT, STANDARD OF LIABILITY

A. Possible approaches to channelling of liability

and (b) taken
In (b) option 1 and 2 taken, 3 excluded.

B. Issues relating to civil liability

1. Possible factors to determine the standard of liability and the identification of the liable person

(a) to (e) all taken

2. Standard of liability and channelling of liability

Both fault based and strict liability taken.
In strict liability, Option 1 taken, Option 2 excluded

3. Exemptions to or mitigation of strict liability

Option 1 No exemptions taken,

Option 2 excluded

4. Additional tiers of liability in situation where:

to (f) taken

5. Issues for further consideration

to (d) taken

V. LIMITATION OF LIABILITY

A. Issues for further consideration

No limit

VI. MECHANISMS OF FINANCIAL SECURITY

A. Coverage of liability

Option 1 Compulsory financial security taken
Option 2 excluded.

B. Supplementary collective compensation arrangements

Only option 1 and 4 taken

C. Issues for further consideration

(a) and (b) taken

VII. SETTLEMENT OF CLAIMS

A. Optional procedures

(a) to (d) all taken

VIII. STANDING/RIGHT TO BRING CLAIMS

A. Issues for further consideration

to (d) all taken

IX. NON-PARTIES

A. Issues for further consideration

All taken

X USE OF TERMS

A. Issues for further consideration

All taken

XI COMPLEMENTARY CAPACITY-BUILDING MEASURES

A. Possible approaches

(a) and (b) both taken

XII. CHOICE OF INSTRUMENT

Option 4 and 5 taken

Comments

1. An International Liability fund should be established.
2. Introduction of mandated insurance.
3. Case by case basis depending on the damage caused.

UNITED STATES OF AMERICA (USA) [21 NOVEMBER 2005]
[SUBMISSION: ENGLISH]

U.S. submission in response to paragraph 44.4 of UNEP/CBD/BS/COP-MOP/2/11

Based on the understanding that issues surrounding "damage" will be the focus of the next meeting of the open-ended, ad hoc working group on liability and redress in the context of the Biosafety Protocol, this submission is limited to views on section II of the Annex to UNEP/CBD/BS/COP-MOP/2/11.

Given the scope of the Biosafety Protocol, damage must be focussed on damage to the conservation and sustainable use of biological diversity or its components. Biological diversity is defined broadly in the CBD as the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems. Other types of damage, e.g. economic damage, are outside the scope of the Protocol and hence the article 27 process.

Further "damage" is not understood merely as a change in biological diversity; rather, it would need to include at least the following elements:

? that there be a change in variability; and
? that such change be negative.

It would seem essential that there be established, verified benchmarks against which to measure any claimed damage.

There should also be a damage threshold and Parties should only address impacts on the conservation and sustainable use of biological diversity that rise above a de minimis level of significance, at least those that are "significant" or "substantial."

U.S. regime

Although the United States does not have domestic legislation specifically on damage to biological diversity, there is a regime established for determining compensation for certain forms of natural resource damage. Two key U.S. statutes are the Comprehensive, Environmental Responsibility, Compensation and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601- 9675, and the Oil Pollution Act (OPA) 33 U.S.C.A. §§ 2701-2761. 1 CERCLA covers damage from hazardous substances and the Oil Pollution Act covers damage caused by oil spills.

? Under both regimes, "natural resources" includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies and other such resources. 42 U.S.C.A. § 9601(16); 33 U.S.C.A. § 2701 (20)

? Natural resources damages can be sought by "trustees," those federal and state governments and Indian tribes appointed to protect, manage and restore natural resources. 43 C.F.R. 11.14 (rr); 15 C.F.R. 990.30

? Under CERCLA injury is defined *inter alia* as a "measurable adverse change, either long-or short-term, in the chemical or physical quality or the viability of a natural resource. . ." 43 C.F.R. 11.14(v). Under OPA regulations, it is "an observable or measurable adverse change in a natural resource or impairment of a natural resource service. . . "15 C.F.R. 990.30

? As explained below, damage is determined as deviation from a baseline. Under both regimes, "baseline" means the condition or conditions that would have existed at the assessment area had the incident under investigation not occurred. OPA regulations further specify that baseline data may be estimated using historical data, reference data, control data or data on incremental changes, alone or in combination, as appropriate. 11 C.F.R. 11.14(e); 15 C.F.R. 990.30

? The process of assessing harm to natural resources is complex.

? Under the current CERCLA rule, many natural resource damage assessments for hazardous substances occur in three stages: 1) injury determination; 2) Injury quantification and 3) damage determination. 43 C.F.R. 11.61

? The steps in injury determination include: defining the injury, determining the exposure pathways connecting the cause to the injury, and testing and sampling methods. 43 C.F.R. 11.62-64

1/ See also the Park System Resources Protection Act, 16 U.S.C.A. § 19jj *et. seq.*, which allows for recovery of damages to park system resources in National Parks. It is therefore geographically limited, but the source of damage is broader than CERCLA and OPA in that it is not limited to damage from hazardous substances or oil spills.

?During the quantification step, the trustee[2] characterizes the injury in terms of a reduction in natural resource services from a baseline state, as well as the amount of time needed to return to baseline state. In determining the physical, chemical and biological baseline conditions, the authorized official should consider, *inter alia*, conditions that would have been expected at the assessment area had the discharge not occurred, taking into account both natural processes and those that result of human activities. 43 C.F.R. 11.72

? Damages are determined first through primary restoration: the cost of restoration or replacement of the damaged resource. There is also the possibility of compensatory restoration: the value of the lost services of the resource during the time period from the injury until baseline conditions have been restored. The trustee can choose among several valuation methods for estimating compensable value, including market valuation, appraisal, factor income, travel cost, hedonic pricing, unit value, contingent valuation, or other suitable valuation methods.[3] 43 C.F.R. 11.80 *et. seq.*

? Under the current OPA rule, natural resource damage assessments for oil spills occur in three stages: 1) preassessment; 2) restoration planning phase; and 3) restoration implementation phase.

? Preassessment is determining jurisdiction to pursue restoration of natural resources under OPA. 15 C.F.R. 990.40.

? During the restoration planning phase, the trustees evaluate and quantify potential injuries (injury assessment), and use that information to determine the need and scale of restoration actions (restoration selection). 15 C.F.R. 990.50. The trustees must consider primary restoration actions which are actions to directly restore the injured natural resources and services to baseline on an accelerated time frame. 15 C.F.R. 990.53(b). The trustees must also consider compensatory restoration actions which are actions to compensate for interim loss of natural resources and services pending recovery. 15 C.F.R. 990.53(c).

? During the restoration implementation phase, the selected restoration actions are implemented. 15 C.F.R. 990.60.

2/ A "trustee" may be a designated Federal agency, a designated State agency, or a designated Indian tribe. See 43 C.F.R. 11.14 (rr)..

3/ See 43 C.F.R. 11.83 for a description of these methods. e.g. "market valuation" is a methodology used whereby if the resource is competitively sold, the diminution of value of the injured resource or lost services may be used to determine the compensable value of the injured resource. "Hedonic pricing" is a method used to determine the value of resources that aren't traded in the market through an analysis of commodities that are traded in market.

SUBMISSIONS FROM ORGANIZATIONS

GLOBAL INDUSTRY COALITION (GIC) [1 NOVEMBER 2005]
[SUBMISSION: ENGLISH]

Introduction

This paper responds to the invitation to governments and organizations to submit further views on the matter covered by Article 27 of the Protocol, in particular with respect to the approaches, options and issues identified in the annex to UNEP/CBD/BS/COP-MOP/2/11.

Choice of Instrument and Capacity Building

Because the fundamental analysis (e.g. gap analysis, examination of applicability of existing laws and mechanisms, etc.) required by Article 27 has not yet been completed in any substantive way and because the scientific and biodiversity realities do not support the development of a legally binding instrument at this time, the private sector users and developers of biotechnology support Option 6 (no instrument) of Section XII of the annex. However, the private sector supports capacity building and appropriate action at the international level, including the development of non-binding instruments such as guidelines or models as described in Option 3 and the possible approached identified in Section XI of the Annex (Complementary Capacity-Building Measures). The private sector also would consider the mixed approach contained in Option 5 to the extent that any legally binding instrument would be limited to transnational process issues not already covered by existing international instruments (e.g., UN ILC work, etc.). We note that the private sector's support for Option 3 and possibly 5 does not foreclose the possibility of undertaking further work under Article 27 if found to be necessary in light of other developments in international and national law in future years under the two-stage approach envisioned in Option 4.

Nature of Further Views and Comments

The annex upon which we are invited to comment contains elements and options for development of a liability regime under the Protocol. The private sector provides the following views and comments on key aspects of those elements and options in the spirit of facilitating a full discussion without prejudice to its position as stated above. While some elements and options have been omitted, the integrity of the numbering of the annex has been maintained to allow for ease of review.

I. SCOPE OF "DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LMOS"		
Topic	**Options, Elements or Issues**	**Comments**
A. Functional scope	Option 1 Damage resulting from transport of LMOs, including transit.	The Art. 27 process is limited to consideration of liability and redress for damage resulting from transboundary movements, which includes transit but is not limited to transport activities. Movement from the port to a point within a state is not transboundary movement since the movement is within a single state, or intrastate.
	Option 2 Damage resulting from transport, transit, handling and/or use of LMOs that finds its origin in transboundary movements of LMOs, as well as unintentional transboundary movements of LMOs	Damages resulting from or during intrastate movement related to shipping, handling, storage, packaging, labeling or use are not subject to the Article 27 process because they do not result from transboundary movement. Such damages, however, would be subject to national liability regimes.
B. Optional components for geographical scope	(b) Damage caused in areas within the limits of national jurisdiction or control of non-Parties;	There is no possible legal basis for to assert jurisdiction over acts or omissions within the territory of a non-party.
C. Issues for further consideration	(a) Limitation on the basis of geographical scope, i.e. protected areas or centres of origin;	If liability rules are negotiated under the Protocol, the regime should be limited to liability for damage to biodiversity in protected areas legally designated as such under international or national law consistent with the CBD.
	(b) Limitation in time (related to section V on limitation of liability);	This is a critical feature of any liability system and is addressed in section V below.
	(c) Limitation to the authorization at the time of the import of the LMOs;	Any act that exceeds or violates the conditions of an authorization is subject to prosecution under national biosafety and/or other administrative laws and need not be addressed in liability rules.
	(d) Determination of the point of the import and export of the LMOs.	The point of export is the place where the LMO is loaded or otherwise prepared for export. The point of import is the port or airport or border crossing where the shipment is received by the importer and customs formalities are undertaken.

II. DAMAGE		
A. Optional components for the definition of damage	(a) Damage to conservation and sustainable use of biological diversity or its components;	Article 14.2 of the CBD makes clear that under the CBD umbrella it is "damage to biological diversity" – without reference to its components -- that must be considered and addressed. The same would be true under a protocol to the CBD. The words "and its components" should be deleted. Further, the word "damage" cannot be defined to mean that change itself equals harm since change may be benign or even positive.
	(b) Damage to environment; (i) Damage to conservation and sustainable use of biological diversity or its components; (ii) Impairment of soil quality; (iii) Impairment of water quality; (iv) Impairment of air quality;	The Protocol addresses and is fundamentally concerned with the conservation and sustainable use of biological diversity. The scope of any liability rules to be developed should therefore pertain to damage to biological diversity rather than the "environment," which is beyond the Protocol's mandate.
	(c) Damage to human health; (i) Loss of life or personal injury; (ii) Loss of income; (iii) Public health measures; (iv) Impairment of health;	*"Damage" to human health as a result of transboundary movement of LMOs has never been documented and is not likely to materialize. Furthermore, according to the language of Article 7 and 15 of the Protocol, the phrase '…taking into account the risks to human health…' refers to risks to human health arising from impacts on biodiversity and is relevant only to the risk assessment and AIA processes. In addition, the traditional damages listed here, in the highly unlikely case they were ever to materialize, would be covered under existing national civil liability systems, in which a vast array of standards for personal injury and other damages have been established based on the unique nature of each legal system and differing societal structures and values. These national laws also are supplemented by existing international law (e.g., to*

		assist with enforcement of judgements, determine applicable law in cases involving actors from multiple states, etc.).
	(d) Socio-economic damage, especially in relation to indigenous and local communities; (i) Loss of income; (ii) Loss of cultural, social and spiritual values; (iii) Loss of food security; (iv) Loss of competitiveness	Socio-economic damage *per se* is not within the scope of the Protocol and therefore cannot be included in any liability rules to be developed. Furthermore, socio-economic values are subjective and unique to each country and will vary even within a state. In addition, inclusion of socio-economic damages would necessarily inhibit development of promising new technologies and solutions because it would cause the new technology to bear the cost of replacing the outdated or less desirable one. Therefore, international rules concerning "socio" damage are neither practicable nor desirable. Moreover, under Article 26 of the Protocol, socio-economic considerations are relevant only to decision making. Finally, Article 27 makes no reference whatsoever to such damages. Any liability rules to be developed should be limited to damage to biodiversity.
	(e) Traditional damage: (i) Loss of life or personal injury; (ii) Loss of or damage to property; (iii) Economic loss;	Conservation and sustainable use of biodiversity is the explicit objective and scope of the Protocol, and hence the only proper scope for assessment and restoration or restitution of damage under the Protocol. The scope of any liability rules to be developed must remain focused exclusively on damage to biodiversity because rules developed pursuant to a legal instrument cannot be broader than the scope of the instrument itself. Neither the Protocol, nor its parent instrument, the CBD, provide any legal basis for coverage of traditional damages. Traditional damages are, however, covered by nearly every national legal system.
	(f) Costs of response measures.	Remedies (including response measures, etc. and/or other awards) are determined once damage is legally established. This item does not belong in this section concerning the definition of "damage."

III. CAUSATION		
Issues for further consideration:	(b) Establishment of the causal link between the damage and the activity: (i) Test (e.g. foreseeability, direct/indirect damage, proximate cause, vulnerability clause); (ii) Cumulative effects;	There must be a clear causal link (both cause-in-fact and proximate cause) between the alleged damage and the activities of the potentially liable person related to the transboundary movement. Only through a strict requirement to demonstrate causation with respect to each defendant can the "polluter pays" principle be applied, and equity and insurability be assured. Questions about foreseeability, proximate and legal causation as well as cumulative effects and related complexities all are considered in the normal course of prosecuting and defending a claim for alleged damages and require no special treatment.
	(iii) Complexity of interaction of LMOs with the receiving environment and time scales involved.	Where the alleged damage is of a diffuse character (i.e., not attributable to a particular source/operator through a causal link), liability should not be imposed. See e.g., EU Directive 2004/35/CE, Art. 4(5).
	(c) Burden of proof in relation to establishing the causal link: (i) Relaxation of burden of proof; (ii) Reversal of burden of proof; (iii) Burden of proof on exporter and importer	The norm in legal systems all over the world is for the person alleging damage to prove all elements of the *prima facie* case. There is no reason to alter the legal norm in this case.
IV. CHANNELLING OF LIABILITY, ROLE OF PARTIES OF IMPORT AND EXPORT, STANDARD OF LIABILITY		
A. Possible approaches to channelling of	(a) State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol)	Party (State) responsibility for wrongful acts that cause damage to the conservation and sustainable use of biological diversity resulting from the transboundary movements of LMOs should be ensured.

liability	(b) State liability (for acts that are not prohibited by international law, including cases where a State Party is in full compliance with its obligations of the Protocol). *Option 1* Primary State liability *Option 2* Residual State liability in combination with primary liability of operator *Option 3* No State liability (a) Civil liability (harmonization of rules and procedures); (b) Administrative approaches based on allocation of costs of response measures and restoration measures.	Parties (States) have the legal responsibility and obligation under the Protocol for reviewing and permitting the use of LMOs within their sovereign domain and for decisions/approvals for imports on the basis of a scientific risk assessment. If the State is at fault, it is only logical that it bear the primary responsibility for any damage caused. Where both an operator and the State are found to be at fault, Option 2 would be appropriate.
	(c) Civil liability (harmonization of rules and procedures) (d) Administrative approaches based on allocation of costs of response measures and restoration measures.	As noted in the introduction, creation of a transnational process regime that helps to provide some harmonization of procedural aspects relating to liability for damage to the conservation and sustainable use of biodiversity and/or the administrative approach mentioned here may merit further exploration. These are possible outcomes, however, not elements of a liability system.

B. Issues relating to civil liability	1. Possible factors to determine the standard of liability and the identification of the liable person (a) Type of damage; (b) Places where damage occurs (e.g. centres of origin and centres of genetic diversity); (c) Degree of risk involved in a specific type of LMO as identified in risk assessment (d) Unexpected adverse effects;	The normal standard of liability around the world is fault-based liability. As discussed below, departure from this standard is justified and in practice only for ultra-hazardous activities, which is not the case with respect to transboundary movement of LMOs. To determine fault, courts must assess whether the defendant has breached his legal obligation or duty. The legal obligation or duty placed on technology developers is determined by the risk assessment process. The Parties have a legal obligation to review submissions, assess risk using sound science and make decisions regarding the permitting of LMOs. Persons or entities can only be held responsible for damage resulting from the realization of risks of which they were aware or should have been aware.
	(e) Operational control of LMOs (stage of transaction involving LMOs).	Operational control is a key factor in assigning liability: causation is the key to any liability system. No predetermination of liability linked to specific "stages" of transactions can therefore be made because where the fault lies, if at all, would depend on the facts and circumstances of a particular case.
	2. Standard of liability and channelling of liability (a) Fault-based liability: (i) Any person who is in the best position to control the risk and prevent the damage; (ii) Any person who has operational control; (iii) Any person who does not comply with the provisions implementing the Biosafety Protocol; (iv) Any entity who has the responsibility to put in place the provisions for implementing the Protocol;	Any liability rules to be developed should properly be fault-based. This is the normal approach of virtually every legal system. Under this standard legal approach, liability can only be established over persons who had operational control and are found to have been at fault (intentional, reckless or negligent acts or omissions), based on proof of causation, for actual damage to biodiversity. Fault-based liability promotes care and preventive action both prior to commercialization and in the market place.

	(v) Any person to whom intentional, reckless or negligent acts or omissions can be attributed	

	(b) Strict liability: *Option 1* Liability to be channelled to one or more of the following persons, including persons acting on his or her behalf, on the basis of prior identification: o The developer o The producer o The notifier o The exporter o The importer o The carrier o The supplier *Option 2* Liability to be channelled on the basis of establishment of a causal link.	Strict liability is reserved for activities that are ultra-hazardous and, therefore, is not appropriate in the context of liability rules relating to LMOs. There have been no cases of actual damage to biodiversity caused by LMOs to date, and it is widely recognized that activities involving LMOs are not inherently dangerous or ultra-hazardous. Furthermore, LMOs will have already undergone careful risk assessment procedures, multiple regulatory reviews, and be approved by the importing Party before their first transboundary movement. It should also be noted that strict liability inhibits development and deployment of new technologies because operators cannot avoid liability by exercising due care and rigorous product stewardship.
	3. Exemptions to or mitigation of strict liability *Option 1* No exemptions. *Option 2* Possible exemptions to or mitigations of strict liability (a) Act of God/force majeure; (b) Act of war or civil unrest (c) Intervention by a third party (including intentional wrongful acts or omissions of the third party)	The heading of this section incorrectly suggests that defenses and exemptions are relevant only to strict liability. Defenses and exemptions also are standard – and necessary – features in fault-based liability systems. The identified exemptions and defences for acts beyond the control of a potentially liable party (force majeure, intervention of third parties etc.) are well known to legal systems and must be included in any liability rules to be developed. These exemptions and defences ensure that parties are only held responsible for things within their control and are required for fundamental fairness and to avoid undesired consequences such as discouraging innovation.

