GROUP OF THE FRIENDS OF THE CO-CHAIRS
CONCERNING LIABILITY AND REDRESS IN
THE CONTEXT OF THE CARTAGENA
PROTOCOL ON BIOSAFETY
First meeting
Mexico City, 23-27 February 2009


INTRODUCTION

1. The Group of the Friends of the Co-Chairs Concerning Liability and Redress in the Context of the Cartagena Protocol on Biosafety (hereinafter “Group of the Friends of the Co-Chairs”, or “the Group”) was established by decision BS-IV/12 of the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. Following the generous offer made by the Government of Mexico to host it, the first meeting of the Group was held in Mexico City from 23 to 27 February 2009.

2. The Group of the Friends of the Co-Chairs consisted of six representatives of the Asia-Pacific region of which four, namely China, India, Malaysia and the Philippines, were represented in the Group; two representatives of the European Union; two representatives of Central and Eastern Europe of which one (Moldova) was represented in the Group; six representatives of the African Group (Burkina Faso, Ethiopia, Liberia, Namibia, South Africa and Zambia were represented in the Group); six representatives of the Latin America and Caribbean Group, and New Zealand, Norway, Switzerland and Japan.

3. The meeting was attended by representatives from the following Parties to the Protocol and other Governments: Argentina, Belgium, Brazil, Burkina Faso, Canada, China, Colombia, Costa Rica, Cuba, Czech Republic, Ecuador, Ethiopia, European Community, Finland, France, Germany, India, Japan, Liberia, Malaysia, Mexico, Namibia, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Philippines, Republic of Moldova, Slovenia, South Africa, Spain, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America and Zambia.

4. A representative of the United Nations Environment Programme (UNEP) also attended.

5. Observers from the following intergovernmental and non-governmental organizations and other stakeholders also participated in the meeting: African Centre for Biosafety, African Union, Biotechnology Coalition of the Philippines, Consejo Mexicano para el Desarrollo Sustentable, A.C., Conselho de Informacoes Sobre Biotechnologia, CropLife International, ECOROPA, Fundacion Semillas de Vida, Global Industry Coalition, Greenpeace International, Inter-American Institute for Cooperation on...

ITEM 1. OPENING OF THE MEETING

6. The meeting was opened at 10.30 a.m. on Monday, 23 February 2009, by Ms. Jimena Nieto, Co-Chair of the Group. She welcomed the participants and recalled the mandate of the Group contained in decision BS-IV/12. Following that, Mr. Reynaldo Ariel Alvarez Morales, Executive Secretary, Inter-Secretarial Commission on Biosafety of Genetically Modified Organisms (CIBIOGEM), welcomed the participants and invited His Excellency, Ambassador Juan Manuel Gomez Robledo, Vice-Minister for Multilateral Affairs and Human Rights of the Mexican Ministry of Foreign Relations, to make an opening statement.

7. In his opening statement, Ambassador Gomez Robledo welcomed all participants to Mexico. He invited the delegates to work in a spirit of cooperation in order to achieve significant progress in the process of developing an international regime on liability and redress for damage resulting from the transboundary movement of living modified organisms. He informed delegates that Mexico was prepared to host the celebrations of the 2009 World Environment Day and that he hoped the positive results of the deliberations of the Group of this week would contribute to the success of the celebration.

8. Mr. Charles Gbedemah, Senior Environmental Affairs Officer, Secretariat of the Convention on Biological Diversity made an opening statement on behalf of the Executive Secretary of the Convention. He encouraged the participants to make significant progress during their deliberations as a second meeting of the Group of the Friends of the Co-Chairs would be contingent on voluntary contributions.

9. Mrs. Sandra Denisse Herrera Flores, Undersecretary of Environmental Legislation, Mexican Ministry of the Environment and Natural Resources, also made some opening remarks. She thanked Ms. Jimena Nieto of Colombia and Mr. Rene Lefeber of the Netherlands, the Co-Chairs of the Group of Friends, for their extraordinary effort in coordinating and guiding the work under this process over the past several years. She expressed her hope that the Group would come up with sound and clear results for the interest of all Parties to the Protocol.

ITEM 2. ORGANIZATIONAL MATTERS

2.1. Adoption of the agenda

10. The Group adopted the following agenda on the basis of the provisional agenda (UNEP/CBD/BS/GF-L&R/1/Add.1) prepared by the Executive Secretary in consultation with the Co-Chairs:

1. Opening of the meeting.

2. Organizational matters:

2.1. Adoption of the agenda;

2.2. Organization of work.
3. Further negotiations on international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms in the context of the Cartagena Protocol on Biosafety.

