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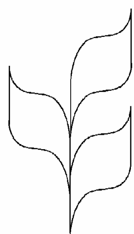

CONVENTION ON BIOLOGICAL DIVERSITY

Distr.
GENERAL

UNEP/CBD/BS/WG-L&R/4/INF/1
28 August 2007

ORIGINAL: ENGLISH

OPEN-ENDED AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY
Fourth meeting
Montreal, 22-26 October 2007
Item 4 of the provisional agenda*

COMPILATION OF SUBMISSIONS OF FURTHER VIEWS AND PROPOSED OPERATIONAL TEXTS WITH RESPECT TO APPROACHES, OPTIONS AND ISSUES IDENTIFIED AS REGARDS MATTER COVERED BY ARTICLE 27 OF THE PROTOCOL AND PROPOSED TEXTS**

The Executive Secretary is circulating herewith, for the information of participants in the fourth Open-ended *Ad Hoc* Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety, a compilation of submissions of further views and proposed operational texts with respect to approaches, options and issues identified as regards matter covered by Article 27.

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

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

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SUBMISSIONS FROM PARTIES AND OTHER GOVERNMENTS

AUSTRALIA

[13 July 2007]
[SUBMISSION: ENGLISH]

Request for further views on the matter covered by article 27 of the Protocol, in particular, with respect to approaches and options identified in sections I to VIII of the working draft, contained in Annex II of the report of the third meeting of the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress

Article 27 of the Biosafety Protocol requires a process to be adopted to appropriately elaborate international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs), analysing and taking due account of the ongoing processes in international law. It does not require the establishment of a liability regime. Noting Annex II to UNEP/CBD/BS/WG-L&R/3/3 and Australia's May 2005 submission, Australia believes that a precise definition of damage remains the key issue. Only after damage is properly understood will it be possible to consider the need for any rules and procedures. Australia believes that consideration of damage in the context of Article 27 of the Protocol should not extend to traditional damage, but be limited, in accordance with Articles 1 and 4 of the Protocol, to damage to the conservation and sustainable use of biodiversity.

Damage

Australia believes that a clear, common and precise definition of damage is the key issue in the consideration of liability and redress under Article 27 of the Protocol. With respect to the operational components for the definition of damage, Articles 1 and 4 of the Protocol explicitly limit the application of the Protocol to 'effects on the conservation and sustainable use of biological diversity, specifically focusing on transboundary movement'. For this reason, Australia believes that consideration of damage in the context of Article 27 should be limited to conservation and sustainable use of biodiversity.

Limitation of the scope of 'damage' to the conservation and sustainable use of biodiversity is essential to ensure that any elaboration of liability and redress accurately reflects the scope of both the CBD and the Protocol. Adopting language consistent with the CBD and the Protocol will keep any elaboration of liability and redress in line with the overarching intention of the biological diversity regime, which will thereby prevent ambiguity in application.

It would also be desirable to consider a threshold such as 'significant' or 'serious'. Australia notes that operational text 1 (Annex II, p.31) is a good starting point for discussion of this threshold issue.

We would then need to carefully consider how to measure the negative impacts of damage to biological diversity that can be quantified and monetised, attributable to a person or legal entity, and are recognised as damage by the applicable law. The valuation of any damage to conservation and sustainable use of biological diversity can be complex and difficult, especially where there is a lack of ecological data. The cost of restoration or rehabilitation of biological diversity to baseline conditions is one approach. However, nothing can be advanced in the discussion about valuation until the scope and nature of damage are clearly understood. We are also concerned to ensure that any measures used for the valuation are practical and do not impose costs disproportionate to the seriousness of the event.

Specific comments on Annex II

Australia provides the following specific comments on Annex II to UNEP/CBD/BS/WG-L&R/3/3.

Annex II

Synthesis of proposed operational texts on approaches and options identified pertaining to liability and redress in the context of Article 27 of the Biosafety Protocol.

I. POSSIBLE APPROACHES TO LIABILITY AND REDRESS

A. State responsibility

Australia considers that State responsibility would be inappropriate, as States are often not directly responsible for importing or exporting LMOs. We could support Operational text 2.

B. State liability

Australia considers that State liability would be inappropriate, as States are often not directly responsible for importing or exporting LMOs. We could support Option 3 (no State liability). Australia could not agree to Option 1 (Primary State liability) or Option 2 (Residual State liability in combination with primary liability of operator).

C. Civil liability

Australia does not support Operational text 1. Definition of damage should not extend to traditional damage, but be limited, in accordance with Articles 1 and 4 of the Protocol, to damage to the conservation and sustainable use of biodiversity.

Depending on the precise definition of damage, Australia suggests the following alternative operational text: *"Civil liability is appropriate for damage to the conservation and sustainable use of biodiversity"*.

D. Administrative approaches based on allocation of costs of response measures and restoration measures

Australia reserves comment on this item.

II. SCOPE

A. Functional scope

In accordance with Article 27, Australia believes the functional scope should be specifically limited to damage resulting from transboundary movement of LMOs.

Operational texts 7, 8, 10 and 14 seem useful in this context.

B. Geographical scope

Australia considers that geographical scope, in accordance with Articles 3(k), 24 and 27, can only be within the national jurisdiction of Parties. However, the elaboration of rules and procedures in the field of liability and redress could lead to the imposition of burdens on non-Parties, which are

tantamount to obligations. Such an effect would clearly be prohibited by Article 34 of the Vienna Convention on the Law of Treaties. Operational text 1 seems compatible with the jurisdictional scope of the Protocol.

C. Limitation in time

Limitation in time and amount will be important in making sure that any rules and procedures are relevant and workable.

Depending on the scope and precise definition of damage, Australia suggests alternative operational text: *"The rules and procedures should apply after they are appropriately elaborated and implemented by Parties"*.

D. Limitation to the authorization at the time of the import of the LMOs

Australia reserves comment on this item.

E. Determination of the point of the import and export of the LMOs

In accordance with Articles 3(k) and 27, Australia believes the transboundary movement of LMOs (the determination of the point of the import and export of the LMOs) should be defined as "the movement of a living modified organism from one Party to another Party".

Operational text 5 seems useful in this context.

F. Non-parties

Noting the relationship of the Protocol to non-Parties under Articles 3(k) and 24, Australia would be concerned with any steps to impose direct or indirect measures on non-Parties. Australia does not support operational texts 1 to 5.

III. DAMAGE

A. Definition of damage

Definition of damage should not extend to traditional damage, but be limited, in accordance with Articles 1 and 4 of the Protocol, to damage to the conservation and sustainable use of biodiversity. Such an approach would be consistent with the overarching intention of the biodiversity regime.

However, Australia notes that many of the proposed texts in Part III A of Annex II seem to adopt language from other liability regimes.1/ This is inappropriate in light of the different focus of the biodiversity regime—whereas these other regimes purport to cover all deleterious effects arising from the relevant hazardous substance, the Convention and Protocol focus on the protection of biodiversity, including from LMOs. Elements of damage such as damage to property are therefore not relevant in the biodiversity context.

1/ The Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal and the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage.

A bis. Damage to conservation and sustainable use of biological diversity or its components

When considering damage to biodiversity, it would also be desirable to consider a threshold such as 'significant' or 'serious'. Australia notes that operational text 1 (Annex II, p.31) is a good starting point for discussion of this threshold issue.

B. Valuation of damage to conservation of biological diversity/environment

The valuation of any damage to conservation and sustainable use of biological diversity can be complex and difficult. We prefer operational text 3 which suggests as a measure the value of restoring biological diversity to baseline conditions and then adding to that any additional compensation where baseline conditions cannot be restored. This option has the flexibility of tailoring the approach and the valuation involved to the individual circumstances. We are also concerned to ensure that any measures used for the valuation are practical and do not impose costs disproportionate to the seriousness of the event.

C. Special measures in case of damage to centres of origin and centres of genetic diversity to be determined

Australia supports operational text 2: "Valuation of damage will relate to the conservation and sustainable use of biological diversity, with no special measures for centres of origin and centres of genetic resources".

D. Valuation of damage to sustainable use of biological diversity, human health, socio-economic damage and traditional damage

Valuation of damage should not extend to traditional damage, but be limited, in accordance with Articles 1 and 4 of the Protocol, to damage to the conservation and sustainable use of biodiversity.

E. Causation

Australia believes it is essential that a causal link be established between the damage and the activity. We reserve comment on the operational text.

IV. PRIMARY COMPENSATION SCHEME

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

2. Standard of liability and channelling of liability

3. Exemptions to or mitigation of strict liability

4. The provision of interim relief

5. Recourse against third party by the person who is liable on the basis of strict liability

6. Joint and several liability or apportionment of liability

7. Limitation of liability

8. Coverage of liability

Australia reserves comment on specific operational text.

Liability should be assigned to the party which is best placed to prevent the circumstances giving rise to damage. While States generally have a regulatory role in the context of the Biosafety Protocol, they are often not directly responsible for importing or exporting LMOs as this is usually a commercial transaction between importers and exporters, or between research institutions. For this reason Australia considers that neither State responsibility nor State liability would be appropriate for consideration in relation to Article 27 of the Protocol.

With respect to the standard of liability, Australia could not support an absolute or strict liability regime. Absolute and strict liability are generally reserved for situations where activity is ultra-hazardous. This ordinarily relates to the seriousness of the harm. There is nothing to suggest that the transboundary movement of LMOs within the scope of the Protocol will fall into that category. Thus, consideration of a fault based standard of liability with relevant exemptions would be more appropriate.