	(d) Compliance with compulsory measures imposed by a competent national authority	A person who has complied with a compulsory order by a competent national authority cannot be held responsible for the consequences since he is compelled by law to comply with any such order..
	(e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator; (f) The "state-of-the-art" in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.	Most legal systems (i.e., fault-based systems) provide for defences where all reasonable action has been taken to prevent damage. These include both the "permit defence," and the "state of the art" defence. These defences render the exposure to loss more predictable and are essential components for insurability. Both defences must be included in any liability rules to be developed.
	4. Additional tiers of liability in situation where: (a) The primary liable person cannot be identified	It is a fundamental matter of law that where a potentially liable person cannot be identified, then no claim can be brought.
	(b) The primary liable person escape liability on the basis of a defence (c) A time limit has expired (d) A financial limit has been reached;	In situations (b) – (d), the law and fairness would dictate that liability simply does not attach. This is in fact the very essence of time and financial limits as well as exemptions and defences.
	(e) Financial securities of the primary liable person are not sufficient to cover liabilities	If a Party (state) is primarily liable, then there should be no issue of financial security. If a private person is primarily liable, then it is imperative that any liability rules to be developed do not prevent that person from obtaining and maintaining insurance; and secondary liability and financial assurance should accrue to the Party (state) based on the legal responsibility to permit the LMO for production or to approve or consent to transboundary movement (export or import).

	(f) The provision of interim relief is required.	Interim relief, which is of a temporary nature, is available in most, if not all, legal systems but only can be invoked in clear cases in which judicial review results in a finding of imminent and irreversible danger or threats, in this case, to biodiversity.
	5. Issues for further consideration (a) Combination of fault liability and strict liability; (b) Recourse against third party by the person who is liable on the basis of strict liability; (c) Joint and several liability or apportionment of liability (d) Vicarious liability.	As noted above, strict liability is not the appropriate standard of liability with respect to biotechnology activities and therefore a combination approach is not appropriate. Recourse against others at fault, however, is a standard legal feature and necessary for fairness in any liability rules to be developed. The doctrine of joint and several liability operates only in cases of indivisible harm. Here the usual requirements for establishing fault and causation for each potentially liable person would apply.
V. LIMITATION OF LIABILITY		
A. Issues for further consideration	(a) Limitation in time (relative time-limit and absolute time-limit);	Both relative and absolute time limits are standard features of legal systems and essential components of any liability rules to be developed. A limitations period also promotes vigilance and care by potential claimants concerning their legal rights, results in fewer evidentiary problems, provides predictability for defendants, and, overall, contributes to a well-functioning legal system. The existence of a statute of limitations also directly affects insurability. It is required in order to gain financial security from the market place, which will not provide coverage for liability for an unlimited amount of time.
	(b) Limitation in amount including caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined, and to be considered in conjunction with section VI on mechanisms of financial security.	Maximum amounts for which any person could be held liability must be part of any liability rules that may be developed. They are a standard element of liability regimes, including in international instruments. Such liability limitations (also referred to as “caps” or “ceilings”) are established in order to strike the right balance

		between holding persons responsible for harm they may cause and avoiding that legal consequences deter persons from innovation, technological advances and other pursuits that benefit the public as a whole. Establishment of a liability cap enhances legal security and thus creates a more stable environment in which researchers, developers and users can work. A cap on liability also is essential to render a system insurable, and hence, workable.
VI. MECHANISMS OF FINANCIAL SECURITY		
A. Coverage of liability	*Option 1* Compulsory financial security. *Option 2*Voluntary financial security.	Under any liability rules to be developed, care must be taken to ensure that the requirements do not prevent or inhibit insurability. The financial responsibility of private parties engaged in businesses involving products of biotechnology is a subject of national corporate law. Most jurisdictions have governing legislation under which companies may do business that includes provisions on financial responsibility. Neither option is therefore acceptable since this matter must be left to national law.
B. Supplementary collective compensation arrangements	*Option 1* Fund financed by contributions from biotechnology industry to be made in advance on the basis of criteria to be determined. *Option 2* Fund financed by contributions from biotechnology industry to be made after the occurrence of the damage on the basis of criteria to be determined. *Option 3* Public fund. *Option 4* Combination of public and private funds.	Funds have serious limitations : They address damage only after the event and do not, by themselves, create incentives to prevent damage. Prevention of damage should be the focal point of any scheme developed under the auspices of the Protocol. The principle that "prevention is better than cure" is already well acknowledged in international, regional and national laws. There are also key practical problems that would need to be overcome if funds are to be employed. The prerequisite to establishment of adequate funds is knowledge of the extent of the risk which they aim to cover. Much work still needs to be done to ensure that the risk of exposure to liability is predictable and the extent of potential damages easily quantifiable. Some solutions are discussed in other parts of this document. These difficulties have

		been discussed at length during the adoption of the EU Directive on Environmental Liability which do not impose any financial security to allow the necessary flexibility for business to operate responsibly.

C. Issues for further consideration	(a) Modes of financial security (insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees). (b) Institutional modalities for the operation of a fund.	See response to A above.
VIII. STANDING/RIGHT TO BRING CLAIMS		
A. Issues for further consideration	(a) Level of regulation (international and/or domestic level); (b) Distinction between inter-State procedures and civil procedures; (c) Level of involvement in the transboundary movement of living modified organisms as a requirement of standing/right to bring claims	In international and national law, legal standing to bring a claim is limited to those who suffer the actual damage. This limitation ensures that those who come to court have direct and important interests and avoids the courts being flooded with (and the public bearing the costs of) cases brought by those not directly impacted by the damage. Since protection of biodiversity is a public interest, the State, as a Party to the Protocol, has the responsibility to act and seek recovery if damage to the conservation and sustainable use of biodiversity occurs. Only States should be able to introduce a claim for damage under any liability rules to be developed under the Protocol. What States chose to do at the national level is up to them.
	2. Type of damage: (i) Traditional damage: affected person, dependents, or any other person acting on behalf or in the interest of that person; (ii) Costs of response measures: person or entity incurring the costs; (iii) Damage to environment/conservation and sustainable use of biodiversity: o Affected State o Groups acting in vindication of common interests;	As discussed above, only damage to biodiversity can be addressed by any liability rules to be developed under the Protocol. Because that limited scope is determined by the Protocol itself, the various types of damage listed under item (d) are irrelevant to the Article 27 process, including the determination of standing to bring a legal claim. As noted above, states must be given the exclusive right to bring lawsuits to establish liability for any damage to biodiversity as a means of allowing them to carry out their responsibilities to protect biodiversity.

	o Person or entity incurring the costs of restoration measures. (iv) Damage to human health: o Affected State; o Affected person or any other person entitled to act on behalf of that person; (v) Socio-economic damage: o Affected State; o Groups acting in vindication of common interests or communities.	
IX. NON-PARTIES		
A. Issues for further consideration	(a) Possible special rules and procedures in the field of liability and redress in relation to LMOs imported from non-Parties (e.g. bilateral agreements requiring minimum standards).	As stated above, there is no legal jurisdiction for the establishment of any liability rules for non-Parties. Similarly there is no basis to create any special rules for bilateral and other arrangements established under Article 14 of the Protocol.
X. USE OF TERMS		
A. Issues for further consideration	(a) Definition of terms for the purpose of international rules and procedures on liability and redress under Article 27 of the Biosafety Protocol, e.g. use, response measures, restoration measures and reasonable.	Defining additional terms specific to the Protocol would only be required at a latter stage if the need for liability rules is established. Other terms mentioned here will be and more properly defined under the Convention on Biological Diversity.

GREENPEACE INTERNATIONAL [20 NOVEMBER 2005]
[SUBMISSION: ENGLISH]

Following the meeting of the Open-Ended ad hoc Working Group of Legal and Technical Experts on Liability and Redress Under the Cartagena Protocol on Biosafety in Montreal on 25-27 May, the Report[1] of the meeting invited stakeholders to:

1) share experiences and submit views on criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Protocol, and
2) to submit further views on the matter covered by Article 27 of the Protocol, in particular with respect to approaches, options and issues identified in the annex to the report, preferably in the form of proposals for text.

Greenpeace International participated as an observer in the Meeting, as well as in the earlier meeting of the Technical Group of Experts on Liability and Redress, held in Montreal from 18 to 20 October 2004.

Greenpeace International presents this submission for consideration by the Parties, other Governments, relevant international organizations, and stakeholders. This submission is in two parts: a discussion of the essential elements of a liability regime, and a suggested draft protocol, where the issues discussed are specifically addressed.

The discussion of essential elements lists essential criteria for effective rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms are rules and procedures that will result in liability and redress for such damage.

These include that:

- absolute liability should govern;
- limitation should be unlimited in amount;
- there should a broad definition of recoverable damage and scope of application;
- there should be an appropriate scope of damage covered;
- all responsible parties should bear joint and several lliability;
- there should be a backup fund;
- there should be a just time limit of liability;
- just standing provisions and access to justice;
- just rules on burden of proof and causation;
- binding effective and affordable dispute resolution procedures;
- applicable law should be that of the claimant; and
- claimants should be able to bring claims in their own Courts or in a neutral tribunal.

Greenpeace has developed a draft Protocol that endeavours to put into practice these criteria. Attached is (1) Essential Elements of a Liability Protocol and (2) Draft Protocol.

---

1 Report of the Open-Ended ad hoc Working Group of Legal and Technical Experts on Liability and Redress Under the Cartagena Protocol On Biosafety, UNEP/CBD/BS/COP-MOP/2/11, 27 May 2005, at http://www.biodiv.org/doc/meetings/bs/mop-02/official/mop-02-11-en.doc. ;

Submission to Open-Ended Working Group of
Legal and Technical Experts on Liability and Redress-
20 November 2005

Contents

Introduction and General outline

An effective and comprehensive liability regime liability regime for living modified organisms (LMOs) responsive to article 27[1] of the Biosafety Protocol must contain a number of essential elements. This introduction references the appropriate provisions in the Greenpeace draft protocol in brackets after the appropriate heading.

A regime will define damage broadly to catch any kinds of damage and injury that may eventuate, require absolute liability, make necessary shifts in the burden of proof, channel liability primarily to the exporter and secondarily to the importer and distributors in the chain, require compulsory insurance or other financial security, and provide a backup fund, funded by contributions from major LMO exporters.[2]

A protocol should rely primarily on national courts for enforcement, and provides primary focus on courts where the damage occurred, to avoid requiring poorly funded farmers and other litigants to have to fund expensive litigation in the exporter's country's courts, and aim at harmonizing laws so that as far as possible applicable laws in different jurisdictions will be similar. However there should also be an

1 Article 27 reads that the Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the ongoing processes in international law on these matters, and shall endeavour to complete this process within four years.

2 This summary does not purport to be exclusive.

independent international arbitral tribunal with compulsory jurisdiction to determine disputes arising with respect to the liability protocol and over allocation of compensation from the fund.

An international regime on liability and redress should be based on the polluter pays principle, according to Principle 16 of the Rio Declaration.[3] They should provide means to prevent or remedy environmental damage and should directly and fully compensate victims.

Absolute liability should govern [Article 4]

Any exception shifts the burden onto the victim. There is considerable consensus that liability should be strict, which means that it does not require fault or negligence by the liable party. However, strict liability is not enough in the context of LMOs. Strict liability does not amount to absolute liability, and many liability regimes, such as the Basel Liability Protocol still allow defences for armed conflict, hostilities, civil war or insurrection, a natural phenomenon of exceptional, inevitable unforeseeable and irresistible character; compliance with a compulsory measure of a public authority of the State where the damage occurred; or wrongful intentional conduct of a third party, including the person who suffered the damage. However in the case of LMOs, LMO producers have the choice of not placing the product on the market, or not releasing it to the environment. They should be liable for the results of their decision to do so, even if the direct cause is a third party cause such as the above defences. To allow the defences shifts liability from the producer to the damaged farmer and/or public. In other words, if in case of a natural exceptional phenomenon, the producer would escape liability but the GE free farmer, or the public, would still suffer the damage, and receive no compensation. To allow the defences amounts to a *de facto* subsidy of the LMO industry.

If other defences are to be allowed, they should be examined closely in the context of LMOs. For instance, firstly if compliance with a compulsory measure of a public authority of the State where the damage occurred is to be a defence, then the public authority should bear the same liability that has been shifted from the excused producer. Secondly, the defence would have to be worded so as not to include compliance with a regulatory regime, so the defendant could not argue that it is excused merely by virtue of compliance. Where damage has recently been caused by extreme weather events, and where the IPCC has warned that climate change can increase the intensity of storms,[4] exclusions of grave natural disasters of an exceptional character will be of great concern.

Of course, in case of breach of the Biosafety Protocol, damage arising from fault through negligence, recklessness or intentional act or omission should carry full, unlimited liability.

Limitation should be unlimited in amount [Article 4]

There are unfortunately no limit on damage that can be caused to States, the population, other industries such as non-LMO producers or the environment. It is therefore logical that liability must be unlimited, and the polluter pays principle would bear this out. Limited liability assists industry to obtain insurance cover,

---

[3] Rio Declaration on Environment and Development 1992, 31 ILM 874 (1992), at http://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/doc. Principle 16 of the Rio Declaration provides that "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment." This was reiterated in the 2002 Plan of Implementation of the World Summit on Sustainable Development, at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf, §15(b) and 19(b).

[4] See IPCC, Third Assessment Report, *Impacts, Adaptation and Vulnerability*, at http://www.grida.no/climate/ipcc_tar/wg2/468.htm, para. 12.1.5.3.

sets relatively low limits, making that insurance cover cheaper. Some in industry will argue that the insurance market is unable or unwilling to insure unlimited liability, but States and others may question why they or the environment at large should be subjected to risks which exceed the capacity of the insurance market.

In fact LMO damage can, unlike damage caused by oil or hazardous waste, be multiplying and continuous. The Basel Liability Protocol, for instance, sets limitations on liability for strict liability but no limits for fault based liability. As with absolute liability defences, limitations on liability amount to a subsidy to the producer, as well as to involuntary assumption of risk by LMO-free farmers, individuals and others, or socialisation of risk, or both.

The pragmatic argument that limits allow producers to find insurance more easily does not bear scrutiny, as if producers will not accept the full consequences of their actions, then their actions should not be encouraged by a liability regime to take place. Secondly, a well-structured regime may provide for set limits of insurance or other financial security that will enable insurance to be provided to that surety limit.

There should a broad definition of recoverable damage [Article 2(4)] and scope of application [Article 3]

It is very important that the definition of damage is as broad, and clear, as possible. Many jurisdictions do not allow for recovery of 'pure economic loss', or loss which is not consequential on physical damage. An accident or incident resulting in market loss caused by perception of contamination, for instance, which may result in markets being closed due to no fault of the producer, is no less real to those suffering the loss if there is no actual contamination that can be proven. The Protocol must cover property damage, economic damage, damage to biodiversity, preventive measures, the cost of reinstatement and reinstatement or remediation of an impaired environment.

Damages should include damages to the marine environment in areas beyond national jurisdiction and damages resulting from perceptions of risk even if damages or health effects are not measurable. Restricting the definition of damages to damages that can be claimed in the exporter's jurisdiction is indefensible.

Broad Scope of Damage Covered and Joint and Several liability: All responsible parties should bear liability [Article 4(4, 7, 8)]

The mandate for the negotiation of the Biosafety Protocol defined its scope as relating to the safe transfer, handling and use of LMOs and, as noted by the Institute for Agriculture and Trade Policy, "the fact that it is to focus *specifically* on transboundary movements does not necessarily imply that the Protocol must necessarily confine itself *exclusively* to transboundary movements as narrowly defined."[5]

Channeling focuses liability on one party who can then insure, but it prejudices the victim as it limits the parties against whom they may claim.

Liability should be borne by parties involved, who should bear joint and several liability.

LMO producers may try to limit liability by incorporating shell entities outside the parent country. This is one reason the exporter should not be excused once the property in the LMO has passed to the importer.

5/ Institute for Agriculture and Trade Policy, "Developing a liability and redress regime under the Cartagena Protocol on Biodiversity", 57.

In the case of LMOs, problems may not be found or be apparent until well after transport. It is thus not necessarily a situation analogous to hazardous waste, where the damage from a spill is likely to be apparent when it takes place.
It is essential that damage stemming from transboundary movements of LMOs is covered, whether it occurs at the transit, handling or use stage. All such damage stems from the transboundary movement. The scope should also cover damage to areas beyond national jurisdiction such as the high seas.

Liability should be channeled to exporters, importers, and distributors, which should all bear joint and several liability. Liability does not end with the import of the LMO in the suggested protocol. The damage results from the movement as it would not have taken place without the movement. The decision of the producer to ship the LMO results in the damage, even if it is only manifested once imported and planted, for instance. The Cartagena Protocol speaks in article 7 in terms of 'intentional introduction into the environment'. Article 17 in addressing unintentional transboundary movements speaks in terms a LMO that is likely to have significant adverse effects on the conservation and sustainable use of biological diversity. This definition has direct reference to the end results of the movement, rather than the movement itself.

Importance of a Backup Fund [Part IV: Article 19 ff]

There are a number of reasons that compensation for damage from contamination or some other occurrence may not be forthcoming. If a liable party cannot or does not pay, or if the liability regime fails for some other reason, compensation must still be paid, and/or the reparation for damage to the environment made. Sometimes, for instance, even if a party is found liable, the company is insufficiently capitalized and cannot or will not pay. A multinational enterprise may set up a shell company so that the local company has limited liability with few resources, for instance. Secondly, a company may claim an applicable exemption, so escapes liability. However in such a case, the victim is still out of pocket. Thirdly, damage may be caused to the environment, but not necessarily to any private interest. In short, a properly structured and well-capitalized fund can ensure compensation and remediation regardless of fault, exceptions or the capitalization of defendants.

For all these reasons, a fund is essential, to ensure that where a liable party is insolvent or for some other reason does not pay, that damage is not left uncompensated or unremedied. A fund would also cover major disasters or accidents or situations where no party is found liable for any reason. Such a fund has a precedent for oil pollution with the Oil Pollution Fund.6

The polluter pays principle must be implemented, so that producers of LMOs pay into the fund. A protocol could assess funds from States according to the amounts of LMOs exported. The Oil Pollution Fund is funded according to the amount of oil received by each State.

Just time limit of liability [Article 14]

Some damage may be latent and may take time to develop or manifest itself, so it is essential that claims can be brought when the damage is found, as well as when it is caused, and that there is a reasonable period to bring a claim after the damage is found or caused. It is important that the time should run from the time it becomes known or reasonably should have become known by the claimant.

A ten-year period following this event is suggested.

6/ The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.

Just standing and access to justice [Article 9]

Damage may be caused to the environment and society without necessarily damaging private property interests as such. Also, damage may be caused to areas such as the high seas. So groups acting in the general interest, for groups such as farmer or consumer interests and for the environment, must have standing to sue. Other barriers to justice, such as, security for costs, liability for costs of the winning party and lack of legal aid must not prevent access to justice.

The instrument should therefore have broad provisions on standing. Groups acting in the general interest and to protect the environment should have standing, as should groups representing small farmers and communities. Also, the wider issue of access to justice is not limited to narrow question of standing, where legal costs can be a vital consideration. This applies to small organic farmers as well as organisations. Some legal systems can require security of costs, for instance, which can be a barrier. Many other legal systems dissuade claims by having costs borne by the losing party, and others provide for legal assistance to bring environmental claims. Standing should not only granted to those affected by the damage but by those acting in the general interest, and groups should have the right to protect environmental and social interests, which may be wider than direct economic interest.

Damage may be caused to the environment and society without necessarily damaging private economic interests as such. This includes so-called 'rumour damage' which may be caused by an incident which does not result in contamination, but which still causes considerable economic loss due to lost market confidence directly attributable to the incident.

