



Convention on Biological Diversity

Distr. GENERAL

UNEP/CBD/BS/ GF-L&R/3/INF/4 7 June 2010

ORIGINAL: ENGLISH/SPANISH

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

Third meeting Kuala Lumpur, 15-19 June 2010 Item 3 of the provisional agenda\*

COMPILATION OF COMMENTS ON THE DRAFT GUIDELINES ON CIVIL LIABILITY AND REDRESS IN THE FIELD OF DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS\*\*

Note by the Executive Secretary

CONTENTS

SUBMISSIONS FROM PARTIES AND OTHER GOVERNMENTS... 2 ARGENTINA ... 2 BOLIVIA ... 8 ECUADOR ... 13 EUROPEAN UNION ... 29 JAPAN ... 32 NEW ZEALAND... 36 PARAGUAY ... 37 MEXICO... 42 SUBMISSIONS FROM ORGANIZATIONS... 43 AFRICAN CENTRE FOR BIOSAFETY ... 43 ASOCIACIÓN DESARROLLO MEDIO AMBIENTAL SUSTENTABLE - ASDMAS ... 45 GLOBAL INDUSTRY COALITION... 51 INSTITUTE FOR INTERNATIONAL TRADE NEGOTIATIONS (ICONE BRAZIL) ... 56 THIRD WORLD NETWORK... 60 WASHINGTON BIOTECHNOLOGY ACTION COUNCIL/ 49TH PARALLEL BIOTECHNOLOGY CONSORTIUM ... 66

\* UNEP/CBD/BS/GF-L&R/3/1.

\*\* Submissions are reproduced in the form and languages in which they were received by the Secretariat and have not been formally edited.

/...

In order to minimize the environmental impacts of the Secretariat's processes, and to contribute to the Secretary-General's initiative for a C-Neutral UN, this document is printed in limited numbers. Delegates are kindly requested to bring their copies to meetings and not to request additional copies.

**SUBMISSIONS FROM PARTIES AND OTHER GOVERNMENTS**

**ARGENTINA**

[28 MAY 2010]  
[SUBMISSION: ENGLISH]

**ARGENTINE COMMENTS ON CO-CHAIRS' PROPOSAL OF DRAFT GUIDELINES ON CIVIL LIABILITY AND REDRESS IN THE FIELD OF DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS**

Argentina reserves the right to elaborate on them in the future.

<b>CO-CHAIRS' PROPOSAL</b>	<b>Argentine Comments</b>
<p style="text-align: center;"><b>Guideline 1</b> <b>Objective</b></p> <p>The objective of these Guidelines is to provide guidance to Parties regarding domestic rules and procedures on civil liability for damage resulting from transboundary movements of living modified organisms, taking also into account risks to human health.</p>	<p>Living modified organisms (LMOs) are not inherently or particularly dangerous compared to other goods, and the theoretical damages included in the draft (guideline 2) are, in most countries, covered by ordinary liability laws (related with the protection of the environment, commerce, personal injury, etc.).</p> <p><i>Therefore, these guidelines not only are unnecessary, but also may potentially collide with pre-existing laws in Party countries, creating a situation of legal insecurity that would also affect the legitimate trade of LMOs (and, potentially, of derived products depending on the final text of the guidelines) between parties and non parties.</i></p>
<p style="text-align: center;"><b>Guideline 2</b> <b>Use of Terms</b></p> <p>1. The terms used in Article 2 of the Convention, Article 3 of the Protocol and Article 2 of the Supplementary Protocol apply to these Guidelines except as otherwise defined in paragraph 2 below.</p> <p>2. In addition, for the purposes of these Guidelines:</p> <ul style="list-style-type: none"> <li>(a) "Damage" means; <ul style="list-style-type: none"> <li>(i) Loss of life or personal injury [incidental to damage to the conservation and sustainable use of biological diversity];</li> <li>(ii) Loss of or damage to property [incidental to damage to the conservation and sustainable use of biological diversity];</li> <li>(iii) Pure economic loss;</li> <li>(iv) Costs of response measures;</li> <li>(v) Damage to the conservation and sustainable use of biological diversity not redressed under the Supplementary Protocol.</li> </ul> </li> </ul>	<p>"Loss of life or personal injury" as well as "loss of or damage to property" and "Pure economic loss" are categories of traditional damage already covered by civil responsibility laws in every country, regardless of the origin of the damage.</p> <p>In addition, even if such traditional kind of damages could hypothetically emerge "incidentally" from damage to biodiversity, such "incidental" link does not</p>

<p>(b) “Damage to the conservation and sustainable use of biological diversity” means damage as defined in Article 2, paragraph 2(c), of the Supplementary Protocol;</p> <p>(c) “Pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the conservation and sustainable use of biological diversity;</p> <p>(d) “Supplementary Protocol” means [Supplementary Protocol on [Liability and Redress for] Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety].</p>	<p>constitute enough ground to conclude that traditional damages can be included in the scope of the Cartagena Protocol, and particularly on any implementation of article 27.</p> <p><i>Therefore, traditional categories of damage such as “Loss of life or personal injury”, “loss of or damage to property” and “Pure economic loss” should be removed from the draft.</i></p> <p>In order to avoid misinterpretation as regards regime scope, it is suggested to use the full title of the Supplementary Protocol, i.e. Supplementary Protocol on [Liability and Redress for] Damage <u>TO THE CONSERVATION AND SUSTAINABLE USE OF BIOLOGICAL DIVERSITY</u> Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety.</p>
<p style="text-align: center;"><b>Guideline 3</b> <b>Scope</b></p> <p>1. These Guidelines apply to damage resulting from transport, transit, handling and use of living modified organisms [and products thereof] provided that these [living modified organisms][activities] find their origin in a transboundary movement. The living modified organisms referred to are those:</p> <ul style="list-style-type: none"> <li>(a) Intended for direct use as food or feed, or for processing;</li> <li>(b) Destined for contained use;</li> <li>(c) Intended for intentional introduction into the environment.</li> </ul> <p>2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1 above.</p>	<p><b>Paragraph 1:</b> The mandate of article 27 only refers to rules for damage resulting from transboundary movements. Article 4 regarding scope of the Protocol contains a list of activities where transboundary movement is clearly regarded as an activity different than transit, handling or use of LMOs. Besides, for a civil liability standard, it is essential to include the establishment of a causal link.</p> <p><i>Therefore, to include “transit”, “handling” or “use” of LMOs goes beyond the mandate of article 27, and such terms should be removed from the draft guidelines. Moreover, it is proposed to use the following chapeau for paragraph 1 “These Guidelines apply where a causal link between damage and the transboundary movement of living modified organisms has been established in accordance with domestic law.”</i></p> <p><b>Paragraph 2:</b> The liability should not extend to (hypothetical) damages from uses of the LMO that were authorized after the transboundary movement was made. In addition, the scope of the protocol only covers “living modified organisms”, and</p>

<p>3. These Guidelines also apply to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.</p>	<p>not derived products. It is widely known that the term “LMO” was specifically coined for this purpose, and the reference to “derived products” in this paragraph goes beyond the scope of the Protocol and the mandate of article 27.</p> <p><i>Therefore, the whole paragraph 2, and particularly any reference to “derived products” should be removed from the draft guidelines.</i></p>
<p style="text-align: center;"><b>Guideline 4 Liability</b></p> <p>1. The standard of liability should be strict where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous.</p> <p>2. In cases where the standard of liability is strict, liability should be channelled to the operator.</p> <p>3. In cases where the standard of liability is strict and two or more operators have caused the damage, their liability should be joint and several.</p> <p>4. In cases where the standard of liability is strict, the right of recourse or indemnity that an operator may have against another person should not be limited or restricted.</p>	<p><b>Paragraph 1:</b> The Guideline should be more clear and state “The standard of liability should be strict <u>ONLY</u> where the damage has been...”</p> <p><i>Therefore, the word “only” should be added to paragraph 1 as shown above.</i></p> <p><b>Paragraph 2:</b> Although the word operator should be defined, it is suggested to add the word “only” so that the text clearly states some kind of limitation in the liability channeling. Therefore, the text would read: “In cases where the standard of liability is strict, liability should ONLY be channeled to the operator”.</p> <p><b>Paragraphs 3 and 4:</b> These draft guidelines do not include the concept of “incident” or a definition of “operator”, which complicates the interpretation of paragraphs 3 and 4 in case of more than one occurrence involving the same LMO and/or the same damage.</p> <p><i>Therefore, it is suggested to include in paragraph 3 the following language (extracted from the current draft of the Supplementary Protocol): “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”.</i></p>
<p style="text-align: center;"><b>Guideline 5 Exemptions</b></p> <p>Parties should consider the application of exemptions from liability, in particular:</p> <ul style="list-style-type: none"> <li>(a) Act of God or <i>force majeure</i>;</li> <li>(b) Act of war or civil unrest.</li> </ul>	<p>The full list of exemptions/mitigations from the earlier version of the draft guidelines should be retained. This list was reduced to two options only for the Supplementary Protocol, considering the particular case of administrative measures and following arguments that do not apply to civil liability. Furthermore, the UNEP guidelines do contain a full list of different grounds for exoneration.</p> <p><i>Therefore, the following should be reinstalled in the list of exemptions:</i></p> <ul style="list-style-type: none"> <li><i>“(c) Intervention by a third party</i></li> <li><i>(d) Compliance with compulsory measures imposed by a public authority;</i></li> <li><i>(e) An activity expressly authorized by and fully in conformity with an</i></li> </ul>