4. Other matters.

5. Adoption of the report.

6. Closure of the meeting.

2.2. Organization of work

11. The Group adopted its programme of work as proposed in annex I of the annotated agenda (UNEP/CBD/BS/GF-L&R/1/Add.1).

ITEM 3. FURTHER NEGOTIATIONS ON INTERNATIONAL RULES AND PROCEDURES IN THE FIELD OF LIABILITY AND REDRESS FOR DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY

12. Agenda item 3 was taken up at the 1st session of the meeting, on Monday, 23 February 2009. Mr. René Lefeber, Co-Chair of the Group, invited the Secretariat to introduce the documents that were before the Group.

13. The representative of the Secretariat drew the attention of participants to the documents of the meeting. He mentioned the primary working document UNEP/CBD/BS/GF-L&R/1/2, which presented decision BS-IV/12 of the fourth meeting of the Parties to the Protocol. He referred to the annex of the decision that contained the proposed operational text on liability and redress which should form the basis for further negotiations. The representative of the Secretariat also highlighted document UNEP/CBD/BS/GF-L&R/1/3 which was a preliminary draft of a decision intended for submission, eventually, to the next meeting of the Parties to the Protocol. The draft was circulated by the Co-Chairs at the meeting of the contact group on liability and redress in Bonn last year. Finally, the representative of the Secretariat introduced information document UNEP/CBD/BS/GF-L&R/1/INF/1 which contained an update on “recent developments in international law relating to liability and redress, including the status of international environment-related liability instruments”. He mentioned that the document synthesized information on the latest developments in international law relating to liability and redress that have occurred since the preparation of the similar information document for the fifth and final meeting of the former Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (hereinafter “Working Group”).

14. The Co-Chair thanked the representative of the Secretariat for his introduction and invited the Friends to turn to document decision BS-IV/12 on liability and redress under the Protocol (made available as document UNEP/CBD/BS/GF-L&R/1/2). Mr. Lefeber recalled the compromise reached at the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol held in Bonn, in May 2008 wherein the Parties agreed to work towards legally binding provisions on the administrative approach, including one provision on civil liability, and to work towards non-legally binding provisions on civil liability. The Co-Chair recalled that no decision had yet been taken as to the form the legally binding agreement would take. He presented four possible options: a supplementary protocol to the Cartagena Protocol on Biosafety, an amendment to the Biosafety Protocol, an annex to the Biosafety Protocol or a Protocol to the Convention on Biological Diversity. He stated that the Co-Chairs
had suggested a supplementary protocol to the Biosafety Protocol at the fifth meeting of the Working Group and then invited the Friends to express their views on this point.

15. Statements were made by representatives of Brazil, Cuba, Ethiopia (on behalf of the African Group), the European Community, India, Japan, Malaysia, New Zealand, Norway, Paraguay, Philippines, the Republic of Moldova and Switzerland.

16. The representative from Peru read a statement in which the Government of Peru firmly expressed its conviction that the regime on liability and redress to the Cartagena Protocol on Biosafety must be binding and that it is ethnically and legally correct that, in a case of proven damage, fair compensation must be made to the affected stakeholders.

17. The Group agreed to work towards legally binding provisions on the administrative approach, including one provision on civil liability, in the form of one supplementary protocol to the Biosafety Protocol. The final decision will be taken at the fifth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol.

18. The representative of the Group of Latin American and Caribbean countries presented a statement from Honduras regarding the liability and redress negotiations under Article 27 of the Protocol. The Spanish text of the statement was made available to delegates.

19. Mexico, on behalf of the Group of Latin American and Caribbean countries, indicated that the Spanish version of the working document (annex to decision BS-IV/12) had several inaccuracies and discrepancies with the English version of the document and asked the Secretariat to address the issue. In response, the representative of the Secretariat stated that the Secretariat will take note of the matter and will endeavour to avoid such translation-related problems in the future. He also invited delegates to provide comments at the latest one month after a document is made available on the Secretariat’s website.

20. A representative of the Secretariat announced that a new version of the Contractual Compensation Mechanism Concerning Recourse in the Event of Damage to Biological Diversity caused by Living Modified Organisms (also known as the “Compact”) was made available by a group of biotechnology companies and that industry representatives were willing to discuss the document with delegates at the present meeting.

21. The Group continued its further negotiations on the basis of the annex to decision BS-IV/12. It covered the section of the annex that refers to ‘working towards legally binding provisions’ on the administrative approach, including a provision on civil liability. Following the further negotiations, the text was integrated into a draft supplementary protocol that was made available by the Co-Chairs. The revised text of the draft supplementary protocol is contained in annex I of appendix I of this report.