In addition, while capacity building to develop national regimes, and harmonization of laws, are both important, developing States must have the capacity and resources to lodge and pursue claims. Legal aid from a Fund could be part of a solution, but an independent standing tribunal is essential. Claimants should not be forced to participate in the legal systems of exporting states to have claims resolved.

Just rules on burden of proof and causation [Article 9(2)]

Rules for liability for dangerous activities in place with other regimes frequently require strict liability and shift the burden of proof. In the absence of a regime, they allow unlimited liability, and allow plaintiffs to claim against multiple defendants.

Proof of damage from LMOs and issues of causation can put an unfair or even insurmountable burden on victims. Slow moving negative impact, in addition, may be difficult to trace and to attribute. The relevance and importance of the precautionary principle is also important, in the context of the shifting the burden of proof of damage to those introducing LMOs, and in the context of proving causation. The burden of proof should shift to the exporter, importer and distributor of the gene, once any release is found including that gene or any damage occurs directly or indirectly attributable to the gene or to its development or release.

Dispute Resolution Procedures [Part V; Article 34 ff]

The dispute resolution procedure section is modeled on the Law of the Sea Convention. A new tribunal, the International Tribunal for the Protection of Biodiversity, would usefully be created. As a suggestion, the Tribunal for the Law of the Sea, in Hamburg, could either be used as a model or even used itself: perhaps a joint accommodation would be reached so that the Secretariat and facilities are shared.

Choice of Instrument

A number of options have been proposed, including a liability Protocol to the Biosafety Protocol, amendment of the Biosafety Protocol, and annex to the Biosafety Protocol, and a liability Protocol to the Convention on Biological Diversity. Certainly it is important to choose an instrument that will achieve wide

ratification and implementation. However it is also important to choose a strong and effective instrument that will accomplish the required task. A liability protocol to the Biosafety Protocol seems on balance to be the most appropriate instrument, since it would specifically address liability under the Biosafety Protocol and since that would be consistent with the approach adopted with other areas such as the Basel liability protocol.

Jurisdiction and Applicable Law: Applicable law should be that of the claimant [Article 8]

In general terms, jurisdiction and applicable law should be that of the place of damage, provided that jurisdiction can be obtained over those that are liable. One consequence of this is that decisions would be likely to follow that if multiple cases are brought in different countries, primary jurisdiction will be found at the place where the damage was suffered. This decision may be made at the expense of obtaining greater damages in the courts of an exporter, but overall it is preferable to ensure justice is obtained for the most cases possible at a reasonable cost.

As with jurisdiction, applicable law should normally be that of the place of damage, provided that jurisdiction can be obtained over those that are liable.

English courts, for instance, are likely to apply the *lex loci delicti*[7], although that may be displaced by significant factors linking the tort or delict to another country.[8] Even with an accident or incident on the high seas, the English courts are likely to apply English law to a UK flagged vessel.[9] Similarly, French[10] and German[11] courts are likely to apply the *lex loci delicti*, as are Chinese,[12] Indian,[13] and Russian courts.[14]

The Lugano Convention[15] provides for jurisdiction where the damage was suffered, where the dangerous activity was conducted, or where the defendant has his habitual residence.

7/ See the Private International Law (Miscellaneous Provisions) Act 1995, section 11, at http://www.opsi.gov.uk/acts/acts1995/Ukpga_19950042_en_1.htm, and Dicey and Morris, *The Conflict of Laws*, Vol. 2 (12th ed., 1993), 257.

8 Private International Law (Miscellaneous Provisions) Act 1995, section 12.

9 *The Esso Malaysia* [1975] QB 198. See Stuart Dutson, "The Conflict of Laws and Statutes: The International Operational of Legislation Dealing With Matters of Civil Law in the United Kingdom and Australia," 60 Modern Law Review (1997) 668, available at http://www.blackwell-synergy.com/doi/abs/10.1111/1468-2230.00107?cookieSet=1.

10 See Ulrich Magnus, "Intercontinental Nuclear Transport from the Private International Law Perspective," 1999, 275, citing Cass. 25 May 1948 Rev. Crit. 1949.

11 See Magnus, note 10, page 275, citing Bundesgerichtshof BGHZ 57, 265 and BGHZ 119, 139.

12 General Principles of Civil Law, §146(1), at http://en.chinacourt.org/public/detail.php?id=2696. Article 146 provides that the law of the place where an infringing act is committed shall apply in handling compensation claims for any damage caused by the act. If both parties are citizens of the same country or have established domicile in another country, the law of their own country or the country of domicile may be applied.

An act committed outside the People's Republic of China shall not be treated as an infringing act if under the law of the People's Republic of China it is not considered an infringing act. See also Magnus, note 10, 280.

13 See Magnus, note 10, 280, citing Paras Diwan, *Private International Law* (3rd ed.), 552ss, 570.

14 See Magnus, note 10, 281, citing Article 167 of the Basic Principles of Civil Legislation of the Russian Union of 31 May 1991.

15 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, 21 June 1993, not in force, 32 I.L.M. 1228-33 (1993), article 19.

Claimants should be able to bring claims in their own Courts or in a neutral tribunal [Articles 8, 21]

Legal regimes that require claims be brought in the exporting state place impecunious claimants at an immense disadvantage. Victims need access to a tribunal that would be neutral and not linked economically to the industry causing the damage, and which is applying law and procedure independent of the State of that industry. Implementation of the polluter pays principle and the duty to avoid damage to areas beyond the limits of national jurisdiction[16] both require access to justice administered impartially by States which do not have an economic interest to protect.

If multiple cases are brought in different countries, *forum non conveniens* arguments in common law countries may well result in primary jurisdiction being found at the place where the damage was suffered.[17] In civil law countries, jurisdiction is likely to stay where the case was first filed.[18]

Overall it is in the interests of States suffering damage to ensure justice is obtained for the most cases possible at a reasonable cost. Victims should not need to go to the Courts of the exporter causing the damage for compensation: they should be entitled to have resort to their national Courts for protection.

---

16 Principle 21 of the Stockholm Declaration provides for responsibility to ensure that activities do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction. Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14, 7, 11 I.L.M. 1416, 1420 (1972) 1416, 1420. *See generally* Louis Sohn, *The Stockholm Declaration on the Human Environment*, 15 Harv. J. Int'l. L.423 (1973), and Michael Akehurst, *International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law*, N.Y.J Int'l. L. 3 (1985). See also Principle 2 of the 1992 Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF.151/5/Rev.1(1992), 31 I.L.M. 874 (1992), and *Restatement (Third) of Foreign Relations Law*, Section 601 (1987). Philippe Sands in *Principles of International Environmental Law I* at 186 (1995) concludes that taken together Principle 21 and Principle 2 "establish the basic obligation underlying environmental law and the source of its further elaboration in rules of greater specificity." For consequences for States of the breach of obligations, see the International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (18 January 2002). At http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm. See Article 3 of the Convention on Biological Diversity *signed* at Rio de Janeiro on 5 June 1992, *entered into force* 29 December 1993, 31 ILM (1992). Text at http://www.biodiv.org/doc/legal/cbd-en.pdf.

17 In England, the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 A.C.460 held that the defendant must show that there is another alternative forum, available and more appropriate than the English forum, where the case will be more suitably tried in the interest of parties and of the ends of justice. If this is shown, the court will grant a stay, unless the plaintiff can show that, even though factors connect the case with the alternative forum, special circumstances exist to show that substantial justice cannot be obtained there.

However, see the ECJ ruling in *Andrew Owusu v NB Jackson*, Case C-281/02 holding that that the *forum non conveniens* doctrine was incompatible with the United Kingdom's obligations under the Brussels Convention. See Ronald A. Brand, "Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice," 2005 University of Pittsburgh School of Law Working Paper Series Paper 25, at http://law.bepress.com/cgi/viewcontent.cgi?article=1025&context=pittlwps.

In the United States, under *Piper Aircraft Co. v. Reyno*, 454 US 250 (1981), the courts see whether an adequate alternative forum exists and is available, and then weigh public and private interest factors, such as the interests of the parties, such as access to evidence, judicial comity and the interests of the forum State.

18 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968, at http://www.jus.uio.no/lm/brussels.jurisdiction.and.enforcement.of.judgments.in.civil.and.commercial.matters.convention.1968/doc.html, article 21 on lis pendens and EC Council Regulation No 44/2001, Regulation 27 of which requires the court other than the first seized court to stay its proceedings until the jurisdiction of the first Court is established.

This is even more so when reinstatement of an impaired environment[19] or preventive measures are claimed.

By way of analogy, the HNS Convention allows for jurisdiction in any State Party including for damage caused within an EEZ,[20] and the Oil Pollution Liability Convention allows for exclusive jurisdiction in a country suffering damage.[21]

Importance of an Interim Regime

Any regime will take time to develop and implement**.** Therefore, an interim regime is essential, since contamination and other damage is occurring right now. At the same time, a legally binding instrument must be developed and implemented as soon as possible, and in any case within four years.

The interim liability regime could include an interim compensation fund raised by exporters and producers and managed by the Secretariat. Contributions to the fund could be levied based on the monetary value of exports of LMOs. Should exporters be located in a country that has not ratified the Protocol, the importing country could levy contributions to the compensation fund. Importing countries may also refuse any imports of LMOs until a final comprehensive liability and redress regime is adopted and implemented. Such an interim liability regime should remain in place until a comprehensive liability and redress regime is agreed, ratified and implemented by the Parties.

Some Suggested Sources

Much of the language of a liability protocol can be taken from the Lugano Convention [22] and Basel Liability Protocol.[23] A basis for the Fund can be drawn from the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.

---

19 Revised Vienna Convention article 1(k). The law of the State where the damage is suffered shall determine who is entitled to take measures of reinstatement and it is the competent authorities of the State where the measures were taken whose approval is required: article 1(m) and (n).

20 The Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, London, 3 May 1996, 35 I.L.M. 1406 (1996). ('HNS Convention'), article 38 and article 3(b).

21 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, article IX, as amended by the 1992 IMO Protocol to Amend The International Convention on Civil Liability for Oil Pollution Damage 1969 ('Oil Pollution Convention').

22 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; Lugano, 21 June 1993

23 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal

Greenpeace International **Suggested Text for Protocol on Liability and Redress for Damage Resulting from Transboundary Movements of Living Modified Organisms to the Convention on Biological Diversity**	**Commentary** This text provided by way of suggestion and is subject to correction and clarification as necessary.
The Parties to this Protocol,	
Being Parties to the Convention on Biological Diversity, hereinafter referred to as "the Convention", Being Parties to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, hereinafter referred to as the "Cartagena Protocol", Mindful of their obligations under the Convention and the Cartagena Protocol, Recalling Article 27 of the Cartagena Protocol, which required the Conference of the Parties serving as the meeting of the Parties to the Protocol to, at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analyzing and taking due account of the ongoing processes in international law on these matters, and to endeavour to complete this process within four years, Recalling also article 14 of the Convention, which required the Conference of the Parties to examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter, Aware of the rapid expansion of modern biotechnology and the growing public concern over liability for any adverse effects on biological diversity, taking also into account liability for adverse effects on human health,	

Recognizing also the potential adverse effects which may be caused by modern biotechnology to centres of origin and centres of genetic diversity, Taking into account the vulnerability of many countries, particularly developing countries, to risks associated with living modified organisms, Desirous of ensuring adequate, equitable and prompt compensation for persons who suffer injury or damage and ensuring adequate and prompt reparation to the environment for damage caused by living modified organisms, Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development and Principle 16 of the Rio Declaration that the polluter should, in principle, bear the cost of pollution, Convinced of the need for unifying the rules applying in the various countries to the liability incurred for such damage, whilst leaving these countries free to take, on a national basis, any additional measures which they deem appropriate, Have agreed as follows:	
Part I Introduction ***Article 1.*** ***Objective*** The Objective of this Protocol is to provide for a comprehensive regime for liability and redress to ensure adequate, equitable and prompt compensation for damage and to ensure adequate and prompt reparation to the environment for damage consequent upon the transboundary movement of living modified organisms.	
Article 2. ***Use of Terms*** For the purposes of this Protocol:	

1. Terms defined in the Cartagena Protocol shall have the meaning defined in that Protocol;	
2. 'Area under national jurisdiction' shall mean the territory and exclusive economic zone under the jurisdiction of or controlled by the Contracting Party and any other areas over which the Contracting Party has sovereignty or exclusive jurisdiction according to international law.	It is important clearly to define the area of application of the Protocol. Under the Law of the Sea Convention 1982, the Coastal State has jurisdiction with regard to the protection and preservation of the marine environment (Art. 56(1)(iii).
3. 'Compensation' shall include compensation for damage, restoration and remediation and other amounts payable under this Protocol.	It must be clear that compensation includes restoration and remediation.
4. 'Damage' includes (i) loss of life or personal injury or disease, together with medical costs including costs of diagnosis and treatment and associated costs; (ii) damage to, impaired use of or loss of property; (iii.) loss of income derived from an economic interest in any use of the environment, incurred as result of impairment of the environment; (iv) the costs of measures of reinstatement or remediation of the impaired environment, where possible, measured by the costs of measures actually taken or to be undertaken; (v) the value of the impairment of the environment, where reinstatement or remediation is not possible, taking into account any impact on biodiversity and the non-economic value of the environment including value to future generations or cost of establishment of natural resources equivalent to the damaged or destroyed natural resources; and (vi.) the costs of preventive measures, including any loss or damage caused by such measures, all to the extent that the damage is caused directly or indirectly by living modified organisms during or following a transboundary movement of the living modified organisms, or in the case of preventive measures, is threatened to be so caused; and includes the damage or threatened damage resulting from the production, culturing, handling, storage, use, destruction, disposal, or release of any such living modified organism.[1]	The definition of 'damage' must be broad enough to cover any kind of damage that can be caused by LMOs. For definition of damage, reference can be made to the Lugano Convention Consistently with the polluter pays principle, damage must include reinstatement, remediation, impairment, and preventive measure, as well as damage to private property, economic losses and injury or disease.

1 Wording from Lugano Convention

2 See Lugano Convention

3 There is no definition of 'farmer' in e.g. International Treaty on Plant Genetic Resources for Food and Agriculture, at ftp://ext-ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf. The definition of farmer allows a farmer to sell 50% of the farmer's product in any year.

5. "Effect" includes (a) any direct or indirect effect, (b) any temporary or permanent effect, (c) any chronic or acute effect, (d) any past, present, or future effect; and (e) any cumulative effect which arises over time or in combination with other effects. 6. 'Environment' includes all natural resources, including (i) air, water, soil, fauna and flora, and the interaction between the same factors, (ii) ecosystems and their constituent parts, (iii) biodiversity, (iv) amenity values, (v) indigenous or cultural heritage,[2] and (vi) social, economic, aesthetic, and cultural conditions which are affected by the matters stated in paragraphs (i) to (v) of this definition. 7. ['Farmer' means[3] mean a person growing a crop or other product for the individual's use or for purposes of sale of the crop or other product grown from the living modified organism. A person shall not be considered a farmer if that person produces and sells or otherwise transfers seeds of living modified organisms or plant parts containing heritable material including living modified organisms, if such products constitute over 50% of the total product of the living modified organism sold or transferred by that person in any 365 day period.] 8. 'Impaired environment' shall include adverse effects on any organism including plants and animals, adverse effects on any associated or dependent species, adverse effects on biological diversity, changes in ecosystem structure or function, and the costs of preventive measures, including any loss or damage caused by such measures. 9. "Measures of reinstatement" means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment.[4] 10. 'Notifier' means the person who notifies the competent national authority of the Party of import prior to the intentional transboundary movement of a living modified organism that falls within the scope of Article 7, paragraph 1 of the Cartagena Protocol.	

[4] Based on art 2 of the Basel Liability Protocol and Lugano Convention

[5] Based on art 2 of the Basel Liability Protocol

[6] Based on art 2 of the Basel Liability Protocol

11. "Occurrence" means any occurrence or incident, or series of occurrences or incidents having the same origin, that causes damage or creates a serious threat of damage; and includes any act, omission, event or circumstance, foreseen or unforeseen, resulting from or following any transboundary movement of any living modified organism.5 12. "Person" includes natural and legal persons. 13. "Preventive measures" means any reasonable measures taken by any person in response to an occurrence, to prevent, minimize, or mitigate loss or damage, or to address damage or threatened damage to biodiversity, or to effect environmental clean-up.6	
Article 3. ***Scope of application*** 1. This Protocol shall apply to damage suffered in an area under the national jurisdiction of a Contracting Party and to damage suffered outside areas of national jurisdiction. 2. (a) When the State of export is a Contracting Party to this Protocol, this Protocol shall apply with respect to damage arising from an occurrence which takes place from the point where the living modified organisms are loaded on the means of transport in an area under the national jurisdiction of the State of export. (b) When the State of import, but not the State of export, is a Contracting Party to this Protocol, this Protocol shall apply with respect to damage arising from an occurrence which takes place after the time at which the importer has taken ownership, possession or control of the living modified organism.	It is essential that damage stemming from transboundary movements of LMOs is covered, whether it occurs at the transit, handling or use stage. All such damage stems from the transboundary movement. The Protocol must cover property damage, economic damage, damage to biodiversity, preventive measures, the cost of reinstatement and reinstatement or remediation of an impaired environment. The scope should also cover damage to areas beyond national jurisdiction such as the high seas.
Part II Liability ***Article 4.*** ***Absolute Liability*** 1. The exporter and notifier of any living modified organism shall be liable for all damage	Any defence such as force majeure or Act of God shifts the risk to the victim, or to society or the environment. To allow exoneration from liability in the case of force majeure or Act of God shifts

caused by the living modified organism from the time of export of the living modified organism. 2. Without prejudice to paragraph 1, the importer of the living modified organism shall be liable for all damage caused by the living modified organism from the time of import. 3. Without prejudice to paragraphs 1 and 2, should the living modified organism be re-exported from the state of import, the second and subsequent exporter and notifier of the living modified organism shall be liable for all damage caused by the living modified organism from the time of re-export of the living modified organism and the second and subsequent importer shall be liable for all damage caused by the living modified organism from the time of import. 4. Without prejudice to the preceding paragraphs, from the time of import of the living modified organism, any person intentionally having ownership or possession or otherwise exercising control over the imported living modified organism shall be liable for all damage caused by the living modified organism. Such persons shall include any distributor, carrier, and grower of the living modified organism and any person carrying out the production, culturing, handling, storage, use, destruction, disposal, or release of the living modified organism, with the exception of a farmer. 5. In the case of unintentional or illegal transboundary movement of a living modified organism, any person intentionally having ownership or possession or otherwise exercising control over the living modified organism immediately prior to or during the movement shall be liable for all damage caused by the living modified organism. 6. Any exporter, notifier and any person having ownership or possession or otherwise exercising control shall be liable for during the case of transit of living modified organisms through States other than the Party of export or Party of import. 7. All liability under this article shall be joint and several. If two or more persons are liable according to this article, the claimant shall have the right to seek full compensation for the damage from any or all of the persons liable.	liability from the producer to the damaged farmer and/or public and amounts to a de facto subsidy to the LMO industry. In other words, in case of a natural exceptional phenomenon, the producer would escape liability but the GE-free farmer, or the public, would still suffer the damage, and receive no compensation. Liability should therefore be absolute. LMO exporters and importers have the choice of undertaking the activity and should pay for damage regardless of cause. The relevance and importance of the precautionary principle is also important in the context of the shifting the burden of proof of damage to those introducing LMOs, and to proving causation. The polluter pays principle means that all persons responsible for damage must pay (joint and several liability) so if one cannot or does not pay, the others responsible must pay, to ensure compensation is paid. Liability should be channeled to all parties responsible for export, import and distribution (and related activities) of the LMO, except the farmer, as an end user of a LMO.