	<p><i>authorization given under domestic law;</i>  <i>(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;</i>  <i>(g) National security exceptions</i>  <i>(h) Where the operator could not have reasonably foreseen the damage.”</i></p>
<p><b>Guideline 6 Time Limits</b>                  Parties should consider the application of relative and/or absolute time limits, including the commencement of the period to which a time limit applies.</p>	<p>The language of the “guidelines” should not follow a “treaty” style. Given the nature of this document, which should provide clear, sound and optional guidance, instead of “Parties should consider the application of relative and/or absolute time limits,...” the document should read “Domestic laws should provide relative and/or absolute time limits,...”</p> <p><i>The same style change should be applied to the other occurrences of “Parties should consider...” throughout the text (paragraphs 5-8 and 10).</i></p>
<p><b>Guideline 7 Financial Limits</b>                  Parties should consider the application of financial limits in cases where the standard of liability is strict.</p>	<p>There should be financial limits in any case where financial security is required, in order to allow for the development of adequate financial security instruments.</p> <p><i>Therefore, the scope of cases where this guideline applies should be the same as the scope of the following guideline.</i></p>
<p><b>Guideline 8 Financial Security</b>                  1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]</p>	<p><b>Paragraph 1:</b> Compulsory financial securities unavoidably imply insurance or similar costs for the operator, which in turn necessarily act as trade barriers that would be in conflict with existing international agreements if not scientifically justified. Furthermore, it is not economically viable for an ordinary operator to maintain financial securities for an undetermined time limit after the end of the transboundary movement or activity where he participated.</p> <p>Hence, paragraph 1 should be restricted to those few cases where it might be scientifically justified. Under the rationale followed by this document, this would be only in case of a living modified organism that an appropriate risk assessment has identified as hazardous (i.e., where the standard of liability is strict, according to guideline 4).</p> <p><i>Therefore, the words “where the standard of liability is strict (because a risk assessment has identified the LMO as hazardous)...” should be added at the</i></p>

<p>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.]</p>	<p><i>beginning of paragraph 1.</i></p> <p><b>Paragraph 2:</b> The language of the guidelines should be more uniform, and not resemble a “treaty style”. All the guidelines are supposed to provide optional, clear and sound guidance.</p> <p><i>Therefore, in paragraph 2 “Parties are urged to take measures to encourage the development...” should be changed to read “measures should be taken to develop...”</i></p>
<p style="text-align: center;"><b>Guideline 9</b> <b>Claims for Compensation</b></p> <p>1. Any person or group of persons, including public authorities, should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage resulting from the transboundary movement of living modified organisms in addition to, where appropriate, the reimbursement of the costs of response measures.</p> <p>2. Parties may allow claims for compensation of damage to the conservation and sustainable use of biological diversity.</p>	<p><b>Paragraph 1:</b> “Loss of life or personal injury” as well as “loss or damage to property” and “Pure economic loss” are not damages to biological diversity, therefore their inclusion goes beyond the scope of the Cartagena Protocol. In addition, these categories of traditional damage are already covered by civil laws in every country, regardless of the origin of the damage. In addition, the right to bring claims should be limited only to the supposedly affected natural or legal persons</p> <p><i>Therefore, paragraph 1 should be removed from the draft.</i></p> <p><b>Paragraph 2:</b> The right to bring claims should be limited only to the supposedly affected natural or legal persons.</p> <p><i>Therefore, paragraph 2 should be modified as follows: “ONLY DIRECTLY AFFECTED NATURAL OR LEGAL PERSONS may be allowed to present claims for compensation of damage to the conservation...”</i></p>
<p style="text-align: center;"><b>Guideline 10</b> <b>Settlement of Claims</b></p> <p>1. Parties should provide for civil law procedures to settle claims for compensation of damage.</p> <p>2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.</p>	<p><b>Paragraph 1:</b> in order to follow the original mandate of article 27 and adopt an adequate wording for a guideline document, it is suggested to modify this paragraph as follows “The settlement of liability claims seeking redress of damage to the conservation and sustainable use of biodiversity resulting from transboundary movements of living modified organisms should be provided in domestic civil law procedures”</p>

<p style="text-align: center;"><b>Guideline 11</b> <b>Access to Information</b></p> <p>Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent authority in possession of such information, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties.</p>	<p>The scope of “persons sustaining damage” is unclear; it should be replaced with “those persons entitled to present claims”.</p> <p>In addition, information from the operator should only be obtained voluntarily or through a reasoned court order; in contrast, this paragraph seems to suggest that the operator cannot refuse to a direct demand of information from any person.</p> <p><i>Therefore, the paragraph should be modified to read as follows:</i>  <i>“THOSE PERSONS ENTITLED TO PRESENT CLAIMS should be entitled to REQUEST any information directly relevant to the presentation of a claim for compensation of damage from the operator THROUGH A REASONED COURT ORDER or FROM the competent authority in possession of such information, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by domestic law or violates the legally protected interests of third parties.</i></p>
---	--

**BOLIVIA**[31 MAY 2010]  
[SUBMISSION: ENGLISH]***Comments of the Draft Guidelines on Civil Liability and Redress in the Field of Damage Resulting From Transboundary Movements of Living Modified Organisms*****General Comments**

The Plurinational State of Bolivia would like to stress that the mandate of the Cartagena Protocol on Biosafety (CPB) through Article 27 will be adequately achieved only by an international legally-binding instrument on civil liability. Accordingly, the Guidelines must not replace the legally binding provision on civil liability in the Supplementary Protocol (SP). In accordance with the agreement reached in Bonn, the Guidelines should – as its names states – provide guidance on the key elements that Parties need to consider for developing civil liability frameworks; but not substitute any civil liability provision of the SP.

Relevant text on the following topics from Appendix II of the report of the Second Meeting of the Group of the Friends of the Co-Chairs (GFCC 2) on Liability and Redress should be included should be included: i) “Valuation of damage”, ii) “interim relief” and iii) “additional and supplementary compensation measures”.

Accordingly, the Bolivian comments and proposed amendments on the Guidelines on Civil Liability are the following:

**Guideline 1 - Objective**

- The objective of the Guidelines should not be restricted to domestic rules and procedures on civil liability. By doing so, the relationship to the Supplementary Protocol is neglected and consequently, it is also neglected the need and purpose of providing special protection to highly biologically and culturally diverse countries (which – coincidentally – have the weakest biosafety frameworks). Accordingly, the objective should stress that the Guidelines also serve as international guiding principles on the civil liability for damage resulting from of LMOs.

- Based on experience and knowledge gain on unintended impacts of LMOs and rooted in precautionary approaches, the Guidelines should not be limited to damage resulting from “transboundary movements” but all sorts of damage, including those originated from “products thereof”.

***Proposed amendments on Guideline 1 – Objective:***

The objective of these Guidelines is to provide guidance to Parties regarding ~~domestic~~ rules and procedures on civil liability for damage resulting from ~~transboundary movements~~ of living modified organisms **and products thereof**, taking also into account risks to human health.

**Guideline 2 - Use of Terms**

- Definitions of “Damage”, “Personal injury” and “Economic loss” should be wide enough to properly include relevant issues to developing countries and biologically and culturally diverse countries/regions (such as *health, individual rights, socioeconomic considerations, indigenous and local communities*). In this



sense, wording that restricts the interpretation of damage (e.g. “pure” economic loss or damage “incidental” or “directly derived” to the conservation and sustainable use of biological diversity) and the proper application of the Guidelines should be erased.

- Article 26 of the Protocol should be included in relation to damage.

- Since definitions of Article 2 of the SP are not fully agreed yet and - from the Bolivian point of view - they are still weak, it is not appropriate to include them in the text of Guideline 2.

- Relevant text of Appendix II of the report of the GFCC 2 on Liability and Redress need to be included in relation of socio-cultural damage, mainly in relation to indigenous or local communities and particularly regarding the reduction of food security. This is highly important to diverse countries – in biological and cultural terms - as Bolivia.

- “Valuation of damage” need to be included as it is directly linked to the content of Guideline 2.

*Proposed amendments to Guideline 2 – Use of Terms:*

1. The terms used in Article 2 of the Convention, **and** Article 3 of the Protocol ~~and Article 2 of the Supplementary Protocol~~ apply to these Guidelines except as otherwise defined in paragraph 2 below.

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

(a) “Damage” means;

(i) Loss of life, **loss of health or any** personal injury ~~[incidental to damage to the conservation and sustainable use of biological diversity];~~

(ii) Loss of or damage to property ~~[incidental to damage to the conservation and sustainable use of biological diversity];~~

(iii) ~~Pure~~ economic loss;

(iv) Costs of response measures;

(v) Damage to the conservation and sustainable use of biological diversity, **taking into account human health** ~~not redressed under the Supplementary Protocol.~~

**(vi) Loss of or damage to cultural, social and spiritual values, or other loss or damage to indigenous or local communities, or loss of or reduction of food security**

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

**(x) “Personal injury” means any violation to any individual’s rights other than his or her rights to property and not restricted to physical harm.**

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

(d) “Supplementary Protocol” means ~~{Supplementary Protocol on {Liability and Redress for} Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety}.~~

### Guideline 3 – Scope

- Wording that not only restricts the proper application of the Guidelines but also do not reflect the reality of the introduction of living modified organisms mainly in developing countries (specifically the restriction of damage to “authorized” LMOs, when the majority of the incidents occur due to unauthorized uses), should be erased.

- The scope should cover all damage resulting from LMOs including those originated from products thereof (according to Annex III of the CPB) and transboundary movement from non-Parties (according to Article 24 of the CPB).

#### *Proposed amendments to Guideline 3 – Scope:*

1. These Guidelines apply to damage resulting from transport, transit, handling and use of living modified organisms ~~{and products thereof} provided that these [living modified organisms][activities] find their origin in a transboundary movement.~~ The living modified organisms referred to are those:

- (a) Intended for direct use as food or feed, or for processing;
- (b) Destined for contained use;
- (c) Intended for intentional introduction into the environment.