ITEM 4. OTHER MATTERS

22. Agenda item 4 was taken up at the last session of the meeting on Friday, 27 February 2009 by Co-Chair Nieto. She stated that, based on the views expressed and the progress made at this meeting, the Co-Chairs had decided that a second meeting was necessary. There was no objection to this decision. On this matter, the representative of Malaysia reaffirmed his Government’s offer made at the fourth meeting of the Parties to the Protocol to host the second meeting of the Group. The representative of Japan also reiterated his Government’s pledge to make a financial contribution to support the next meeting of the Group.
23. The Friends agreed that at their second meeting they would further negotiate international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms in the context of the Cartagena Protocol on Biosafety on the basis of:

(a) Appendix I to this report which contains:
   - A preliminary draft decision that the Group would eventually consider for submission to the fifth meeting of the Parties to the Protocol, which was not discussed during this meeting;
   - Annex I, draft supplementary protocol, which was further negotiated during this meeting, with the exception of some draft provisions as indicated in the text itself;
   - Annex II, draft guidelines on civil liability, which was not discussed during this meeting; and

(b) Appendices II and III to this report, containing proposed operational texts in the context of working towards non-legally binding provisions on civil liability, and other provisions, respectively, which were not discussed during this meeting.

ITEM 5. ADOPTION OF THE REPORT

24. The Group adopted the present report as orally amended at the last session of the meeting held on 27 February 2009.

ITEM 6. CLOSURE OF THE MEETING

25. The representative of Mexico made some closing remarks during the final session of the Group. In his statement, the representative of Mexico expressed his country’s appreciation for the work of the Co-Chairs in facilitating the negotiations. He stated that the Friends must ensure that the proposed supplementary protocol brings added value to the issues of living modified organisms and the potential adverse effects on biological diversity and human health resulting from transboundary movements of these organisms. He maintained that a legally binding instrument such as the one which is being negotiated by the Group cannot simply be limited to requesting countries to develop and apply national legislation. He reaffirmed Mexico’s political will to continue participating in the Group of the Friends of the Co-Chairs in a constructive spirit.

26. Co-Chair Lefeber expressed his and Co-Chair Nieto’s thanks to Mexico for hosting the first meeting of the Group and their appreciation to the delegates for their constructive participation. He invited the Friends to come prepared for intensive negotiations at the second meeting of the Group.

27. After the customary exchange of courtesies, Mr. Lefeber, Co-Chair of the Group, declared the first meeting of the Group of the Friends of the Co-Chairs closed at 6 p.m. on Friday, 27 February 2009.
APPENDIX I *

Draft decision BS-V/--

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

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

Recalling Article 27 of the Cartagena Protocol on Biosafety, which required the Conference of the Parties serving as the meeting of Parties to adopt, at its first meeting, 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 on-going processes in international law on these matters, and to endeavour to complete this process within four years,

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

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

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

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

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

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

A. SUPPLEMENTARY PROTOCOL ON DAMAGE CARTAGENA PROTOCOL ON BIOSAFETY ON DAMAGE TO THE CONSERVATION AND SUSTAINABLE USE OF BIOLOGICAL DIVERSITY RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS TO THE CARTAGENA PROTOCOL ON BIOSAFETY

1. Decides to adopt the Supplementary Protocol to the Cartagena Protocol on Biosafety on Damage to the Conservation and Sustainable Use of Biological Diversity Resulting from Transboundary

* This Appendix was neither discussed nor negotiated by the Group of Friends of the Chair at its first meeting with the exception of Annex I.
Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety, as contained in annex I to the present decision (hereinafter referred to as “the Supplementary Protocol”);

2. Requests the Secretary-General of the United Nations to be the Depositary of the Supplementary Protocol and to open it for signature at … by Parties to the Cartagena Protocol on Biosafety from … to …, and at the United Nations Headquarters in New York from … to ….;

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

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

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

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

C. ADDITIONAL AND SUPPLEMENTARY COMPENSATION MEASURES

6. (…)

D. COMPLEMENTARY CAPACITY-BUILDING MEASURES

7. (…)

/…
Annex I

[SUPPLEMENTARY PROTOCOL ON DAMAGE to the Conservation and Sustainable Use of Biological Diversity RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS TO THE CARTAGENA PROTOCOL ON BIOSAFETY]

The Parties to this Supplementary Protocol,

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

Recalling Article 27 of the Protocol,

Recalling also …

Have agreed as follows:

[Article 1 *]
The objective of this Supplementary Protocol is to contribute to ensuring that prompt, adequate and effective response measures are taken in the event of damage or imminent threat of damage to the conservation and sustainable use of biological diversity resulting from living modified organisms that find their origin in transboundary movements.]