8. If an occurrence consists of a continuous occurrence, all persons successively exercising the control of the living modified organism immediately before or during that occurrence shall be jointly and severally liable. 9. In the case of a person liable under this article being financially unable fully to meet the compensation for damages, together with costs and interest, as provided in this Protocol, or otherwise fails to meet such compensation, the liability shall be met by the State of which the person is a national.	
Article 5. ***Fault-Based Liability*** Without prejudice to article 4., any person shall be liable for damage caused or contributed to by that person's lack of compliance with the provisions implementing the Convention or the Protocol or by that person's wrongful intentional, reckless or negligent acts or omissions.	Breach of the Convention or Protocol or fault should give rise to liability.
Article 6. ***Preventive Measures Required*** Subject to any requirement of domestic law, any person in operational control of living modified organisms at the time of an occurrence shall take all reasonable measures to mitigate damage arising therefrom.	An overarching obligation to mitigate damage is essential.
Article 7. ***Right of recourse*** 1. Any person liable under the Protocol shall be entitled to a right of recourse in accordance with the rules of procedure of the competent court: (a) against any other person also liable under the Protocol; and (b) as expressly provided for in contractual arrangements. 2. Nothing in the Protocol shall prejudice any rights of recourse to which the person liable	This article allows cross-claims and claims for contributions where multiple persons may be liable.

might be entitled pursuant to the law of the competent court.	
Article 8. ***Jurisdiction and Applicable Law*** 1. Primary jurisdiction over actions under this Protocol shall lie with the courts of the Contracting Party where the damage occurs. 2. If the damage occurs only beyond the limits of national jurisdiction, primary jurisdiction over actions under this Protocol shall lie with the courts of the State of import or the intended State of import, or, if the transboundary movement was unintended, with the courts of the State most closely connected with the damage. 3. Jurisdiction over actions under this Protocol shall also lie with the courts of the Contracting Party where the occurrence took place, where the defendant has his habitual residence or has his principal place of business.7 4. All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in this Protocol shall be governed by procedural and substantive law of that court.8 The nature, form and extent of the compensation, as well as the equitable distribution thereof, shall be governed by that law, and shall be consistent with this Protocol. 5. Each Contracting Party shall (a) ensure that its courts possess the necessary competence to entertain claims for compensation under this Protocol and (b) shall adopt the legislative measures necessary to ensure that the laws provide for compensation according to this Protocol and according to any harmonizing recommendations made by the Assembly under article 15.	This article allocates jurisdiction, firstly to where the damage occurred, and if the damage occurred e.g. in the high seas, to the State most closely connected with the damage. Jurisdiction where the defendant is resident may be necessary to ensure recovery of damages.

7 Basel Protocol art 17

8 Basel Protocol art 19

Article 9. ***Court Powers and Procedures*** 1. Courts shall have the power to order remediation and restoration as well as compensation and may order costs and interest. 2. The Court shall presume that (a) the living modified organism which was the subject of a transboundary movement caused the damage where there is a reasonable possibility that it could have done so and (b) that any damage caused by a living modified organism which was the subject of a transboundary movement is the result of its biotechnology-induced characteristics rather than any natural characteristics.9 To rebut the presumption a person must prove to the standard required by the procedural law applied pursuant to article 8 that the damage is not due to the characteristics of the living modified organism resulting from the genetic modification, or in combination with other hazardous characteristics of the living modified organism. 3. When considering evidence of the causal link between the occurrence and the damage, the court shall take due account of the increased danger of causing such damage inherent in undertaking the transboundary movement of or exercising ownership, possession or control over the living modified organism.10 4. Orders for compensation for damage shall fully compensate affected persons and shall pay the cost of preventive measures and costs of reinstatement or remediation of the environment. 5. The Court shall have the power to order interim or preliminary measures to order any person to take or abstain from any act where necessary or desirable to prevent significant damage, to mitigate or avoid further damage.	Damage may be caused to the environment and society without necessarily damaging private property interests as such. Also damage may be caused to areas such as the high seas. So groups acting in the general interest, for groups such as farmer or consumer interests and for the environment, must have standing to sue. Also, other barriers to justice, such as, security for costs, liability for costs of the winning party and lack of legal aid must not prevent access to justice. A presumption is necessary since it may be difficult or impossible to prove that damage was caused by a particular LMO. The exporter, distributor etc is in a better position to discharge a burden of proof than the victim. The other procedural measures are aimed at upholding the principle of wide access to justice and wide powers of the Court to address damage. Standing should not be restricted to legal interest.

9 Cf. Austrian law on genetic engineering. UNEP/CBD/ICCP/3/3, para. 27

10 from Lugano Convention

6. The principle of wide access to justice[11] shall be implemented. To this end, persons and groups with a concern for or interest in environmental, social or economic matters, persons and groups representing communities or business interests and local, regional and national governmental authorities, shall have standing to bring a claim under this Protocol. 7. Nothing in the Protocol shall be construed as limiting or derogating from any rights of persons who have suffered damage, or as limiting the protection or reinstatement of the environment which may be provided under domestic law.[12] 8. Financial and other barriers to justice shall not impede access to justice under this article and Contracting Parties shall take appropriate steps to remove or reduce such barriers.[13]	
Article 10. ***Lis Pendens*** 1. Where proceedings involving the same or similar cause of action and between the same or substantially the same parties are brought in the courts of another Contracting Party or Parties, any court other than the court described in paragraphs 1 and 2 of article 8. shall of its own motion stay its proceedings unless and until the court described in paragraphs 1 and 2 article 8. rules that it does not have jurisdiction under this Protocol. 2. Where the jurisdiction of the court described in paragraphs 1 and 2 is established by that court, any court other than that court shall decline jurisdiction in favour of that court. 3. When there are two or more courts described in paragraphs 1 and 2 of article 8., then any	These provisions are drawn mainly from the Lugano Convention, and are addressed at resolving scenarios where claims are brought in different countries about the same or similar matters.

11 Cf Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998.

12 from Basel Liability Protocol art 20

13 Cf Aarhus Convention article 9(5)

14 This may arise for instance with damage caused in two states or principally beyond national jurisdiction

court other than the court described in paragraphs 1 and 2 of article 8. and first seized of the case shall of its own motion stay its proceedings unless and until the court first seized of the case rules that it does not have jurisdiction under this Protocol. Where the jurisdiction of the court first seized of the case is established by that court, any court other than that court shall decline jurisdiction in favour of that court.[14]	
Article 11. ***Related Actions*** 1. Where related actions are brought in the different courts described in article 8., any court other than the court described in paragraphs 1 and 2 of article 8. shall, while the actions are pending at first instance, stay its proceedings upon the motion of a party to any of the proceedings. 2. A court other than the court described in paragraphs 1 and 2 of article 8. shall, on the application of one of the parties, decline jurisdiction if the law of that court the court described in paragraphs 1 and 2 of article 8. permits the consolidation of related actions and the court first seized has jurisdiction over both or all actions. 3. When related actions are brought in the courts of different Parties, and all courts are described in article 8., then any court other than the court first seized of the case may of its own motion stay its proceedings until the court first seized of the case rules whether it has jurisdiction under this Protocol. Where the jurisdiction of the court first seized of the case is established by that court, any court other than that court may decline jurisdiction in favour of that court. 4. For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.	These provisions are taken mainly from the Lugano Convention, and are addressed at closely connected cases that should be heard in the same proceedings.

Article 12. ***Enforcement*** 1. Judgments entered by the competent court under article 8. after trial, or by default or by consent, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory of any of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgments. 2. The foregoing provisions shall not apply if (a) a decision was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence, or (b) the judgment was obtained by fraud.15 3. If an action is brought against a Contracting Party under this Convention, such Contracting Party may not, except in respect of measures of execution, invoke any jurisdictional immunities before the court competent in accordance with this article.	These provisions broadly follow the Basel Liability Protocol provisions on the enforcement of judgments. No public policy exception should be permitted, since such an exception may interfere with fair application of this protocol.
Article 13. ***Implementation*** 1. Contracting Parties shall adopt the legislative, regulatory and administrative measures necessary to implement this Protocol. 2. In order to promote transparency, Contracting Parties shall inform the Secretariat of measures to implement thus Protocol, 3. The provisions of this Protocol shall be applied without discrimination based on nationality, domicile or residence.	This article aims to ensure broad implementation of the Protocol.

15 Broadly following Basel Liability protocol art 21

Article 14. ***Time Limitation of Liability*** 1. Claims for compensation under this Protocol shall not be admissible unless they are brought within ten years from (a) the date of the occurrence of the damage, or (b) from the date the damage becomes known or reasonably should have become known by the claimant and is known by the claimant to be attributable to the occurrence or should reasonably have been known to be so by the claimant, whichever occurs later. 2. Where the occurrence consists of a series of occurrence having the same origin, the date of occurrence under this article shall be the date of the last of such occurrence. Where the occurrence consists of continuous occurrence, such time limit shall run from the end of that continuous occurrence.	It may take time to discover damage. The limitation period should run from when the damage is found, not when it was caused, and should be sufficiently long to allow a reasonable time for a claim to be brought (see article 22.). The time must run from the date of the occurrence of the damage or the date of discovery of the occurrence of the damage, since the damage may take time to manifest itself.
Part IIII institutional ***Article 15.*** ***Conference of the Parties serving as the Meeting of the Parties to this Protocol*** 1. The Conference of the Parties shall serve as the meeting of the Parties to this Protocol. 2. The provisions of article 29 of the Cartagena Protocol shall apply, mutatis mutandis, to this Protocol. 3. The Conference shall, *inter alia,* (a) Consider and adopt, as required, amendments to this Protocol and its annexes, as well as any additional annexes to this Protocol, that are deemed necessary for the implementation of this Protocol; (b) Pass and amend regulations with respect to this Protocol; (c) Make recommendations for Contracting Parties to achieve harmonization of national laws to facilitate the achievement of the objectives of this Protocol; (d) Exercise such other functions as may be required for the implementation of this	These articles establish institutional arrangements.

Protocol. 4. 5. The rules of procedure of the Conference of the Parties and financial rules of the Convention shall be applied, mutatis mutandis, under this Protocol, except as may be otherwise decided by consensus by the Conference of the Parties serving as the meeting of the Parties to this Protocol.	
Article 16. ***Secretariat*** 1. The Secretariat established by article 24 of the Convention shall serve as the secretariat to this Protocol. 2. Article 24, paragraph 1, of the Convention on the functions of the Secretariat shall apply, mutatis mutandis, to this Protocol. 3. To the extent that they are distinct, the costs of the secretariat services for this Protocol shall be met by the Parties hereto. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, decide on the necessary budgetary arrangements to this end.	
Article 17. ***Biosafety Liability and Compensation Authority*** 1. A Biosafety Liability and Compensation Authority is hereby established. The Authority shall be open to participation by all Parties. It shall report regularly to the Conference of the Parties serving as the meeting of the Parties to this Protocol on all aspects of its work. 2. Its functions shall be: (a) To perform functions assigned to it by this Protocol (b) To perform such other functions as may be determined by the Conference of the Parties.	This article establishes a Biosafety Liability and Compensation Authority, which may provide administrative, capacity-building and other functions assigned to it by the Conference of the Parties.

Article 18. ***Insurance and other Financial Guarantees*** 1. Exporters, notifiers, importers, distributors, growers, carriers, and other persons liable under article 4. shall establish and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability under article 4. of this Protocol for amounts not less than the minimum limits specified in paragraph [] of Annex I according to the terms and conditions established by the Regulations passed by the Conference of the Parties serving as the meeting of the Parties to this Protocol. 2. A document reflecting the coverage of the liability of the exporter and the notifier under article 4. paragraph 1, of this Protocol or of the importer under article 4., paragraph 2, of this Protocol shall accompany the notification referred to in article 8 or Annex II of the Cartagena Protocol. Proof of coverage of the liability of the exporter and the notifier shall be delivered to the competent national authorities of the State of import. 3. Any claim under this Protocol may be asserted directly against any person providing insurance, bonds or other financial guarantees. The insurer or the person providing the financial guarantee shall have the right to require the person liable under article 4. to be joined in the proceedings.	This article ensures that persons who are liable for damage carry financial guarantees to ensure damages can be recovered from them.
Part IV **The Fund**	A fund is essential, to ensure that where a liable party is insolvent or for some other reason does not pay, that damage is not left uncompensated or unremedied. A fund would also cover major disasters or accidents or situations where no party is found liable for any reason.
Article 19. ***Fund Established*** 1. An International Fund for compensation for damage, to be named "The International Living Modified Organism Compensation Fund" and hereinafter referred to as "The Fund", is hereby established with the following aims:	While capacity building is important, in the context of Article 27, so is access to justice, which in practical terms may mean developing States having the capacity to lodge and pursue claims in

(a) to provide compensation for and prevention, remediation or reinstatement of damage to the extent that the protection afforded by this Protocol is inadequate; (b) to provide legal aid to claimants; (c) to give effect to the related purposes set out in this Convention. 2. The Fund shall in each Contracting Party be recognized as a legal person capable under the laws of that State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State. Each Contracting Party shall recognize the Director of the Fund (hereinafter referred to as "The Director") as the legal representative of the Fund.	exporting States and otherwise providing legal aid to victims. Much language for the Fund is taken from the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.
Article 20. ***Applicability of Fund*** This Part shall apply with regard to compensation according to article 21. to damage caused in areas under the national jurisdiction of a Contracting Party or in areas beyond the limits of national jurisdiction, and to preventive measures taken to prevent or minimize such damage or for reinstatement or remediation of the environment following such damage.	This article ensures wide applicability of the Fund.
Article 21. ***Payment of compensation and Remediation*** 1. The Fund shall pay compensation to any person suffering damage if such person has been unable to obtain full and adequate compensation for the damage under this Protocol, either (a) because no liability for the damage arises under this Protocol; (b) because the party liable for the damage under this Protocol is financially incapable of meeting his obligations in full and any financial security that may be provided under this Protocol does not cover or is insufficient to satisfy the claims for compensation for the damage; a person being treated as financially incapable of meeting that person's obligations and a financial security being treated as	This article provides the mechanism for the payment of compensation and remediation. A maximum is necessary since the Fund's resources will be limited, and since the Fund has no control over activities of exporters, importers and other parties.

insufficient if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under this Protocol after having taken all reasonable steps to pursue the legal remedies available to him; 2. The Fund shall pay the costs of prevention, remediation or reinstatement of the environment where payment for such remediation or reinstatement was not available under this Protocol. 3. The aggregate amount of compensation and prevention, remediation and reinstatement payable by the Fund under this article shall in respect of any one occurrence be limited, so that the total sum of that amount and the amount of compensation actually paid under this Protocol for an occurrence, shall not exceed the amount specified in Annex IV. 4. Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under this Protocol shall be the same for all claimants. 5. The Assembly of the Fund (hereinafter referred to as "the Assembly") may, having regard to the experience of incidents which have occurred and in particular the amount of damage resulting therefrom and to changes in the monetary values, decide that the amount referred to in paragraph 2, shall be increased; provided, however, that this amount shall in no case be decreased. The changed amount shall apply to incidents which occur after the date of the decision effecting the change. 6. The Fund shall, at the request of a Contracting Party, use its good offices as necessary to assist that State to secure promptly such personnel, material and services as are necessary to enable the State to take measures to prevent or damage arising from an occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol. 7. The Fund may on conditions to be laid down in Regulations provide credit facilities with a view to the taking of preventive measures against damage arising from a particular occurrence in respect of which the Fund may be called upon to pay compensation under	

this Protocol.	
Article 22. ***Time Limitations*** Rights to compensation under article 21. shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 23., paragraph 6, within ten years from the date when the damage occurred or from when the damage is discovered.	It may take time to discover damage. The limitation period should run from when the damage is found, not when it was caused, and should be sufficiently long to allow a reasonable time for a claim to be brought (see article 14.)
Article 23. ***Jurisdiction*** 1. Subject to the subsequent provisions of this article, any action against the Fund for compensation under article 21. of this Protocol shall be brought only before a court competent under article 8. of this Protocol in respect of actions against a person who is or who would be been liable for damage caused by the relevant occurrence. 2. Each Contracting Party shall ensure that its courts possess the necessary jurisdiction to entertain such actions against the Fund as are referred to in paragraph 1. 3. Where an action for compensation for damage has been brought before a court competent under article 8. of this Protocol, such court shall have exclusive jurisdictional competence over any action against the Fund for compensation under the provisions of article 21. of this Convention in respect of the same damage. 4. Each Contracting State shall ensure that the Fund shall have the right to intervene as a party to any legal proceedings before a competent court of that State against a person who may be liable under article 4. of this Protocol. 5. Except as otherwise provided in paragraph 6, the Fund shall not be bound by any judgment or decision in proceedings to which it has not been a party or by any settlement to which it is not a party. 6. Without prejudice to the provisions of paragraph 4, where an action under this Protocol for	These provisions establish jurisdiction over actions for compensation against the Fund.

compensation for damage has been brought before a competent court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgment rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgment was given, become binding upon the Fund in the sense that the facts and findings in that judgment may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.	
Article 24. ***Enforcement*** Subject to any decision concerning the distribution referred to in article 21., paragraph 4, any judgment given against the Fund by a court having jurisdiction in accordance with article 23., paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in article 12. of this Protocol.	This article provides for enforcement of judgments against the Fund.
Article 25. ***Subrogation*** 1. The Fund shall, in respect of any amount of compensation for damage paid by the Fund in accordance with article 21., paragraph 1, of this Protocol, acquire by subrogation the rights that the person so compensated may enjoy under the Protocol against any person who may be liable under article 4. of this Protocol. 2. Nothing in this Convention shall prejudice any right of recourse or subrogation of the Fund against persons other than those referred to in the preceding paragraph. In any event the right of the Fund to subrogation against such person shall not be less favourable than that of an insurer of the person to whom compensation or indemnification has been paid. 3. Without prejudice to any other rights of subrogation or recourse against the Fund which may exist, a Contracting Party or agency thereof which has paid compensation for	This article ensures the Fund can recover damages against those responsible.

damage in accordance with provisions of national law shall acquire by subrogation the rights which the person so compensated would have enjoyed under this Protocol.	
Article 26. ***Assessment of Contributions*** 1. Contributions to the fund shall be made in respect of each Contracting Party by any person who, in the calendar year referred to in article 27., paragraph 1, as regards initial contributions and in article 28., paragraphs 2 (a) or (b), as regards annual contributions, has exported living modified organisms in total quantities exceeding the amount specified in Annex II. 2. For the purposes of paragraph 1, where the value of living modified organisms exported by any person in a calendar year when aggregated with the value of living modified organisms by any associated person or persons exceeds the amount specified in Annex II, such person shall pay contributions in respect of the actual quantity received by him notwithstanding that that value did not exceed the amount specified in Annex II. 3. "Associated person" means any subsidiary or commonly controlled entity. The question whether a person comes within this definition shall be determined by the national law of the Party concerned.	This article makes provision for contributions to the Fund.
Article 27. ***Quantum of Contributions*** 1. In respect of each Contracting Party initial contributions shall be made of an amount which shall for each person referred to in article 26. be calculated on the basis of a fixed sum proportionate to the value of the living modified organisms exported during the calendar year preceding that in which this Convention entered into force for that State. 2. The sum referred to in paragraph 1 shall be determined by the Assembly within three months after the entry into force of this Protocol. In performing this function the Assembly shall, to the extent possible, fix the sum in such a way that the total amount of	This article sets contributions to the fund according to exports of LMOs.