2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any ~~authorized use of the~~ living modified organisms ~~{and products thereof}~~ referred to in paragraph 1 above.

3. These Guidelines also apply to damage resulting from: **i) unintentional transboundary movements** as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol; **ii) transboundary movement from non-Parties.**

### Guideline 4 – Liability

- For an effective implementation of liability and redress measures, “liability” should not be restricted to: i) “risks assessments” since several countries (mainly developing ones) do not have biosafety frameworks that require risk assessment; however, damage occur (e.g. genetic contamination in centers or origin and diversity”; ii) “hazardous” living modified organism since neglects precautionary approaches and the uncertainties related to LMOs.

#### *Proposed amendments to Guideline 4 – Liability:*

1. The standard of liability should be strict ~~where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous.~~

2. In cases where the standard of liability is strict, liability should be channeled to the operator.

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

4. In cases where the standard of liability is strict, the right of recourse or indemnity that an operator may have against another person should not be limited or restricted.

### Guideline 5 – Exemptions

- From an ethical point of view, it results unacceptable any exemptions related to “Act of war or civil unrest” on liability for any damage or imminent threat of damage resulting from transport, transit, handling and use of living modified organisms or products thereof.

*Proposed amendments to Guideline 5 – Exceptions:*

Parties ~~should~~ **may** consider the application of exemptions **or mitigation** from liability, in particular:

- (a) Act of God or force majeure **that is uncontrollable by any human resource;**
- ~~(b) Act of war or civil unrest.~~

### Guideline 6 - Time Limits and Guideline 7 - Financial Limits

It is suggested to bracket Guidelines 6 and 7 to further discussion, since they imply that States or society might bare the implications of any damage that goes beyond the time or financial limit. This becomes the most likely scenario in the case of long-term ecological and health negative impacts, or damage to biodiversity at several scales (from local to national) in centers of origin. These limits do not consider the potential impacts of living modified organisms along their life cycle (e.g. gene flow).

### Guideline 8 - Financial Security

In consistency with comments related to Guidelines 6 and 7, and to avoid redundancy in relation to international law, the suggested amendments on Guideline 8 are:

*Proposed amendment to Guideline 8 – Financial Security:*

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

### Guideline 9 - Claims for Compensation

In consistency with previous comments:

*Proposed amendment to Guideline 9 – Claims for Compensation:*

1. Any person or group of persons, including public authorities, should be entitled to claim compensation ~~for loss of life, or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage~~ resulting from the ~~transboundary movement of~~ living modified organisms **and products thereof** in addition to, where appropriate, the reimbursement of the costs of response measures.
2. Parties **shall may** allow claims for compensation of damage to the conservation and sustainable use of biological diversity, **including socio-economic considerations relevant to indigenous and local communities and also taking into account human health.**

## **Guideline 10 - Settlement of Claims**

In accordance with Guideline 1:

*Proposed amendment to Guideline 10 – Settlement of Claims:*

1. Parties should provide for civil law procedures to **bring claims in national courts and** settle claims for compensation of damage.
2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

## **Guideline 11 - Access to Information**

- Further restrictions on access to information are unnecessary since full transparency to governmental instances and the public are crucial to reduce risk and properly redress damage or imminent threat of damage.

*Proposed amendment to Guideline 11 – Access to Information:*

Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent authority in possession of such information, ~~unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties~~

ECUADOR

[27 MAY 2010]  
[SUBMISSION: ENGLISH]

**WORKING TOWARDS NON-LEGALLY BINDING PROVISIONS ON CIVIL LIABILITY**

APPENDIX II OF GFCC 2 REPORT	SUPPLEMENTARY PROTOCOL	UNEP GUIDELINES	CO-CHAIRS' PROPOSAL
<p><b>Objective</b></p>	<p><b>Article 1</b> [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 finds its origin in transboundary movements.]</p>	<p><b>Guideline 1: Objective</b> The objective of the present guidelines is to provide guidance to States regarding domestic rules on liability, response action and compensation for damage caused by activities dangerous to the environment, taking into account the polluter pays principle.</p>	<p><b>Objective</b> The objective of these Guidelines is to provide guidance to Parties regarding domestic rules and procedures on civil liability for damage resulting from transboundary movements of living modified organisms, taking also into account risks to human health.</p> <p><b>Ecuador can work with this formulation</b></p>
<p><b>Use of terms</b></p>	<p><b>Article 2</b> 1. The terms used in Article 2 of the Convention and Article 3 of the Protocol shall apply to this Supplementary Protocol. 2. In addition, for the purposes of this Supplementary Protocol: (a) "Conference of the Parties serving as the meeting of the Parties to the Protocol" means; (b) "Convention" means; (c) "Damage" means; [(d) "Imminent threat of damage" is;] [(e) "Incident" means;] (f) "Operator" means; (g) "Protocol" means; (h) "Response measures" means.</p>	<p><b>Guideline 2: Definitions</b> 1. The term "activity dangerous to the environment" means. 2. The term "damage" means. 3. The term "environmental damage". 4. The term "operator" means any person or persons, entity or entities in command or control of the activity, or any part thereof at the time of the incident. 5. The term "incident" means. 6. The term "preventive measures" means. The term "pure economic loss" means 8. The term "reinstatement measures" means. 9. The term "response action" means.</p>	<p><b>Use of Terms</b> 1. The terms used in Article 2 of the Convention, Article 3 of the Protocol and Article 2 of the Supplementary Protocol apply to these Guidelines except as otherwise defined in paragraph 2 below. 2. In addition, for the purposes of these Guidelines: (a) "Damage" means; (b) "Damage to the conservation and sustainable use of biological diversity" means; (c) "Pure economic loss" means; (d) "Supplementary Protocol" means.</p> <p><b>Pure economic loss: to agree in this definition is very difficult, so</b></p>

			<p>the question is if we really need to introduce this definition.</p>
<p><b>I. State Responsibility</b>  <i>Operational text</i>                  These rules and procedures 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.  <i>Preambular text</i>                  Recognizing that these rules and procedures would 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.</p>	<p><b>Article 15 (adopted)</b>                  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.</p>		
<p><b>II. Scope</b>  <b>A. Functional Scope</b>  <i>Operational text 1</i>                  1. These rules and procedures apply 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.                  2. With respect to intentional transboundary movements, these rules and procedures apply to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1.</p>	<p><b>Article 3</b>                  1. This Supplementary Protocol applies to damage to the conservation and sustainable use of biological diversity, taking also into account risks to human health.                  2. This Supplementary Protocol applies to damage resulting from transport, transit, handling and use of living modified organisms [and products thereof] provided that these [living modified organisms][activities] find their origin in a transboundary movement. The living modified organisms referred to are 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</p>	<p><b>Guideline 3: Scope of application</b>                  1. The present guidelines apply to liability, response action and compensation for damage caused by activities dangerous to the environment.                  2. They are not intended to apply to damage caused by activities dangerous to the environment that are covered by other domestic laws establishing special liability regimes or that principally relate to national defence, international security or natural disaster management.</p>	<p><b>Scope</b>                  1. These Guidelines apply to damage resulting from transport, transit, handling and use of living modified organisms [and products thereof] provided that these [living modified organisms][activities] find their origin in a transboundary movement. The living modified organisms referred to are those:                  (a) Intended for direct use as food or feed, or for processing;                  (b) Destined for contained use;                  (c) Intended for intentional introduction into the environment.                  2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1 above.                  3. These Guidelines also apply to</p>

<p>3. These rules and procedures also apply 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.</p>	<p>damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 2. 4. This Supplementary Protocol also applies to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.</p>		<p>damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.</p> <p><b>Ecuador will not support the addition of products thereof</b></p>
<p><b>B. Geographical Scope</b> <i>Operational text 2</i> These rules and procedures apply to areas within the limits of its national jurisdiction[, including the exclusive economic zone,] [or control] of the Parties to the Protocol.</p>	<p><b>Article 4 (adopted)</b> 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. Parties may use criteria set out in their domestic law to address damage that occurs within the limits of their national jurisdiction.</p>		
<p><b>C. Limitation in Time</b> <i>Operational text 3</i> These rules and procedures apply to damage resulting from a transboundary movement of living modified organisms when that transboundary movement was commenced after their implementation by Parties into domestic law. <i>Operational text 3 alt</i> These rules and procedures apply to damage resulting from a transboundary movement of living modified organisms that started after the entry into force of these rules and procedures.</p>	<p><b>Article 5 (adopted)</b> This Supplementary Protocol applies to damage resulting from a transboundary movement of living modified organisms that started after the entry into force of this Supplementary Protocol for the Party into whose jurisdiction the transboundary movement was made.</p>		

<p><b>D. Limitation to the authorization at the time of the import of the living modified organisms</b>  <i>Operational text 4</i>                  [These rules and procedures apply 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 use will not be covered by these rules and procedures.]</p>			
<p><b>E. Non-Parties</b>  <i>Operational text 5</i>                  1. National rules on liability and redress implementing these rules and procedures should also cover damage resulting from the transboundary movements of living modified organisms from non-Parties, in accordance with Article 24 of the Protocol.                  2. These rules and procedures apply to “transboundary movements” of living modified organisms, as defined in Article 3(k) of the Protocol.</p>	<p><b>Article 4 (adopted)</b>                  3. Domestic law implementing this Supplementary Protocol shall also apply to damage resulting from the transboundary movements of living modified organisms from non-Parties.</p>		
<p><b>III. Damage</b>  <b>A. Definition of damage</b>  <b>Operational text 1</b>  <i>[1. These rules and procedures apply to damage [resulting from the transboundary movement of living modified organisms] as provided for by domestic law.]</i>  <i>[2. For the purposes of these rules and</i></p>	<p><b>Article 2</b>                  2(c) “Damage” means an adverse effect on the conservation and sustainable use of biological diversity, taking also into account risks to human health, that:                  (i) Is measurable or otherwise observable taking into account, wherever available, scientifically-established baselines recognized by a</p>	<p><b>Guideline 2: Definitions</b>                  2. The term “damage” means:                  (a) Loss of life or personal injury arising from environmental damage;                  (b) Loss of or damage to property arising from environmental damage;                  (c) Pure economic loss;                  (d) Costs of reinstatement measures, limited to the costs of measures</p>	<p><b>Use of Terms</b>                  2. In addition, for the purposes of these Guidelines:                  (a) “Damage” means:                  (i) Loss of life or personal injury [incidental to damage to the conservation and sustainable use of biological diversity];                  (ii) Loss of or damage to property</p>