V. SUPPLEMENTARY COMPENSATION SCHEME

A. Residual state liability

Australia does not consider that residual State liability would be appropriate. We do not support operational texts 1 to 5.

B. Supplementary collective compensation arrangements

Australia considers it premature to consider the establishment of compensation arrangements. Before we can develop a view on this, agreement needs to be reached on damage and the form of liability.

VI. SETTLEMENT OF CLAIMS

A. Inter-State procedures (including settlement of disputes under Article 27 of the CBD)

B. Civil procedures

C. Administrative procedures

D. Special tribunal

E. Standing/right to bring claims

Australia reserves comment on settlement of claims. We note that consideration should be given to dispute-settlement procedures of the CBD.

VII. COMPLEMENTARY CAPACITY BUILDING MEASURES

Australia considers existing capacity building measures as appropriate. We note operational text 2 seems a reasonable starting point in this context.

VIII. CHOICE OF INSTRUMENT

Australia does not support a strict or legally-binding liability regime, but favours the COP elaborating guidelines to national legislation for non-binding fault-based civil liability.

CANADA

[28 August 2007]
[SUBMISSION: ENGLISH]

Cartagena Protocol on Biosafety
Government of Canada – Submission August 2007

Request for 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 and options identified in sections I to VIII of the working draft, contained in annex II of the present report, preferably in the form of proposals for operational text.

At the end of the Third 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 Biosafety, the Working Group invited Parties, other Government, relevant international organizations and stakeholders to submit further views on the matter covered by Article 27 of the Protocol.

In response to this request, Canada is putting forward the following submission in the form of operational text. Canada continues to explore the potential merits of various international liability and redress mechanisms and submits this proposal, without prejudice to its final position, with a view to stimulating discussion.

Canada's submission is consistent with a voluntary administrative approach to addressing damage to conservation of biodiversity. This approach to liability and redress, which is based on the polluter-pay principle, allows for rapid redress and efficient restoration of damages—two components which are essential when it comes to the conservation of biodiversity.

For Consideration by the 4th Meeting of the Open Ended ad hoc Working Group on Liability and Redress

Recalling that both the Preamble and Article 3 of the Convention on Biological Diversity affirm the sovereign rights of states over their biological diversity,

Recalling the objective of the Biosafety Protocol to contribute to ensuring an adequate level of protection regarding LMOs that may have adverse effects on the conservation and sustainable use of biological diversity,

Recalling Article 27 of the Protocol,

Recognizing that transboundary movement of LMOs may result in damage to biological diversity in the receiving country.

Desiring to facilitate timely access to adequate redress for damage resulting from the transboundary movement of LMOs.

Acknowledging the difficulties encountered by many countries in fully implementing their obligations under the Protocol.

Acknowledging that most states currently have a legal basis for pursuing redress for damage to persons and property in their domestic law, and that there is a need to ensure that all Parties, especially developing country Parties, small island states and centres of diversity, have a legal basis for pursuing redress for damage to biodiversity resulting from transboundary movement of LMOs

Decides that:

1. For damage to the conservation of biological diversity from LMOs subject to transboundary movement, each Party should take measures to amend its laws implementing the Cartagena Protocol to include provision for the state to take an administrative approach to require or to take action to prevent or remediate such damage caused by living modified organisms, taking into account the annex to this decision;

2. For other damage resulting from LMOs subject to transboundary movement, Parties and Governments are encouraged to review their national liability rules and related rules of court with a view to ensuring that foreign plaintiffs have access to their courts, where such access is supported by the principles of fundamental justice, on a non-discriminatory basis;

3. The Parties to the Protocol will review at MOP-6 the effectiveness of this decision in addressing cases of damage resulting from the transboundary movement of LMOs pursuant to Article 27, and whether further action should be considered, including work under the Hague Conference on Private International Law.

Annex 1

Elements of an Administrative Approach in National Biosafety Law for Damage to the Conservation of Biological Diversity resulting from the Transboundary Movement of LMOs under Article 27

1. General

a. This approach is recommended for inclusion within an existing national law relating to biosafety or biodiversity, particularly a statute or regulation implementing the Biosafety Protocol, but could be a standalone approach in a statute. It is referred to in this annex generically as a "law".

b. This administrative system does not apply to cases of personal injury, damage to private property, or economic loss, and does not affect any right under existing national legal systems regarding these types of damages.

c. Parties to the rules and procedures are encouraged to require coverage of these responsibilities with financial security, as it becomes available.

2. Specific Elements of an Administrative Approach

a. For purposes of this law, "operator" means any person or entity which has the control of the LMO at the time of the incident causing damage occurs, owns or has the charge or management of an LMO during its transboundary movement.

b. For purposes of this law, "incident" refers to any unintended release into the environment of an LMO subject to a transboundary movement.

c. For purposes of this law, "damage" is defined as a significant and adverse effect on the conservation of biological diversity that is measurable relative to baseline ecological data, or equivalent, established by the Competent National Authority.

d. Where there occurs or is a likelihood of damage to the conservation of biological diversity as a result of the transboundary movement of an LMO in contravention of this law, the operator shall, as soon as possible,

   i. notify the competent authority; and
   ii. take all reasonable measures consistent with the conservation of biodiversity to reduce or mitigate any threat of a significant adverse effect on the conservation of biological diversity or to remedy any such significant adverse effect.

e. Where the operator fails to take measures required under paragraph 2.d, the competent authority may take those measures, cause them to be taken or direct the operator to take them.

f. Measures to remedy damage shall comprise assessment, reinstatement or restoration through the introduction of original components of biological diversity, or, if this is not possible, introduction of equivalent components on the same location, for the same use, or in another

location for other types of use. The competent authority may at any time review remedial actions proposed or taken, and order other actions as appropriate.

g. The competent authority may recover the costs and expenses of, and incidental to, the taking of any measures under paragraph (e), from the operator, or any other person who caused or contributed to the damage or increased the likelihood of its occurrence, to the extent that such person knowingly or negligently caused or contributed to such damage.

h. Recovery of such costs and expenses shall be taken by the competent authority within five years of the incident, when the measures were taken by the operator, or when the identity of the operator became known, whichever is the later.

i. The operator will not be liable for such costs where the damage:

  a. Resulted from an act of war, hostilities or insurrection or from a natural phenomenon of an exceptional inevitable and irresistible character;
  b. Was wholly caused by an act or omission of a third party with intent to cause damage; or
  c. Was wholly caused by the negligence or other wrongful act of government or the competent authority.

j. Any person with concerns arising about an incident not reported to the Competent Authority may so report the incident. If the matter is covered by this law, the Competent Authority is to take action pursuant to the provisions of this law and advise the person within [ ] days of any action taken.

3. Quasi-civil Sentencing Options for Violations of National Biosafety Law1/

Parties and Governments are encouraged to include guidance on creative sentencing options for convictions for violating national Biosafety Protocol implementing laws, such as providing the court with options including:

  a. directing the person to pay the competent authority for all or any of the cost of remedial or preventive action taken or to be taken by the competent authority or government as a result of the commission of the offence (double counting with the administrative approach to be avoided);
  b. directing the person to pay, in the manner prescribed by the court, an amount for the purpose of conducting research into valuation of biodiversity;
  c. directing the person to take any action that the court considers appropriate to remedy or avoid any harm to biodiversity that resulted or may result from the commission of the offence;
  d. directing the person to pay, in the manner prescribed by the court, an amount to an educational institution for scholarships for students enrolled in studying biodiversity and biosafety;
  e. directing the person to post a bond or pay to the court an amount that the court considers appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement under the biosafety law.

1/ This section is made up of provisions taken directly from the *Canadian Environmental Protection Act 1999* and the *Species at Risk Act*.

Canadian positions on technical elements that will be considered irrespective of the decision on instrument choice:

Element 1: Scope of damage/rules

a) Functional scope.

The rules and procedures apply to damage to biodiversity resulting from transboundary movements of LMOs.

b) Geographical scope:

The rules and procedures apply to damage suffered in an area under the national jurisdiction of a State arising from an incident as referred to under the functional scope provision.

c) Temporal scope.

The rules shall not apply to damage resulting from a transboundary movement of a living modified organism that commenced prior to the effective date of the entry into force of the rules and procedures for the contracting party under whose national jurisdiction the damage has occurred.

Element 2: Definition of Damage

The rules and procedures shall apply to damage to biological diversity. To constitute damage to the conservation of biological diversity there must be a change to the current status of biodiversity that is adverse, significant and measurable from baseline ecological data, or equivalent, previously established and published by the CNA taking into account natural variation and human induced variation, and is not reversible through the normal capacity of the system. The mere presence of an LMO in the environment does not constitute damage.

Element 3: Causation

Irrespective of the nature of the instrument, there must be a direct and proximate link between the transboundary movement and the damage.
The burden of proof will fall under the entity alleging damage to biological diversity resulting from a transboundary movement of a LMO.

EUROPEAN UNION [19 July 2007]
[SUBMISSION: ENGLISH]

DRAFT COP/MOP DECISION SUBMITTED BY THE EU 1/

Biosafety Liability and Redress
Sample decision under Article 27 CPB 2/

The Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety,

Recalling Article 27 of the Protocol,

Recalling also its decisions BS-I/8, BS-II/11and BS-III/12.