initial contributions would, if contributions were to be made in respect of 90 per cent of the quantities of living modified organisms exported throughout the world, equal ____ million SDR. 3. The initial contributions shall in respect of each Contracting Party be paid within three months following the date at which the Protocol entered into force for that Party.	
Article 28. ***Budget*** 1. With a view to assessing for each person referred to in article 26. the amount of annual contributions due, if any, and taking account of the necessity to maintain sufficient liquid funds, the Assembly shall for each calendar year make an estimate in the form of a budget of: **(i) Expenditure** (a) costs and expenses of the administration of the Fund in the relevant year and any deficit from operations in preceding years; (b) payments to be made by the Fund in the relevant year for the satisfaction of claims against the Fund due under article 21., including repayment on loans previously taken by the Fund for the satisfaction of such claims, to the extent that the aggregate amount of such claims in respect of any one incident does not exceed the amount specified in Annex I; **(ii) Income** (a) surplus funds from operations in preceding years, including any interest; (b) initial contributions to be paid in the course of the year; (c) annual contributions, if required to balance the budget; (d) any other income.	This article sets a Budget for Fund and sets allocations of contributions

2. For each person referred to in article 26. the amount of his annual contribution shall be determined by the Assembly and shall be calculated in respect of each Contracting Party. 3. The sums referred to in paragraph 2 above shall be arrived at by dividing the relevant total amount of contributions required by the total amount of living modified organisms exported by all Contracting States in the relevant year. 4. The Assembly shall decide the portion of the annual contribution which shall be immediately paid in cash and decide on the date of payment. The remaining part of each annual contribution shall be paid upon notification by the Director. 5. The Director may, in cases and in accordance with conditions to be laid down in the Regulations of the Fund, require a contributor to provide financial security for the sums due from him. 6. Any demand for payments made under paragraph 4 shall be called rateably from all individual contributors.	
Article 29. ***Assessment of Contributions*** 1. The amount of any contribution due under article 28. and which is in arrear shall bear interest at a rate which shall be determined by the Assembly for each calendar year provided that different rates may be fixed for different circumstances. 2. Each Contracting Party shall ensure that any obligation to contribute to the Fund arising under this Protocol in respect of living modified organisms exported from the territory of that State is fulfilled and shall take any appropriate measures under its law, including the imposing of such sanctions as it may deem necessary, with a view to the effective execution of any such obligation; provided, however, that such measures shall only be directed against those persons who are under an obligation to contribute to the Fund. 3. Where a person who is liable in accordance with the provisions of articles 27. and 28. to make contributions to the Fund does not fulfil his obligations in respect of any such	This article sets mechanisms for the collection of assessed contributions and enforcement action.

contribution or any part thereof and is in arrear for a period exceeding three months, the Director shall take all appropriate action against such person on behalf of the Fund with a view to the recovery of the amount due. However, where the defaulting contributor is manifestly insolvent or the circumstances otherwise so warrant, the Assembly may, upon recommendation of the Director, decide that no action shall be taken or continued against the contributor.	
Article 30. ***Fund Bodies*** 1. The Fund shall have an Assembly, a Secretariat headed by a Director and an Executive Committee. 2. The Assembly shall consist of all Contracting States to this Protocol.	This article establishes the institution of the Fund.
Article 31. ***Assembly Functions*** The functions of the Assembly shall be: 1. to elect at each regular session its Chair and two Vice-Chairmen who shall hold office until the next regular session; 2. to determine its own rules of procedure, subject to the provisions of this Protocol; 3. to adopt Internal Regulations necessary for the proper functioning of the Fund; 4. to appoint the Director and make provisions for the appointment of such other personnel as may be necessary and determine the terms and conditions of service of the Director and other personnel; 5. to adopt the annual budget and fix the annual contributions; 6. to appoint auditors and approve the accounts of the Fund;	This article establishes the functions of the Assembly.

7. to approve settlements of claims against the Fund, to take decisions in respect of the distribution among claimants of the available amount of compensation in accordance with article 21., paragraph 3, and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of damage are compensated as promptly as possible; 8. to elect the members of the Assembly to be represented on the Executive Committee. 9. to establish any temporary or permanent subsidiary body it may consider to be necessary; 10. to determine which non-Contracting States and which inter-governmental and international non-governmental organizations shall be admitted to take part, without voting rights, in meetings of the Assembly, the Executive Committee, and subsidiary bodies; 11. to give instructions concerning the administration of the Fund to the Director, the Executive Committee and subsidiary bodies; 12. to review and approve the reports and activities of the Executive Committee; 13. to supervise the proper execution of the Convention and of its own decisions; 14. to perform such other functions as are allocated to it under the Convention or are otherwise necessary for the proper operation of the Fund.	
Article 32. ***Sessions of Assembly*** 1. Regular sessions of the Assembly shall take place once every calendar year upon convocation by the Director; provided, however, that if the Assembly allocates to the Executive Committee the functions specified in article 31., paragraph 5, regular sessions of the Assembly shall be held once every two years. 2. Extraordinary sessions of the Assembly shall be convened by the Director at the request of the Executive Committee or of at least one-third of the members of the Assembly and may	This article establishes the Assembly sessions.

be convened on the Director's own initiative after consultation with the Chairman of the Assembly. The Director shall give members at least thirty days' notice of such sessions.	
Article 33. ***Quorum*** A majority of the members of the Assembly shall constitute a quorum for its meetings.	
[other mechanical provisions as necessary]	
Part V ***Settlement of Disputes***	The following articles establish a disputes mechanism, modeled largely on the dispute settlement provisions of the Law of the Sea Convention, focused on an International Tribunal for the Protection of Biodiversity.
Section 1: General Provisions	
Article 34. ***Obligation to Settle Disputes by Peaceful Means*** Contracting Parties shall settle any dispute between them concerning the interpretation or application of this Protocol by peaceful means in accordance with article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in article 33, paragraph 1, of the Charter	
Article 35. ***Settlement of disputes by any peaceful means chosen by the parties*** Nothing in this Part impairs the right of any Contracting Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Protocol by any peaceful means of their own choice.	
Article 36.	

Procedure where no settlement has been reached by the parties 1. If the Contracting Parties which are parties to a dispute concerning the interpretation or application of this Protocol have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure . 2. If the parties have also agreed on a time limit, paragraph 1 applies only upon the expiration of that time limit.	
Article 37. ***Obligation to exchange views*** 1. When a dispute arises between Contracting Parties concerning the interpretation or application of this Protocol, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.	
Article 38. ***Conciliation*** 1. A Contracting Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation under Annex II. 2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure. 3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.	

4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.	
Section 2. Compulsory Procedures Entailing Binding Decisions	
Article 39. ***Application of procedures under this section*** Subject to section 3 of this Part, any dispute concerning the interpretation or application of this Protocol shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.	
Article 40. ***Choice of procedure*** 1. When signing, ratifying or acceding to this Protocol or at any time thereafter, a Contracting Party shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Protection of Biodiversity established in accordance with Annex III. (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex IV; (d) a special arbitral tribunal constituted in accordance with Annex IV for one or more of the categories of disputes specified therein. 2. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted the International Tribunal for the Protection of Diversity in accordance with Annex III.	

3. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree. 4. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to the International Tribunal for the Protection of Biodiversity in accordance with Annex III, unless the parties otherwise agree. 5. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations. 6. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree. 7. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.	
Article 41. ***Jurisdiction*** 1. A court or tribunal referred to in article 40. shall have jurisdiction over any dispute concerning the interpretation or application of this Protocol which is submitted to it in accordance with this Part. 2. A court or tribunal referred to in article 40.shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement. 3. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.	
Article 42.	

Experts In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or proprio motu, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex V, to sit with the court or tribunal but without the right to vote.	
Article 43. ***Provisional measures*** 1. If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to biodiversity, pending the final decision. 2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist. 3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard. 4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other Contracting Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures. 5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Protection of Biodiversity may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4. 6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.	

Article 44. ***Access*** 1. All the dispute settlement procedures specified in this Part shall be open to Contracting Parties. 2. The dispute settlement procedures specified in this Part shall be open to entities other than States Parties as specifically provided for in this Protocol or as provided in Rules passed by the Assembly under article 31.	
Article 45. ***Applicable law*** 1. A court or tribunal having jurisdiction under this section shall apply this Protocol and other rules of international law not incompatible with this Protocol. 2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree.	
Article 46. ***Preliminary proceedings*** 1. A court or tribunal provided for in article 40. to which an application is made in respect of a dispute referred to in article 39. shall determine at the request of a party, or may determine proprio motu, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case. 2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time limit within which they may request it to make a determination in accordance with paragraph 1. 3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure.	

Article 47. ***Exhaustion of local remedies*** Any dispute between Contracting Parties concerning the interpretation or application of this Protocol may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.	
Article 48. ***Finality and binding force of decisions*** 1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute. 2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.	
Section 3. Limitations and exceptions to applicability of section 2	
Article 49. ***State Responsibility*** The Protocol shall not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to State responsibility.	
Part VI Final Provisions	These articles establish final mechanical provisions.
Article 50.	

Relationship with the Convention Except as otherwise provided in this Protocol, the provisions of the Convention relating to its protocols shall apply to this Protocol.	

Article 51. ***Assessment and Review*** The Conference of the Parties serving as the meeting of the Parties to this Protocol shall undertake, five years after the entry into force of this Protocol and at least every five years thereafter, an evaluation of the effectiveness of the Protocol, including an assessment of its procedures and annexes.	
Article 52. ***Signature*** This Protocol shall be open for signature at the United Nations Office at Nairobi by States and regional economic integration organizations from ___ to _____, and at United Nations Headquarters in New York from _____ to _____.	
Article 53. ***Entry into Force*** 1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the [fiftieth] instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Convention. 2. This Protocol shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves this Protocol or accedes thereto after its entry into force pursuant to paragraph 1 above, on the ninetieth day after the date on which that State or regional economic integration organization deposits its instrument of ratification, acceptance, approval or accession, or on the date on which the Convention enters into force for that State or regional economic integration organization, whichever shall be the later.	

3.	For the purposes of paragraphs 1 and 2 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.	

Article 54. ***Reservations*** No reservations may be made to this Protocol.	
Article 55. ***Withdrawal*** 1. At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from the 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.	
Article 56. ***Authentic Texts*** The original of this 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.	

Annex I

1. Minimum limits of insurance, bonds or other financial guarantees covering their liability under article 4. (Reference article 18.)
2. Minimum amount of export of LMOs to qualify for contributions to the Fund. (Reference article 26.)
3. Initial contributions for each Contracting Party (Reference article 27.1.)
4. Total amount for aggregate claims against Fund (Reference article 28.1(b))
5. Total amount for aggregate claims against Fund (Reference article 28.1(c))
6. Annual contribution (Reference article 28.2)

Annex II
Conciliation Procedure [see Law of the Sea Convention Annex V] (reference article 38.)

Annex III
International Tribunal for the Protection of Biodiversity (reference article 40.)

Annex IV
Arbitral tribunal (reference art 40.)

Annex V
List of Experts (reference art 42)

Annex VI
Maximum amount payable under Fund under article 21.

INTERNATIONAL FEDERATION OF ORGANIC AGRICULTURE MOVEMENTS (IFOAM)

[8 NOVEMBER 2005]
[SUBMISSION: ENGLISH]

Submission of the International Federation of Organic Agriculture Movements (IFOAM) on Article 27 of the Cartagena Protocol on Biosafety, with respect to approaches, options and issues on liability and redress for damage resulting from Living Modified Organisms (LMOs). This submission is made in response to the invitation from the first meeting of the Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (BSLR WG-1), for submissions in respect of the annex of its report.

In this submission, the terms genetically modified organisms (GMOs) and living modified organisms (LMOs) are used interchangeably.

The submitter

1. The International Federation of Organic Agriculture Movements (IFOAM) unites 700 member organizations active in oranic agriculture, from more than 100 countries around the world. Members of the IFOAM are organizations throughout the whole production chain in organic agriculture; producers, processors, traders, handlers, researchers, extensionists, consultants and consumers.

Organic agriculture

2. Organic agriculture includes all agricultural systems that promote environmentally, socialy and economically sound production of food and fibers. By respecting the natural capacity of plants, animals and the landscape, it aims to optimise quality in all aspects of agriculture and the environment. Organic agriculture dramatically reduces external inputs by refraining from the use of synthetic fertilizers and pesticides, genetically modified organisms and pharmaceuticals. Pests and diseases are controlled with naturally occurring means and substances according to both traditional as well as modern scientific knowledge.

3. The act of genetic engineering and the use of genetically modified organisms (GMOs) consequently, are not compatible with the principles and practices of organic agriculture.

Standards and certification

4. In the IFOAM basic standards for organic agriculture, as well as in public regulations and legislation on organic agriculture the use of genetically modified organisms throughout the whole production chain is prohibited. At the international level, the Codex Alimentarius guidelines for the production, processing, marketing and labelling of organically produced foods also prohibit the use of genetically modified organisms. The Codex Alimentarius Commission is the joint FAO/WHO agency that regulates international food safety and is recognized by the World Trade Organization's Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).

5. Certification of organic producers and labelling of products is based on a process approach. Throughout the production process practitioners must have followed organic practices and refrained from forbidden substances in order for the end product to be labeled as organic and for production units to be certified.

Organic production systems

6. Organic agriculture is base on living and healthy soil. The interconnectivity of soil organisms, healthy plant and animal production and healthy food is acknowledged within the organic agricultural and food systems.

7. Organic agriculture depends on local biological diversity for it's functioning as a living agro ecological system. In designing systems that enable the natural balances to work – therewith preventing as much as possible pests and diseases and therewith making the use of synthetic, chemical pesticides redundant – organic farmers rely on functional biological diversity in and around the farming system.

8. Organic agriculture depends of locally and regionally adapted varieties of plants and animals, fitting to the local conditions on which organic farmers depend.

9. In order to safeguard their production environment, organic farmers (as well as conventional farmers) increasingly organize themselves in "GMO free zones": areas wherein the producers themselves declare not to use nor tolerate GMOs: actions, which might be tolerated or even supported by (local and regional) governments, depending on the legal and political situation.

Labeling of GMOs

10. Public standards for the labeling of GMOs include threshold levels under which the presence of GMOs in the product will not trigger labelling, as long as the presence is adventitious (accidental and technically unavoidable), and above which products need to be labelled as containing GMOs. As consumers expect organically produced products to not contain GMOs, any public threshold level for GMO labelling consequently means an implicit threshold level presence of GMOs in organically produced products.

Labeling of organic products

11. Private standards on organic agriculture in general have zero or lower tolerance than regulatory threshold levels for the presence of gmo's: meaning organic products with GMO presence within regulatory levels may be unable to use private market organic labels.

Damage to organic agriculture

12. Given the above, the following will cause damage to organic agricultural and production systems and organic products in the context of article 27 of the Cartagena Protocol on Biosafety. The list is not exhaustive, as other forms of damage, given other circumstances, can occur.

a. Any unwanted spread of GMOs, either cia wind, human, insect, animal or other (uncontrollable) means of transport
b. Any decrease or change in soil activity due to alien gene constructs in the soils that the organic farmers are caring for and depending on.
c. Any decrease in ecological complexity of local and regional biological diversity following unwanted spread or out crossing of GMOs creating amongst others, so called "super weeds".
d. Any disturbance of functional biological diversity, e.g. pest regulation functions and nutrient recycling, following the spread of unwanted pollution of organisms
e. Any decrease in varieties and variety choice in the market for organic farmers as a consequence of the introduction of GMOs, through seed contamination.
f. Any presence of GMOs in organic products making the labelling of the products as organic impossible, despite the fact that the organic producers throughout the production chain have followed the organic production method.
g. Any cost of testing and other protective measures to stop contamination from GMOs for affecting organic production systems.
h. Any damage to the image of organic agriculture and organic products following unwanted contamination of GMOs.
i. Any loss of future possibilities to produce organic products caused by any damage as listed here.
j. Any loss of organic market.

In these cases damage is done to conservation, to the environment, to human health, local communities, to the income of organic practitioners, and to food security. These aspects are interconnected: a farmer experiencing damage to the functional biodiversity in her production system and soil, experiences consequently damage to traditional knowledge, loss and damage of property and therewith of income and future income.

Valuation of damage

13. As stated under 12 damage is as interconnected as the different aspects of organic production systems. Loss of nature and biological diversity and functional biological diversity is incurable. Direct and indirect damage to property, income and production possibilities could be valuated, for example loss of income though loss of organic markets. Prevention of damage ultimately implies a total ban on GMOs, a measure that could turn out to be cheaper in all aspects that any possible redress for damage.

Liability

14. Liable for any damage caused by genetic pollution are the owners of the LMOs. Ownership of natural resources, including seed, is not compatible with the principles of organic agriculture – at the same time however those who consider themselves to be owners of LMOs should be kept liable for any damage caused by their produce. Liability therefore should be considered very strict. It is the duty of owners of LMOs to instruct users (i.e. farmers, producers) of their produce in such a manner as to cause no damage. If these instructions fail, or cannot be secured, it is still the owner (rather than the user) who is to be kept liable for any damage caused. To be able to identify the owner of an

LMO the LMOs as such should be identifiable in the filed; a precondition that can only be fulfilled through mandatory identification and PCR tests delivered with the release of the LMO by the owner.

Settlements of claims

15. Settlement of claims is to be done directly by the owner of the GMO and, where possible with the person, cooperative or company experiencing the damage directly.

16. Any indirect damage, or damage to nature and biological diversity is to be settled by the owner of the GMO and

    a. Active nature conservation bodies in the area
    b. Representatives of communities depending on the natural resources of the area
    c. Representatives of GMO free zones
    d. Local and regional governments
    e. Representatives of local and indigenous communities
    f. Etc.

17. IFOAM urges the Secretariat of the Convention on Biological Diversity to bring this susbmission forward to the second meeting of the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress.

ORGANIC AGRICULTURE PROTECTION FUND (OAPF)

[19 NOVEMBER 2005]
[SUBMISSION: ENGLISH]

Statement of Position and Liability

We the Organic Agriculture Protection Fund (OAPF) of Saskatchewan, Canada would like to provide you with some insight into our perspective as organic farmers and how the introduction of Genetically Modified Organisms (GMO's) currently affects our lives and business. At the same time we would like to submit the elements we feel are essential to protecting organic producers and consumers from the spread of GMO's. The OAPF would like this document to be considered when making decisions at the 2nd meeting of the working group in Montreal.

Our Perspective:

Organic farming in this country and else where in the world is growing and changing every year. In Saskatchewan alone there are more than 1200 organic farmers working hard to grow their crops in a sustainable manner without the use of synthetic fertilizers, chemicals and genetic engineering. We believe that farming should be economically viable for the producer, that it should be safe and environmentally sound.

Genetically altered seed offers nothing to organic or conventional producers in the way of economics, but it does allow control of seed and monopoly over food supplies. Organic producers in the province of Saskatchewan have already suffered the consequences of genetically altered crops through the release of

genetically engineered (GE) herbicide tolerant canola. It has been proven that GE crops cannot be contained and the resuft has been genetic drift of novel traits into other non GE crops. This contamination results from a variety of sources, such as transportation, wind moving seed and pollen, severe climatic changes (floods, tornadoes etc). insect and wildlife movement and human error.

Organic certification standards were developed to adhere to consumer demand. These standards prohibit the use of genetically modified organisms (GMOs). The organic market depends on being able to supply food that is produced without pesticides and genetic engineering. If we cannot grow crops free of unintended genetic contamination., we are not able to service those markets, resulting in the loss of our ability to be financially sustainable and a loss of choice for consumers' world wide. Organic farmers, along with other farmers, marketers, researchers and consumers are saying that management practices, detection technology, or segregation systems will not prevent GE crops from contaminating fields, seed and feed supplies and food shipments. How can we put faith in a segregation system for GE crops when it cannot be segregated in the field?