<p><i>procedures, damage [resulting from the transboundary movement of living modified organisms] as provided for by domestic law may, inter alia, include:</i></p> <p><b>(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></p> <p>(b) Damage to human health, including loss of life and personal injury;</p> <p>(c) Damage to or impaired use of or loss of property;</p> <p>(d) Loss of income and other economic loss [resulting from damage to the conservation or sustainable use of biological diversity];</p> <p>[(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.]]</p>	<p>competent national authority that takes into account any other human induced variation and natural variation; and</p> <p>(ii) Is significant as set out in paragraph 3 below;</p> <p>3. A “significant” adverse effect is to be determined on the basis of factors, such as:</p> <p>(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;</p> <p>(b) The extent of the qualitative or quantitative changes that adversely affect the components of biological diversity;</p> <p>(c) The reduction of the ability of components of biological diversity to provide goods and services;</p> <p>(d) The extent of any adverse effects on human health in the context of the Protocol.</p>	<p>actually taken or to be undertaken;</p> <p>(e) Costs of preventive measures, including any loss or damage caused by such measures;</p> <p>(f) Environmental damage.</p> <p>3. The term “environmental damage” means an adverse or negative effect on the environment that:</p> <p>(a) Is measurable taking into account scientifically established baselines recognized by a public authority that take into account any other human-induced variation and natural variation;</p> <p>(b) Is significant, which is to be determined on the basis of factors such as:</p> <p>(i) Long-term or permanent change, to be understood as change that may not be redressed through natural recovery within a reasonable period of time;</p> <p>(ii) Extent of the qualitative or quantitative changes that adversely or negatively affect the environment;</p> <p>(iii) Reduction or loss of the ability of the environment to provide goods and services, either of a permanent nature or on a temporary basis;</p> <p>(iv) Extent of any adverse or negative effect or impact on human health;</p> <p>(v) Aesthetic, scientific and recreational value of parks, wilderness areas and other lands.</p> <p>7. The term “pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of the environment and incurred as a result of environmental damage.</p>	<p>[incidental to damage to the conservation and sustainable use of biological diversity];</p> <p>(iii) Pure economic loss;</p> <p>(iv) Costs of response measures;</p> <p>(v) Damage to the conservation and sustainable use of biological diversity not redressed under the Supplementary Protocol.</p> <p>(b) “Damage to the conservation and sustainable use of biological diversity” means damage as defined in Article 2, paragraph 2(c), of the Supplementary Protocol;</p> <p>(c) “Pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the conservation and sustainable use of biological diversity.</p> <p><b>Pure economic loss, as said before Ecuador finds very difficult to agree in this definition. Nevertheless, if it is going to appear in this document, we suggest one definition in “use fo terms”</b></p>
--	---	---	---

<p><b>B. Valuation of Damage</b>  <i>Operational text 2</i>          [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</p>			
---	--	--	--

<p>biological diversity at the same location or for the same use or at another location or for another type of use.]]</p>			
<p><b>C. Causation</b> <i>Operational text 3</i> 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.</p>	<p><b>Article 6 (adopted)</b> A causal link shall be established between the damage and the activity in question in accordance with domestic law.</p>		
<p><i>IV. Primary Compensation Scheme</i> <b>A. Civil liability</b> <b>Operational text 4</b> 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.</p>			
<p><b>1. Standard of liability and channelling of liability</b> <b>Operational text 5</b> [The standard of liability, whether fault-based liability, strict liability or mitigated strict liability, needs to be established in accordance with domestic law.] <b>Option 1: Strict liability</b> <b>Operational text 6</b> [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</p>	<p><b>Article 2</b> 2(f) “Operator” [in relation to response measures] means any person in [direct or indirect] [operational] control of [the activity at the time of the incident causing damage resulting from the transboundary movement of living modified organisms][the living modified organism at the time that the condition giving rise to the damage arose] [and could include, as appropriate and as determined by domestic law, the permit holder, person who placed the living modified organism on the market, developer, producer, notifier, exporter, importer,</p>	<p><b>Guideline 5: Liability</b> 1. The operator should be strictly liable for damage caused by activities dangerous to the environment. 2. Without prejudice to paragraph 1, any person should be liable for damage caused or contributed to by not complying with applicable statutory or regulatory requirements or through wrongful, intentional, reckless or negligent acts or omissions. A violation of a specific statutory obligation should be considered fault per se.</p>	<p><b>Liability</b> 1.The standard of liability should be strict where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous. 2. In cases where the standard of liability is strict, liability should be channelled to the operator.  <b>Ecuador would like to maintain the possibility of “mitigated strict liability”.</b></p>

<p>fault on his part.] <i>{For operational texts on “operator”, see sub-section IV.A of section 1.A in the annex to decision BS-IV/12}</i></p> <p><b>Option 2: Mitigated strict liability</b></p> <p><i>Operational text 7</i></p> <p>[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.]</p> <p>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.</p> <p>3. In cases where a strict liability standard has been determined to be applicable, pursuant to paragraph 1 above, liability shall be channelled to the [entity that has operational control][operator] over the activity that is proven to have caused the damage.]</p> <p><b>Option 3: Fault-based liability</b></p> <p><b>Operational text 8</b></p> <p>[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</p>	<p>carrier or supplier];</p>		
---	------------------------------	--	--

<p>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.]</p>			
<p><b>2. The provision of interim relief</b>  <b>Operational text 9</b>                  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.</p>			
<p><b>A bis. Additional elements of civil liability</b>  <b>1. Exemptions or mitigation</b>  <i>Operational text 10</i>                  [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 <i>force majeure</i>;                  (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;]</p>	<p><b>Article 8 (adopted)</b>                  1. Parties may provide, in their domestic law, for the following exemptions:                  (a) Act of God or <i>force majeure</i>;                  (b) Act of war or civil unrest.                  2. Parties may provide, in their domestic law, for any other exemptions or mitigations as they may deem fit.</p>	<p><b>Guideline 6: Exoneration from liability</b>                  1. Without prejudice to additional exoneration provided for in domestic law, the operator should not be liable, or in the case of (c) below not liable to the degree not apportioned to him or her, if the operator proves that the damage was caused:                  (a) By an act of God/force majeure (caused by natural phenomena of an exceptional, inevitable and uncontrollable nature);                  (b) By armed conflict, hostilities, civil war, insurrections or terrorist attacks;                  (c) Wholly or in part by an act or omission by a third party, notwithstanding safety measures appropriate to the type of activity concerned but in the case of claims for compensation, only if the damage caused was wholly the result of wrongful intentional conduct of a third party, including the person who</p>	<p><b>Exemptions</b>                  Parties should consider the application of exemptions from liability, in particular:                  (a) Act of God or <i>force majeure</i>;                  (b) Act of war or civil unrest.</p> <p><b>Ecuador supports only these two exemptions.</b></p>

<p>[(e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;]</p> <p>[(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;]</p> <p>[(g) National security exceptions [or international security];]</p> <p>[(h) Where the operator could not have reasonably foreseen the damage.]</p>		<p>suffered the damage;</p> <p>(d) As a result of compliance with compulsory measures imposed by a competent public authority.</p> <p>2. In relation to paragraph 4 of guideline 4, exonerations additional to those referenced in subparagraphs 1 (a)–(d) above or mitigating factors may include:</p> <p>(a) That the activity was expressly authorized and fully in conformity with an authorization given under domestic law, that allows the effect on the environment;</p> <p>(b) That the damage was caused by an activity which was not likely to cause damage according to the state of scientific and technical knowledge at the time that the activity was carried out.</p> <p>3. The operator may be exonerated wholly or in part towards a claimant if the operator proves that the damage resulted from the claimant’s act or omission done with intent to cause damage, or that the damage resulted wholly or in part from the claimant’s negligence.</p>	
<p><b>2. Recourse against third party by the person who is liable on the basis of strict liability</b></p> <p><b>Operational text 11</b></p> <p>These rules and procedures do not limit or restrict any right of recourse or indemnity that an operator may have against any other person.</p>	<p><b>Article 9 (adopted)</b></p> <p>This Supplementary Protocol shall not limit or restrict any right of recourse or indemnity that an operator may have against any other person.</p>		<p><b>Liability</b></p> <p>4. In cases where the standard of liability is strict, the right of recourse or indemnity that an operator may have against another person should not be limited or restricted.</p>

<p><i>3. Joint and several liability or apportionment of liability</i>  <b>Operational text 12</b>        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.  <b>Operational text 12 alt</b>        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</p>		<p><b>Guideline 7: Joint and several liability</b>        In the event of multiple operators their liability should be joint and several, or apportioned, as appropriate.</p>	<p><b>Liability</b>        3. In cases where the standard of liability is strict and two or more operators have caused the damage, their liability should be joint and several.</p>
---	--	---	---