Noting with appreciation the work undertaken by the Open-ended Ad hoc Working Group of Legal and Technical Experts on Liability and Redress in the context of the Protocol,

Mindful of the need to develop, foster and promote effective arrangements in the field of liability and redress for damage resulting from transboundary movements of living modified organisms

1. Adopts the rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, as contained in the Annex to this decision, for the purpose set out in paragraph 2 below;

2. Recommends the implementation of these rules and procedures by the Parties to the Protocol through domestic legislative, regulatory and administrative measures as necessary, while recognizing their respective varying needs and circumstances;

Annotation
While this decision is, as such, non-legally binding, ***Parties will be able to implement the decision at national level through binding measures such as legislation or regulation****. This decision would provide them with the necessary flexibility to incorporate the basic elements of rules and procedures on liability and redress for LMOs in a way that is compatible with their legal order.*

The EU thinking on the preferred choice of instrument is driven by the purpose of designing a liability and redress regime that is immediately operational and which would apply to all Parties to the Protocol as they would undertake a strong political commitment to the implementation of this ambitious decision. These two objectives are best accommodated by taking a two-stage approach. That is to develop a regime by way of a COP/MOP decision, which would take effect, for all Parties, immediately upon

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1/ It includes a revised version of the Draft CoP/MoP Decision submitted by the EU at the 3rd meeting of the Open-ended ad hoc working group of legal and technical experts on liability and redress. In revising our submission we have taken into account views expressed by other Parties at that meeting and we have also added explanatory annotations to clarify the rationale and content of the Draft CoP/MoP Decision.

2/ The text of this sample decision is drawn from the operational text of Chapter X and Chapter XI of the EU submission for the 3rd meeting of the Open-ended ad hoc working group of legal and technical experts on liability and redress, Montreal, 19-23/2/2007, contained in UNEP/CBD/BS/WG-L&R/3/INF/1.

adoption. This first stage would subsequently be evaluated. We would learn from experience and, on this basis, the development of a legally binding instrument could be considered.

3. Invites Parties to take into account, as appropriate, the present decision including capacity building measures, such as assistance in the development of domestic "liability rules" and considerations such as "contributions in kind", "model legislation", or "packages of capacity building measures", in the next review of the Updated Action Plan for Building Capacities for the Effective Implementation of the Cartagena Protocol on Biosafety, as contained in the Annex to decision BS III/3;

4. Invites Parties that are in the process of developing their domestic legislative, regulatory and administrative measures relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms to submit on a voluntary basis, through the Secretariat, draft measures for advice to the [*Committee responsible for the facilitation of the implementation of this decision hereinafter "the Committee"*];

Annotation
The Committee would play an important role in capacity building by advising Parties – upon their requests - on the development of domestic measures aimed at implementing this decision. The Committee could, in the EU view, be a new committee. The EU does not have a fixed view on this and is ready to discuss pro and cons of different alternatives.

5. Decides that, under the COP/MOP's overall guidance, the Committee has the following functions:

(a) to provide, at the request of a Party, advice to that Party on any draft domestic measure relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms submitted to it in accordance with paragraph 4;
(b) to provide, at the request of a Party, advice to that Party on questions relating to the implementation of this decision;
(c) to report to each ordinary meeting of the COP/MOP on its activities;
(d) to report to the [seventh] meeting of the COP/MOP on the implementation and effectiveness of this decision on the basis, *inter alia*, of the information available in the Biosafety Clearing House and from Parties' reports in accordance with Article 33 of the Protocol. The report of the Committee should include any recommendations for further action in this field, including in relation to the development of a legally binding instrument, taking into account best practices;

Annotation
The above mentioned functions reflect a bottom-up approach. It is for Parties to choose if they want to avail themselves of the possibility of requesting advice from the Committee on draft domestic measures or on the implementation of this decision and if they want to follow such advice. The Committee, on the basis of the experience gained in the implementation of this decision, would also advise the COP/MOP on the need to initiate the second stage i.e. the development of a legally binding instrument.

6. Decides to review the implementation and effectiveness of the present decision at its [seventh] meeting, taking into account experience at the domestic level to implement this decision and the report of the Committee according to paragraph 5 lit.(d) with a view to considering the need to take further action in this field.

Annotation

The suggested timing - the 7th meeting - is a mere indication. The EU is ready to consider other deadlines, including earlier ones. Obviously, any decision on further action will rest with the COP/MOP as the supreme body under the Protocol and not with the Committee.

Annex

RULES AND PROCEDURES IN THE FIELD OF LIABILITY AND REDRESS FOR DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS 3/

I. SCOPE

Functional Scope

1. These rules and procedures apply to shipments, transit, handling and use of living modified organisms (LMOs), provided that these activities find their origin in a transboundary movement.

2. With respect to intentional transboundary movements, these rules and procedures apply to damage resulting from any authorized use of the LMO listed in paragraph 3, as well as to any use in violation of such authorization (i.e. illegal uses).

3. These rules and procedures apply to LMOs that are:
(a) Intended for direct use as food and feed or for processing;
(b) Destined for contained use;
(c) Intended for intentional introduction into the environment.

4. These rules and procedures apply to unintentional transboundary movements (legal or illegal). The point where these movements begin should be the same as for an intentional transboundary movement.

5. These rules and procedures apply to transboundary movements in contravention of domestic measures to implement the Cartagena Protocol (i.e. illegal uses).

Geographical scope

These rules and procedures apply to areas under the jurisdiction or control of the Parties to the Cartagena Protocol.

Limitation in time

These rules and procedures apply to damage resulting from a transboundary movement of LMOs when that transboundary movement was commenced after their implementation by Parties into domestic law.

3/ The text in Chapter I and Chapter II of the Annex is based on an earlier EU submission dated 8 November 2005, available in document UNEP/CBD/BS/WG-L&R/2/INF/1. Chapters IV-IX of the Annex are drawn from the operational text of the EU submission for the 3rd meeting of the Open-ended ad hoc working group of legal and technical experts on liability and redress, Montreal, 19-23/2/2007, contained in UNEP/CBD/BS/WG-L&R/3/INF/1.

Determination of the commencement of the transboundary movement of LMOs

1. With respect to seaborne transport, the commencement of a transboundary movement is the point where a LMO leaves the exclusive economic zone of the State, or in the absence of such zone, the territorial sea of a State.

2. With respect to land borne transport, the commencement of a transboundary movement is the point at which a LMO leaves the territory of a State.

3. With respect to airborne transport, the commencement of a transboundary movement will depend on the route and could be the point where a LMO leaves the exclusive economic zone, the territorial sea or the territory of the State.

Determination of the end of the transboundary movement of LMOs

These rules and procedures apply to intentional transboundary movement in relation to the use for which LMOs are destined and for which authorization has been granted prior to the transboundary movement. If, after the LMOs are already in the country of import, a new authorisation is given for a different use of the same LMOs, such use will not be covered by these rules and procedures.

II. DAMAGE

Damage to conservation and sustainable use of biological diversity

1. For the purpose of these rules and procedures, damage to the conservation of biological diversity means an adverse effect on biological diversity that:

- (a) is a result of human activities involving LMOs; and
- (b) relates in particular to species and habitats protected under national, regional or international law; and
- (c) is measurable or otherwise observable taking into account, wherever available, baseline conditions; and
- (d) is significant as set out in paragraph 3 below.

<u>Annotation</u>
*The text under 1(b) refers to damage that relates **in particular** to protected species and habitats. This is aimed at highlighting that Parties, in the implementation of this decision, should pay **special attention** to those species and habitat but by no means excludes the possibility of covering with the present rules and procedures **ALL** species and habitats.*

2. For the purposes of these rules and procedures, damage to the sustainable use of biological diversity means an adverse effect on biological diversity that:

- (a) is a result of human activities involving LMOs; and
- (b) is related to a sustainable use of biodiversity; and
- (c) has resulted in loss of income; and
- (d) is significant as set out in paragraph 3 below.

3. A “significant” adverse effect on the conservation and sustainable use of biological diversity is to be determined on the basis of factors, such as:

- (a) the long term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonably short period of time; and/or

(b) a qualitative or quantitative reduction of components of biodiversity and their potential to provide goods and services.

<u>Annotation</u>
The EU understands paragraphs 2 and 3 above as including damage to property to the extent that it 'relates to a sustainable use of biodiversity' and 'has resulted in loss of income'.

Response measures

1. The damage to conservation and sustainable use of biodiversity is valued on the basis of the costs of response measures, eventually undertaken or to be undertaken, to remedy it.

2. For the purposes of these rules and procedures, response measures are actions to minimise, contain or remedy damage, as appropriate.

3. In the event of damage or imminent threat of damage, the liable person should be required by domestic law to take such response measures. This is without prejudice to a primary and general obligation for affected persons to minimise damage as far as possible and feasible.

III. CAUSATION

A causal link needs to be established between the damage and the activity in question in accordance with domestic procedural rules.

IV. CHANNELLING OF LIABILITY

1. The operator/importer of a transboundary movement of LMOs should be liable for the damage resulting from such a transboundary movement.

2. If two or more operators/importers are liable according to these rules and procedures, the claimant should have the right to seek full compensation for the damage from any or all operators/importers i.e. the latter should be liable jointly and severally without prejudice to domestic provisions concerning the rights of contribution or recourse.

3. The operator/importer who proves that only part of the damage was caused by the transboundary movement of LMOs should only be liable for that part of the damage.

4. The operator/importer should not be liable to the extent that the damage was caused by an act of God/force majeure, an act of war or civil unrest, the intervention by a third party or compliance with compulsory measures imposed by a public national authority.