Our Position
WHEREAS:

Genetically modified organisms are threatening the integrity of the organic foos product industry of Canada due to;

1. the inability of owner- developers, crop producers, and handlers to control the spread of GMO material in application and use, thereby contaminating neighboring growers' fieids, both organic and conventional., and out crossing with closely related native plants and other field crop species,
    - - through POLLEN and SEED DRIFT to neighboring fields by means of wind (year round) or application process,
    - - through insect and other WILDLIFE ACTIVITY spreading the GMO contamination beyond field borders,
    - - through RUNOFF water and WATERSHED action,
    - - through HUMAN CARRIERS, VEHICLES and EQUIPMENT as fields are inspected and field work preformed,
    - - through TRANSPORT of GM products,
    - - through PROCESSING of GM products.

2. the rejection of GMO contaminated food products by our principal markets, that is:
    - nations that import our organic food products reject GMO contamination; there is zero tolerance,
    - producers have already lost the market for certified organic canola
    - the domestic markets are showing a justifiable groundswell of opposition to GMO contaminated food products.

AND WHEREAS:
Owner-developers of genetically modified crops have demonstrated irresponsibility and lack of accountability in promotion and wide scale use of this technology. The safety of this technology has not been proven in regard to its effects, acute or chronic, on human health of the health of the environment, issues of paramount importance to organic growers and consumers.

LIABILITY
THEREFORE BE IT RESOLVED THAT:

Owners-developers and producers of genetically modified crops shall be liable for the damages and losses incurred upon:

- the environment or public health
- the livelihood of the individual farmer producers of Non-GMO crops
- whose fields have been contaminate with GMO's
- the Organic industry as a whole, should it national certified food product become contaminated and its credibility as a supplier of pure non genetically modified organic products in the domestic and international marketplaces becomes irreparably compromised;
- the Environment, in perpetuity

LABELLING

AND FURTHER BE IT RESOLVED THAT:

In both domestic and international markets; genetically modified food products shall bear clear identification as to the presence of GM material in the product and/or in the plant producing the product; and that such labelling be mandatory.

SEGREGATION

AND FURTHER BE IT RESOLVED THAT:

- there shall, in the growth, harvesting, transportation, storage and processing of such food products, be effective segregation between GM products and non-GM products, and documentation to prove the same.
- Since existing protocol and legislation regarding isolation requirements are inadequate and mostly non-existent, the regulations need to be rewritten and legislated.

PRECAUTIONARY PRINCIPLE

AND FURTHER BE IT RESOLVED THAT:

The precautionary Principal must be observed. This principal involves protection of the environment and human health taken in advance of potential damage, not after the potential or actual damage has occurred. Actions must be taken to control or eliminate practices, such as genetic modification/engineering using recombinant DNA and other transgenic techniques, that seem likely to harm the environment, human health or sound social relations, even if proof of harm is not definitive.

PATENT

AND FURTHER BE IT RESOLVED THAT:

- Life, plant or otherwise, is the domain of all humankind. All life forms must be held in common.
- No individual, corporation, organization or state must be allowed to hold patent life forms including seed for food production.

ANNEX

Article 27 of the Cartagena Protocol is very important to organic producers as it will provide international rules and procedures in the field of liability and redress. To make our submission comprehensive we have included the

annex as it is written. Under each heading we choose the option that best suited our position.

We appreciate the time and energy spent on the liability portion of the Cartagena. Protocol. It is vitally important that liability be placed on the owners and controls of GMO/LMO’s.

The OAPF Committee

1. SCOPE OF "DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LM0S"

A. Functional scope

Option 2
Damage resulting from transport, transit, handling and/or use of LMOs that finds its origin in transboundary movements of LMOs, as well as unintentional transboundary movements of LMOs

B. Optional components for geographical scope

(a) Damage caused in areas within and beyond the limits of national jurisdiction or control of Parties; non- Parties and in the control of States
(b) Damage caused in areas within the limits of national jurisdiction or control of non-Parties;
(c) Damage caused in areas beyond the limits of national jurisdiction or control of States.

C. Issues for further consideration

(a) Limitation on the basis of geographical scope, i.e. protected areas or centres of origin;
(b) Limitation in time (related to section V on limitation of liability);
(c) Limitation to the authorization at the time of the import of the LMOs
(d) Determination of the point of the import and export of the LMOs.

II. DAMAGE

A. Optional components for the definition of damage

(a) Damage to conservation and sustainable use of biological diversity or its components;
(b) Damage to environment;
(i) Damage to conservation and sustainable use of biological diversity or its components;
(ii) Impairment of soil quality;
(iii) Impairment of water quality;
(iv) Impairment of air quality;

(c) Damage to human health;

(i) Loss of life or personal injury;
(ii) Loss of income;
(iii) Public health measures;
(iv) Impairment of health;

(d) Socio-economic damage, especially in relation to indigenous and local communities;

(i) Loss of income;
(ii) Loss of cultural, social and spiritual values;
(iii) Loss of food security;
(iv) Loss of competitiveness;

(e) Traditional damage:

(i) Loss of life or personal injury;
(ii) Loss of or damage to property;
(iii) Economic loss;

(f) Costs of response measures.

It is important that (a to f) be included in the definition of damage.

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

(a) Costs of reasonable measures taken or to be taken to restore the damaged components of the environment/biological diversity:

(i) Introduction of original components;
(ii) Introduction of equivalent components that could be on the same location, for the same use, or on another location for other types of use;

C. Issues for further consideration with respect to valuation of damage

(a) Determination of biodiversity loss (baseline conditions or other means to measure the loss, taking into account natural variations and human-induced variations other than those caused by LMOs);
(b) Obligations to take response and restoration measures,
(c) Special measures in case of damage to centres of origin and centres of genetic diversity to be determined;
(d) Formulation of qualitative threshold of damage to conservation and sustainable use of biological diversity;
(e) Valuation of damage to the environment, sustainable use of biological diversity, human health, socio-economic damage and traditional damage.

With respect to valuation of damage points (a to e) should be made inferable by the protocol.

III. CAUSATION

Issues for further consideration:

(a) Level of regulation (international/or domestic level);
(b) Establishment of the causal link between the damage and the activity.:
    (i) Test (e.g. foreseeability, direct/indirect damage, proximate cause, vulnerability clause);
    (ii) Cumulative effects
    (iii) Complexity of interaction of LMOs with the receiving environment and time scales involved;

IV. CHANNELLING OF LIABILITY, ROLE OF PARTIES OF IMPORT AND EXPORT, STANDARD OF LIABILITY

A. Possible approaches to channelling of liability

(a) State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol);
(b) State liability (for acts that are not prohibited by international law, including cases where a State Party is in full compliance with its obligations of the Protocol).

Option 1

Primary State liability with primary liability of operator

(c) Civil liability (harmonization of rules and procedures);
(d) Administrative approaches based on allocation of costs of response measures and restoration measures.

B. Issues relating to civil liability

1. Possible factors to determine the standard of liability and the identification of the liable person

(a) Type of damage;
(b) Places where damage occurs (e.g. centres of origin and centres of genetic diversity);
(c) Degree of risk involved in a specific type of LMO as identified in risk assessment
(d) Unexpected adverse effects;
(e) Operational control of LMOs (stage of transaction involving LMOs).

2. Standard of liability and channelling of liability

(a) Fault-based liability:

(i) Any person who is in the best position to control the risk and prevent the dlarnage;
(ii) Any person who has operational control;
(iii) Any person who does not comply with the provisions implementing the Biosafety Protocol;
(iv) Any entity who has the responsibility to put in place the provisions for implementing the Protocol;
(v) Any person to whom intentional, reckless or negligent acts or omissions can be attributed;

(b)Strict liability:

Option 1

Liability to be channelled to one or more of the following persons, including persons acting on his or her behalf, on the basis of prior identification:

o The developer
o The producer
o The notifier
o The exporter
o The importer
o The carrier
o The supplier

3. Exemptions to or mitigation of strict liability

Option 1

No exemptions.

4. Additional tiers of liability in situation where:

(a) The primary liable person cannot be identified;
(b) The primary liable person escape liability on the basis of a defence;
(c) A time limit has expired;
(d) A financial limit has been reached;
(e) Financial securities of the primary liable person are not sufficient to cover liabilities; and
(f) The provision of interim relief is required.

5. Issues for further consideration

(a) Combination of fault liability and strict liability;
(b) Recourse against third party by the person who is liable on the basis of strict liability;
(c) Joint and several liability or apportionment of liability
(d) Vicarious liability.

V. LIMITATION OF LIABILITY

A. Issues for further consideration

(a) Limitation in time (relative time-limit and absolute time-limit),
(b) Limitation in amount including caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined, and to be considered in conjunction with section VI on mechanisms of financial security .

VI. MECHANISMS OF FINANCIAL SECURITY

A. Coverage of liability

Option 1

Compulsory financial security.

B. Supplementary collective compensation arrangements

Option 1

Fund financed by contributions from biotechnology industry to be made in advance on the basis of criteria to be determined.

C. Issues for further consideration

(a) Modes of financial security (insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees),

(b) Institutional modalities for the operation of a fund.

VII. SETTLEMENT OF CLAIMS

A. Optional procedures

(a) Inter-State procedures (including settlement of disputes under Article 27 of the Convention on Biological Diversity);
(b) Civil procedures:
    (i) Jurisdiction of courts or arbitral tribunals;
    (ii) Determination of the applicable law;
    (iii) Recognition and enforcement of judgments or arbitral awards.
(c) Administrative procedures;
(d) Special tribunal (e.g. Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment).

VIII. STANDING/RIGHT TO BRING CLAIMS

A. Issues for further consideration

(a) Level of regulation (international and/or domestic level);
(b) Distinction between inter-State procedures and civil procedures;
(c) Level of involvement in the transboundary movement of living modified organisms as a requirement of standing/right to bring claims;
(d) Type of damage:
    (i) Traditional damage: affected person, dependents, or any other person acting on behalf or in the interest of that person;
    (ii) Costs of response measures: person or entity incurring the costs;
    (iii) Damage to environment/conservation and sustainable use of biodiversity:
        o Affected State
        o Groups acting in vindication of common interests;
        o Person or entity incurring the costs of restoration measures;

    (iv) Damage to human health:
        o Affected State;
        o Affected person or any other person entitled to act on behalf of that person;

    (v) Socio-economic damage:
        o Affected State;
        o Groups acting in vindication of common interests or communities.

IX. NON-PARTIES

A. Issues for further consideration

(a) Possible special rules and procedures in the field of liability and redress in relation to LMOs imported from non-Parties (e.g. bilateral agreements requiring minimum standards).

X.USE OF TERMS

A. Issues for further consideration

(a) Definition of terms for the purpose of international rules and procedures on liability and redress under Article 27 of the Biosafety Protocol, e.g. use, response measures, restoration measures and reasonable.

XI. COMPLEMENTARY CAPACITY-BUILDING MEASURES

A. Possible approaches

(a) Use of measures adopted under Article 22 of the Protocol, including use of roster of experts and the Action Plan for Building Capacities for Effective Implementation of the Protocol, e.g. exchange of best practices in the design and implementation of national rules and procedures on liability and redress, cooperation at the regional level in the use of available expertise, and training in all relevant fields;

(b) Development of specific complementary capacity building measures, based on national needs and priorities, for the design and implementation of national rules and procedures on liability and redress, e.g. establishment of baseline conditions and monitoring of changes in the baseline conditions.

XII. CHOICE OF INSTRUMENT

Option 1

One or more legally binding instruments.

- o A liability Protocol to the Biosafety Protocol;
- o Amendment of the Biosafety Protocol;
- o Annex to the Biosafety Protocol
- o A liability Protocol to the Convention on Biological Diversity.

PUBLIC RESEARCH AND REGULATION INITIATIVE (PRRI) [4 NOVEMBER 2005] [SUBMISSION: ENGLISH]

At the close of the first meeting of the Working Group on Liability in May of this year, the PRRI requested the floor to share its views on the issue of liability and redress - a very important issue for us. Unfortunately, the PRRI was not given the opportunity to speak. However, we did make our statement available in hard copy following the meeting.

In response to notification 2005-074 on liability and redress, we wish to submit that statement (attached) as well as the following considerations, which provide a further explication of the main aspects of our position on liability in connection with the paper UNEP/CBD/BS/COP-MOP/2/11, upon which comments have been requested.

By way of general introduction, we emphasize that we regard liability as an important mechanism in society. However, we also need to emphasize that the current debate on liability is often confused by some fundamental misperceptions. For example, there is the misperception that GMOs are inherently dangerous - which they are not, and there is the misperception that modern biotechnology is the domain of large multinationals - which it is not. In addition, there also seems to be a lack of appreciation that modern

biotechnology is an important tool in helping to address some of the most pressing problems of our global community and which cannot be solved by conventional techniques alone. While firmly endorsing that organisations causing damage to the environment should compensate for that damage, we believe that there is no justification to single out biotechnology for liability purposes.

In addition to these general remarks, we submit the annexed considerations with regard to the elements mentioned in the annex to the paper UNEP/CBD/BS/COP-MOP/2/11.

Considerations of the PRRI regarding liability and in particular with regard to the elements mentioned in the annex to the paper UNEP/CBD/BS/COP-MOP/2/11.

The PRRI believes the liability and redress discussions are of great importance because liability plays an important role in encouraging care. We think that discussions under the CBD, in particular, are critical to reach a common understanding of what constitutes damage to biodiversity, which should be of top priority amongst all the liability discussions regarding biodiversity.)

We also believe that the Protocol discussions may help us all to understand better what this means with respect to biotechnology activities, but that debate can logically only be conducted once we have a common understanding of damage to biodiversity. While there are no examples of biodiversity damage from the release of genetically modified organisms to date, it is important carefully to consider scientifically conceivable scenarios (but not the unfounded scare scenarios that have been raised in previous meetings) that could result in a significant negative impact on biodiversity. We therefore support further detailed discussions, based on scientific input and coordinated between the CBD and Protocol that would focus better on defining what might constitute damage to conservation and the sustainable use of biodiversity (see Section II, part A, option (a)).

In defining damage to biodiversity, it is important to reflect that change in biodiversity is in itself not damage. It is also important to reflect that every human activity – such as agriculture – has an impact on the environment. It is also important to emphasise that certain applications of agricultural biotechnology seek to correct some of the negative impacts on biodiversity from current agricultural practices.

Moreover, when considering the issue of GMOs in a debate on what constitutes damage to biodiversity, it is important to reflect that outcrossing of crops (regardless whether they are genetically modified or not) in itself is not damage. As an illustration, we attach a recent article by Dr. Peter Raven, which addresses some of the misconceptions around outcrossing of genetically modified maize to landraces of maize, which has been subject of much controversy lately.

More generally, we need to examine properly what are the expected functions of the liability regimes. Liability regimes can play different roles and functions. When in an international context, in a risk conscious society, involving a technology of significant economic importance, what can we expect from a liability regime? What will be affected? These issues should be taken into consideration before we jump into detailed or substantial discussion of the possible content of the liability regime.

The elements paper seeks views on a variety of components of legal regimes including time limitations (Section V.A(a)), caps on liability (Section V.A(b), and defences (Section IV, 3) which are standard features of nearly all liability regimes. Creation of an international regime that fails to include these standard features, as well as any efforts to reverse the burden of proof (Section III (c)), would significantly restrict public research in modern biotechnology, because of the fear by public researchers

and their host institutions of unknown and unlimited liability. As we understand from information provided by Swiss Re, even large companies would be affected because the possibility of limitless and unpredictable liability would prevent them from being able to obtain insurance.

Delegates to the Protocol liability meeting discussed liability and tabled proposed elements as if only the multinationals are engaged in biotechnology research and development. But international exchange of research materials is fundamental to public research work and takes place every day. The liability regime many delegates appear to support would also apply to these shipments and would prevent us from collaborating even at the sub-regional level. Furthermore, impacts on big companies also impact public research. If large companies are affected by a liability regime, the technology transfer upon which we depend will dry up. This would be particularly detrimental to developing countries.

The PRRI believes no convincing arguments have been presented to support the development of a liability regime under the Protocol (Section XII, option 6). This does not mean, however, that public research institutes do not accept liability. In fact, we understand from our participation in the most recent CBD expert meeting on liability, that biotechnology could be addressed along with all other activities that may result in damage to biodiversity under liability rules that may be developed under Article 14 of the Convention. If international liability rules are needed to protect biodiversity, the international community should lend support to their development under the CBD as a matter of priority. In all events, if rules are developed under either the CBD or Protocol, they should be based on findings of fault (Section IV.B.2). LMOs are neither inherently risky nor inherently safe. They cannot, with any scientific integrity, be treated the same as nuclear and space activities for which strict liability is reserved.

Finally, we note that views are requested on the topic of state responsibility (Section IV). We believe that whether and how this is addressed at the international level is a matter best left to governments to resolve. But we do wonder, if regulations or liability regimes block the use of biotechnology, who will be held liable for the loss of the opportunity for increased food production or better health care? Have States considered their responsibilities from this point of view?

SOUTH AFRICAN CIVIL SOCIETY [14 NOVEMBER 2005]
[SUBMISSION: ENGLISH]

SOUTH AFRICAN CIVIL SOCIETY SUBMISSIONS AND CONTRIBUTIONS TO THE OPEN-ENDED AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS ON LIABILITY AND REDRESS ON THE "ANNEX" TO THE WORKING GROUP'S REPORT, (MAY 2005)
INTRODUCTION

INTRODUCTION

These submissions are made in response to the invitation extended by the Open-ended Ad Hoc Working Group of Legal and Technical Exports on Liability and Redress ("Working Group") to stakeholders, to submit views with regard to the annex to the report of first meeting of the Working Group held in May 2005 in Montreal, Canada. The annex to the report sets out options, approaches and issues and an appendix containing scenarios for further consideration with regard to the negotiation of a liability and redress regime for genetically modified organisms (GMOs).

1. Our primary motivation for accepting this invitation is to support negotiations that culminate in a legally binding international liability and redress regime, which sets out clear internationally recognised liability principles and standards, capable of enforcement in domestic courts against private persons, in addition to enabling an action to be brought in the court where the Applicant has its head office. In this regard, we note that time is of the essence in that the Working Group has been mandated by the First Meeting of the Parties to the Cartagena Protocol (Kuala Lumpur, February 2004) to complete its work by 2008.

2. We note that enormous efforts have already been invested by the Secretariat of the Convention on Biological Diversity ("Secretariat") in regard to collating, analysing and disseminating information and extensive research with respect to *inter alia*, the general principles of State liability under international law; multilateral liability treaties and national liability regimes for GMOs already in existence in several countries. Whilst we view this information as being necessary, we are acutely aware of the tactics of the biotechnology industry, supported by many countries, to request more and more information in order to delay and stymie the process of negotiating an international regime.

3. Indeed, what has become clear to us from the research conducted to date, is that the development of a liability and redress regime for GMOs does not occur in a vacuum, but a number of general principles and highly evolved liability regimes already exist in international law, which provide a basis for the development of international rules for liability and redress in the context of the Cartagena Protocol on Biosafety (" Biosafety Protocol").

4. Our support of an international liability regime is premised on the direct relationship between such a regime and the use of the precautionary principle. Crucially, our view is that such a regime must be based on the express need to ensure biodiversity conservation, protection of human and animal health, food sovereignty, and generally, supporting the right and access by the poor to safe, nutritious and culturally acceptable food. We do not support a regime that is developed within a reactive context of adopting rules to promote the co-existence of genetically modified (GM) and non-GM crops. We thus encourage governments to develop a regime that goes beyond simple compensation for damage having occurred and support one that contributes to damage prevention, which is a fundamental principle of environmental law.