<p>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.</p>			
<p><b>4. Limitation of liability</b>  <b>a. Limitation in time</b>  <i>Operational text 13</i>                  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].</p>	<p><b>Article 10 (adopted)</b>                  Parties may provide, in their domestic law, for relative and/or absolute time limits including for actions related to response measures and the commencement of the period to which a time limit applies.</p>	<p><b>Guideline 12: Time limits for presentation of claims</b>                  1. Domestic law should establish that claims for compensation are inadmissible unless they are brought within a certain period of time from the date the claimant knew or ought to have known of the damage and the identity of the operator. In addition, claims should be inadmissible unless they are brought within a certain period of time following the occurrence of the damage.                  2. Where the damage-causing incident is a series of occurrences having the same origin, the time limits established under the present guideline should run from the last of such occurrences. Where the damage-causing incident consists of a continuous occurrence, such time limits should run from the end of that continuous occurrence.</p>	<p><b>Time Limits</b>                  Parties should consider the application of relative and/or absolute time limits, including the commencement of the period to which a time limit applies.</p>
<p><b>b. Limitation in amount</b>  <i>Operational text 14</i>                  [Domestic law may provide for financial limits for strict liability[, provided that such limits shall not be less than [z] special drawing rights].]</p>	<p><b>Article 11 (adopted)</b>                  Parties may provide, in their domestic law, for financial limits for the recovery of costs and expenses related to response measures.</p>	<p><b>Guideline 10: Financial limits</b>                  1. Liability pursuant to guideline 5, paragraph 1, may be limited in accordance with criteria established under any applicable domestic classification scheme for activities dangerous to the environment.                  2. Given that the operator might be</p>	<p><b>Financial Limits</b>                  Parties should consider the application of financial limits in cases where the standard of liability is strict.</p>



		<p>unable to meet his or her liability or that actual damages might exceed the operator’s limit of liability, domestic law may provide for closure of potential compensation gaps by way of special funding or collective compensation mechanisms.</p> <p>3. There should be no financial limit on liability arising under guideline 5, paragraph 2.</p>	
<p><b>5. Coverage</b> <i>Operational text 15</i></p> <p>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.]</p> <p>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.]</p>	<p><b>Article 12</b></p> <p>1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]</p> <p>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 law implementing this Supplementary Protocol.]</p>	<p><b>Guideline 11: Financial guarantees</b></p> <p>1. The operator should, taking into account the availability of financial guarantees, be encouraged or required to cover liability under guideline 5, paragraph 1, for amounts not less than the minimum specified by law for the type of activity dangerous to the environment concerned and should continue to cover such liability, during the period of the time limit of liability, by way of insurance, bonds or other financial guarantees.</p> <p>2. The competent public authority should periodically review the availability of and the minimum limits for financial guarantees, taking into account the views of relevant stakeholders, including the specialized and general insurance industry.</p>	<p><b>Financial Security</b></p> <p>1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]</p> <p>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.]</p> <p><b>Ecuador does not support the inclusion of financial securities, we can work with numeral 2 changing the verb urge by encourage.....</b></p>
<p><b>V. Settlement of Claims</b> <b>A. Civil procedures</b> <b>Operational text 1</b></p> <p>Civil law procedures should be available at the domestic level to settle claims for damage between claimants and defendants. In cases of</p>		<p><b>Guideline 13: Claims with foreign elements: applicable law</b></p> <p>1. Subject to domestic laws on jurisdiction and in the absence of special rules established by contract or international agreement, any claim for compensation that raises a</p>	<p><b>Settlement of Claims</b></p> <p>1. Parties should provide for civil law procedures to settle claims for compensation of damage.</p>

<p>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] [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.</p> <p><b>Operational text 1 alt</b>                  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.</p> <p><i>Operational text 1 second alt</i>                  No provision.</p>		<p>choice-of-law issue should be decided in accordance with the law of the place in which the damage occurred, unless the claimant chooses to base the claim on the law of the country in which the event giving rise to the damage occurred.</p> <p>2. The timing of the claimant's choice pursuant to paragraph 1 should be determined by the law of the forum.</p>	
<p><b>B. Special procedure</b>  <b>Operational text 2</b>                  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.</p> <p><b>Operational text 2 alt</b>                  Parties may also avail dispute settlement through civil/administrative procedures and special tribunals such</p>			<p><b>Settlement of Claims</b>                  2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.</p>

<p>as the Permanent Court of Arbitration’s Optional Rules for the Arbitration of Disputes relating to Natural Resources and/or the Environment.</p> <p><b>Operational text 2 second alt</b>                  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.</p> <p><b>Operational text 2 third alt</b>                  No provision.</p>			
<p><b>C. Standing/Right to bring claims</b>  <b>Operational text 3 (civil liability)</b>                  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.</p>		<p><b>Guideline 8: Claims for compensation</b>                  1. Any person or group of persons, including public authorities, should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage caused by activities dangerous to the environment in addition to, where appropriate, the reimbursement of the costs of preventive measures and reinstatement measures.                  2. Domestic law may allow claims for compensation for environmental damage.</p> <p><b>Guideline 9: Other claims</b></p>	<p><b>Claims for Compensation</b>                  1. Any person or group of persons, including public authorities, should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage resulting from the transboundary movement of living modified organisms in addition to, where appropriate, the reimbursement of the costs of response measures.                  2. Parties may allow claims for compensation of damage to the conservation and sustainable use of biological diversity.</p> <p><b>Access to Information</b></p>

<p>2. States should guarantee appropriate access to information relevant for the pursuance of remedies, including claims for compensation.</p> <p><b>Operational text 3 alt (civil liability)</b>                  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.</p> <p><i>Operational text 4 (administrative approach)</i>                  [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.]</p>		<p>1. Any person or group of persons should be entitled to seek response action by competent public authorities if neither the operator nor the competent public authorities concerned are taking prompt and effective measures to redress environmental damage, provided that the person or group of persons has a sufficient interest or suffers the impairment of a right if so required by domestic law.</p> <p>2. Any person or group of persons within the meaning of paragraph 1 above should have the right to challenge in administrative or judicial proceedings the legality of any act or omission by private persons or public authorities that contravenes domestic laws or regulations relating to damage caused by activities dangerous to the environment.</p> <p>3. Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation from the operator or the competent public authority in possession of such information, unless such disclosure is specifically prohibited by law or violates the legally protected interests of third parties.</p>	<p>Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent public authority in possession of such information, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties.</p>
---	--	--	--

EUROPEAN UNION

[28 MAY 2010]  
[SUBMISSION: ENGLISH]

## **EU INITIAL COMMENTS TO THE PROPOSAL OF THE CO-CHAIRS**

The EU reserves its right to withdraw, modify or amend the below proposals over the course of the negotiations on the Guidelines. Aspects not addressed do not imply their acceptance by the EU as such or in the specific form in which they appear.

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

### **Proposal of Co-Chairs<sup>1</sup>**

#### **Guideline 1**

##### **Objective**

The objective of these Guidelines is to provide guidance to Parties **intending to introduce** domestic rules and procedures on civil liability for damage resulting from transboundary movements of living modified organisms, taking also into account risks to human health.

#### **Guideline 2**

##### **Use of Terms**

1. The terms used in Article 2 of the Convention, Article 3 of the Protocol and Article 2 of the Supplementary Protocol apply to these Guidelines except as otherwise defined in paragraph 2 below.

2. In addition, **under** these Guidelines:

(a) “Damage” means;

(i) Loss of life or personal injury incidental to damage to the conservation and sustainable use of biological diversity;

(ii) Loss of or damage to property incidental to damage to the conservation and sustainable use of biological diversity;

(iii)

(iv) Costs of response measures;

(v) Damage to the conservation and sustainable use of biological diversity not redressed under the Supplementary Protocol.

**Damage may also extend to pure economic loss.**

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

(c) “Pure economic loss” means loss of income, **directly deriving from an economic interest in any use of components of biological diversity, where the loss is** unaccompanied by personal injury or damage to property, and **is** incurred as a result of damage to the conservation and sustainable use of biological diversity;

(d) “Supplementary Protocol” means [Supplementary Protocol on [Liability and Redress for] Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety].

### **Guideline 3**

#### **Scope**

1. These

Guidelines **address** damage resulting from transport, transit, handling and use of living modified organisms [and products thereof] provided that these [living modified organisms][activities] find their origin in a transboundary movement. The living modified organisms referred to are those:

- (a) Intended for direct use as food or feed, or for processing;
- (b) Destined for contained use;
- (c) Intended for intentional introduction into the environment.

2. With respect to intentional transboundary movements, these Guidelines **address** damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1 above.

3. These Guidelines also **address** damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.

### **Guideline 4**

#### **Liability**

1. The standard of liability should be strict where the damage has been caused by a living modified organism that a risk assessment **under article 15 of the Protocol** has identified as hazardous.

2. In cases where the standard of liability is strict, liability should be channelled to the operator.

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

4. In cases where the standard of liability is strict, the right of recourse or indemnity that an operator may have against another person should not be limited or restricted.

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

### **Guideline 5**

#### **Exemptions**

Parties should consider the application of exemptions from **strict** liability, in particular:

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

### **Guideline 6**

#### **Time Limits**

Parties should consider the application of relative and/or absolute time limits, including the commencement of the period to which a time limit applies.

**Guideline 7**  
**Financial Limits**

Parties should consider the application of financial limits in cases where the standard of liability is strict.

**Guideline 8**  
**Financial Security**

1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]
2. [Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities.]

**Guideline 9**  
**Claims for Compensation**

1. Any person or group of persons, including public authorities, **who suffered damage** should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and, **if appropriate**, pure economic loss in consequence of the occurrence of damage resulting from **and caused by** the transboundary movement of living modified organisms
2. Parties may allow claims for compensation of damage to the conservation and sustainable use of biological diversity.