Article 2

1. The terms used in Article 2 of the Convention and Article 3 of the Protocol shall apply to this Supplementary Protocol [except as otherwise defined in paragraph 2 below].

2. In addition, for the purposes of this Supplementary Protocol:

(a) “Conference of the Parties serving as the meeting of the Parties to the Protocol” means the Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety;

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

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

(d) “Damage to the conservation and sustainable use of biological diversity” [in relation to the administrative approach as contained in Articles xx – xx] means an adverse effect on biological diversity that:

(i) Is measurable or otherwise observable taking into account, wherever available, scientifically-established baselines recognized by a competent national authority that takes into account any other human induced variation and natural variation; and

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

[This definition of damage shall be without prejudice to the domestic law of Parties in the field of civil liability.]
[(e) “incident” means any occurrence or series of occurrences, [originating [in][from] a transboundary movement of LMOs][having the same origin] that causes damage[ or creates [a grave and] an imminent threat of causing damage];]

(f) **Option 1 chapeau**

“Response measures” mean reasonable actions, in the event of damage [or imminent threat of damage], to:

**Option 2 chapeau**

“Response measures” mean reasonable actions [not covered under domestic law concerning civil liability], which may include:

(a) [Avoid,] minimize, contain or mitigate damage[, or take the necessary preventive measures in case of imminent threat of damage], as appropriate;

(b) Restore biological diversity[, if not covered under domestic law concerning civil liability,] through actions to be undertaken in the following order of preference:

(i) Restoration[, to the extent it is technically and economically feasible,] of biological diversity to the condition that existed before the damage occurred, or its nearest equivalent; and/or

(ii) Restoration by, *inter alia*, replacing[, as appropriate,] the loss of biological diversity with other components of biological diversity for the same, or for another type of use either at the same or, as appropriate, at an alternative location;

(g) “Operator” means

**Option 1**

any person in [operational control][[direct or indirect] command or control]:

(i) of the activity at the time of the incident [causing damage resulting from the transboundary movement of living modified organisms];

[(ii) of the living modified organism [at the time that the condition that gave rise to the damage] [or imminent threat of damage] arose [including, where appropriate, the permit holder or the person who placed the living modified organism on the market];] [and/or]

(iii) as provided by domestic law.

**Option 2**

The developer, producer, notifier, exporter, importer, carrier, or supplier.

**Option 3**

Any person in operational control of the activity at the time of the incident and causing damage resulting from the transboundary movement of living modified organisms.

[(h) “Imminent threat of damage” is an occurrence or occurrences determined, on the basis of best available scientific and other relevant information, to be likely to result in damage if not addressed in a timely manner.]

3. A “significant” adverse effect on the conservation and sustainable use of biological diversity, also taking into account risks to human health, is to be determined on the basis [of factors, such as][of the following factors]:

/...
(a) The long term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonable period of time;

(b) The extent of the qualitative or quantitative changes that adversely affect the components of biological diversity;

(c) The reduction of the ability of components of biological diversity to provide goods and services;

(d) The extent of any adverse effects on human health in the context of the Protocol;

[(e) The extent of adverse effects on locally or regionally important components of biological diversity].

Article 3

1. This Supplementary Protocol applies to damage to the conservation and sustainable use of biological diversity, taking also into account [damage to][risks to][adverse effects on] human health [in the context of the Protocol].

2. This Supplementary Protocol applies to transport, transit, handling and use of living modified organisms [and products thereof], provided that these activities find their origin in a transboundary movement. The living modified organisms referred to are those:

   (a) Intended for direct use as food or feed, or for processing;

   (b) Destined for contained use;

   (c) Intended for intentional introduction into the environment.

3. With respect to intentional transboundary movements, this Supplementary Protocol applies to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 2.

4. This Supplementary Protocol also applies to unintentional transboundary movements as referred to in Article 17 of the Protocol as well as illegal transboundary movements as referred to in Article 25 of the Protocol.

Article 4

1. This Supplementary Protocol applies to damage that occurred in areas within the limits of the national jurisdiction of Parties resulting from activities as referred to in Article 3.

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

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

Article 5

[1. This Supplementary Protocol applies to damage that results from a transboundary movement of living modified organisms that started after the entry into force of the Supplementary Protocol for the Party into whose jurisdiction the transboundary movement was made.

/...
2. Nothing in this Supplementary Protocol shall be interpreted as restricting the right of a Party to require [appropriate measures] in its domestic law to deal with damage resulting from [a] transboundary movement[s] of living modified organisms [consistent with international [obligations] [law]] [that started before the entry into force of the Supplementary Protocol].