5. Where appropriate, the operator/importer may not have to bear the costs of remedial action when he proves that he was not at fault or negligent and the damage was caused:

(a) by an activity expressly authorised by and fully in conformity with an authorisation given under national law; or

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

6. Nothing in these rules and procedures should prejudice any right of recourse of the operator/importer against the exporter.

7. In case civil liability is complemented by an administrative approach, the operator/importer should be required to take all necessary preventive and remedial measures and to bear their costs. Competent public authorities should establish which operator/importer has caused the damage (or the imminent threat of damage). They should assess the significance of the damage and determine which remedial measures should be taken. Competent authorities may themselves also take the necessary preventive or remedial measures and then recover the costs from the operator/importer.

Annotation

*The **operator** is a wide notion which in essence focuses on the person/s that have the actual control of the activity that caused the damage and therefore could either have prevented the damage or, at least, benefited economically from the activity involving the LMOs. This is an expression of the well-known 'polluter-pays principle'. Here below two definitions of the term 'operator' are provided as mere examples.*

*The **International Law Commission**, in the "Draft principles on the allocation of loss in case of transboundary harm arising out of hazardous activities"(Principle 2, paragraph (g)) defines the operator as "any person in command or control of the activity at the time the incident causing the transboundary damage occurs".*

*Under the **EC Environment Liability Directive** (Art 2.6): "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"*

*The present rules and procedures single out (in paragraphs 1 to 7 above) the **importer** as the possible subject of channelling in addition to the operator. There may be cases in which the operator and the importer are the same because the importer was the person in control but this will not always be true. The EU has decided to put emphasis on the importer since he is normally based in the same jurisdiction as the victim. Therefore, it is easier for the victim to find a defendant against whom to start a court action. Moreover, the importer has generally a contractual relationship with the exporter under which they agree how to settle potential disputes. He would therefore have a right of recourse against the exporter in case he was not responsible for the damage.*

*A similar approach is reflected in the **African Model Law on Safety in Biotechnology** (Art. 14.1): "A person who imports, makes contained use of, releases or places on the market a genetically modified organism or a product of a genetically modified organism shall be strictly liable for any harm caused by such a genetically modified organism. The harm shall be fully compensated."*

V. LIMITATION OF LIABILITY

1. A claim for damages under these rules and procedures should be exercised within [x] years from the date by which the claimant knew or ought reasonably to have known of the damage and the person liable and in any event not later than [y] years from the date of the transboundary movement of LMOs.

2. Where the transboundary movement of LMOs consists of a series of occurrences having the same origin, the time limits under this rule should run from the date of the last such occurrence. Where the effect of the transboundary movement consists of a continuous occurrence, such time limits should run from the end of the continuous occurrence.

VI. MECHANISMS OF FINANCIAL SECURITY

Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of

insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic measures implementing this decision.

Annotation
In relation to chapter V section B, of Annex II to the report of the *3rd meeting of the Open-ended ad hoc working group of legal and technical experts on liability and redress on "Supplementary collective compensation arrangements", the EU does not exclude exploring supplementary approaches, in exceptional cases such as major accidents or disasters, to compensate for certain damages that could not be redressed otherwise*

VII. SETTLEMENT OF CLAIMS

1. Civil law procedures should be available at the domestic level to settle claims between operators/importers and victims. In cases of transboundary disputes, the general rules of private international law will apply as appropriate. The competent jurisdiction is generally identified on the basis of the defendants' domicile. Alternative grounds of jurisdiction may be provided for well-defined cases, e.g. in relation to the place where a harmful event occurred. Special rules for jurisdiction may also be laid down for specific matters, e.g. relating to insurance contracts.

2. Resorting to special tribunals, such as the Permanent Court of Arbitration and its Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, may be considered in specific cases such as when a large number of victims are affected.

3. In case civil liability is complemented by an administrative approach, decisions of public authorities imposing preventive or remedial measures should be motivated and notified to the addressees who should be informed of the legal remedies available to them and of their time limits.

VIII. STANDING/RIGHT TO BRING CLAIMS

1. Parties should provide for a right to bring claims by affected natural or legal persons as appropriate under domestic law. Those persons should have access to remedies in the State of export that are no less prompt, adequate and effective than those available to victims that suffer damage from the same incident within the territory of that State.

States should guarantee appropriate access to information relevant for the pursuance of remedies, including claims for compensation.

2. In case civil liability is complemented by an administrative approach, natural and legal persons, including NGOs promoting environmental protection and meeting relevant requirements under domestic law, should have a right to require the competent authority to act according to these rules and procedures and to challenge, through a review procedure, the competent authority's decisions, acts or omissions as appropriate under domestic law.

IX. NON-PARTIES

National rules on liability and redress implementing these rules and procedures should also cover damage resulting from the transboundary movements of LMOs from non-Parties, in accordance with Article 24 of the Cartagena Protocol and COP/MOP decisions BSI-/11 and III/6.

JAPAN

[31 July 2007]
[SUBMISSION: ENGLISH]

SUBMISSION OF THE GOVERNMENT OF JAPAN-JULY 2007

Ⅰ. Possible Approaches to Liability and Redress

< Comment >

- There has not been any consensus or any shared understanding among the member countries of the Protocol on the fundamental points such as:
    1. necessity of formulating international rule for LMOs' liability and redress at this point as there has not been any case reported as of yet;
    2. scope and magnitude of environmental damage caused by trans-boundary movements of LMOs;
    3. possible cases of environmental damage caused by LMOs

Given that above points remain to be discussed, we consider it important to thoroughly discuss on the above points at the next legal experts working group meeting before getting into the discussion on the provisions.

- The Japanese government would like to insist on the following points:
    1. We do not consider the activities with LMOs conducted under the Protocol as of particularly high risk. As this is the case, strict liability, which applies to ultra-hazardous activities, does not apply for this purpose.
    2. We believe that if the international rule is to be formulated, fault-based liability is the only standard of liability appropriate in the case of activities with LMOs which are not inherently dangerous. Accordingly, a person who was in control of an activity and failed to prevent the damage would be responsible and must pay for the damage caused based on the civil liability procedure.
    3. As compensation for damage should be based upon fault-based liability procedure, establishment of fund mechanism is not necessary. However, as for cases as such that the damage is serious and scientifically unforeseeable, modalities of voluntary arrangements for the solution of the damage would be discussed by interested parties together with relevant entities involved in transboundary movements of living modified organisms after such an incident occurs.
    4. The final product of the working group must not be legally binding.

II . Scope

< Proposed text >

These rules of procedures should apply to damage resulting from transboundary movements of living modified organisms, which occurred within the limits of national jurisdiction or control of Parties and to response measures taken to avoid, minimize or contain impact of such damage.

III. Damage

< Proposed text >

Damage: measurable loss or damage caused by the transboundary movements of living modified organisms that has adverse and significant impact upon the conservation and sustainable use of biological diversity, and includes the costs of response measures.

IV. Causation

< Comment >

If the rules of procedures adopted under Article 27 are guidelines for the development of national liability rules, each State may apply its own definition of causation consistent with best international practice.

V . Primary Compensation Scheme

< Proposed text >

1. The Parties should require any legal or natural person who has the operational control of living modified organisms subject to trans-boundary movement to be liable for significant damage caused by the person's intentional or negligent act or omission regarding the trans-boundary movement. In this regard, the Parties would elaborate the compensation scheme in accordance with domestic laws and regulations.

2. The Parties should endeavor to require any legal or natural person who caused significant damage by that person's intentional or negligent act or omission regarding the trans-boundary movement to undertake reasonable response measures to avoid, minimize or contain the impact of the damage.

VI. Supplementary Compensation Scheme

< Proposed text >

The parties should encourage any legal or natural person who takes on the operational control of living modified organisms that are subject to transboundary movements to maintain adequate insurance or other financial security.

VII. Complementary Capacity Building Measures

< Proposed text >

1. Recognizing the crucial importance of building capacities in biosafety, the Parties are encouraged to strengthen their efforts in implementing relevant COP/MOP decisions on capacity

building under Article 22 of the Protocol.

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

NORWAY [29 June 2007]
[SUBMISSION: ENGLISH]

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

Norway submits its operational text proposals while underlining the following:

The relationship between the rules and procedures on liability and redress under the Cartagena Protocol and other international agreements and mechanisms will have to be further elaborated before a final position on the geographical scope of the rules are developed.

I. POSSIBLE APPROACHES TO LIABILITY AND REDRESS

The rules and procedures on liability and redress under the Cartagena Protocol should cover state responsibility and liability in addition to civil liability.

A. State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol)

Operational text proposal:

This instrument shall not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to State responsibility.

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)

No operational text proposal at present.

C. Civil liability (harmonization of rules and procedures)

Operational text proposal is found in chapter IV below.

D. Administrative approaches based on allocation of costs of response measures and restoration measures

Operational text proposal is found in chapter IV (c) Administrative approaches.

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

A. Functional scope

Operational text proposal:

This instrument applies to transport, transit, handling and use of living modified organisms (LMO) that finds its origin in a transboundary movement. It applies to all LMOs covered by the Cartagena Protocol.

With respect to intentional transboundary movements, this instrument applies to damage resulting from any authorized use of the LMO, as well as any use in violation of such authorization.

This instrument also applies to unintentional transboundary movements and transboundary movements in contravention of domestic measures to implement the Protocol.

