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

SYNTHESIS OF PROPOSED TEXTS AND VIEWS ON APPROACHES, OPTIONS AND ISSUES IDENTIFIED PERTAINING TO LIABILITY AND REDRESS IN THE CONTEXT OF ARTICLE 27 OF THE BIOSAFETY PROTOCOL

Note by the Co-Chairs

I. INTRODUCTION

1. The first meeting of the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosfaety (the 'Working Group', hereinafter) was held from 25 to 27 May 2005 in Montreal. The meeting reviewed and further developed the scenarios (of possible damage resulting from the transboundary movement of living modified organisms (LMOs)), options, approaches and issues for further consideration relating to liability and redress in the context of Article 27 of the Protocol, as contained in the annex to the report of the Technical Group of Experts on Liability and Redress, which was convened to undertake preparatory work for the first meeting of the Working Group.

2. The Working Group identified several documents as well as information covering a range of areas that were considered relevant and informative to its future work. It requested the Secretariat to make the documents and the information available for consideration at its second meeting.

3. The Working Group also invited Parties, other Governments, relevant international organizations and stakeholders to submit further views on the matter covered by Article 27 of the Protocol, in particular with respect to approaches, options and issues identified and annexed to its report. It indicated its preference of submissions made in the form of proposed texts. The Group requested the Co-Chairs of the Working Group to synthesize the submissions and produce, with the assistance of the Secretariat, a working draft for consideration at its second meeting.

4. By 30 November 2005, submissions were received from the following Governments: Argentina, Canada, Ethiopia, European Community and its Member States, Indonesia, Madagascar, Sri Lanka, United States of America. Submissions were also received from the following international organizations and stakeholders: Global Industry Coalition (GIC), Greenpeace International, International Federation of Organic Agriculture Movements (IFOAM), Organic Agriculture Protection Fund (OAPF), Public Research

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and Regulation Initiative (PRRI), South African Civil Society, and Third World Network (TWN). While Norway's submission was received on 15 December 2005, it has, nevertheless been integrated into the present synthesis or working draft.

5. The present document puts together the views and the proposed texts received. It follows the structure of the elements contained in the annex to the report of the first meeting of the Working Group. Texts of submissions in the working draft are preceded by text boxes that contain the relevant sections or subsections of the annex.

6. All substantive submissions of views and proposed texts are included in the document with some adjustments that were necessary to achieve better structure and limit the focus and the coverage of the synthesis document to those elements of options, approaches or issues outlined in the annex. For example, in the case of submissions of proposed texts accompanied with comments or introductory notes, as the case may be, only the proposed texts are incorporated in the working draft. Texts such as preambular paragraphs, objectives or final clauses, which otherwise make the individual submissions of proposed texts complete, are not included, for the obvious reason that they do not exactly fall into any of the sections or sub-sections of the annex. Minor editing of a non-substantive nature has been done on some of the submissions. Texts of the annex that have been reproduced fully or partially in several submissions to indicate or integrate preference to elements or options, have been either left out or modified with a view to achieving a manageable size of a working draft.

7. Numbering and lettering that appear in the submissions have been removed for the purpose of this working draft except where they were justified as in the case of enumeration and paragraphs of a legal text. However, most of the numberings of articles that appear in the submission of Greenpeace International have been retained so that the cross-referencing that exists at several places in their submission would not be lost.

8. The full texts of the submissions have been compiled and made available in an information document (UNEP/CBD/BS/WG-L&R/2/INF/1).

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

A Working Draft

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

20-24 February 2006

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

Argentina:

Option 1: This is the option that most closely fits the scope of Article 27 of the Protocol. Article 27 refers to liability and redress for damage resulting from transboundary movements of LMOs, and Article 3, sub-paragraph k) defines "transboundary movement" as the "movement of a living modified organism from one Party to another Party, save that for the purposes of Articles 17 and 24 transboundary movement extends to movement between Parties and non-Parties."

Although the Protocol refers to a broader range of activities, which include the transit, handling and use of LMOs in addition to transboundary movement, Article 27 only covers transboundary movement.

In this respect, any damage resulting from anything other than transboundary movement would fall under respective local legislation.

In order to clarify the meaning of the terms "resulting from", it is proposed to interpret the phrase "damage resulting from transboundary movements of LMOs" according to the meaning of "damage resulting from incidents occurring during the transboundary transportation of LMOs", to encompass the damages produced in a State Party of transit, derived from said movement.

However, in the event that the State of transit is a non-Party, it would not be possible for it to be covered in case of damage, unless the Party were to enter into a special agreement as provided for in sub-paragraph 2) of Article 24.

Canada:

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.

EU:

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.

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.

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.

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.

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.

Norway:

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)

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

Therefore Norway supports option 2.

Sri Lanka:

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

Global Industry Coalition:

Option 1

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.

Greenpeace International:

(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.

Organic Agriculture Protection Fund (OAPF):

Option 2.

South African Civil Society:

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:

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;

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;

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);

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

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.

Third World Network (TWN):
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.

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.