**Guideline 10**  
**Settlement of Claims**

1. Parties should provide for civil law procedures to settle claims for compensation of damage.
2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

**Guideline 11**  
**Access to Information**

Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the competent authority in possession of such information, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties.

JAPAN

[4 JUNE 2010]  
[SUBMISSION: ENGLISH]

**Japan's Comment  
on Co-Chairs' personal draft on GUIDELINES ON CIVIL LIABILITY AND REDRESS IN THE  
FIELD OF DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING  
MODIFIED ORGANISMS**

1. Japan would like to extend its appreciation for the Co-Chairs' efforts to put together a draft on "Guidelines on Civil Liability and Redress in the Field of Damage Resulting from Transboundary Movements of Living Modified Organisms" dated 24 April, 2010.
2. **Japan recognizes the importance of the civil liability guidelines. At the same time, the resolution of the outstanding issues under the Supplementary Protocol would automatically lead to the resolution of many of the issues under the Civil Liability Guidelines. Thus, while it is useful that Parties' views on the civil liability guidelines be known at this point of the negotiation, Japan urges the Friends of the Co-Chairs to concentrate, at the third meeting in Kuala Lumpur, on the negotiation and possible finalization of the text of the Supplementary Protocol.**
3. Since the UNEP Guidelines for the development of domestic legislation on liability (Annex to UNEP decision SS.XI/4/ II (2010)) applies to the activities dangerous to the environment, it is not appropriate to substantively refer to its contents when drafting our Guidelines on Civil Liability and Redress for Damage Resulting from Transboundary Movement of Living Modified Organisms in the Context of the Cartagena Protocol on Biosafety. Because the basis of our current negotiation on liability regime under the Cartagena Protocol is that the Parties recognize the existence of different views among the Parties as to the inherent danger of the LMOs and/or LMO related activities, the substantive reference to the UNEP Guidelines when drafting our Guidelines reflects only one view of the issue. Also, the said UNEP Guidelines has been carefully negotiated as a whole (its commentary not being adopted yet), therefore, it is inappropriate to pick-and-choose certain guidelines from it. For example, in Japan's view, the "preamble" to this UNEP Guidelines as excerpted below is very important to understand the purpose and possible use of this Guidelines:

"The purpose of the present guidelines is to highlight core issues that States will have to resolve should they choose to draft domestic laws and regulations on liability, response action and compensation for damage caused by activities dangerous to the environment. The guidelines discuss key elements for possible inclusion in any such domestic legislation and offer specific textual formulations for possible adoption by legislative drafters. It is envisaged that they will be of assistance to, in particular, developing countries and countries with economies in transition, in devising, as they deem appropriate, domestic legislation or policy on liability, response action and compensation."

4. At the last Friends of the Co-Chairs meeting, the Friends agreed to entrust the Co-Chairs to streamline the current proposed texts as reflected in UNEP/CBD/BS/GF-L&R/2/3, Appendix II, pp.17-22, without entering into the policy decisions. Japan considers that some of the Co-Chairs' personal draft, particularly Guidelines 2 (2), 4, 9 and 10, which seem to reflect specific policy, need further discussion, taking into account the very divergent views among the Parties as reflected in the above document.



5. Japan submits attached modification to the Co-Chairs' personal draft on Guidelines on Civil Liability and Redress.

**ATTACHMENT**

**(Proposed Modification by Japan)**

**DRAFT GUIDELINES ON CIVIL LIABILITY AND REDRESS ~~IN THE FIELD OF~~ FOR  
DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED  
ORGANISMS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY**

**Guideline 1**

**Purpose and Objective**

1. The purpose of the present Guidelines is to highlight core issues that the Parties to the Cartagena Protocol on Biosafety (hereinafter "Parties") will have to resolve should they choose to draft domestic laws and regulations on civil liability for damage resulting from transboundary movements of living modified organisms (LMOs). The present Guidelines will be of assistance to, in particular, developing Parties and Parties with economies in transition, in devising, as they deem appropriate, domestic legislation or policy in this field.
2. The objective of ~~the present these~~ **voluntary** Guidelines is to provide **general** guidance to ~~the~~ Parties, **as they deem appropriate**, regarding domestic rules and procedures on civil liability for damage resulting from transboundary movements of **LMOs** ~~living modified organisms~~, taking also into account risks to human health.

**Guideline 2**

**Use of Terms**

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

**Guideline 2bis**

**Damage**

1. Parties should define in their domestic law the term "damage." The damage, in their domestic law, may, *inter alia* include:
- (a) Loss of life or personal injury ~~incidental to damage to the conservation and sustainable use of biological diversity~~;
  - (b) Loss of or damage to property ~~incidental to damage to the conservation and sustainable use of biological diversity~~;
  - (c) ~~Pure economic loss, meaning loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the conservation and sustainable use of biological diversity;~~

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

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

### Guideline 3

#### Scope

1. The present ~~se~~ Guidelines **should** apply to damage resulting from transport, transit, handling and/or use of **LMOs** ~~[and products thereof]~~ provided that these living modified organisms ~~[activities]~~ find their origin in a transboundary movement. **LMOs** referred to **may be** ~~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.
2. With respect to intentional transboundary movements, the present ~~se~~ Guidelines **should also** apply to damage resulting from any authorized use of **LMOs** ~~[and products thereof]~~ referred to in paragraph 1 above.
3. The present ~~se~~ Guidelines **should** also apply to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.

### GUIDELINE 3BIS

#### Causation

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

### Guideline 4

#### Liability

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

- ~~1. The standard of liability should be strict where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous.~~
- ~~2. In cases where the standard of liability is strict, liability should be channelled to the operator.~~
- ~~3. In cases where the standard of liability is strict and two or more operators have caused the damage, their liability should be joint and several.~~
- ~~4. In cases where the standard of liability is strict, the right of recourse or indemnity that an operator may have against another person should not be limited or restricted.~~

### Guideline 5

#### Exemptions

1. Parties should consider the application of exemptions from liability, in particular:
  - (a) Act of God or *force majeure*;
  - (b) Act of war or civil unrest.
2. Parties may provide, in their domestic law, for any other exemptions or mitigations as they may deem fit.

### **Guideline 6 Time Limits**

Parties should consider the application of relative and/or absolute time limits, including the commencement of the period to which a time limit applies.

### **Guideline 7 Financial Limits**

1. Parties should consider the application of financial limits in cases where the standard of liability is strict.
2. There should be no financial limit on liability in cases where the standard of liability is fault-based.

### **Guideline 8 Financial Security**

- ~~1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]~~
- ~~2. [Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities.]~~

### **Guideline 9 Claims for Compensation**

1. Any person or group of persons, including public authorities, **sustaining damage** should be entitled to claim compensation for **such damage**. ~~loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage resulting from the transboundary movement of living modified organisms in addition to, where appropriate, the reimbursement of the costs of response measures.~~
2. Parties may, **where appropriate and meeting relevant requirements under domestic law**, allow claims for compensation ~~of~~ **for** damage to the conservation and sustainable use of biological diversity.
3. **The present Guidelines does not prevent Parties from adopting appropriate measures, such as the prohibition of double recovery of costs, in relation to situations where double recovery could occur as a result of concurrent action by a competent authority under the Supplementary Protocol and by a person or a group of persons suffering damage under the present Guidelines.**

### **Guideline 10 Settlement of Claims**

- ~~1. Parties should provide for civil law procedures to settle claims for compensation of damage.~~
- ~~2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.~~

### **~~GUIDELINE 11~~**

#### **~~Access to Information~~**

~~Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent authority in possession of such information, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties.~~

**NEW ZEALAND**

[26 MAY 2010]  
[SUBMISSION: ENGLISH]

**New Zealand comments on Co-Chair's draft guidelines on civil liability**

Thank you for your work in putting together the revised draft Guidelines on civil liability. New Zealand welcomes the opportunity to engage with you on the draft text ahead of the third meeting of the Group of Friends of the Co-Chairs on Liability and Redress in the context of the Cartagena Protocol on Biosafety (Friends Group).

We view the revised draft text prepared by you as a good basis for continuing the work of the Friends Group. However, because much of the content of the draft Guidelines will depend on the outcome of negotiations on the Supplementary Protocol, New Zealand would like to reserve its position on the Guidelines until negotiations on the Supplementary Protocol have concluded. For that reason, and while we recognise that the Guidelines form an important element of our work, New Zealand supports the focus of the next meeting of the Friends Group being on finalising the text of the Supplementary Protocol.

That said, we have carefully reviewed the revised draft text prepared by you and set out below our preliminary comments:

- First, in respect of Guideline 4 (which articulates a specific standard of liability for damage caused by a living modified organism (LMO) that has been identified in a risk assessment as “hazardous”) we note that New Zealand’s risk assessment procedures for LMOs do not distinguish between “hazardous” and “non-hazardous” LMOs. For that reason, and because there is no definition of “hazardous” included in the draft Guidelines, or in the Biosafety Protocol or the Convention on Biodiversity, we would like to explore further the concept of “hazardous” and the rationale for distinguishing between “hazardous” and “non-hazardous” LMOs in the Guidelines.
- Secondly, in respect of the appropriate standard of liability, our position is that this should ultimately be a matter for State determination.
- Thirdly, in respect of Guideline 8, we have reservations about including any provisions on financial securities, particularly given the difficulties around availability of insurance and the risk of a de facto prohibition if financial securities are unavailable or prohibitively expensive.
- Finally, and for the reasons already articulated in the negotiations on the Supplementary Protocol, we do not support products of LMOs being included within the scope of the Guidelines.