B. Geographical scope

Operational text proposal:

1. This instrument applies to:

a) Damage resulting from a transboundary movement and suffered within an area under national jurisdiction or control of Parties to the instrument, regardless of whether the transboundary movement has its origin in a Party or non-Party, and

b) Damage caused by an operator of a State party to this instrument by a transboundary movement and suffered beyond areas of national jurisdiction or control, provided that it is resulting from a transboundary movement of LMOs originating from an area covered by a).

2. This instrument does not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to jurisdiction.

C. Limitation in time

Operational text proposal:

This instrument applies to damage resulting from a transboundary movement of LMOs that started after the entry into force of this instrument.

D. Limitation to the authorization at the time of the import of the LMOs

No limitation proposed.

E. Determination of the point of the import and export of the LMOs

Operational text proposal:

4. For the purposes of this instrument, a transboundary movement starts from the following points;

a) In cases of sea borne transport, where a LMO leaves the exclusive economic zone of the State, or in the absence of such zone, the territorial sea of a State.

b) In cases of land borne transport, where a LMO leaves the territory of a State

c) In cases of air borne transport, where a LMO leaves the exclusive economic zone, the territorial sea or the territory of the State, depending on the route.

F. Non-Parties

No special rules and procedures proposed. The instrument is proposed to cover damage resulting from a transboundary movement and suffered within an area under national jurisdiction or control of Parties to the instrument, regardless of whether the transboundary movements has its origin in a Party or non-Party. The origin of the transboundary movements is only relevant for damage suffered beyond areas of national jurisdiction or control.

See Operational text proposal under II B No. 1 a).

III. DAMAGE

A. Definition of damage

Operational text proposal:

Alternative 1

This instrument covers damage to conservation and sustainable use of biological diversity and to human health as follows:

1. *Damage to the conservation of biological diversity means any measurable significant change in the quantity or quality of organisms within species, of species as such or ecosystems.*
2. *Damage to the sustainable use of biological diversity means any quantitative or qualitative reduction of the component of biological diversity which negatively affect the continued use of those components in a sustainable way and thereby leads to economic loss, loss of, damage to, or impaired use of property, loss of income, disruption of the traditional way of life in a community or hinders, impedes or limits exercising of the right of common.*
3. *Damage to human health, including loss of life, personal injury, impairment of health, loss of income and public health measures.*

Alternative 2

1. "Damage" means:

a) Loss of life or personal injury;

b) Loss of or damage to property;

c) *Loss of income directly deriving from an economic interest in the use of biological diversity, incurred as a result of impairment of the biological diversity, taking into account savings and costs;*

d) *The costs of measures of reinstatement or remediation of the impaired biological diversity actually taken or to be undertaken;*

e) *The costs of preventive measures, including any loss or damage caused by such measures*

2. "Measures of reinstatement" means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of biological diversity. Domestic law may indicate who will be entitled to take such measures;

3. "Preventive measures" means any reasonable measures taken by any person, in response to an incident, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up.

A bis. Damage to conservation and sustainable use of biological diversity or its components

No operational text proposal.

B. Valuation of damage to conservation of biological diversity/environment

Operational text proposal 1/:

In the valuation of the damage to conservation of biological diversity, the costs of measures of reinstatement or remediation of the impaired biological diversity actually taken or to be undertaken shall be taken into account, including introduction of original components or introduction of equivalent components on the same location, for the same use, or on another location for other types of use

C. Special measures in case of damage to centres of origin and centres of genetic diversity to be determined

No operational text proposal.

D. Valuation of damage to sustainable use of biological diversity, human health, socio-economic damage and traditional damage

No operational text proposal.

E. Causation

Operational text proposal:

All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the instrument shall be governed by the law of that court, including any rules of such law relating to conflict of laws, in accordance with generally accepted principles of law.

1/ In case Operational text proposal, Alternative 1 under Part II A is chosen. The definition of "damage" under Operational text proposal, Alternative 2 makes further elaboration of approaches to valuation of such damage unnecessary.

IV. PRIMARY COMPENSATION SCHEME

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

No operational text proposal.

2. Standard of liability and channelling of liability

a) Primary State liability

No primary State liability proposed.

b) Civil liability (harmonisation of rules and procedures)

Operational text proposal:

Civil liability
The person responsible for intentional or unintentional transboundary movements of living modified organisms shall be liable for damages resulting from transport, transit, handling and/or use of living modified organisms that finds its origin in such movements, regardless of any fault on his part.

(c) Administrative approaches

Operational text proposal:

The person responsible for intentional or unintentional transboundary movements of living modified organisms shall take reasonable measures to prevent damage resulting from transport, transit, handling and/or use of living modified organisms that finds its origin in such movements, and shall take reasonable measures of reinstatement in case such damage nevertheless occurs.

The Party in which damage resulting from an intentional or unintentional transboundary movement of living modified organisms occurs, may require the person responsible for the movement to take reasonable preventive measures and measures of reinstatement.

If the person responsible fails to take such measures, the Contracting Party may undertake the measures at his expense.

3. Exemptions to or mitigation of strict liability

Operational text proposal:

Liability may be limited in cases where the person referred to in paragraph 1 above proves that the damage was:

1. *The result of an act of armed conflict, hostilities, civil war or insurrection; or*
2. *The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character.*

4. The provision of interim relief

No operational text proposal.

5. Recourse against third party by the person who is liable on the basis of strict liability

No operational text proposal.

6. Joint and several liability or apportionment of liability

Operational text proposal:

Any persons responsible for transboundary movements referred to in paragraph 1 above2/ shall be jointly and severally liable for damages referred to in the same paragraph.

7. Limitation of liability

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

Operational text proposal:

Claims for compensation under the Protocol shall not be admissible unless they are brought within 3 years from the date the claimant knew or ought reasonably to have known of the damage and the person responsible, and at the latest 20 years from the date on which the activity causing the damage ceased.

(b) Limitation in amount

No limitation proposed.

8. Coverage of liability (insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees)

Operational text proposal:

The persons liable under Article X shall establish and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability in accordance with requirements set out in the regulatory framework of the party of import or the decision on the import of living modified organisms taken by a Party of import pursuant to Articles 10-12 of the Cartagena Protocol. The requirements shall take into account inter alia the likelihood, seriousness and possible costs of damage and the possibilities to offer financial security.

V. SUPPLEMENTARY COMPENSATION SCHEME

A. Residual State liability

No operational text proposal at present.

B. Supplementary collective compensation arrangements

No operational text proposal at present.

Norway is open to consider supplementary collective compensation arrangements, such as fund financed by the biotechnology industry, without totally excluding any of the remaining identified options at the outset.

2/ See operational text proposal under IV 2 b) Civil liability above.

Supplementary collective compensation arrangements may need to be developed in order to secure compensation in specific cases where the compensation for damage cannot otherwise be obtained.

VI. SETTLEMENT OF CLAIMS

A. Inter-state procedures (including settlement of disputes under Article 27 of the Convention on Biological Diversity)

No operational text proposal.

B. Civil procedures

Operational text proposal:

Competent courts

1. Claims for compensation may be brought in the courts of a Party only where either:
- *a) The damage was suffered; or*
- *b) The incident occurred; or*
- *c) The defendant has his habitual residence or principal place of business.*

2. Each Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.

Related actions

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Parties, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

3. Where related actions are brought in the courts of different Parties, any court other than the court first seized may stay its proceedings.

4. Where these actions are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

5. 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 judgements resulting from separate proceedings.

Applicable law

All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the instrument shall be governed by the law of that court, including any rules of such law relating to conflict of laws, in accordance with generally accepted principles of law.

Relationship between the instrument and the law of the competent court

The instrument is without prejudice to any rights of persons who have suffered damage or to any measures for the protection or reinstatement of the environment that may be provided under applicable domestic law.

Mutual recognition and enforcement of judgements
1. Any judgement of a court having jurisdiction in accordance with Article X on competent courts which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms of review, shall be recognized in any Party as soon as the formalities required in that Party have been completed, except:

a) Where the judgement was obtained by fraud;
b) Where the defendant was not given reasonable notice and a fair opportunity to present his case;
c) Where the judgement is irreconcilable with an earlier judgement validly pronounced in another Party with regard to the same cause of action and the same parties; or
d) Where the judgement is contrary to the public policy of the Party in which its recognition is sought.

2. A judgement recognized under paragraph 1 of this Article shall be enforceable in each Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be re-opened.

3. The provisions of paragraphs 1 and 2 shall not apply between Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgements under which the judgement would be recognizable and enforceable.

C. Administrative procedures

No operational text proposal.

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

No operational text proposal.

E. Standing/right to bring claims

Operational text proposal:

Applicable law
All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the instrument shall be governed by the law of that court, including any rules of such law relating to conflict of laws, in accordance with generally accepted principles of law.

VII. COMPLEMENTARY CAPACITY BUILDING MEASURES

Operational text proposal:

The Parties to this instrument undertake to contribute to ensuring that the next review of the Updated Action Plan for Building Capacities for the Effective implementation of the Cartagena Protocol on Biosafety, as contained in the annex to decision BS-III/3, reflects this instrument and include capacity building measures such as assistance in the implementation and application of this instrument, including

assistance to develop national implementing legislation, foster inter-sectoral coordination at national level, ensure appropriate public participation and enhance the skills of the judiciary in handling liability cases.

VIII. CHOICE OF INSTRUMENT

Norway favours a legally binding instrument on liability and redress in the form of a liability Protocol to the Biosafety Protocol, without excluding at the outset the other identified options for a legally binding instrument.