(a) Damage caused in areas within the limits of national jurisdiction or control of Parties;

Argentina:

It is understood that the scope of application of the liability regime would extend from the point at which the LMO leaves the jurisdiction of the exporting State to the point of transfer of liability within the territory of the importing State;

Ethiopia:

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.

Norway:

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.

Sri Lanka:

(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**;

Greenpeace International:

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.

Organic Agriculture Protection Fund (OAPF):

Damage caused in areas within and beyond the limits of national jurisdiction or control of Parties; non-Parties and in the control of States

Third World Network (TWN):

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.

(b) Damage caused in areas within the limits of national jurisdiction or control of non-Parties

Argentina:

It is not acceptable for non-Parties to bring claims under the liability regime.

Canada:

The Protocol and any instrument under the Protocol only applies to Parties, therefore it is not possible to include non-Parties in the scope, neither as entities nor in terms of applicability. The Protocol identifies transboundary movement as between two Parties.

Global Industry Coalition (GIC):

There is no possible legal basis to assert jurisdiction over acts or omissions within the territory of a non-party.

Organic Agriculture Protection Fund (OAPF):

Damage caused in areas within and beyond the limits of national jurisdiction or control of Parties; non-Parties and in the control of States

(c) Damage caused in areas beyond the limits of national jurisdiction or control of States.

Argentina:
Considering the fact that the scope of the liability regime should refer to the conservation and sustainable use of biological diversity, and not to traditional damage, it is deemed that there would be no victims in areas outside of national jurisdiction entitled to claim for damages to the conservation and sustainable use of biodiversity.

Ethiopia:

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.

Norway:

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.

Sri Lanka:

(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**;

Greenpeace International:

The scope should also cover damage to areas beyond national jurisdiction such as the high seas.

Organic Agriculture Protection Fund (OAPF):

Damage caused in areas within and beyond the limits of national jurisdiction or control of Parties; non-Parties and in the control of States

Third World Network (TWN):

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.

South African Civil Society:

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.

a) Limitation on the basis of geographical scope, i.e. protected areas or centres of origin

Canada:

It is a valid consideration to identify special areas of interest such as centres of origin or diversity, protected or endangered species or areas.

Sri Lanka:

No limitation

Global Industry Coalition (GIC):

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.

South African Civil Society:

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.

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

Argentina:

A reasonable time limit should be set for undertaking action to claim for damages.

Canada:

Canada would support a time limitation based on the biology of the LMO and the biology of the affected species of biodiversity

Sri Lanka:

No limitation

Global Industry Coalition (GIC):

This is a critical feature of any liability system and is addressed in section V below**.**

South African Civil Society:

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.

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

EU:

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.

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.

Sri Lanka:

No limitation.

Global Industry Coalition (GIC):

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.

South African Civil Society:

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.

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

Argentina:

From the point outside of the territorial jurisdiction of the exporting State, to the moment of transfer of liability for the shipment in the importing State.

EU:

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.

Global Industry Coalition (GIC):
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.

South African Civil Society:
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.

II. DAMAGE

A. Optional components of the Definition of damage

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

(b) Damage to environment;

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

(c) Damage to human health;

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

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

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

(e) Traditional damage:

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

(f) Costs of response measures.

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

Argentina:

The type and scope of damage are not specified in Article 27. It is necessary to turn to articles 1 (Objective) and 4 (Scope) of the Protocol, which refer to “adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health”, to give substance to the damage mentioned in Article 27. Therefore, it is considered that the damage referred to in Article 27 is “damage to the conservation and sustainable use of biological diversity”.

The Protocol does not define the "conservation and sustainable use of biological diversity". Article 2 of the CBD provides a definition of biological diversity that encompasses habitats and ecosystems in addition to species. From a legal perspective, habitats and ecosystems could very well cover "variability among living organisms". It is therefore necessary to know what the adverse effects/damage to variability among living organisms would be, how they could be quantified and what would be the threshold of damage entailing liability (UNEP/CBD/ICCP/2/3).

Taking into account that LMOs cannot be considered generically as hazardous substances, because there are no proven associated risks, more information on the damage to biological diversity caused by LMOs is required, in particular with regard to the types of incidents that could give rise to significant damage to biological diversity. Since other elements needed to draft international rules and procedures on liability and redress depend on the scope of damage, it is of the utmost importance to move forward on these issues.

It would be useful for Biosafety Protocol Parties and Observers to present lists of the varieties of LMOs that could generate real and concrete damage to their country, considering its particular characteristics (for example: countries that are centres of origin for a given crop). In concrete terms, it is necessary to have further information on damage to biological diversity produced by LMOs.

In this respect, it is essential to have valuation criteria to analyze the damage that has taken place in order to formulate liability and the proper restoration costs for that damage.

Canada:

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 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.

EU:

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.

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'.

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

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.

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 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.

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.

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.

Norway:
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

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.

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).

Sri Lanka:
All taken without (a)

U.S.:
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."

Global Industry Coalition (GIC):
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.

International Federation of Organic Agriculture Movements (IFOAM):
Damage to organic agriculture

[T]he 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 via 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.