**Article 6**

[This Supplementary Protocol applies to intentional transboundary movement in relation to the use for which living modified organisms are destined and for which authorization has been granted prior to the transboundary movement. If, after the living modified organisms are already in the country of import, a new authorization is given for a different use of the same living modified organisms, such [different] use will not be covered by this Supplementary Protocol.]

**Article 7**

1.

**Option 1**

A Party shall[, consistent with international obligations,] provide for domestic response measures consistent with the provisions outlined below.

**Option 2**

A Party shall[, consistent with international obligations,] in accordance with its domestic law implement the provisions outlined below.

2. Parties shall require the operator, in the event of damage [or imminent threat of damage], subject to any requirements of the competent authority, to:

(a) immediately inform the competent authority;

(b) evaluate the damage [or imminent threat of damage]; and

(c) take appropriate response measures.

3. The competent authority[, in accordance with domestic law]:

(a) [should][shall] identify the operator which has caused the damage [or the imminent threat of damage];

(b) [should][shall][may] evaluate the significance of the damage and determine which response measures should be taken by the operator.

4. The competent authority has the discretion to implement [appropriate][response] measures[, in accordance with domestic law including in particular][where necessary and, in particular,] where the operator has failed to do so.

5. The Party may define, under domestic law, which response measures may be required or taken by the competent authority, taking into account those that are already addressed by civil liability.

6. The competent authority has the right to recover from the operator the costs and expenses of, and incidental to, [the evaluation of the damage and] the implementation of any [such appropriate][response] measures.
7. Decisions of the competent authority imposing or intending to impose response measures should be reasoned and notified to the operator, where identified, who should be informed of the remedies available, including the opportunity for [the][an independent] review of such decisions[, inter alia, through access to an independent body, such as a court] [, provided that recourse to such remedies shall not impede the right of the competent authority to take such response measures, as may be necessary].

[8. Decisions required or taken by the competent authority of a Party pursuant to paragraphs 2, 3 and 4 above shall be consistent with international law.]

Article 8

1. Parties may provide, in their domestic law, for the following exemptions that may be invoked by the operator:

   (a) Act of God or force majeure;

   (b) Act of war or civil unrest;

   [(c) National security exceptions [or international security]].

2. Option 1 chapeau

[Parties may provide, in their domestic law, for the following [exemptions or] mitigations that may be invoked by the operator [in the case of recovery of the costs and expenses]:

Option 2 chapeau

Parties may provide, in their domestic law, for [differentiated responsibility for][not bearing wholly or partially] the costs and expenses of, and incidental to, the implementation of any response measures under article -- if the operator proves that the damage or imminent threat of damage arose from any one or more of the following exhaustive list:

   [(a) Intervention by a third party [that caused damage despite the fact that appropriate safety measures were in place];]

   [(b) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;]

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

   [(d) An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out;]]

Article 9

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

Article 10

Domestic law may provide for relative and/or absolute time limits for the recovery of costs and expenses.
Article 11

Domestic law may provide for financial limits for the recovery of costs and expenses[, provided that such limits shall not be less than [z] special drawing rights].

Article 12

1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of the time limit of liability, financial security, including through self-insurance.]

2. [Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic measures implementing these rules and procedures.]

Article 13

Option 1

[Parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with living modified organisms.]

Option 2

1. Parties shall provide in their domestic law for rules and procedures that address liability and redress in the event of damage resulting from the transboundary movement of living modified organisms. To [implement this obligation][this end], Parties may apply or develop, as appropriate:

   (i) their existing domestic laws, including where applicable general provisions on civil liability;

   (ii) a specific civil liability regime; or

   (iii) a combination of both.

2. Any specific civil liability regime as referred to in paragraph (1)(ii) [shall][may, as appropriate] address, *inter alia*, the following elements:

   a. Damage;

   b. Standard of liability: that may include strict, fault or mitigated liability;

   c. Channelling of liability, where appropriate;

   d. [Financial security, where [feasible][appropriate]] [Redress or compensation];

   e. Right to bring claims.

[3. Parties shall recognize and enforce foreign judgments in accordance with [the applicable rules of procedures of the domestic courts] [domestic law][governing the enforcement of foreign judgments] in respect of matters within the scope of these rules and procedures/this instrument/ the Guidelines in Annex [x] to this [supplementary Protocol].[Parties who do not have legislation concerning recognition of foreign judgments should endeavour to enact such laws.]]
4. While this provision does not require any change in domestic law, and does not in itself constitute a treaty on reciprocal enforcement of foreign judgments, Parties, whose domestic law requires bilateral reciprocity agreements for recognition of foreign judgments [shall endeavour to extend their domestic law governing the reciprocal enforcement of foreign judgments to other Parties not presently covered by their domestic law].