5. In this paper, we use the terms living modified organism and genetically modified organisms interchangeably.

STRUCTURE OF DOCUMENT

Our submissions and contributions are made in respect of the annex only. In this regard, we have reproduced the annex below, and have created an additional space under each heading for our inputs under the sub-heading, "comments". We have not at this juncture submitted text, but would like to retain the right to do so once there is more clarity on several issues raised by us.

Annex

This annex includes options, approaches, issues, as well as an appendix containing scenarios, for further consideration. It is not meant to be exhaustive nor does it reflect a preference for any of the options or approaches listed. The choice of instrument and possible elements for international rules and procedures on liability and redress are closely interlinked and changes to one element could impact on other elements.

I. SCOPE OF "DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LMOS"

A. Functional scope

Option 1
Damage resulting from transport of LMOs, including transit
Option 2
Damage resulting from transport, transit, handling and/or use of LMOs that finds its origin in transboundary movements of LMOs, as well as unintentional transboundary movements of LMOs

COMMENTS

A liability and redress regime should apply to the transboundary movement, transit, handling and use of all living modified organisms that may have adverse effects on the conservation and sustainable use of biological diversity, also taking into account the risks to human health (Article 4 of the Biosafety Protocol). We also support explicit reference to unintentionally transboundary movements.

The central issue that needs to be deal with is the fact that Article 27 only mentions transboundary movement and not transit, handling and use. In this regard, we make the following submissions:

1. It is generally accepted that the activities that a liability and redress regime should cover must be commensurate with the scope of the Biosafety Protocol as set out in Article 4 of the Protocol;
2. Liability of GMOs would need to apply to the situations where damage is likely to arise in the Party of import including, the long term effects on human health and the environment as a result of the use and consumption of GMOs in that Party of import over a period of time;
3. There are significant gaps in our knowledge about the safety of GMOs, and in this regard, the following must be taken into account: the unknown level of risk; the unknown magnitude of potential harm; the possibility of catastrophic, irreversible and/or uncompensatable damage and the possible time lapse before damage is discovered. (New Zealand Law Commission);
4. The Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention) applies a much wider interpretation to what constitutes a dangerous activity in relation to GMOs. Article 2(1) provides that a dangerous activity includes the production, culturing, handling, storage, use, destruction, disposal, release or any other operation dealing with one or more genetically modified organisms which as a result of the properties of the organism, the genetic modification and the conditions under which the operation is excised, pose a significant risk for man, the environment or property; and
5. In respect to unintentional transboundary movement, we point out that Article 17 of the Biosafety Protocol which deals with unintentional transboundary movement of living modified organisms also envisages incidents of release that might occur during the process of development, handling, use etc. of such organisms at the national level that might lead to the unintentional transboundary movement. Thus, a wide interpretation should be given to the term 'transboundary movement' so as to include the unintended movement of living modified organisms even where there is no deliberate act to transport them.

B. Optional components for geographical scope

(a) Damage caused in areas within the limits of national jurisdiction or control of Parties;
(b) Damage caused in areas within the limits of national jurisdiction or control of non-Parties;
(c) Damage caused in areas beyond the limits of national jurisdiction or control of States.

COMMENTS

The central issues for consideration are, where is damage likely to arise as a result of the transbondary movement (intentional and unintentional), transit, handling and use of GMOs, and where is the source of such damage?

In this regard, we are reminded of the incidents of contamination that have already taken place around the world to date. These include, numerous contamination incidents in Europe (1999, Switzerland, contamination of conventional maize seeds by a Bt variety; 2000, France, Britain, Sweden and Germany, contamination by GM canola from Canada; 2000, France, soyabeans contaminated with GE material; 2000, UK, honey reported to be contaminated by GMOs; 2001, GM maize contamination scandal of traditional landraces in Mexico, centre of origin of maize, 2002, Saskatchawan organic farmers sue Monsanto and Aventis Cropscience Canada (now Bayer) for damages suffered because of contamination of their organic canola by GM canola; 2003, Starlink contamination scandal in the US, Japan, South Korea and in food aid shipments in 2004, to various countries in Central America etc, 2003, GM maize delivered to Malawi as food aid is reported to be planted in that country; 2005, Syngenta's Bt 10 contamination scandal in Europe and Japan etc.)

These cases indicate the following: that contamination takes place in the country of export in the fields, their grain elevation systems, for instance in those of the US and Canada both non-Parties; in shipments of food aid emanating from non Parties to developing countries; in food aid shipments meant for direct consumption emanating in non-Parties and planted out in African countries thousands of kilometres away from the country of export.

We believe that the three options outlined above are all unsatisfactory and do not adequately address the problems posed by the contamination of GMOs in the fields, and post harvest, along the chain of international trade/aid. We believe that a combination of the three options will be much more realistic and look forward to more debate on these critically important issues.

C. Issues for further consideration

(a) Limitation on the basis of geographical scope, i.e. protected areas or centres of origin;
(b) Limitation in time (related to section V on limitation of liability);
(c) Limitation to the authorization at the time of the import of the LMOs;
(d) Determination of the point of the import and export of the LMOs.

COMMENTS

Limitation on the basis of geographical scope:

We vehemently oppose any limitation of liability to specific geographic areas in principle, because such limitation attempts to narrowly construe the negative impacts arising from GMOs mainly to genetic

contamination and the loss of biodiversity. The range of negative environmental impacts instance, include the unpredictability of environmental effects of unintended transfer of genetic material such as by horizontal gene transfer between species, contamination of non-GM crops and food by GMOs, evolution of resistant pests, creation of "superweeds" for instance, by hybridisation of crops with wild relatives or from genetic recombination, adverse effects on beneficial organisms such as insects that control other pests, and the potential allergenicity and toxicity of GM food etc.

Limitation in time

The issue is, what period of time should be granted for lodging claims in the case of harm caused by GMOs to human health and the environment that may only manifest in the long term? In this regard, whilst we are aware that time limits have been set in international legal instruments, these vary considerably, from 30 years to five years to one year. We believe that flexibility must be shown in the crafting of a regime for GMOs, and taking into account the long- term manifestation of the risks involved, and infancy of the technology and the knowledge gaps, no time limit should be prescribed.

Limitation to the authorisation at time of import

This form of limitation is extremely problematic for a number of reasons. First, this approach may involve the avoidance of liability by private persons and the patent holder for instance, on the grounds that it is the State that should be liable because it authorised the import and use of dangerous GMOs, when it should have taken a precautionary approach by imposing and policing particular risk management measures to avoid the harm caused. Indeed, such an approach will undermine the need for an international liability and redress regime. Second, this approach also utterly undermines concerns about scientific uncertainty and unintended impacts because new knowledge of the harm may only become available after a decision has been made to authorise an import. We point out in this regard that Article 12 of the Biosafety Protocol anticipates that new scientific information may necessitate and justify a review and change in a decision to authorise an import. Third, such an approach will be difficult to enforce in circumstances where Party A authorises the import and release of a GMO into its territory and contamination of traditional varieties takes place in Party B, its neighbour.

Determination of the point of import and export of the GMOs

We are not opposed to such determination being made, but we have no idea what purpose such determination will serve and reserve our rights to comment once this issue becomes clearer.

**Specific recommendation: limitations on patent liability

Since most GMOs are protected by patent or other intellectual property rights, we believe that the case of Schmeiser v Monsanto deserves special attention in the context of patent liability arising from contamination (as opposed to breach of contact between the farmer and the patent holder). In this case, Percy Schmeiser was held liable by the Canadian courts for having acquired the patented GM canola involuntarily. In other words, because the simple presence of the GM seed on his land without his knowledge or consent, was found to be an infringement of Monsanto's patent.

We share the opinions expressed by the International Environmental Law Research Centre (Liability and Redress in Biotechnology: Towards the Development of Rules at the National and International Levels) that the Schmeiser case has significant implications for the development of an international liability and redress regime for GMOs. The case shows that liability regimes need to address the relationship between

intellectual property rights and property rights such as land rights as well as the relationship with other rights such as the fundamental right to food. Indeed, if the Schmeiser precedent were to be adopted in other jurisdictions, it would have far reaching consequences for farmers the world over, as well as to issues related to land management generally. For instance, a land user will be both responsible for the unwanted intrusion on the land and for the damage that occurred as a result of the unwanted intrusion/contamination against the will of the land user.

Thus, we believe that an international liability and redress regime must set international minimum standards to deal squarely with the limits of patent protection. Put another way, an international regime must seek to protect farmers from prosecution as Monsanto prosecuted and persecuted Percy Schmeiser.

We also strongly feel that at the next meeting of the Working Group in February 2005, Percy Schmeiser should be invited to address the meeting and inform its further deliberations. We remind the Secretariat that it has already given Muffy Koch, from the biotechnology industry (Agbios Canada) an opportunity to address the Working Group in May 2005. The principles of fairness dictate that Mr Schmeiser also be given an equal opportunity to address Working Group.

II. DAMAGE

A. Optional components for the definition of damage

(a) Damage to conservation and sustainable use of biological diversity or its components;
(b) Damage to environment;
  (i) Damage to conservation and sustainable use of biological diversity or its components;
  (ii) Impairment of soil quality;
  (iii) Impairment of water quality;
  (iv) Impairment of air quality;
(c) Damage to human health;
  (i) Loss of life or personal injury;
  (ii) Loss of income;
  (iii) Public health measures;
  (iv) Impairment of health;
(d) Socio-economic damage, especially in relation to indigenous and local communities;
  (i) Loss of income;
  (ii) Loss of cultural, social and spiritual values;
  (iii) Loss of food security;
  (iv) Loss of competitiveness;
(e) Traditional damage:
  (i) Loss of life or personal injury;
  (ii) Loss of or damage to property;
  (iii) Economic loss;
(f) Costs of response measures.

COMMENTS

As a general principle, we support general references with regard to the definition of damage (specific types of damages under discreet headings). A limited approach may undermine the scientific uncertainties

inherent in the technology, and the interaction between GMOs, our bodies and the environment, as well as the socio-economic impacts of GMOs. Second, we support a comprehensive scope of the damage to be covered. These must include damage to biodiversity, ecosystems, human health, socio-economic damages and so forth. Having said this, we are not opposed to the inclusion of some of the elements set out in the (a)-(f) provided that general chapeaus are created, subject to the following remarks.

- We expressly support specific references to damage to life, loss of life and personal injury. We point out that both the CBD and the Biosafety Protocol envisage that GMOs may negatively impact on human health. The Space Objects Liability Convention makes reference to "impairment of health" which allows for a wide interpretation to cover a range of direct and indirect effects on human health;
- In regard to socio-economic damage, we would like to see special attention being given to crops in centres of genetic origin and diversity beyond the discussion of damage to the effected communities. Crops in these centres have their own intrinsic value, and as such the heritage of humankind to use, respect and conserve;
- We also point out with regard to socio-economic damage, "loss" is too strict a test whereas "impairment" may be a more acceptable term to include for instance, adverse effects on the ability of communities to respect, preserve and maintain knowledge, innovations, and practises embodying traditional lifestyles, irrespective of whether this is related to or relevant to the conservation and sustainable use of biological diversity.
- We also point out that the loss of food security is not appropriate because importation of GM food aid can be said to be achieving food security in many countries in Africa.

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

(a) Costs of reasonable measures taken or to be taken to restore the damaged components of the environment/biological diversity
  (i) Introduction of original components;
  (ii) Introduction of equivalent components that could be on the same location, for the same use, or on another location for other types of use;
(b) Monetary compensation to be determined on the basis of criteria to be developed.

COMMENT

We support the approaches outlined above, as contributions towards some of the options that may be considered but not as an exclusive list because for instance, valuation of damage could also include the costs of any preventative measures as well as any damage arising from the taking of such measures. Furthermore, we reserve our rights to submit further comments once these options have been more fully developed, particularly for instance the criteria referred to in (b).

We require more discussion about the appropriateness of the (extensive) use of the term "component" in order to ensure that this terms does not restrict the ambit of the definition of damage to biodiversity.

We also believe that innovation is required to deepen discussion relating to whether or not it is possible to reinstate an environment damaged by GMOs and how to quantify the damage to biodiversity. In cases where damage is irreversible other solutions must be devised. Possibilities should include criminal sanction, especially if the regime is to function as a mechanism to contribute to damage prevention.

C. Issues for further consideration with respect to valuation of damage

(a) Determination of biodiversity loss (baseline conditions or other means to measure the loss, taking into account natural variations and human-induced variations other than those caused by LMOs);
(b) Obligations to take response and restoration measures;
(c) Special measures in case of damage to centres of origin and centres of genetic diversity to be determined;
(d) Formulation of qualitative threshold of damage to conservation and sustainable use of biological diversity;
(e) Valuation of damage to the environment, sustainable use of biological diversity, human health, socio-economic damage and traditional damage.

COMMENT

We believe that the overall scope of this section is narrow because it does not deal with the critically important issues concerning the displacement of existing native plants by GM plants, its negative impact on biodiversity generally, and crucially, on agricultural biodiversity in the hands of and under the control of local and indigenous communities. Displacement of food crops of the poor in developing countries means that these people will be deprived of the ability to feed themselves. This is a critical issue for us, and we would like to see some text to this effect.

We believe that the terms "loss" should be replaced by "impairment" in (a) for the reasons already discussed above. We do not understand the terms "natural variations and human-induced variations" and reserve our rights to submit further comments once these terms have been more fully explained and discussed.

The obligations set out in (b) and we especially support the inclusion of restorative measures.

We strongly support the crafting of special measures for centres of genetic origin and diversity as proposed in (c) and emphasise our view that these centres are the heritage of humankind. Damage to such centres must include severe punitive damages coupled with criminal sanction. **Indeed, we believe that stand- alone provisions should be crafted to deal specifically with centres of origin and genetic diversity, with a strong emphasis on prevention of damage.**

We strongly oppose the notion of imposing thresholds for damage to conservation and sustainable use of biological diversity in (d).

We support (e) and believe that expert opinion from independent ecologists and other scientists should specifically be sought to guide the further deliberation of these important principles.

III. CAUSATION

Issues for further consideration:

(a) Level of regulation (international/or domestic level);
(b) Establishment of the causal link between the damage and the activity:
    (i) Test (e.g. foreseeability, direct/indirect damage, proximate cause, vulnerability clause);
    (ii) Cumulative effects;

(iii) Complexity of interaction of LMOs with the receiving environment and time scales involved;

(c) Burden of proof in relation to establishing the causal link:

(i) Relaxation of burden of proof;

(ii) Reversal of burden of proof;

(iii) Burden of proof on exporter and importer.

COMMENTS

In so far as (a) is concerned, we strongly support an international liability and redress regime. We do not believe that it is necessary to open a discussion as to why this is necessary. It has become abundantly clear during the Biosafety Protocol negotiations that the majority of developing countries favour international binding rules on liability and redress and the reasons in support thereof have been thoroughly canvassed and discussed such as legal, scientific and equity issues in support of such a regime as opposed to mere domestic regulation. We will not repeat those arguments here.

We believe that such a regime is an indispensable component of the Biosafety Protocol and biosafety generally speaking.

Our view is that (b) deals with too many issues that need to be teased out. The first issue to be considered when dealing with issues of causation is what is the nature of the liability we are dealing with, is it fault based, or strict liability, or a combination of the two? We favour strict liability because it is iniquitous to expect that resource poor farmers who plant Bt cotton for instance, and who suffer some sort of damage, should have to prove the causal connection between the act of planting GM cotton and the resultant damage that has arisen from such planting. We believe that it is in the best interest of the public that the regime adopts a strict liability approach.

Strict liability is not new in international treaties. Indeed, the Space Objects Liability Convention imposes absolute liability as well as fault- based liability. Strict or absolute liability is appropriate for ultrahazardous activities such as the use of GMOs. An activity is regarded as ultrahazardous even if the probability of occurrence is low (quantitative) but the magnitude of the resultant harm is huge (qualitative). Three reasons have been advanced to justify the imposition of strict or absolute liability in the context of the Space Objects Convention, which resonates well with the challenges posed by GMOs. First, scientific causation is difficult to establish given the nature of the technology and its relative short history. Second, there is secrecy attached to the space exploration programmes. Accessing information to establish fault would be unusually difficult. Third, the person who benefits from the activity should bear the cost. Finally, the establishment of a causal link between the GMO and the damage suffered requires the implementation of special, reliable and effective post-commercialisation monitoring measures, something that African countries are unable to afford.

In so far as cumulative effects are concerned, we are not sure what this relates to in (ii) and reserve our rights to make further submissions. In the meanwhile, we do support an approach that takes into account the cumulative effects of the use of GMOs and accompanying chemicals and poisons as intrinsic components of the GMO. Here we are referring to gyphosate as an intrinsic component of herbicide which is used for GM crops engineered specifically to tolerant this herbicide.

We support the need to take into account the complexities of the functioning of ecosystems and thus the impacts of GMOs on the receiving environment, but only in the context of no limitations being placed on

the time scales for such impacts. Indeed, such an approach is key to the valuation of damage to biodiversity.

We support provisions dealing with burden of proof only insofar as it is necessary to support provisions dealing with strict liability. In other words, we support provisions that absolve a Plaintiff from the responsibility of proving causation.

IV. CHANELLING OF LIABILITY, ROLE OF PARTIES OF IMPORT AND EXPORT, STANDARD OF LIABILITY

A. Possible approaches to channelling of liability

(a) State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol);
(b) State liability (for acts that are not prohibited by international law, including cases where a State Party is in full compliance with its obligations of the Protocol).

Option 1

Primary State liability

Option 2

Residual State liability in combination with primary liability of operator

Option 3

No State liability

(c) Civil liability (harmonization of rules and procedures);
(d) Administrative approaches based on allocation of costs of response measures and restoration measures.

COMMENTS

We believe (a) to be superfluous because the State is in any event responsible when it breaches an international obligation such as if it fails to comply with an existing duty under international law.

In regard to (b), our understanding is that it is a general principle of international law that States are under an obligation to protect within their own territory the rights of other States to territorial integrity and inviobility (Trial Smelter Arbitration). Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration both recognise the general duty of States for transboundary harm. This obligation means that States must take measures to prevent the occurrence of transboundary environmental harm and where harm does occur, to redress the consequent damage. Even if private individuals cause the environmental injury in their personal capacity, States still have the obligation to prevent the harm by taking appropriate measures by exercising due diligence to prevent private individuals from causing environmental harm.

We do not, however, believe that if a State has discharged its international law "state responsibility" obligations that it should be liable for damages arising from GMOs. The central issue for us is, where does State responsibility end and the liability of a third party begin, if a decision is said to have been made on the basis of the precautionary principle to allow GMOs to be imported and used in the Party of import. This is extremely important because the pressures on governments in the South to approve GM applications are enormous, particularly when considering that many risk assessment, which ostensibly makes a prima facie case that the GMO is risk free?

Arguably, an aggrieved person will always have the right to sue its own government for failure to protect it from the risks posed by GMOs. An international regime cannot take away this right. Thus, we do not believe that an international regime should pin any liability on the State and we thus favour option (c).

We need more information on option (d) and (e) and therefore, make no comments here.

B. Issues relating to civil liability

1. Possible factors to determine the standard of liability and the identification of the liable person

(a) Type of damage;
(b) Places where damage occurs (e.g. centres of origin and centres of genetic diversity);
(c) Degree of risk involved in a specific type of LMO as identified in risk assessment
(d) Unexpected adverse effects;
(e) Operational control of LMOs (stage of transaction involving LMOs).

COMMENTS

We are not convinced of the relationship between the type of damage and the identity of the person liable. We are of the view that the nature of the liability should be strict irrespective of where that damage has occurred. The nature of the damage becomes important in respect to valuation of the damage and whether or not criminal sanctions should be imposed for instance, in the context of damage to centres of origin and diversity.