Organic Agriculture Protection Fund (OAPF):
It is important that (a to f) be included in the definition of damage.

Public Research and Regulation Initiative (PRRI):
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.

(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;

Argentina:
The Cartagena Protocol deals with the conservation and sustainable use of biological diversity. Therefore, the scope of any liability rules that may be developed should concern the conservation and sustainable use of biological diversity, not the "environment" in general terms.

Ethiopia:
Damage includes any harm to 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.

EU:
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'.

Sri Lanka:
All taken with out (a)

Global Industry Coalition (GIC):
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.

Greenpeace International:
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

* SYNTHESIS NOTE: Some of the specific elements of the definition are reproduced also in other sections where they seem to be relevant.

environment including value to future generations or cost of establishment of naturalresources 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.

Organic Agriculture Protection Fund (OAPF):
It is important that (a to f) be included in the definition of damage.

Third World Network (TWN):
The types of damage should include the following:
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

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

Argentina:
Article 4 of the Biosafety Protocol, which refers to the scope of application, includes the phrase "...taking also into account risks to human health." This mention takes effect when it comes to assessing risks for which that type of damage must be taken into account.

However, the Protocol's central objective refers to damage to the conservation and sustainable use of biological diversity, making it possible to interpret that the scope of Article 27 as not dealing with direct damage to health.

The protection of human health is covered by other relevant international regulations (Codex Alimentarius). In this respect, the damage to health caused by transgenic food should follow the general regulations applicable to conventional food.

With regard to how this issue is addressed in the Codex Alimentarius, the following documents, adopted by the Codex Commission at its 26th Meeting (2003), are submitted for consideration:

1/ Wording from Lugano Convention

Agreement on Principles for Assessing Food Obtained by Modern Biotechnology Means (FAO/OMS 2003a)
Agreement on Guidelines for Assessing the Innocuousness of Food Derived from Recombinant DNA Plants (FAO/OMS 2003b)
Agreement on Guidelines for Assessing the Innocuousness of Food Produced Using Recombinant DNA Organisms (FAO/OMS 2003c)
The Codex guidelines indicate that the process for evaluating the innocuousness of GM food should be carried out by comparing it with its conventional counterpart, which is generally considered innocuous due to its long history of use. When an innocuousness problem is identified, the risk associated with it must be characterized in order to determine its relevance to human health.

Ethiopia:
Damage includes human health, including

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

EU:
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).

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).

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.

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)).

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)

Norway:
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.

Sri Lanka:
All taken with out (a)

Global Industry Coalition (GIC):
"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.).

Organic Agriculture Protection Fund (OAPF):
It is important that (a to f) be included in the definition of damage.

South African Civil Society:
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;

Third World Network (TWN):
Damage to human health includes:
a. loss of life or personal injury
b. loss of income
c. public health measures
d. 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;

Argentina:
For the above-mentioned reasons, socio-economic damage *per se* is not within the scope of the Protocol. Socio-economic considerations only appear in Article 26 and the Protocol only authorizes Parties to take them into account in the process of adopting a decision prior to the first transboundary movement of a given LMO.

In particular, Article 26 establishes that: "The Parties, in reaching a decision on import under this Protocol (...) may take into account, consistent with their international obligations, socio-economic considerations arising from the impact of living modified organisms on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities."

Canada:
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.

Ethiopia:
Damage includes 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;

EU:
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.

Global Industry Coalition (GIC):
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.

Organic Agriculture Protection Fund (OAPF):

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

South African Civil Society:
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.

Third World Network (TWN):
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

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

Argentina:
Traditional damage (loss of life or personal injury, loss of or damage to property and economic loss):
This is not within the scope of the Protocol. Neither the Protocol nor the Convention provides any legal basis to cover traditional damage. The objective of a liability regime is aimed exclusively at considering damage to the conservation and use of biological diversity, consistent with the purpose of the Cartagena Protocol, which encompasses damage to the conservation and sustainable use of biological diversity.
Traditional damage is covered by national legislation.

EU:
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.

Sri Lanka:
Traditional damage mentioned in (e) is not clear

Global Industry Coalition (GIC):

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.

Greenpeace International:
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;

Organic Agriculture Protection Fund (OAPF):
It is important that (a to f) be included in the definition of damage.

Third World Network (TWN):
Traditional damage:
a. loss of life or personal injury
b. loss of or damage to property
c. economic loss.

(f)	Costs of response measures.

Ethiopia:
"damage" includes Costs of response measures.

EU:
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).

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.

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.

Norway:
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.

Global Industry Coalition (GIC):
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."

Greenpeace International:
(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,

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.

Organic Agriculture Protection Fund (OAPF):
It is important that (a to f) be included in the definition of damage.

Third World Network (TWN):
a. Cost of response measures including remediation and restoration
b. Cost of preventive measures

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 biological diversity.

(i) Introduction of original components;

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

EU:
Valuation of damage to the conservation of biological diversity
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).

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
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.

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.

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.

Norway:
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.