[3 & 4 alt. Parties may, in accordance with domestic law, recognise and enforce foreign judgments arising from the implementation of the above guidelines.]

5. Parties may also take into account the guidelines contained in the annex 2 to decision BS-V/--when developing their legislation or policy on civil liability.]

Article 14

1. The institutional mechanism under the Supplementary Protocol shall undertake [3] years after the entry into force of this Supplementary Protocol a review of the effectiveness of the Supplementary Protocol.

2. This review shall include a consideration of [further and necessary steps][whether further steps are necessary] to provide for an effective civil liability regime on liability and redress.

Article 15

This Supplementary Protocol shall not affect the rights and obligations of States under the rules of general international law with respect to the responsibility of States for internationally wrongful acts.

[Article 16•

Option 1 Non-Parties to the Supplementary Protocol participate in taking decision

1. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall serve as the governing body of the Supplementary Protocol.

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

Option 2 Non-Parties to the Supplementary Protocol participate as observers in decision taking

1. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall serve as the governing body of the Supplementary Protocol.

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

3. Parties to the Protocol that are not Parties to this Supplementary Protocol may participate in the proceedings of any meeting of the Conference of the Parties serving as the meeting of the Parties to the

* Articles 16 to 24 have been neither discussed nor negotiated.
Protocol that deals with matters concerning the Supplementary Protocol except for the adoption of decisions. Decisions under this Supplementary Protocol shall be taken only by Parties to it.

**Article 17**

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

**Article 18**

**Option 1**

The provisions of the Protocol shall apply, *mutatis mutandis*, to the Supplementary Protocol, except as otherwise provided in this Supplementary Protocol.

**Option 2**

Once this Supplementary Protocol enters into force, it shall form an integral part of the Protocol.

**Option 3**

1. This Supplementary Protocol shall supplement the Cartagena Protocol on Biosafety and shall neither modify nor amend the Protocol.

2. Nothing in this Supplementary Protocol shall derogate from the rights and obligations of the Parties to this Supplementary Protocol under the Convention on Biological Diversity and the Cartagena Protocol on Biosafety.

3. Except as otherwise provided in this Supplementary Protocol, the provisions of the Convention on Biological Diversity and the Cartagena Protocol on Biosafety shall apply to this Supplementary Protocol.

**Article 19**

**Option 1**

1. Amendments to this Supplementary Protocol may be proposed by any Party to this Supplementary Protocol.

2. Amendments to this Supplementary Protocol shall be adopted by a two-third majority vote of the Parties to the Protocol.

3. Amendments adopted in accordance with paragraph 2 above shall enter into force among Parties to the Protocol having accepted them on the ninetieth day after the deposit of instruments of ratification, acceptance or approval by at least two-thirds of the Parties to the Supplementary Protocol.

4. Paragraphs 3 to 5 of Article 29 of the Convention shall apply to this Supplementary Protocol.

**Option 2**

No text

**Article 20**

This Supplementary Protocol shall be open for signature at … by Parties to the Cartagena Protocol on Biosafety from … to …, and at the United Nations Headquarters in New York from … to ….
Article 21

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

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

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

Article 22

No reservations may be made to this Supplementary Protocol.

Article 23

1. At any time after two years from the date on which this Supplementary Protocol has entered into force for a Party, that Party may withdraw from the Supplementary Protocol by giving written notification to the Depositary.

2. Any such withdrawal shall take place upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.

3. Any Party which withdraws from the Protocol in accordance with Article 39 of the Protocol shall be considered as also having withdrawn from the Supplementary Protocol.

Article 24

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

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

DONE at ........on this ............day of .........., two thousand and……]
Annex II

GUIDELINES ON CIVIL LIABILITY AND REDRESS IN THE FIELD OF DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS
APPENDIX II

2. Working Towards Non-Legally Binding Provisions on Civil Liability

I. STATE RESPONSIBILITY (FOR INTERNATIONALLY WRONGFUL ACTS, INCLUDING BREACH OF OBLIGATIONS OF THE PROTOCOL)

(For operational and preambular texts, see sub-section I of section 1.A in the annex to decision BS-IV/12)

II. SCOPE

(For operational texts, see sub-section II of section 1.A in the annex to decision BS-IV/12)

III. DAMAGE

A. Definition of damage

Operational text 1

[1. These rules and procedures apply to damage [resulting from the transboundary movement of living modified organisms] as provided for by domestic law.]