We are extremely wary of using risk assessment as a standard of measure for liability. It is common cause that testing and assessment of GMOs is left up to the developer of the transgenic organism because there are no standardised agreed-upon protocols for such testing. Many developing countries like South Africa rely heavily on the approvals granted by the Environment Protection Agency (EPA) in the US, who test *inter alia*, for allergenicity of pesticidal proteins etc. However, the protocols used by the EPA are out-dated and fail to meet international standards as expressed in FAO-WHO (Food and Agriculture Organistion, World Health Organisation).

We also note that "Degree of risk" also appears to convey notions of 'acceptable levels of risk' a concept we do not support in the context of GMOs, given the infancy of the technology and the significant gaps in current scientific knowledge about the safety of GMOs.

We are not sure how the issue of unexpected adverse effects in (d) will be factored into the discussion underway. We, however, oppose any provision that mitigate liability on the grounds that unexpected adverse effects occurred, which were not/could not have been anticipated or identified during the risk assessment by the developer and risk evaluation by the authorising entity. Such an approach has the potential to undermine the legitimacy of the precautionary principle.

We appreciate the need to take into account the circumstances of operational control of LMOs and support this inclusion as is more fully discussed below. We are, however, mindful that damages are likely to manifest several years when several actors in the chain of liability may no longer exist.

2. Standard of liability and channelling of liability

(a) Fault-based liability:
   (i) Any person who is in the best position to control the risk and prevent the damage;
   (ii) Any person who has operational control;
   (iii) Any person who does not comply with the provisions implementing the Biosafety Protocol;
   (iv) Any entity who has the responsibility to put in place the provisions for implementing the Protocol;
   (v) Any person to whom intentional, reckless or negligent acts or omissions can be attributed;
(b) Strict liability:

Option 1
Liability to be channelled to one or more of the following persons, including persons acting on his or her behalf, on the basis of prior identification:
o The developer
o The producer
o The notifier
o The exporter
o The importer
o The carrier
o The supplier

Option 2
Liability to be channelled on the basis of establishment of a causal link.

COMMENTS

As we have already discussed, the State is liable in the event of it breaching the customary international law principles and standards and/or breach of any of its obligations under the Biosafety Protocol. Additionally, we have discussed that harm may still arise even in situations where the state has discharged its obligations. International legal instruments 'channel' liability to clearly identifiable person/s such as the 'operator' of the activity causing damage-the person who has the operational control of the activity at the same time of the incident causing damage. However the polluter pays principle demands that the persons who may be responsible for the harm must be held liable. In the case of GMOs, this may include the carriers if they are responsible for the incident that give rise to damage.

The principles of fairness and equity dictate that those who may never obtain control but who profit from the commerce involving GMOs should also be held liable including the producer of the GMO. At the same time, it may be inequitable to hold a host of actors involved in the international grains trade/food aid responsible for damage that occurred as a result of the import of GMOs in the country of import, whereas the liability should rest squarely on the developer of the technology for example.

In the case of commodity imports and commercial releases, it is a fairly simple exercise. The applicants who obtain the commodity import permit or permit to sell GM seeds are usually the patent holders acting on their own or in partnership with the seed company e.g Monsanto and Delta and Pinelands. These companies must be held liable, as the GMOs are theirs, so to speak.

It must also be noted that once a commercial permit to sell GMOs is granted, the Party of import does not have any control over the plantings by farmers and the biosafety measures being taken by them. Competent authorities in developing countries will not be able to track every sale of every bundle of GM

seeds and the exchange that takes place thereafter between farmers. The same applies to the import of bulk shipments of GM grain into developing countries. The range of players involved in the handling of the grain is enormous. These people cannot be held liable for any damage that arises. This is common sense. Thus, the liability must attach to the developer of the technology.

For field trials, the situation is more complex because research institutions will most likely be the persons responsible for making the application. The argument that public research institutions will thus proffer in these circumstances is that this approach will stymie investment, research and development. However, safety must come first. So must principles of fairness, equity and justice. If one was to accept that the developer is responsible, than this would also include research institutions, especially for instance, if the transformation has taken place in the country where the release has taken place and the harm has arisen.

We must therefore, open up discussions about the relationship between intellectual property rights, patents and the liability of the patent holders.

We are also of the view that the approach to be taken is one that should be less concerned with tabulating the list of potential players that may be liable and rather look at the nature of the activity involved, the purpose of the transboundary movement and work on the basis of eliminating those players that should not and could not thus be held liable. For instance, the World Food Programme delivering GMO food aid to a country that allows the import of GMOs cannot be held liable for allergic reactions that may take place.

3. Exemptions to or mitigation of strict liability

Option 1

No exemptions.

Option 2

Possible exemptions to or mitigations of strict liability

(a) Act of God/force majeure;
(b) Act of war or civil unrest;
(c) Intervention by a third party (including intentional wrongful acts or omissions of the third party);
(d) Compliance with compulsory measures imposed by a competent national authority;
(e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator;
(f) The "state-of-the-art" in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

COMMENTS

We believe that the issue of exemptions from liability should be carefully considered in the light of the nature of the technology, because whilst an act of God may be justifiable, will this also include the transfer of genetic material by wind?

We prefer that as a general rule, no exemptions or exceptions should be allowed. We thus favour absolute liability.

4. Additional tiers of liability in situation where:

(a) The primary liable person cannot be identified;
(b) The primary liable person escape liability on the basis of a defence;
(c) A time limit has expired;
(d) A financial limit has been reached;
(e) Financial securities of the primary liable person are not sufficient to cover liabilities; and
(f) The provision of interim relief is required.

COMMENTS

We mention that many international legal instruments also contemplate subsidiary state liability to complement the liability of the operator. This means that the State is required to pay certain sums into funds in order to satisfy liability claims, for example, the Oil Fund Convention 1971 or where the state is held liable when the operator fails to provide adequate compensation under the liability regime as provide by the Vienna Convention 1963.

We believe that the State cannot escape all liability completely and should make contributions towards a compensation fund. However, we are mindful that ultimately, such costs are borne by society, a situation we do not favour either, which cannot be completely avoided if the GMO producing countries are to be singled out, as those that must make such contributions.

5. Issues for further consideration

(a) Combination of fault liability and strict liability;
(b) Recourse against third party by the person who is liable on the basis of strict liability;
(c) Joint and several liability or apportionment of liability
(d) Vicarious liability.

COMMENT

We have already addressed this issue above.

V. LIMITATION OF LIABILITY

A. Issues for further consideration

(a) Limitation in time (relative time-limit and absolute time-limit);
(b) Limitation in amount including caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined, and to be considered in conjunction with section VI on mechanisms of financial security.

COMMENT

We have already addressed this issue above.

VI. MECHANISMS OF FINANCIAL SECURITY

A. Coverage of liability

Option 1

Compulsory financial security.

Option 2

Voluntary financial security.

B. Supplementary collective compensation arrangements

Option 1

Fund financed by contributions from biotechnology industry to be made in advance on the basis of criteria to be determined.

Option 2

Fund financed by contributions from biotechnology industry to be made after the occurrence of the damage on the basis of criteria to be determined.

Option 3

Public fund.

Option 4

Combination of public and private funds.

COMMENTS

We are aware of the submissions made by Swiss Re (May 2005), which clearly imply that the risks associated with GMOs under a liability Protocol are uninsurable. Furthermore, even if such risks were insurable, when a risk manifests itself as a loss, insurance can only pay indemnity in the form of money, and therefore, the only risks that qualify as insurable are those that are generally accepted, and about which there is consensus as to the value of a damaged entity and the way a loss can be compensated. Crucially, if the liability instrument should demand compulsory insurance, this requirement will only bind the liable party, and the insurance company may still limit or decline to provide cover.

In the circumstances we are of the view that issues of coverage of liability should go beyond merely requiring compulsory insurance by the identified liable person. We are of the view that an international indemnification fund should be established with contributions from the biotechnology industry, and other actors benefiting from the international commerce involving GMOs, as well as those countries that have approved activities (imports, exports, release) in relation to GMOs. However, since the contributions by the State come from public spending budgets, we believe that their contributions should only be used in circumstances where the liable person is unable to meet its obligations. We are aware that the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (also referred to as the HNS Convention) creates an international indemnification fund.

C. Issues for further consideration

(a) Modes of financial security (insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees).
(b) Institutional modalities for the operation of a fund.

COMMENT

We have already discussed our reservations concerning compulsory insurance, although we are aware that these have been imposed by the Oil Pollution Liability and Compensation: Convention on Civil Liability for Oil Pollution Damage 1969 ("CLC") and Basel Protocol on Liability and Compensation Resulting from the Transboundary Movement of Hazardous Wastes and their Disposal ("Basel Liability Protocol"). Elaborate rules already exist under the CLC for States to ensure that the person/s potentially liable take out the compulsory insurance and provide adequate evidence of the insurance or other cover.

Whilst bonds or other financial guarantees may also be acceptable if the insurers or other financial institutions can be sued directly, and in circumstances where the defences available to these institutions are circumscribed to limit their opportunities to avoid lengthy litigation and avoidance of liability.

We reiterate though, that we prefer the establishment of a fund. Access to justice is a critically important principle that must be factored into these discussions. The establishment of *inter alia*, strict liability, clearly identifiable persons who will be liable, clear criteria for the valuation of liability and speedy access to a compensation fund without recourse to courts and litigation, is of utmost importance.

VII. SETTLEMENT OF CLAIMS

A. Optional procedures

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

(i) Jurisdiction of courts or arbitral tribunals;
(ii) Determination of the applicable law;
(iii) Recognition and enforcement of judgments or arbitral awards.

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

COMMENTS

We are not opposed in principle to the establishment of a mechanism under the CBD aimed at resolving claims by way of conciliation and mediation. In this regard, the Space Objects Liability Convention may be a model to consider. Under this Convention, claims are presented through the diplomatic channels of a country that has diplomatic relations with the defendant country within a prescribed time period. If there is no settlement within a time limit, the Claims Commission is set up by the Parties to hear and determine the claim. We are particularly in favour of an approach that does not require the national on behalf of whom the claim is made, to exhaust all available domestic remedies first.

With regard to the question of adjudication of the claim, we are in favour of the approach taken in the Basel Liability Protocol, which provides for three options with regard to the fora (court) that may be have jurisdiction to hear claims, namely, where either:

- The damage was suffered; or
- The incident occurred; or

- The defendant has his habitual residence, or has his principal place of business.

However, these should not be the only fora that will have jurisdiction to hear the claims, but should include in particular, the courts of non-contracting parties.

We are not in principle opposed to the use of a special tribunal but oppose this if it will mean delays in the implementation of the liability and redress regime for GMOs.

VIII. STANDING/RIGHT TO BRING CLAIMS

A. Issues for further considerattion

(a) Level of regulation (international and/or domestic level);
(b) Distinction between inter-State procedures and civil procedures;
(c) Level of involvement in the transboundary movement of living modified organisms as a requirement of standing/right to bring claims;
(d) Type of damage:
    i. Traditional damage: affected person, dependents, or any other person acting on behalf or in the interest of that person;
    ii. Costs of response measures: person or entity incurring the costs;
    iii. Damage to environment/conservation and sustainable use of biodiversity:
        o Affected State
        o Groups acting in vindication of common interests;
        o Person or entity incurring the costs of restoration measures.

    iv. Damage to human health:
        o Affected State;
        o Affected person or any other person entitled to act on behalf of that person;

    v. Socio-economic damage:
        o Affected State;
        o Groups acting in vindication of common interests or communities.

COMMENTS

We have addressed several of the issues raised here, in the course of our preceding comments. We raise here only new issues concerning who may prefer a claim. We support the approach taken under the Basel Liability Protocol where the person who may claim is not specified. By implication it is any person who suffers damage; this would cover individuals, entities, the State itself under the provisions of the Protocol itself as well as under general rules of international law on State responsibility.

We specifically support as a general rule, the standing of any person to bring a claim in the interests of the environment, human health of humanity, and the protection of society.

IX. NON-PARTIES

A. Issues for further consideration

(a) Possible special rules and procedures in the field of liability and redress in relation to LMOs imported from non-Parties (e.g. bilateral agreements requiring minimum standards).

COMMENTS

We support this principle and note the provisions of Article 14 of the Biosafety Protocol in this regard.

X. USE OF TERMS

A. Issues for further consideration

(a) Definition of terms for the purpose of international rules and procedures on liability and redress under Article 27 of the Biosafety Protocol, e.g. use, response measures, restoration measures and reasonable.

COMMENTS

We believe that a section dealing with definitions is of critical importance to bring about legal certainty.

XI. COMPLEMENTARY CAPACITY-BUILDING MEASURES

A. Possible approaches

(a) Use of measures adopted under Article 22 of the Protocol, including use of roster of experts and the Action Plan for Building Capacities for Effective Implementation of the Protocol, e.g. exchange of best practices in the design and implementation of national rules and procedures on liability and redress, cooperation at the regional level in the use of available expertise, and training in all relevant fields;

(b) Development of specific complementary capacity building measures, based on national needs and priorities, for the design and implementation of national rules and procedures on liability and redress, e.g. establishment of baseline conditions and monitoring of changes in the baseline conditions.

COMMENTS

We believe that more information is required regarding the efficacy of the current capacity building initiatives already underway in terms of Article 22 of the Protocol, before the discussion regarding the adoption of new measures is opened. In this regard, we believe that an independent assessment is required.

XII. CHOICE OF INSTRUMENT

Option 1

One or more legally binding instruments.

- o A liability Protocol to the Biosafety Protocol;
- o Amendment of the Biosafety Protocol;
- o Annex to the Biosafety Protocol

o A liability Protocol to the Convention on Biological Diversity.

Option 2

One or more legally binding instruments in combination with interim measures pending the development and entry into force of the instrument(s).

Option 3

One or more non-binding instruments:

(a) Guidelines;

(b) Model law or model contract clauses.

Option 4

Two-stage approach (initially to develop one or more non-binding instruments, evaluate the effects of the instrument(s), and then consider to develop one or more legally binding instruments)

Option 5

Mixed approach (combination of one or more legally binding instruments, e.g. on settlement of claims, and one or more non-binding instruments, e.g. on the establishment of liability).

Option 6

No instrument.

COMMENTS

We support a discreet Liability Protocol to the Biosafety Protocol. We vehemently oppose the use of non-binding instruments and reject with utter contempt, Option 6 proposed by New Zealand of 'no instrument.'

THIRD WORLD NETWORK (TWN) [20 NOVEMBER 2005]
[SUBMISSION: ENGLISH]

Choice of instrument

The legally binding instrument should be a Liability and Redress Protocol to the Cartagena Protocol on Biosafety.

Interim measures should be put in place immediately, pending the development and entry into force of the liability and redress protocol. The measures, and the development of such measures must not prejudice or delay the development of the liability and redress protocol.

Scope

The scope of the international liability and redress protocol should cover damage resulting from the transboundary movement, transit, handling, and use of all living modified organisms and their products.

It should include intentional, unintentional and illegal transboundary movements.

The international liability and redress protocol should apply to damage caused in areas within the limits of national jurisdiction or control of Parties as well as in areas beyond any national jurisdiction.

Damage

The types of damage should include the following:

1. Damage to the environment includes:
a. loss or changes to biological diversity
b. impairment of soil quality
c. impairment of water quality
d. impairment of air quality

2. Damage to human health includes:
a. loss of life or personal injury
b. loss of income
c. public health measures
d. impairment of health

3. Socio-economic damage, especially in relation to indigenous people and local communities includes:
a. loss of income
b. impairment or loss of cultural, social and spiritual values
c. impairment or loss of food security
d. loss of competitiveness

4. Traditional damage:
a. loss of life or personal injury
b. loss of or damage to property
c. economic loss

5. Cost of response measures including remediation and restoration

6. Cost of preventive measures

The burden of proving damage should be reversed.

Standard of liability

Strict liability should apply.

Liability may only be mitigated in the following cases:

1. Damage caused directly by an Act of God where such occurrences could not have been reasonably foreseen and are of an exceptional nature;
2. Damage caused directly by an unforeseeable act of war or civil unrest, unless this is instigated or initiated by the Party;
3. Damage caused wholly by the wrongful intentional act of a third party.

- This shall not apply where the damage results from any false, misleading or fraudulent claim or the suppression or omission of any material facts by the person under the obligation to provide such information.
- This shall not apply unless it can be shown that the person under the obligation to provide such information has ensured or has taken all reasonable steps to ensure that the third party has understood all material information.

Causation

Cumulative effects resulting from an LMO, multiple LMOs or multiple incidents that cause damage should be taken into account.

The complexity of interaction of LMOs with the receiving environment and time scales involved should be taken into account, but causation cannot be avoided on the basis of these complexities, so long as the damage or any part of it can be related to that LMO.

There should be a reversal of the burden of proof in establishing causation. If a basic causal link can be established between damage and an LMO, then the person or entity deemed liable has to prove that the damage was not caused by the LMO in question.

Channeling of liability

Any one or more of the following, including persons or entities acting on his, her or its behalf, should be held liable depending on the circumstances, including:

1. the exporter
2. the Party of export
3. any person who holds the approval in the Party of export
4. the developer
5. the producer
6. the importer
7. the carrier
8. the supplier

The circumstances should include intentional, unintentional and illegal transboundary movement, and should be in respect of damage caused by LMOs for introduction into the environment, LMOs for direct use for food or feed or for processing, LMOs for contained use, and LMOs in transit.

Where the primary liable person cannot be identified, the Party of export should be held liable.

Nature and time of relief

There should be provision for interim relief, both monetary (e.g. if damage is established but the nature and extent are still unknown) and non-monetary (e.g. injunction). When damage has occurred, there should be an immediate obligation for cessation of the activity that could cause further damage.

Nature and extension of liability

There should be a right of recourse among other wrong doers under the liability and redress protocol.

Joint and several liability should apply. If two or more persons are liable, full compensation can be sought from any or all of the persons liable.

Vicarious liability should apply.

There should be provision for the lifting of the corporate veil in order to ascertain the principals. This is for situations including where companies may set up shell companies or claim that they are separate legal entities to avoid liability.

Limitation in time

Limitation in time to bring a claim should run at least 10 years after the person or entity who has suffered the damage knows or ought to have known about the damage, and that it was caused by the LMO in question.

There should be no absolute time limit to bring a claim.

If there are multiple incidents which caused the damage, the limitation in time should run from the last incident.

If the incident takes place over a period of time, the limitation in time should run from the end of the incident.

Financial limit

There should be no upper financial limit.

Insurance and other financial guarantees

There should be a clear and mandatory obligation on Parties to ensure that insurance, bonds or other financial guarantees are established and maintained for amounts not less than a minimum limit. Proof of coverage should be provided before an activity takes place.

There should be a fund set up under the liability and redress protocol. The fund can be used to ensure redress in situations where redress was not fully obtainable including where:

- the liable person is bankrupt or ceases to exist
- a time limit has expired
- financial securities of the primary liable person are not sufficient to cover liabilities
- the primary liable person escapes liability on the basis of a defence

Standing/right to bring claims

The person who has suffered damage, the Party whose citizen has suffered damage, or any person or group of persons should be entitled to bring a claim in respect of

1. their own interest
2. the interests of a person/s who is unable to bring a claim
3. the interest of protecting the environment or biological diversity

Settlement of disputes, non-compliance

There should be strong mechanism(s) under the liability and redress protocol for dealing with non-compliance, dispute settlement and settlement of claims.

Monitoring

There should be mandatory monitoring and reporting of adverse incidents/impacts. Parties should report every case that may lead to liability. These cases should be posted on the BCH.

Non-Parties

Parties importing from non-Parties and Parties exporting to non-Parties should ensure that, in respect of liability and redress, such transboundary movement does not result in a lower level of protection as provided for under the liability and redress protocol.