Sri Lanka:
(a) and (b) All taken

International Federation of Organic Agriculture Movements (IFOAM):

As stated under [para.12 of their submission] 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.

South African Civil Society:
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.

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

Argentina:
Where equivalent restitution is not possible, monetary compensation could be accepted as a subsidiary measure, in which case a maximum financial limit should be set.

Sri Lanka:
(a) and (b) All taken

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.

(a) Determination of biodiversity loss: it is essential to have baselines to measure loss, taking into account natural variations and human-induced variations other than those caused by LMOs;

Sri Lanka:
(a), (b), (c), (d) and (e) all taken

Organic Agriculture Protection Fund (OAPF):
With respect to valuation of damage points (a to e) should be made inferable by the Protocol.

South African Civil Society:
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.

(b) Obligations to take response and restoration measures

Argentina:

For redress, it is considered appropriate to support reasonable and possible measures to restore the damaged biological diversity.

EU:
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.

Sri Lanka:
(a), (b), (c), (d) and (e) all taken

Organic Agriculture Protection Fund (OAPF):
With respect to valuation of damage points (a to e) should be made inferable by the protocol.

South African Civil Society:
The obligations set out in (b) and we especially support the inclusion of restorative measures

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

Argentina:
It is not considered necessary to adopt special measures for such cases. It is understood that prevention measures should be proportional to the risk to the conservation and sustainable use of biological diversity, and, the greater the body of damage created, the greater the obligation of redress.

Sri Lanka:
(a), (b), (c), (d) and (e) all taken

Organic Agriculture Protection Fund (OAPF):
With respect to valuation of damage points (a to e) should be made inferable by the protocol.

South African Civil Society:
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.**

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

Argentina:
Based on the definition of biological diversity in Article 2 of the CBD, damage cannot be understood as a simple change in biological diversity. While Article 27 does not specify a threshold of damage, it should cover the effects on the conservation and sustainable use of biological diversity that arise above a minimum level. The usual terminology adopted in various instruments on liability and redress refers to "noticeable" or "significant" damage.

The damage must furthermore be measurable. The concept of baselines is an essential condition to measure whether and what type of damage has occurred, since it will be the starting point for any technique to measure biological diversity, which is in a permanent state of flux and is influenced by a multitude of natural and human-induced factors.

Finally, damage must be permanent or long-term, since biological diversity has mechanisms to restore itself. Consequently, an adverse change can only be considered damage if natural restoration capacity is not verified or restoration takes a very long time to occur. The opposite situation would lead to the creation of "artificial damage" for which redress is not necessary, since it is subject to the natural restoration process, which will take place in any case.

A definition of the time frame for the concept of "long-term" should be worked on.

Valuation of damage requires having reference points (baselines) with which damage can be contrasted and measured. Indicators of the *status* of biological diversity should be worked on, in order to be able to determine when there is damage to the conservation and sustainable use of biological diversity, and determine its causal link to the use of LMOs.

In addition, the regime should recognize a threshold of damage to biological diversity that exceeds the damage than may be caused by any non-LMO crop. This is because a proper level of protection should prevent discrimination against LMOs when a non-LMO product could cause a similar impact on a given ecosystem.

The CBD produced a definition of loss of biological diversity and developed a series of indicators to assess progress toward achieving the Millennium Goal of significantly reducing biodiversity loss by 2010. That being said, while that work may provide useful elements, it is recognized that its approach to geographical scope, resolution in time, baselines, valuation of damage, etc., for the developed indicators prevent them from being applied to measure the damage referred to in Article 27 (UNEP/CBD/BS/AHWEG-L&R/1/INF/2).

Organic Agriculture Protection Fund (OAPF):
With respect to valuation of damage points (a to e) should be made inferable by the protocol.

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

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

Sri Lanka:
(a), (b), (c), (d) and (e) all taken

Organic Agriculture Protection Fund (OAPF):
With respect to valuation of damage points (a to e) should be made inferable by the protocol.

South African Civil Society:
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.

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

Sri Lanka:
(a), (b) and (c) all taken

South African Civil Society:
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.

(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

Argentina:
A clear causal link is considered to be an essential component of any liability regime. Generally, both national legislation on liability and international law in this area establish the following requirements:
1) effective proof of the damage
2) that the damage has in fact been caused by the action or omission ("factual grounds")
3) that the action or omission is recognized by the legislation as a cause of damage ("legal grounds")

Therefore, a clear causal link must be established between the alleged damage, the transboundary movement and non-compliance with obligations under the Cartagena Protocol, and the duty of due care on the part of individual operators. The strict requirement to prove the causal link (factual grounds and proximate cause) must be maintained.
When the alleged damage is vague in nature – cannot be attributed to identifiable sources or operators, liability shall not be enforceable. Operators should be liable for reasonably foreseeable risks. Similarly, operators must act according to a standard of due diligence in light of the information they should have regarding the risks of the activity in which they are involved.

Canada:
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.

Sri Lanka:
(a), (b) and (c) all taken

Global Industry Coalition (GIC):
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

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).

South African Civil Society:
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.

Third World Network (TWN):
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.