[2. For the purposes of these rules and procedures, damage [resulting from the transboundary movement of living modified organisms] as provided for by domestic law may, inter alia, include:

   (a) Damage to the conservation and sustainable use of biological diversity not redressed through the administrative approach {For operational texts, see sub-section III.A of section 1.A, above};

   (b) Damage to human health, including loss of life and personal injury;

   (c) Damage to or impaired use of or loss of property;

   (d) Loss of income and other economic loss [resulting from damage to the conservation or sustainable use of biological diversity];

   [(e) Loss of or damage to cultural, social and spiritual values, or other loss or damage to indigenous or local communities, or loss of or reduction of food security.]]

B. Valuation of damage

Operational text 2

[1. Damage [resulting from the transboundary movement of living modified organisms] [shall][should] be valued in accordance with domestic laws and procedures, including factors such as:]

   (a) The costs of response measures [in accordance with domestic law and [procedures] [regulations]];

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

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

[(d) The costs and expenses arising from damage to cultural, social and spiritual values, including compensation for damage to the lifestyles of indigenous and/or local communities.]

2. In the case of centres of origin and/or genetic diversity, their unique value should be considered in the valuation of damage, including incurred costs of investment.

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

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

   [(ii) Restore to the condition that existed before the damage or the nearest equivalent, by the replacement of the loss by other components of the biological diversity at the same location or for the same use or at another location or for another type of use.]]

\[\textbf{C. Causation}\]

\textit{Operational text 3}

A causal link between the damage and the activity in question as well as the related allocation of the burden of proof to either the claimant or the respondent needs to be established in accordance with domestic law.

\textbf{IV. PRIMARY COMPENSATION SCHEME}

\textit{A. Civil liability (harmonization of rules and procedures)}

\textit{Operational text 4}

Parties [may][shall][should] have civil liability rules and procedures for damage [resulting from the transboundary movement of living modified organisms] in accordance with domestic law. Parties [should consider the inclusion of][shall include][may include] the following [minimum] elements and procedures.

\textbf{1. Standard of liability and channelling of liability}

\textit{Operational text 5}

[The standard of liability, whether fault-based liability, strict liability or mitigated strict liability, needs to be established in accordance with domestic law.]
Option 1: Strict liability

Operational text 6

[The operator [shall][should] be liable for damage [under these rules and procedures][resulting from transport, transit, handling and/or use of living modified organisms that finds its origin in such movements], regardless of any fault on his part.]

{For operational texts on “operator”, see sub-section IV.A of section 1.A in the annex to decision BS-IV/12}

Option 2: Mitigated strict liability

Operational text 7

1. A fault-based standard of liability [shall][should][may] be used except a strict liability standard [should][shall] be used in cases [such as] where[:]

   [(a) a risk-assessment has identified a living modified organism as ultra-hazardous; and/or]

   [(b) acts or omissions in violation of national law have occurred; and/or]

   [(c) violation of the written conditions of any approval has occurred.]

2. In cases where a fault-based standard of liability is applied, liability [shall][should] be channeled to the [entity having operational control][operator] of the activity that is proven to have caused the damage, and to whom intentional, reckless, or negligent acts or omissions can be attributed.

3. In cases where a strict liability standard has been determined to be applicable, pursuant to paragraph 1 above, liability shall be channeled to the [entity that has operational control][operator] over the activity that is proven to have caused the damage.]

Option 3: Fault-based liability

Operational text 8

[In a civil liability system, liability is established where a person:

   (a) Has operational control of the relevant activity;

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

   [(c) Such breach has resulted in actual damage to biological diversity; and]

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

2. The provision of interim relief

Operational text 9

Any competent court or tribunal may issue an injunction or declaration or take such other appropriate interim or other measure as may be necessary or desirable with respect to any damage or imminent threat of damage.
### A bis. Additional elements of civil liability

#### 1. Exemptions or mitigation

*Operational text 10*

[Domestic law may provide for] exemptions or mitigations [that] may be invoked by the operator in the case of strict liability. Exemptions or mitigations [may be][are] based on [any one or more elements of] the following [exhaustive] list:

- (a) Act of God or *force majeure*;
- (b) Act of war or civil unrest;
- (c) Intervention by a third party [that caused damage despite the fact that appropriate safety measures were in place];
- (d) Compliance with compulsory measures imposed by a public authority;
- (d alt) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;
- (e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;
- (f) An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out;
- (g) National security exceptions [or international security];
- (h) Where the operator could not have reasonably foreseen the damage.

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

*Operational text 11*

These rules and procedures do not limit or restrict any right of recourse or indemnity that an operator may have against any other person.

#### 3. Joint and several liability or apportionment of liability

*Operational text 12*

In case two or more operators have caused the damage, joint and several liability or apportionment of liability may, as appropriate, apply in accordance with domestic law.

*Operational text 12 alt*

1. If two or more operators [are][may be] liable according to these rules and procedures, the claimant [should][shall] have the right to seek full compensation for the damage from any or all such
operators, i.e., may be liable jointly and severally [without prejudice] [in addition][subject] to domestic laws providing for the rights of contribution or recourse.