SUBMISSIONS FROM ORGANIZATIONS

GLOBAL INDUSTRY COALITION (GIC) [5 July 2007]
[SUBMISSION: ENGLISH]

Global Industry Coalition (GIC) Submission
Response to Notification 2007-035 dated 20 March 2007

This paper responds to the invitation to governments and organizations to submit further views on the matter covered by Article 27 of the Cartagena Protocol on Biosafety (Biosafety Protocol), in particular with respect to the approaches, options and issues identified in Annex II to UNEP/CBD/BS/WG-L&R/3/3.1/

The GIC suggests that analysis and consideration of the available approaches and options is clearer when the options are considered in three distinct categories:

1. The first category includes the “substantive” options, that is, the options considered for the various elements of a regime to provide remedies for damages alleged to be caused by living modified organisms (LMOs).
2. The second category includes the options for the type of system to establish responsibility or liability and the remedy to address damage to biodiversity. There are only two such systems: a civil (or common) law system administered by the Courts; or an administrative system operated by a competent authority.
3. The third category includes the options for international access among Parties or persons, such as a transnational process, an international court, or an international treaty establishing both substantive law and an administrative or judicial system. Alternative mechanisms to resolve disputes among Parties or persons, such as arbitration (which are generally faster, more efficient and less costly), can be included in the system of administering the law and in the processes for international access.

Choices can be made among the approaches and options in each of the categories in a variety of combinations.

The GIC believes that the various forms of traditional damages (e.g. personal injury and property damage), and any new forms of damage that a Party may wish to address are unique to both the culture and the society of a Party and therefore best addressed in national law. In addition, traditional damages are in almost every case already addressed by existing national law and legal systems, and should not be overruled by international edict.

Therefore, this submission is devoted to positions and text addressing:

- damage to biodiversity

1/ The GIC provides the following views and comments in the spirit of facilitating a full discussion without prejudice to their position on the need for, utility or fairness of developing liability and redress rules under the Biosafety Protocol. Further, all of the Operational Text is interrelated: proposals are valid only where the related texts (e.g., scope, definition of damage, etc.) also are accepted. The GIC is providing the suggested text below *not* in order to support the development of a legally binding international civil liability regime, but to facilitate consideration of all available options under discussion.

- systems providing international access among persons and Parties; and
- systems for resolving disputes among persons and Parties.

PROPOSED TEXT FOR ANNEX II ELEMENTS

II. SCOPE

A. *Functional Scope*

The following rules establish responsibility and provide for remediation of damage to biodiversity resulting from transboundary movement of LMOs.

"Biological diversity" is defined in Article 2 of the Convention on Biological Diversity.

"Transboundary movement" means the intentional movement of LMOs from the territory of a Party to the Protocol to the territory of another Party to the Protocol.

"Resulting from" means that the damage was:

(a) caused in fact by (would not have occurred but for) the transboundary movement of the LMO; and

(b) proximately caused by (there were no superseding or intervening causes) the transboundary movement of the LMO.

III. DAMAGE

A. *Definition of Damage*

The following rules provide for remediation of damage to biodiversity.

Damage to biodiversity is actionable when there is "measurable", "significant" and "adverse" change in a protected species or protected area, or a measurable and significant impairment of a natural resource service provided by a protected species or area, resulting from the transboundary movement of an LMO.

"Protected species" (hereinafter "species") are those that are protected under national law by the country in which the alleged damage occurs.

"Protected areas" (hereinafter "areas") are those habitats, nature reserves, parks and/or other physical spaces protected under national law in accordance with CBD obligations by the country in which the alleged damage occurs.

Change in biodiversity is "significant" and "adverse" when:

1. Population dynamics data for the species in question demonstrate that the species cannot maintain itself on a long term basis as a viable component of its natural habitat;
2. The natural range of the species has been reduced to an unsustainable level; and
3. A sufficient habitat of appropriate quality no longer exists to maintain species population on a long term basis.

The following changes in biodiversity are not "significant" and "adverse" in and of themselves2/:

1. Variations in biodiversity that are within the historical or expected range of fluctuations regarded as "normal" for the species or area in question;
2. Variations in biodiversity due to inevitable and unavoidable "natural" causes;
3. Change in biodiversity for which it is determined that any resulting reduction in numbers or distribution of species will be reversed or will recover to an acceptable baseline condition within a reasonable period of time due to natural restorative forces;
4. Change in the genetic content of a species that does not significantly impact its functionality, interactions within its ecosystem or its conservation status; or
5. Newly detected presence of a LMO or unique genetic elements from a LMO in the environment.

B. *Measurability of Damage to Biodiversity - Baseline*

Any identified change to biodiversity must be "measurable" and "significant". Both the measurability and the significance of the change will be determined by comparison to the baseline condition that existed before the observed change occurred.

This measurement will be based on accepted science-based factors, including the following:

1. The nature and characteristics of the species or area affected;
2. The natural range/distribution of species and the naturally occurring fluctuation in numbers and distribution of the species over time;
3. The interaction of the species within the habitat and the habitat's capacity for natural regeneration;
4. The species' capacity for propagation; and
5. The species' or area's capacity for recovery within a reasonable period of time under natural restorative forces.

C. *Process for Assessing Damage to Biodiversity*

Damage to biodiversity will be assessed using a science-based process to identify the nature and significance of change. This process will be described by regulation and will include the following:

When an allegation or claim of damage to biodiversity is made, the competent authority will conduct an assessment to determine:

1. Whether measurable, significant and adverse change in biodiversity has occurred. That assessment will apply accepted scientific principles and methods to:
   a. measure change from baseline conditions considering the factors set forth in Paragraph B on measurability; and
   b. determine whether the change was caused by a specific identifiable LMO.

2/ The life histories of numerous species demonstrate frequent changes over time (increases and decreases) in population census, geographical distribution, frequencies of different genes, and other biological parameters to such an extent that changes in these or other parameters alone cannot be considered damage, per se. While changes in such parameters within a population may be necessary for damage to occur they are not sufficient in and of themselves.

2. Whether the impact of the change is adverse, neutral or beneficial. That assessment will determine:

   1. whether the change from the baseline functional value of the protected species or area is adverse and has resulted in a loss of value or loss of use; and
   2. whether the adverse change is reversible or repairable by natural restorative processes within a reasonable time in which case the change is not actionable, or whether remedial actions can restore or repair and are necessary to restore or repair the adverse change to an "acceptable" baseline condition. The acceptable baseline condition shall take into account the factors set forth in Paragraph B on measurability.

3. If repair or remediation is necessary, the nature of and the specific plan for the actions necessary to return the adverse change to that acceptable baseline condition.

D. ***Remediation or Repair of Damage***

1. The person or Party responsible for the LMO and for the damage will remediate or repair, or shall compensate for the damage in accordance with the principles of the "Rio Declaration".3/

2. If the determination is made that remediation or repair can restore the damage to an acceptable baseline condition and is necessary, then the responsible person or Party will perform a specific remediation or repair plan developed to address the damage to biodiversity.

3. Only if the determination is made that remediation or repair of the damage is not possible or would cost more than the value of the damage to biodiversity, then the responsible person or Party will compensate for the "value" of the damage to biodiversity. In no event shall a person be entitled to compensation for damage to biodiversity. The "value" of the damage to biodiversity will be determined based on the change from baseline and the consequent loss of functionality of the species or area. That value will be established in national legislation of the country where the damage has occurred, and based upon the assessment of value by a competent national authority taking into account existing domestic policies, customs, norms, and legislation and precedents.

IV. PRIMARY COMPENSATION SCHEME

2. Standard of liability and channeling of liability
(b)Civil liability

(a) In a civil liability system, liability is established where the operator:

(b) 1. Has operational control of the relevant activity;

3/ Rio Declaration on Environment and Development, Rio de Janeiro 3-14 June 1992, Principle 16: *National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.*

(c) 2. Has breached a legal duty of care through intentional, reckless or negligent conduct, including acts or omissions;

(d) 3. Such breach has resulted in actual damage to biodiversity; and

(e) 4. Causation is established in accordance with section [] of these rules.

(f)

(g) In an administrative system, responsibility is established where the operator:

1. has operational control of the relevant activity, or
2. has released the relevant LMO into the environment, or
3. has placed the relevant LMO on the market; and
4. that LMO has caused damage to biodiversity

"Operator" is the person, entity or Party which has the operational control of the activity which causes the damage to biodiversity.

3. Exemptions to or mitigation of strict liability

Liability shall not be established where the damage to biodiversity is a result of:

1. Act of God/force majeure;
2. Act of war or civil unrest;
3. Intervention by a third party;
4. Compliance with compulsory measures imposed by a competent national authority;
5. Permission of an activity by means of an applicable law or a specific authorization issued to the operator; or
6. 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.

V. SUPPLEMENTARY COMPENSATION SCHEME

Where no responsible operator can be identified, or the responsible operator can not remediate the damage, then the Party shall remediate for the damage to biodiversity.

VI. SETTLEMENT OF CLAIMS

The GIC proposes a new category under "VI. Settlement of Claims", which includes the following three procedures for the resolution of claims and for international access among

Parties and among private entities. Each of these procedures below can stand alone and be adopted independent of any rules and procedures developed to establish responsibility for damage to biodiversity (i.e., are not limited to the settlement of claims). The GIC believes that Parties should adopt a system for addressing liability and redress for damage to biodiversity at the national level. One or more of the procedures listed below may also be necessary to complement national systems by creating systems that allow international access among Parties and among private entities for recovery of remediation or costs for damage to biodiversity.