(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.

Argentina:

The rule in legal systems is that damage is proved by the person alleging the damage. In the case of a liability regime based on fault or negligence, this includes proving that: 1) the person against whom the claim is being made had the duty of care and failed to comply with that duty or with a legal obligation under the Cartagena Protocol, and 2) a causal link exists.
Therefore, a fourth option is proposed: iv) burden of proof on the affected party.

Canada:
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.

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

Global Industry Coalition (GIC):
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.

Greenpeace International:
Article 9 Court Powers and Procedures

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

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

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

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.

South African Civil Society:
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.

Third World Network (TWN):
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. The burden of proving damage should be reversed.

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.

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

10 from Lugano Convention

Protocol);

Argentina:
The current state of affairs is set out, to a great extent, in UNGA resolution 56/83, which adopts the draft instrument on State Liability for Internationally Wrongful Acts, developed by the United Nations International Law Commission (ILC).

EU:
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.

Sri Lanka:
[a] and (b) taken

Global Industry Coalition (GIC):
(a) State responsibility
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.

Greenpeace International:
Article 49. State Responsibility
The Protocol shall not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to State responsibility.

Public Research and Regulation Initiative (PRRI):
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:
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.

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

Option 1

Primary State liability

Option 2

Residual State liability in combination with primary liability of operator

Option 3

No State liability

Argentina:

The only case in which liability is directly attributed to the State is under the Convention on International Liability for Damage Caused by Space Objects, which can be explained by the special circumstances in which the Convention was approved, since the States foresaw and desired, for political reasons inherent to space activities, that such activities be carried out by States, with the exclusion of individuals.

According to ILC reports, neither State practice nor international jurisprudence provide a clear and explicit basis for compensation for activities that involve risk and produce damage through accidents, when said accidents have occurred despite having taken advisable precautions.

We therefore support Option (3) No State liability.

EU:
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.

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 operator4 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. 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.

Indonesia:
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).

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)

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.
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.

Sri Lanka:
[a] and (b) taken
In (b) option 1 and 2 taken, 3 excluded.

Global Industry Coalition (GIC):
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.

Organic Agriculture Protection Fund (OAPF):
Option 1.

South African Civil Society:
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 [(b)]

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

Norway:

Favours option [(c)], 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.

Global Industry Coalition (GIC):
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.

South African Civil Society:
We need more information on option [(c) and (d)], and therefore, make no comments here

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

Global Industry Coalition (GIC):
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.

South African Civil Society:
We need more information on option [(c) and (d)] 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).

(a) Type of damage

Argentina:
Only damage to the conservation and sustainable use of biological diversity shall be considered.

Sri Lanka:
(a) to (e) all taken

Organic Agriculture Protection Fund (OAPF):
All, from (a) to (e).

South African Civil Society:
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.

(b) Places where damage occurs (e.g. centres of origin and centres of genetic diversity);

Argentina:
Places where damage occurs (it is not considered necessary to provide for special rules for certain types of places);

Sri Lanka:
(a) to (e) all taken

Organic Agriculture Protection Fund (OAPF):
All, from (a) to (e).

(c) Degree of risk involved in a specific type of LMO as identified in risk assessment

Argentina:
This should be considered, taking into account that a given LMO does not have the potential to produce damage in a given country, but does in another.

Sri Lanka:
(a) to (e) all taken

Organic Agriculture Protection Fund (OAPF):
All, from (a) to (e).

South African Civil Society:
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.

(d) Unexpected adverse effects

Argentina:
Effects that could not reasonably have been foreseen according to the "state of the art" should not generate liability;

Sri Lanka:
(a) to (e) all taken

Organic Agriculture Protection Fund (OAPF):
All, from (a) to (e).

South African Civil Society:
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.

(e) Operational control of LMOs (stage of transaction involving LMOs).

Argentina:
Operational control of LMOs (stage of transaction involving LMOs): should be considered for the purpose of determining who is in the best position to prevent damage.

Sri Lanka:
(a) to (e) all taken

Global Industry Coalition (GIC):
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.

Organic Agriculture Protection Fund (OAPF):
All, from (a) to (e).

South African Civil Society:
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:

- 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.

(a) Fault-based liability:

(i) Any person who is in the best position to control the risk and prevent the damage;

(ii) Any person who has operational control;

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

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

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

Argentina:
This type of liability is the one that most closely fits the current state of scientific knowledge regarding the risks of transboundary movements of LMOs. It requires that the damage be caused by an intentional or negligent act or omission on the part of the liable person. Liability is channelled toward the person

liable for the failure to comply with the duty of care or with obligations under the Protocol. Liability could be concurrent.

Option (ii) could coincide with option (i) and option (v), and these options could concur with option (iii). It would be a question of testing and verifying who is responsible in each specific case (on a case-by-case basis).

Option (iv) is not considered appropriate, since there is no necessary verification of a causal link to production of the damage.

The "state of the art" may be taken into consideration as grounds to exclude liability (an action would not generate liability if it could not have been considered dangerous at the time it was carried out)

Indonesia:
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.