2. If damage results from an incident that consists of a continuous occurrence, all operators involved successively in exercising the control of the activity during that occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence during the period when he was exercising the control of the activity caused only a part of the damage shall be liable for that part of the damage only.

3. If damage results from an incident that consists of a series of occurrences having the same origin, the operators at the time of any such occurrence shall be jointly and severally liable. However, any operator who proves that the occurrence at the time when he was exercising the control of the activity caused only a part of the damage shall be liable for that part of the damage only.

4. Where the claim for damage has not been satisfied, the unsatisfied portion shall be fulfilled by any other person[, identified by the operator,] whose activity has contributed to the occurrence of the damage resulting from the transboundary movement.

4. Limitation of liability

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

Operational text 13

Domestic law may provide for relative and/or absolute time limits for the submission of claims in the case of civil liability[, provided that such limits shall not be less than:

(a) [three] years from the date the claimant knew or reasonably could have known of the damage and its origin; and/or

(b) [fifteen] years from the date of the occurrence of the damage].

b. Limitation in amount

Operational text 14

[Domestic law may provide for financial limits for strict liability[, provided that such limits shall not be less than [z] special drawing rights].]

5. Coverage

Operational text 15

1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of the time limit of liability, financial security, including through self-insurance.]

2. [Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic measures implementing these rules and procedures.]
APPENDIX III

3. Other Provisions

I. SUPPLEMENTARY COMPENSATION SCHEME

A. Residual State liability

Operational text 1

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

Operational text 1 alt

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

B. Supplementary collective compensation arrangements

Operational text 1

1. Where the costs of response measures to redress damage to the conservation and sustainable use of biological diversity have not been redressed by the primary compensation scheme (administrative approach) or by any other applicable supplementary compensation scheme, additional and supplementary compensation measures aimed at ensuring adequate and prompt compensation may be taken.

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

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

Operational text 1 alt

No provision

OR

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

/*...*/
II. SETTLEMENT OF CLAIMS

A. Civil procedures

Operational text 1

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

Operational text 1 alt

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

Operational text 1 second alt

No provision

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

Operational text 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.

Operational text 2 alt

Parties may also avail dispute settlement through civil/administrative procedures and special tribunals such as the Permanent Court of Arbitration’s Optional Rules for the Arbitration of Disputes relating to Natural Resources and/or the Environment.

Operational text 2 second alt

In the event of a dispute between persons claiming for damage pursuant to these rules and procedures and persons liable under these rules and procedures, and where agreed by both or all parties, the dispute may be submitted to [final and binding] arbitration [in accordance with] [including through] the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment including in specific cases such as when a large number of victims are affected.

/...
**C. Standing/Right to bring claims**

**Operational text 3 (civil liability)**

1. Subject to domestic law, Parties should provide for a right to bring claims by [affected] natural and legal persons [with a legal interest in the matter] [, including those with an interest in [the conservation and sustainable use of biological diversity] [environmental [and socio-economic] matters and meeting relevant requirements under domestic law]]. Those persons should have access to remedies in the State of export that are no less prompt, adequate and effective than those available to victims that suffer damage from the same incident within the territory of that State.

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

**Operational text 3 alt (civil liability)**

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

**Operational text 4 (administrative approach)**

[Natural and legal persons[, including [those] non-governmental organizations promoting environmental protection and meeting relevant requirements under domestic law,] should have a right to [require][request] the competent authority to act according to [domestic law, or in the absence thereof,] these rules and procedures [and to challenge], through a review procedure, the competent authority’s decisions, acts or omissions as appropriate under domestic law.]

**III. COMPLEMENTARY CAPACITY-BUILDING MEASURES**

**Operational text 1 (to decision)**

Invites Parties to take into account, as appropriate, in the next review of the Updated Action Plan for Building Capacities for the Effective Implementation of the Cartagena Protocol on Biosafety, as contained in the annex to decision BS-III/3, these rules and procedures by (a) considering notions, such as “contributions in kind”, “model legislation”, or “packages of capacity building measures”, and (b) including capacity building measures, such as the provision of assistance in the implementation and application of these rules and procedures, including assistance to (i) develop national liability rules and procedures, (ii) foster inter-sectoral coordination and partnership among regulatory organs at the national level, (iii) ensure [appropriate][effective] public participation, and (iv) enhance the skills of the judiciary in handling issues pertaining to liability and redress.

/*...*/
Operational text 2

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 Biosafety Protocol.

2. Parties are invited to take into account the present rules and procedures 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.

Operational text 3 (to decision)

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

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

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