PARAGUAY

[28 MAY 20]

[SUBMISSION: ENGLISH]

**COMMENTS OF THE PARAGUAYAN DELEGATION FOR THE CO-CHAIR’S PROPOSAL DRAFT GUIDELINES ON CIVIL LIABILITY AND REDRESS IN THE FIELD OF DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS**

CO-CHAIRS’ PROPOSAL	Comments
<p style="text-align: center;"><b>Guideline 1</b> <b>Objective</b></p> <p>The objective of these Guidelines is to provide guidance to Parties regarding domestic rules and procedures on civil liability for damage resulting from transboundary movements of living modified organisms, taking also into account risks to human health.</p>	<p>The unknown damages mentioned in the draft Guideline are covered by domestic laws in most countries related with the protection of the environment, commerce, personal injury, etc. LMOs are not particularly dangerous per se.</p> <p><i>Hence, these guidelines are unnecessary for those countries and can also potentially run into domestic laws, affecting the legitimate trade of LMOs between parties and non parties.</i></p>
<p style="text-align: center;"><b>Guideline 2</b> <b>Use of Terms</b></p> <p>1. The terms used in Article 2 of the Convention, Article 3 of the Protocol and Article 2 of the Supplementary Protocol apply to these Guidelines except as otherwise defined in paragraph 2 below.</p> <p>2. In addition, for the purposes of these Guidelines:</p> <p>(a) “Damage” means;</p> <p>(i) Loss of life or personal injury [incidental to damage to the conservation and sustainable use of biological diversity];</p> <p>(ii) Loss of or damage to property [incidental to damage to the conservation and sustainable use of biological diversity];</p> <p>(iii) Pure economic loss;</p> <p>(iv) Costs of response measures;</p> <p>(v) Damage to the conservation and sustainable use of biological diversity not redressed under the Supplementary Protocol.</p>	<p>The traditional categories of damages stated in the Guideline 2 are covered by domestic laws in most countries, despite of the origin of the damage as well as the absence of such damages in the scope of the Cartagena Protocol, and particularly on article 27.</p> <p><i>Therefore, these categories of damage mentioned in the draft (“loss of life or personal injury”, “loss of or damage to property”, and “pure economic loss”) should be removed.</i></p>

<p>(b) “Damage to the conservation and sustainable use of biological diversity” means damage as defined in Article 2, paragraph 2(c), of the Supplementary Protocol;</p> <p>(c) “Pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the conservation and sustainable use of biological diversity;</p> <p>(d) “Supplementary Pr</p>	
<p style="text-align: center;"><b>Guideline 3</b> <b>Scope</b></p> <p>1. These Guidelines apply to damage resulting from transport, transit, handling and use of living modified organisms [and products thereof] provided that these [living modified organisms][activities] find their origin in a transboundary movement. The living modified organisms referred to are those:</p> <ul style="list-style-type: none"> <li>(a) Intended for direct use as food or feed, or for processing;</li> <li>(b) Destined for contained use;</li> <li>(c) Intended for intentional introduction into the environment.</li> </ul> <p>2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1 above.</p> <p>3. These Guidelines also apply to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.</p>	<p>Paragraph 1: Article 27 refers to rules for damages resulting from transboundary movements. Any other categories of damage go beyond the scope of the Protocol.</p> <p><i>Including the “transit”, “handling” or “use” of LMOs goes beyond the scope of article 27. Such terms should be excluded from the draft guidelines.</i></p> <p>Paragraph 2: The scope of the Protocol only covers “living modified organisms”, and not derived products. The references to “derived products” are not included in the scope of the Protocol and in the article 27 respectively. The liability should not extend to hypothetical damages from uses of the LMOs that were authorized after the transboundary movement was made.</p> <p><i>Therefore, any reference to “derived products” should be removed from the draft guidelines.</i></p>

<p style="text-align: center;"><b>Guideline 4</b> <b>Liability</b></p> <p>1. The standard of liability should be strict where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous.</p> <p>2. In cases where the standard of liability is strict, liability should be channelled to the operator.</p> <p>3. In cases where the standard of liability is strict and two or more operators have caused the damage, their liability should be joint and several.</p> <p>4. In cases where the standard of liability is strict, the right of recourse or indemnity that an operator may have against another person should not be limited or restricted.</p>	<p>Paragraph 1: In order to make the guide more concise, the standard of liability should be applicable <u>ONLY</u> where the damage has been caused...”</p> <p><i>Therefore, the word “strict” shall be replaced by “applicable only” to paragraph 1 as shown above.</i></p> <p>Paragraph 2: Standard of liability shall be determined in accordance to domestic law, therefore the paragraph 2 should be removed.</p> <p>Paragraphs 3 and 4: Paragraphs 3 and 4 do not clarify the interpretation in case of more than one occurrence involving the same LMO and/or the same damage, because they do not include the concept of “incident” and the definition of “operator”.</p> <p><i>The following text should be included: “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”.</i></p>
<p style="text-align: center;"><b>Guideline 5</b> <b>Exemptions</b></p> <p>Parties should consider the application of exemptions from liability, in particular:</p> <ul style="list-style-type: none"> <li>(a) Act of God or <i>force majeure</i>;</li> <li>(b) Act of war or civil unrest.</li> </ul>	<p>In order to clarify Guideline 5, we consider introducing the full list of exemptions for civil liability provided by the UNEP.</p> <p><i>Thus, the following should be included in the list of exemptions:</i></p> <ul style="list-style-type: none"> <li><i>“(c) Intervention by a third party</i></li> <li><i>(d) Compliance with compulsory measures imposed by a public authority;</i></li> <li><i>(e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;</i></li> <li><i>(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;</i></li> <li><i>(g) National security exceptions</i></li> <li><i>(h) Where the operator could not have reasonably foreseen the damage.”</i></li> </ul>

<p style="text-align: center;"><b>Guideline 6 Time Limits</b></p> <p>Parties should consider the application of relative and/or absolute time limits, including the commencement of the period to which a time limit applies.</p>	<p>This Guideline should mention time limits stipulated by civil law. Moreover, this guideline is not mandatory, and the expression “Parties should consider...” shall be replaced by “Parties may consider...” instead.</p>
<p style="text-align: center;"><b>Guideline 7 Financial Limits</b></p> <p>Parties should consider the application of financial limits in cases where the standard of liability is strict.</p>	<p>There should be financial limits in any case where financial security is required by law.</p> <p><i>Therefore, the scope of cases where this guideline applies should be the same as the scope of the following guideline.</i></p>
<p style="text-align: center;"><b>Guideline 8 Financial Security</b></p> <p>1. [Parties may [, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]</p> <p>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.]</p>	<p>Financial securities imply costs and insurance for the operator that can turn into unnecessary trade barriers that would be in conflict with existing international agreements if the risk is not scientifically justified.</p> <p>Moreover, they may cause an unjustified increase in food prices; therefore Guideline 8 should be removed from the Draft.</p>
<p style="text-align: center;"><b>Guideline 9 Claims for Compensation</b></p> <p>1. Any person or group of persons, including public authorities, should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage resulting from the transboundary movement of living modified organisms in addition to, where appropriate, the reimbursement of the costs of response measures.</p>	<p>Paragraph 1: “Loss of life or personal injury” as well as “loss or damage to property” and “Pure economic loss” are not damages to biological diversity, therefore their inclusion goes beyond the scope of the Cartagena Protocol. In addition, these categories of traditional damage are already covered by civil laws in every country, regardless of the origin of the damage.</p> <p><i>Therefore, paragraph 1 should be removed from the draft.</i></p>



<p>2. Parties may allow claims for compensation of damage to the conservation and sustainable use of biological diversity.</p>	<p>Paragraph 2: The right to bring claims should be limited only to the supposedly affected natural or legal persons. .</p> <p>.  <i>Therefore, paragraph 2 should be modified as follows: “ONLY DIRECTLY AFFECTED NATURAL OR LEGAL PERSONS may be allowed to present claims for compensation of damage to the conservation...”.</i></p>
<p style="text-align: center;"><b>Guideline 10</b> <b>Settlement of Claims</b></p> <p>1. Parties should provide for civil law procedures to settle claims for compensation of damage.</p> <p>2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.</p>	<p>The settlement of liability claims seeking redress of damage to the conservation and sustainable use of biodiversity resulting from transboundary movements of living modified organisms should be provided in national civil law procedures</p>
<p style="text-align: center;"><b>Guideline 11</b> <b>Access to Information</b></p> <p>Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent authority in possession of such information, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties.</p>	<p>The mention of “persons sustaining damage” is unclear; it should be replaced with “those persons entitled to present claims”.</p> <p>Information from the operator should only be obtained voluntarily or through a reasoned court order.</p>

MEXICO

[31 MAY 2010] [SUBMISSION:  
SPANISH]

**El Gobierno de México, en relación con la carta de los Copresidentes de Responsabilidad y Compensación, de fecha 24 de abril de 2010, mediante la cual pone a consideración de las Partes, para sus observaciones, un Proyecto de Lineamientos en Responsabilidad Civil, relativo a las negociaciones del artículo 27 del Protocolo de Cartagena sobre Seguridad de la Biotecnología, manifiesta su agradecimiento a los Copresidentes en la elaboración del Proyecto referido, así como a la matriz comparativa que lo acompaña.**

México considera que este documento constituye, como esquema, un importante avance para los trabajos del Grupo de Amigos de los Copresidentes de Responsabilidad y Compensación. Ahora bien, en el ánimo de contribuir al enriquecimiento del documento, se hacen valer los siguientes comentarios:

**a) Naturaleza de los lineamientos.** Se sugiere valorar la conveniencia de precisar, desde el objetivo contenido en el Lineamiento 1, que su naturaleza es voluntaria (no vinculante) y que podrán aplicarse a través del desarrollo de legislación nacional en la materia (no directamente). Es decir, que pueden servir de orientación para los países que deseen adoptarlas o modificar sus legislaciones nacionales para incluir disposiciones relativas a la reclamación de daños ocasionados a la conservación y uso sustentable de la diversidad biológica por el movimiento transfronterizo de organismos vivos modificados (OVMs).