F. International Procedures

1. Inter-state Resolution

1.Settlement of Disputes in Accordance with Article 27 of the CBD

Claims for recovery of costs of the restoration of damage to biodiversity as a result of the transboundary movement of LMOs that cannot be addressed on a bilateral basis shall be addressed in accordance with the provisions of Article 27 (Settlement of Disputes) of the Convention on Biological Diversity.

2. Permanent Court of Arbitration

Claims for recovery of costs of the restoration of damage to biodiversity as a result of the transboundary movement of LMOs that cannot be addressed on a bilateral basis shall be settled in accordance with the rules and procedures set forth in the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

2. Transnational Process Regime

ARTICLE I. JURISDICTION OF COURTS

1. Only the courts of the state where the damage occurred shall have jurisdiction to hear actions in respect of liability and redress for damage to biodiversity resulting from the transboundary movement of living modified organisms, as defined in Article 3(g) of the Biosafety Protocol, except where:

a. the parties have agreed specifically to bring such claims before the courts of another jurisdiction, in which case that jurisdiction shall have jurisdiction; or

b. the court has no jurisdiction to order a form of redress with respect to damage to biodiversity, as defined in Article 2 of the Biodiversity Convention, in which the court of the place where the defendant is domiciled may accept jurisdiction.

2. If an action in respect of liability and redress for damage to biodiversity resulting from the transboundary movement of living modified organisms, as defined in Article 3(g) of the Biosafety Protocol, is brought before a court that does not have jurisdiction pursuant to section 1 of this Article I, the court shall refuse to accept jurisdiction.

3. In actions covered by this Article 1, the doctrine of *forum non conveniens* shall not apply.

ARTICLE II. GOVERNING LAW

1. In any action for damage to biodiversity resulting from the transboundary movement of living modified organisms, as defined in Article 3(g) of the Biosafety Protocol, the courts having jurisdiction pursuant to Article I(1) hereof shall apply (i) the laws of the state where the damage occurred and, insofar as applicable, (ii) international law, including the Biodiversity Convention and the Biosafety Protocol.

2. If and to the extent the law governing the claims pursuant to Section 1 of this Article II, under (i), conflicts with provisions of international law, the provisions of international law shall govern.

3. The rules on admissibility of actions and standing of claimants of the state where the damage to biodiversity occurred, shall apply.

ARTICLE III. ENFORCEMENT OF JUDGMENT

1. A final and binding judgment rendered by a court in an action in respect of liability and redress for damage to biodiversity resulting from the transboundary movement of living modified organisms, as defined in Article 3(g) of the Biosafety Protocol, shall be recognized and enforced by the courts of the defendant's domicile, except in the following cases:

a. the court rendering the judgment did not have jurisdiction pursuant to Article I of this Protocol;

b. the court applied a law other than the law specified in Article II of this Protocol;

c. the court disregarded essential requirements of procedural justice;

d. an earlier judgment has been rendered in the same matter;

e. the judgment conflicts with the public policy or public order of the defendant's domicile, or with applicable provisions of international law; or

f. the judgment was rendered in default of the appearance of the defendant, unless the plaintiff shows that the defendant was properly served with documents initiating the proceedings and with adequate notice and opportunity for the defendant to properly appear and defend the claim.

2. The final and binding determination of a competent authority duly constituted by the national government to administer and remediate claims of damage to biodiversity resulting from the transboundary movement of living modified organisms that the defendant is responsible shall be given the same force and effect as a judgment rendered by a national court of competent authority, provided that the same exceptions listed in the preceding Section 1 shall apply,

ARTICLE IV. COMPLIANCE WITH THE BIOSAFETY PROTOCOL

1. In determining whether a defendant is liable for damage to biodiversity resulting from the transboundary movement of living modified organisms, compliance with the relevant

provisions of the Biosafety Protocol and applicable national laws and regulations shall create a rebuttable presumption that the defendant is not liable.

GREENPEACE INTERNATIONAL [5 July 2007]
[SUBMISSION: ENGLISH]

Submission to the Co-Chairs of the Working Group

Preparation for the Fourth Meeting of the *Ad Hoc* Open-ended Working Group of Legal and Technical Experts on Liability and Redress in the context of the Cartagena Protocol

4 July 2007

Ref: SCBD/BS/WDY/jh/57796

Following the third 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 Biosafety (BSWG-L&R-3) held in Montreal from 19 to 23 February 2007,1/ the Executive Secretary invited 2/ further views, in the form of operational text, in order to allow the Co-Chairs of the Working Group to undertake, with the assistance of the Secretariat, the necessary document preparations for the upcoming fourth meeting of the Working Group, by 5 July 2007.

Greenpeace International participated as an observer in the first, second and third meetings of the *Ad Hoc* Working Group, as well as the earlier meeting of the Technical Group of Experts on Liability and Redress, held in Montreal in October 2004.

Greenpeace International presents this supplementary submission for consideration by the Parties, other Governments, relevant international organizations and stakeholders. This submission is in addition to its earlier submissions to the Third meeting, which was comprised of a discussion of the essential elements of a liability regime, and a suggested draft protocol.

We look forward to seeing all participants at the fourth meeting of the Working Group.

1/ Report of the Open-Ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the context of the Cartagena Protocol on Biosafety on the Work of its Third Meeting, UNEP/CBD/BS/WG-L&R/3/3, 15 March 2007, at http://biodiv.org/doc/meetings/bs/bswglr-03/official/bswglr-03-03-en.doc.

2/ Notification of 20 March 2007, SCBD/BS/WDY/jh/57796, at http://biodiv.org/doc/notifications/2007/ntf-2007-035-bs-en.pdf.

IV.3 Exemptions to or mitigation of strict liability

Reference: *IV.3/p. 48*

Add as an option:

In particular, (a) no mutation and no biological effect of any kind, including any change to an organism or an ecosystem whether due to evolution or otherwise and whether gradual or otherwise, shall be considered an Act of God or *force majeure*, and (b) no weather, meteorological disturbance or climatic occurrence or effect shall be considered Act of God or *force majeure*.

IIII.A. Definition of Damage

Reference: *III.A/p. 26*

Add definitions of 'environment', 'biological diversity' 'ecosystem' , 'centres of origin' and 'centres of genetic diversity

1. '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) biological diversity, (iv) amenity values, (v) indigenous or cultural heritage, and (vi) social, economic, aesthetic, and cultural conditions which are affected by the matters stated in paragraphs (i) to (v) of this definition.

2. "Biological diversity" means 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.

3. "Ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

4. A "center of origin" means a geographical area where a species first developed its distinctive properties. 3/

5. A "centre of diversity" means a geographic area containing a high level of genetic diversity for species in *in situ* conditions.4/

3/ Definition adopted from International Treaty on Plant Genetic Resources for Food and Agriculture. ftp://ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf

4/ Definition adopted from International Treaty on Plant Genetic Resources for Food and Agriculture. ftp://ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf

VI. Settlement of Claims

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

Reference: *Chap. VI.A/p. 69*

Substitute new art. 43:

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 the environment, 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.

INTERNATIONAL GRAIN TRADE COALITION (IGTC)

[29 June 2007]
[SUBMISSION: ENGLISH]

Further to instructions from the Secretariat, the International Grain Trade Coalition (IGTC) would like to comment on a number of matters related to Liability and Redress, namely scope of the Protocol, damage, liability and types of legislative systems for determining redress. You will recall that IGTC membership includes 21 organizations involving more than 8000 members operating in more than 80 countries that are involved in the production, handling, marketing, transportation and processing of grains, oilseeds, pulses and their derived products for food, feed or for processing.

The global grain trading system is diverse and complex and any unanticipated adverse consequences to the shipment of grains and their products around the world may impact not only those directly involved but also the hundreds of millions of consumers dependent upon imported foods. It is within this context that the IGTC makes the following comments:

1. **Scope:** The IGTC does not believe that the actual transboundary movement of LMOs itself is an appropriate focal point for the international rules and procedures referred to in Article 27 but rather such rules and procedures should apply to damage that may occur subsequent to the transboundary movement. That is those parties that are proven to be actually at fault for the damage, such as a domestic user who diverts an LMO shipment for non-food, non-feed or non-processing purposes or who does not exert sufficient care during transportation from discharge to the point of use would be liable.

2. **Damage:** Damage under Article 27 should mean damage to biodiversity, or a change in variability among species, where such change is also adverse and significant. Any rules adopted pursuant to the Protocol should be consistent with similar rules and definitions under the Convention on Biological Diversity to avoid any conflicts or divergent interpretations. With respect to damage valuation, damages recoverable under the Protocol should be limited to a change in variability among species where this has an adverse affect on biodiversity. This is consistent with the scope and authority of the Protocol. Adoption of a more expansive view of the definition of damage would be beyond the scope of the Protocol, potentially subjecting the system of liability and redress to enforcement challenges. The Protocol addresses the conservation and sustainable use of biological diversity, and accordingly the system of liability and redress under the Protocol should be crafted carefully to address damage to biodiversity, including reasonable costs of response actions reasonably taken.

For the system to maintain credibility and support among its stakeholders, any particular damage to biodiversity should not be actionable unless it has the following minimum characteristics:

- Objectively and scientifically measurable, i.e., measured against a scientifically established baseline;
- Adverse;
- Significant; and
- Permanent, i.e., not self-correcting over a reasonable period of time.