Sri Lanka:
Both fault based and strict liability taken.

Global Industry Coalition (GIC):
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.

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.

Greenpeace International:
Article 5. Fault-Based Liability
Without prejudice to article 4., any person shall be liable for damage caused or contributed to by that person's lack of compliance with the provisions implementing the Convention or the Protocol or by that person's wrongful intentional, reckless or negligent acts or omissions.

Breach of the Convention or Protocol or fault should give rise to liability.

Public Research and Regulation Initiative (PRRI):
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.

(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.

Argentina:
b) Strict liability (sine delicto). As set out above, this type of regime is only used for substances that are generally recognized as being hazardous.

Ethiopia:
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.

EU:
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.

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.

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.

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

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

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.

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

Global Industry Coalition (GIC):
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.

Greenpeace International:

Article 4. Absolute Liability

1. The exporter and notifier of any living modified organism shall be liable for all damage caused by the living modified organism from the time of export of the living modified organism.

2. Without prejudice to paragraph 1, the importer of the living modified organism shall be liable for all damage caused by the living modified organism from the time of import.

3. Without prejudice to paragraphs 1 and 2, should the living modified organism be re-exported from the state of import, the second and subsequent exporter and notifier of the living modified organism shall be liable for all damage caused by the living modified organism from the time of

re-export of the living modified organism and the second and subsequent importer shall be liable for all damage caused by the living modified organism from the time of import.

4. Without prejudice to the preceding paragraphs, from the time of import of the living modified organism, any person intentionally having ownership or possession or otherwise exercising control over the imported living modified organism shall be liable for all damage caused by the living modified organism. Such persons shall include any distributor, carrier, and grower of the living modified organism and any person carrying out the production, culturing, handling, storage, use, destruction, disposal, or release of the living modified organism, with the exception of a farmer.

5. In the case of unintentional or illegal transboundary movement of a living modified organism, any person intentionally having ownership or possession or otherwise exercising control over the living modified organism immediately prior to or during the movement shall be liable for all damage caused by the living modified organism.

6. Any exporter, notifier and any person having ownership or possession or otherwise exercising control shall be liable for during the case of transit of living modified organisms through States other than the Party of export or Party of import.

7. All liability under this article shall be joint and several. If two or more persons are liable according to this article, the claimant shall have the right to seek full compensation for the damage from any or all of the persons liable.

8. If an occurrence consists of a continuous occurrence, all persons successively exercising the control of the living modified organism immediately before or during that occurrence shall be jointly and severally liable.

9. In the case of a person liable under this article being financially unable fully to meet the compensation for damages, together with costs and interest, as provided in this Protocol, or otherwise fails to meet such compensation, the liability shall be met by the State of which the person is a national.

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 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.

International Federation of Organic Agriculture Movements (IFOAM):
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.

Organic Agriculture Protection Fund (OAPF):
Option 1

South African Civil Society:
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.

Third World Network (TWN):
Strict liability should apply.
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

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.

Option 1

No exemptions.

Sri Lanka:
Option 1 No exemptions taken,

Organic Agriculture Protection Fund (OAPF):
Option 1

South African Civil Society:
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.

Option 2

Possible exemptions to or mitigations of strict liability

(a)Act of God/force majeure;

(b)Act of war or civil unrest;

(c) Intervention by a third party (including intentional wrongful acts or omissions of the third party);

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

(e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator;

(f) The "state-of-the-art" in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

Argentina:
Option 2:
The following options are considered to be suitable:

a) Act of God/force majeure;
b) Act of war or civil unrest;
c) Intervention by a third party
d) Compliance with compulsory measures imposed by a competent national authority;
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.

It does not seem appropriate to include e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator, since this mechanism does not fit with fault-based or negligence-based liability.

Ethiopia:
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 sub-article 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. Sub-article 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.

EU:
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.

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.

Norway:
Favours 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.

Sri Lanka:
Option 2 excluded

Global Industry Coalition (GIC):

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.

*(a), (b) and (c):*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): 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) and (f): 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.

Third World Network (TWN):
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.

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.

EU:
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

Sri Lanka:
[(a)] to (f) taken

Global Industry Coalition (GIC):
(a): It is a fundamental matter of law that where a potentially liable person cannot be identified, then no claim can be brought.

(b), (c) and (d): 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): 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): 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.

Organic Agriculture Protection Fund (OAPF):
All, from (a) to (f).

South African Civil Society:
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.

Third World Network (TWN):
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.

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.

Argentina:
Roles of the importing and exporting Parties
The Protocol recognizes the balance of liability between the exporter and importer within the transboundary movement process. It is therefore considered that this balance should also be maintained in the context of Article 27.

EU:
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.

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.

Sri Lanka:
[(a)] to (d) taken

Global Industry Coalition (GIC):
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.

South African Civil Society:
We have already addressed this issue above.

Third World Network (TWN):
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.

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 .

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

Argentina:
Limitation in time: time limit should be foreseen for undertaking action.
It would be necessary to set a maximum limit for compensation and a time limit for undertaking action to demand redress.
Both options shall be supported: a) Limitation in time, and option b) Limitation in amount including caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined.