3. **Liability:** In determining liability, exporters and shippers of grains, oilseeds and pulses that have been produced with modern technology should comply with their contractual and legal (for example record keeping, testing and labeling obligations). Exporters/importers should only be responsible for releases of LMOs that they cause or negligently permit to happen and that cause significant harm to the conservation and sustainable use of biodiversity. It is important that government officials from all States understand that exporters and shippers should not be responsible for the intentional or inadvertent misconduct of another party.

For this reason, the standard of liability for LMO shipments of food or feed, whether or not there is to be further processing, must be fault-based. There should be no liability for any party that has not acted intentionally illegally, or been negligent, or failed to exercise reasonable diligence or due care. The exercise of due care and following of reasonable business practices should always be a defense against liability claims. There should be no absolute or strict liability, as such a regime would impose unmanageable and unknowable risks on all parties in a global, bulk commodity shipment environment. It is imperative that there be commercial predictability in order for the grain trade to continue to function in a way that ensuring food and feed are available around the world.

Liability, if any, should be channeled to those who are directly at fault, and apportioned among jointly liable parties in relation to their respective levels of responsibility and degrees of fault. Exporters and transporters who comply with their labeling and other obligations, but do not develop the technology, produce the products, or decide how the products get used when they reach the importing country, should not have liability. Exporters and transporters could be partially responsible if they are knowing parties to an improper shipment, or an

improper diversion of products, or negligent in connection with an accident that causes a significant adverse change in variability among species.

There should also be a maximum claim that any person or entity could bring. Such a liability limitation would strike a balance between holding persons responsible for the harm they may cause, and avoiding legal consequences that severely disrupt the trade, deter advances in technology, or otherwise undermine the ability to ship and receive food and grain worldwide.

4. **Types of Legislative Systems for Determining Redress:** The Protocol is a treaty among States. Because only States are signatories, disputes arising directly under the Protocol should involve States that have adopted the treaty. Additionally every signatory state, will implement the treaty slightly differently within its own borders. Accordingly, existing legal mechanisms should not be changed under any liability and redress rules adopted within the framework of the Protocol.

As part of the internationalisation of the administration of justice, States have entered into a multiplicity of treaties by which they provide for the recognition in each other's courts of judgments pronounced by other parties to the treaty, and for subsequent enforcement of those judgments. The World Trade Organization ("WTO") is an international forum where member governments negotiate and implement trade agreements and settle disputes that arise under those agreements. The WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes establishes a system for the resolution of trade disputes that arise between member governments. This is a forum that could be utilized to resolve government-to-government disputes under the Protocol.

However, non-governmental entities are not subject to the jurisdiction of the WTO, and neither the WTO nor any other international body is the proper venue for disputes involving private parties. Such disputes, if they arise, should be resolved through existing legal channels in the involved country.

PUBLIC RESEARCH AND REGULATION INITIATIVE (PRRI)

[5 July 2007]
[SUBMISSION: ENGLISH]

PRRI submission for the Ad Hoc Open-ended Working Group of Legal and Technical Experts on Liability and Redress in the context of the Protocol

Version 1 July 2007

Introduction

Article 27 of the CPB instructs the Meeting of the Parties (MOP) to “adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the ongoing processes in international law on these matters, and shall endeavour to complete this process within four years”.

For the purpose of presenting options for consideration by the MOP, the Ad Hoc Open-ended Working Group of Legal and Technical Experts on Liability and Redress (WGL&R) has identified several possible options for international rules and procedures.

There are options of different *form* of the MOP decision (legally binding vs. guidelines) and there are options of different *content* (a civil liability regime, an administrative approach, a trans-national process regime, and a dispute settlement mechanism). The first two substantive approaches work on the national level, whereas the latter two address trans-national questions. The table below gives an overview. Different approaches table can be combined.

	Civil liability regime *Gives defined groups, ranging from governments to civil society, the right to claim in courts compensation in case of damage*	**Administrative system** *Gives national competent authorities tools to require re-mediation or undertake remediation and claim the costs from the operator*	**Trans-national Process regime** *Defines process rules, such as which courts have jurisdiction over claims of damage, choice of law etc.*	**Dispute Resolution** *Defines a body and the rules for dispute resolution between governments*
Legally binding				
Guidelines				

PRRI believes that the debate in the context of article 27 is intended to focus on damage to biodiversity rather than on traditional damage, i.e. damage to persons, goods, economic interests, which is covered in most – if not all – national civil liability systems. Those national civil liability systems could be complemented by Private International law, where appropriate.

PRRI believes that central in the debate on damage to biodiversity should be speedy and adequate *remediation of damage to biodiversity*. PRRI is therefore of the opinion that the goal of conserving biodiversity would best be achieved by systems that would empower national competent authorities to require remediation or undertake remediation of damage to biodiversity and claim the costs from the responsible operator. Such a system can contain access to justice for the general public.

Such a so-called *'administrative approach'* would be similar in many respects to existing environmental liability systems in several countries and in the EU Directive on environmental liability. Where necessary, the administrative approach can be complemented by a dispute resolution mechanism on the international level, e.g. the Permanent Court of Arbitration in The Hague.

The advantages of an administrative approach for liability are:

- *The interest of biodiversity*: the emphasis of the administrative approach is on remediation and the system allows the competent authority to take immediate action where necessary.
- *The interest of the Government*: An administrative approach will by itself provide a standing for instructions to the responsible operator to cover the costs, because they do not require the involvement of lengthy and costly court procedures.
- *The interest of the general public*: the system contains access to justice for individuals and groups who believe that in specific cases the national competent authorities have not adequately executed the powers granted to them in this respect.
- *The interest of public sector research in modern biotechnology:* by channelling actions and decisions through the competent authority, the public research sector will not have to reserve a

portion of their limited resources to handle lengthy and costly law suits, which is particularly important for public research institutes in developing countries.

For the purpose of clarifying what such an administrative system would entail, PRRI offers the language below. The text below is not intended to be a final version of a full text, but is intended as an illustration of what such an administrative approach looks like, for the benefit of the discussions.

PRRI invites all interested to send feedback on this proposal to: pietvandermeer@cs.com.

Draft Guidelines to assist with the establishment of national administrative systems for liability in cases of damage to biodiversity

The purpose of these Guidelines is to assist Parties to establish, where necessary and appropriate, a national administrative system based on the "polluter-pays" principle to remedy damage to biodiversity and claim the costs from the responsible operator. This so called administrative approach for damage to biodiversity complements existing national civil liability systems for traditional damage, i.e. damage to persons, goods or economic interests. An administrative approach could be incorporated into national biosafety legislation or be the subject of an independent law, regulation or decree. These Guidelines could be adopted by the Meeting of the Parties in the form of a decision. Where necessary a administrative approach can be complemented by existing mechanisms of dispute settlement, such as the Permanent Court of Arbitration.

Article 1. Objective

The objective of this regulation/law/decree (XX) is to establish a national administrative system to remedy damage to biodiversity and claim the costs from the responsible operator(s).

Article 2. Definitions

In the context of this XX:

- 'Damage to the biodiversity' means damage to species and natural habitats or ecosystems established and regulated by national law in conformity with Article 8 of the Convention on Biological Diversity that has significant and permanent adverse effects on reaching or maintaining the favourable conservation status of such species or habitats. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria and methodology set out in Annex I.
- 'LMO' means living modified organism as defined in the Cartagena Protocol on Biosafety.
- 'operator' means …
- et cetera

Article 3. Scope

1. This XX shall apply to damage to biodiversity resulting from the transboundary movement of Living Modified Organisms (LMOs).
2. This XX does not apply to cases of personal injury, to damage to private property or to economic loss, and does not affect any right or obligation under existing civil liability systems regarding these types of damages.
3. This XX shall only apply to damage to biodiversity, where it is possible to establish a causal link between the damage, the genetic modification and the activities or omissions of the operator(s).

Article 4. Remedial Action

1. Where damage to biodiversity has occurred, the Competent Authority may, at any time:

(a) Require the operator to provide supplementary information on the damage occurred;

(b) Take, require the operator to take, or give instructions to the operator concerning, all practicable steps to immediately control, contain, remove or otherwise manage the damage factors in order to limit or to prevent further damage to biodiversity;

(c) Require the operator to take the necessary remedial measures; and/or

(d) Itself take the necessary preventative measures.

2. The Competent Authority shall decide which remedial measures shall be implemented in accordance with Annex II.

Article 5. Remediation Costs

1. The operator shall bear the costs for the preventative and remedial actions taken pursuant to this XX.

2. An operator shall not be required to bear the cost of remedial actions taken pursuant to this XX in case of:

- Act of God, force majeure, and Act of war or civil unrest;
- Intervention by a third party, including intentional wrongful acts or omissions of the third party;
- Compliance with compulsory measures imposed by a competent national authority;
- Damage that could not have been foreseen given the scientific knowledge at the time when a risk assessment was undertaken as part of the approval process for the transboundary movement
- Damage that was deemed acceptable by the competent authority in the approval process for the activity.

Article 6. Request for Action

1. Natural or legal persons affected or likely to be affected by damage to biodiversity shall be entitled to request the Competent Authority to take action under this XX.

2. In such circumstances, the Competent Authority shall give the relevant operator an opportunity to respond to the request for action before making a decision on such request for action.

Article 7. Access to Justice

1. Persons who have requested action under Article 6 of this XX shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the Competent Authority.

2. Operators required by the Competent Authority to take remedial action or to bear the costs of any such actions taken by the Competent Authority shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions and/or orders of the Competent Authority under this XX.