Ethiopia:
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.

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

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.

Norway:
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.

Sri Lanka:
No limit

Global Industry Coalition (GIC):

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.

Greenpeace International:
Article 14. Time Limitation of Liability

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

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.

Third World network (TWN):
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.

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

Argentina:
It would be necessary to set a maximum limit for compensation and a time limit for undertaking action to demand redress.

Both options shall be supported: a) Limitation in time, and option b) Limitation in amount including caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined.

Ethiopia:
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.

EU:
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). 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.

Sri Lanka:
No limit

Global Industry Coalition (GIC):
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.

Public Research and Regulation Initiative (PRRI):
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.

South African Civil Society:
We have already addressed this issue above.

Third World network (TWN):
There should be no upper financial limit.

VI. MECHANISMS OF FINANCIAL SECURITY

A. Coverage of liability

Option 1

Compulsory financial security.

Option 2

Voluntary financial security.

Argentina:
These mechanisms are common elements of liability (*sine delicto)* schemes reserved for hazardous substances, and are not applicable in the context of fault-based liability.
Seeing as, in cases of environmental damage, more people are entitled to act, since publicly owned goods are affected, and because of the complexity of environmental damage (reflected not only in the impact on the environment as such, but also in the damage caused by the environment), coverage of environmental damage is not very attractive to insurance companies.
In Argentina, insurance policy forms approved by the *Superintendencia de Seguros de la Nación* (The Nation's Supervising Authority for Insurance) are classic models of civil liability. So far, this body has not authorized any clauses with environmental content that would make it possible to speak of reasonable requirements when applying for insurance, for example, in the case of a transporter of hazardous waste seeking coverage for environmental damage. Furthermore, aside from the big multinational companies that have their own reinsurance, national insurers lack the reinsurance that would enable them to cover risks of damage to the environment in an acceptable manner.

Ethiopia:
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.

EU:
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.

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.

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.

Norway:
According to the Norwegian Gene Technology Act a duty to take insurance or provide financial security for liability may be imposed as a condition 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.

Sri Lanka:
Option 1 Compulsory financial security taken
Option 2 excluded.
Comments
1. An International Liability fund should be established.
2. Introduction of mandated insurance.
3. Case by case basis depending on the damage caused.

Global Industry Coalition (GIC):
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.

Greenpeace International:
Article 18. Insurance and other Financial Guarantees
1. Exporters, notifiers, importers, distributors, growers, carriers, and other persons liable under article 4. shall establish and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability under article 4. of this Protocol for amounts not less than the minimum limits specified in paragraph [] of Annex I according to the terms and conditions established by the Regulations passed by the Conference of the Parties serving as the meeting of the Parties to this Protocol.
2. A document reflecting the coverage of the liability of the exporter and the notifier under article 4. paragraph 1, of this Protocol or of the importer under article 4., paragraph 2, of this Protocol shall accompany the notification referred to in article 8 or Annex II of the Cartagena Protocol. Proof of coverage of the liability of the exporter and the notifier shall be delivered to the competent national authorities of the State of import.
3. Any claim under this Protocol may be asserted directly against any person providing insurance, bonds or other financial guarantees. The insurer or the person providing the financial guarantee shall have the right to require the person liable under article 4. to be joined in the proceedings.

This article ensures that persons who are liable for damage carry financial guarantees to ensure damages can be recovered from them.

Organic Agriculture Protection Fund (OAPF):
Option 1

Third World Network (TWN):
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.

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.

Ethopia:
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.

EU:
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

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

Sri Lanka:
Only option 1 and 4 taken
Comments

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

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

Global Industry Coalition (GIC):
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.

Greenpeace International:
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:

   (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.

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 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 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.

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.

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 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.

These provisions establish jurisdiction over actions for compensation against the Fund.

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 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.

This article ensures the Fund can recover damages against those responsible.

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 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.

This article sets contributions to the fund according to exports of LMOs.

Article 28. Budget

1. With a view to assessing for each person referred to in article 26. the amount of annual contributions due, if any, and taking account of the necessity to maintain sufficient liquid funds, the Assembly shall for each calendar year make an estimate in the form of a budget of:

(i) Expenditure

(a) costs and expenses of the administration of the Fund in the relevant year and any deficit from operations in preceding years;

(b) payments to be made by the Fund in the relevant year for the satisfaction of claims against the Fund due under article 21., including repayment on loans previously taken by the Fund for the satisfaction of such claims, to the extent that the aggregate amount of such claims in respect of any one incident does not exceed the amount specified in Annex I;

(ii) Income

(a) surplus funds from operations in preceding years, including any interest;
(b) initial contributions to be paid in the course of the year;
(c) annual contributions, if required to balance the budget;
(d) any other income.

2. For each person referred to in article 26. the amount of his annual contribution shall be determined by the Assembly and shall be calculated in respect of each Contracting Party.
3. The sums referred to in paragraph 2 above shall be arrived at by dividing the relevant total amount of contributions required by the total amount of living modified organisms exported by all Contracting States in the relevant year.
4. The Assembly shall decide the portion of the annual contribution which shall be immediately paid in cash and decide on the date of payment. The remaining part of each annual contribution shall be paid upon notification by the Director.

5. The Director may, in cases and in accordance with conditions to be laid down in the Regulations of the Fund, require a contributor to provide financial security for the sums due from him.
6. Any demand for payments made under paragraph 4 shall be called rateably from all individual contributors.

This article sets a Budget for Fund and sets allocations of contributions

Article 29. Assessment of Contributions

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

This article sets mechanisms for the collection of assessed contributions and enforcement action.

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;
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.

This article establishes the functions of the Assembly.

Article 32. Sessions of Assembly

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

This article establishes the Assembly sessions.

Article 33. Quorum

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

Organic Agriculture Protection Fund (OAPF):
Option 1

South African Civil Society:
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.

Third World Network (TWN):
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.

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.

Sri Lanka:
(a) and (b) taken

Global Industry Coalition (GIC):
See response to A above.

South African Civil Society:
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).

Argentina:
It is premature to move forward with regard to these procedures until other elements are defined, such as, the type of instrument.

Ethiopia:
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.

EU:
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.

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

Norway:
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

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[1] 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.

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.

Sri Lanka:
(a) to (d) all taken

Greenpeace International:
Article 8. Jurisdiction and Applicable Law

1. Primary jurisdiction over actions under this Protocol shall lie with the courts of the Contracting Party where the damage occurs.

2. If the damage occurs only beyond the limits of national jurisdiction, primary jurisdiction over actions under this Protocol shall lie with the courts of the State of import or the intended State of import, or, if the transboundary movement was unintended, with the courts of the State most closely connected with the damage.

3. Jurisdiction over actions under this Protocol shall also lie with the courts of the Contracting Party where the occurrence took place, where the defendant has his habitual residence or has his principal place of business.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.

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 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

7/ Basel Protocol art 17.

8/ Basel Protocol art 19.

the case is established by that court, any court other than that court shall decline jurisdiction in favour of that court.14/

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.

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 defense, 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.

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

15/ Broadly following Basel Liability protocol art 21

Settlement of Disputes

The following articles establish a disputes mechanism, modelled largely on the dispute settlement provisions of the Law of the Sea Convention, focused on an International Tribunal for the Protection of Biodiversity.

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.

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.

International Federation of Organic Agriculture Movements (IFOAM):
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.

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.

Organic Agriculture Protection Fund (OAPF):
All the procedures referred to from (a) to (d).

South African Civil Society:
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.

Third World Network (TWN):
There should be strong mechanism(s) under the liability and redress protocol for dealing with non-compliance, dispute settlement and settlement of claims.

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.

Argentina:

The right to bring claims, under both national and international law, is limited to those affected by the damage. This limitation ensures that whoever initiates the legal action has a direct and significant interest.

Furthermore, no international body has so far accepted the bringing of claims for environmental damages on the part of groups with a specific interest in the matter.

Ethiopia:

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.

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.

EU:

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.

Sri Lanka:

[(a)] to (d) all taken

Global Industry Coalition (GIC):

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.

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.

Greenpeace International:

Article 9. Court Powers and Procedures

1. 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

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

representing communities or business interests and local, regional and national governmental authorities, shall have standing to bring a claim under this Protocol.

2. 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/
3. 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/

South African Civil Society:
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.

Third World Network (TWN):
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

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:
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.

Norway:
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.

12/ From Basel Liability Protocol art 20.

13/ Cf Aarhus Convention article 9(5).

Sri Lanka:
All taken

Global Industry Coalition (GIC):
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.

South African Civil Society:
We support this principle and note the provisions of Article 14 of the Biosafety Protocol in this regard.

Third World Network (TWN):
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.

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.

Ethiopia:
For the purpose of this Protocol:

"Contracting Party" means a Party to this Protocol.

“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.

Sri Lanka:
All taken

Global Industry Coalition (GIC):
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:
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

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.

1/ Wording from Lugano Convention.

2/ See Lugano Convention.

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.

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/

South African Civil Society:
We believe that a section dealing with definitions is of critical importance to bring about legal certainty.

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.

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.

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:
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.

Sri Lanka:
(a) and (b) both taken

South African Civil Society:
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.

- 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.

Argentina:
It is considered that, until sufficient progress is made on the main content of the rules referred to in Article 27, the conditions do not exist to assess the best type 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.

Greenpeace International:
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.

Organic Agriculture Protection Fund (OAPF):
Option 1

South African Civil Society:
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.

Option 2

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

Norway:
Supports option 2. The interim instrument could be in the form of guidelines/Codes of conduct to countries in order to enable them to develop national legislation.

Third World Network (TWN):
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.

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)

EU:
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.

Sri Lanka:
Option 4 and 5 taken

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

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).

Sri Lanka:
Option 4 and 5 taken

Option 6

No instrument.

Public Research and Regulation Initiative (PRRI):
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.