**b) Responsabilidad Civil/Responsabilidad Administrativa.** El estipular que los daños previstos por las leyes nacionales, pueden incluir daños a la conservación y utilización sostenible de la diversidad **no compensados por medio del enfoque administrativo** parece inapropiado. Se considera improcedente que los sistemas de responsabilidad administrativa y civil, que pueden ser claramente distinguidos en cuanto a sus objetos y alcances, se excluyan entre sí. No se advierte impedimento alguno para que los daños, en su caso, puedan ser reclamados, en contra de diferentes actores, por distintas vías.

**c) Tipos de Responsabilidad.** La propuesta contenida en el Lineamiento 4 no nos parece adecuada, pues básicamente condiciona la responsabilidad estricta a la intervención de un OVM peligroso, sin especificar otro tipo de responsabilidad respecto a otros supuestos. Las discusiones del Grupo se centraron en tres distintos tipos de Responsabilidad (Estricta, Estricta Mitigada y Basada en la Culpa), por lo que consideramos que es conveniente trabajar sobre los mismos conceptos.

**d) Nexo Causal.** México considera que es necesario anexar un Lineamiento en el que se aborde lo relativo al concepto de Nexo Causal. Entendemos que éste ha quedado subsumido en el Lineamiento 4 presentado por los Copresidentes, sin embargo, ya especificamos en el inciso inmediato anterior la inconveniencia de mantener dicho Lineamiento en los términos que ahora aparece, por lo que creemos que el Nexo Causal puede tener un tratamiento puntual.

**e) Acciones Procesales.** La facultad de presentar demandas debe estar íntimamente relacionada con el alcance del concepto de “Daño”.

**f) Valoración de los Daños.** Se sugiere que éste concepto quede en un Lineamiento aparte.

**g) Medidas Provisionales.** Se sugiere también la inclusión de éste concepto en un Lineamiento, pues recordemos que aún y cuando bajo un esquema de Responsabilidad Administrativa resulta idóneo el prevenir daños (sin referirnos en específico a las discusiones del Grupo de Amigos de los Copresidentes respecto al Anexo I de Enfoque Administrativo), lo cierto es que la Responsabilidad Civil permite a los demandantes que así lo requieran, la posibilidad de “detener” un daño continuo, es decir, permite la prevención de la continuación de los daños.

**SUBMISSIONS FROM ORGANIZATIONS****AFRICAN CENTRE FOR BIOSAFETY**

[31MAY 2010]

[SUBMISSION: ENGLISH]

COMMENTS FROM AFRICAN CENTRE FOR BIOSAFETY ON THE PROPOSAL OF CO CHAIRS: DRAFT GUIDELINES ON CIVIL LIABILITY AND REDRESS IN THE FIELD OF DAMAGE RESULTING FROM THE TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS

Guideline one: objective

It is evident that the document is to facilitate only the domestic rules and procedures for civil liability as a result of transboundary movement of living modified organisms. In this regard, it is not meant to serve as international guidelines on the subject. It also negates to some extent any nexus between the Supplementary Protocol and these guidelines.

Guideline 2: use of terms

The definition of terms already defers to other definitions referred to in article 2 of the Supplementary Protocol (SP), whereas several critically important definitions remain unresolved under the SP, including the all important definition of 'operator'. The definition of "damage" in regard to loss of life or personal injury or damage to property is made "incidental" to other damage of biological diversity. Therefore personal injury or death or damage to property which is not incidental thereto would appear not to be included yet, the definition of damage in the SP specifically makes mention of "also taking into account the risks to human health". The same problem is repeated in regard to the definition of "pure economic loss" in that such loss must be as a result of damage to the conservation and sustainable use of biological diversity. If it is not as a result thereof then it will appear there is no economic loss. If these guidelines have no relationship with the SP, and are meant to serve as guidelines for domestic regulation of LMOs- why restrict it to its association to biodiversity? A compelling case can conversely be made that such restrictions point to the inextricable link between these guidelines and the provisions still to be negotiated under the SP dealing with civil liability.

Guideline Three: Scope

Its noted that the damage referred to above has to have its roots in a transboundary movement that is intended for direct food feed or processing etc etc... again very direct relationships to the Biosafety Protocol and the SP.

Guideline Four: liability

The Guidelines suggest that strict liability would apply only if a particular LMO has been identified as hazardous in terms of the risk assessment. If there is no such risk assessment or it is not being identified as hazardous than strict liability would not apply. As we have seen from the Kenyan GM maize fiasco recently, where a country has no operational Biosafety Law requiring a RA for FFP LMOs, or where that law provides for exemptions for RA to be conducted, such countries can import the GMO provided that the Party of export has approved it.

These guidelines also provide that such liability accrues to the "operator", a definition heavily contested in the draft SP and not defined in these guidelines. There is nothing in these guidelines that accrue liability to the developer, distributor or others in the value chain. The indemnity or recourse for liability, which an operator may have against the third party, is unlimited. This is fine if it is meant to operate against the manufacturer or supplier of the technology.

#### Guideline seven: financial limits

This guideline seems to suggest that compensation for liability should have a limit or a cap on the extent of compensation that may flow from strict liability. This would appear to have a direct bearing on guideline four. Once the liability of the operator or developer is limited, it will mean that a third party such as society at large, or the state would have to make good any shortfall in any loss suffered as a result of the damage.

#### Guideline eight: financial security

This guideline appears to envisage that the operator (farmer) would either have to take out public liability insurance or self-insure to cater for any financial claim made against the operator. Needless to say that in developing countries a farmer may not have the financial wherewithal to be able to meet one or several such claims as may ensue. The cost of insurance for such an event would have to be an additional cost for the farmer. In many instances, particularly in developing countries there is a risk that farmers would simply ignore the provision of financial security. In these guidelines there is no such requirement placed on the developer or others in the value chain as mentioned above. Any insurance required to be taken out by the operator would only benefit the insurance companies and would be seen as an input costs to be passed on to the consumer by the operator or developer etc and would have little impact on either creating safer technology.

#### Guideline 10: settlement of claims

Arbitration provided for in accordance with a permanent Court of arbitration. This would appear to be fine provided that signatories to the guideline are familiar with the rules and procedures of that arbitration and provided that such a clause is not construed to replace an ordinary claimants access to the courts of the land in preference for a much more expensive arbitration process, should the claimant prefer to institute a claim under the its domestic court system and laws.

ASOCIACIÓN DESARROLLO MEDIO AMBIENTAL SUSTENTABLE - ASDMAS

[31MAY 2010]  
[SUBMISSION: ENGLISH]

CO-CHAIRS' PROPOSAL	Comments	RESULTING PROPOSAL
<p><b>Objective</b> The objective of these Guidelines is to provide guidance to Parties regarding domestic rules and procedures on civil liability for damage resulting from transboundary movements of living modified organisms, taking also into account risks to human health.</p>	<p>Although traditional damage is already covered, in most countries, by existing civil liability laws, it's highly important to have an special regime for damages caused by LMOs.</p> <p>The Guidelines should suggest an appropriate protection to human integrity, therefore it's essential to include on the scope the risks to human health.</p> <p>By replacing "<i>also</i>" for "<i>specially</i>", the Guidelines are not transgressing the Scope of the Cartagena Protocol, but are adding attention to what civil laws must protect.</p>	<p><b>Objective</b> The objective of these Guidelines is to provide guidance to Parties regarding domestic rules and procedures on civil liability for damage resulting from transboundary movements of living modified organisms, taking <b>especially</b> into account risks to human health.</p>
<p><b>Use of Terms</b> 1. The terms used in Article 2 of the Convention, Article 3 of the Protocol and Article 2 of the Supplementary Protocol apply to these Guidelines except as otherwise defined in paragraph 2 below. 2. In addition, for the purposes of these Guidelines: (a) "Damage" means; (i) Loss of life or personal injury, [incidental to damage to the conservation and sustainable use of biological diversity]; (ii) Loss of or damage to property [incidental to damage to the conservation and sustainable use of</p>	<p>The term "Human Health" should be considered in "Damage"</p>	<p><b>Use of Terms</b> 1. The terms used in Article 2 of the Convention, Article 3 of the Protocol and Article 2 of the Supplementary Protocol apply to these Guidelines except as otherwise defined in paragraph 2 below. 2. In addition, for the purposes of these Guidelines: (a) "Damage" means; (i) Loss of life or personal injury, <del>[incidental to damage to the conservation and sustainable use of biological diversity];</del> (ii) Loss of or damage to property <del>[incidental to damage to the conservation and sustainable use</del></p>

<p>biological diversity];                  (iii) Pure economic loss;                  (iv) Costs of response measures;                  (v) Damage to the conservation and sustainable use of biological diversity not redressed under the Supplementary Protocol.                  (b) “Damage to the conservation and sustainable use of biological diversity” means damage as defined in Article 2, paragraph 2(c), of the Supplementary Protocol;                  (c) “Pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the conservation and sustainable use of biological diversity;                  (d) “Supplementary Protocol” means [Supplementary Protocol on [Liability and Redress for] Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety].</p>		<p><del>of biological diversity];</del>                  (iii) <del>Pure</del>-Economic loss;                  (iv) Costs of response measures;                  (v) Damage to the conservation and sustainable use of biological diversity taking also into account human health not redressed under the Supplementary Protocol.                  (b) “Damage to the conservation and sustainable use of biological diversity” means damage as defined in Article 2, paragraph 2(c), of the Supplementary Protocol;                  (c) “<del>Pure</del> economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the conservation and sustainable use of biological diversity;                  (d) “Supplementary Protocol” means [Supplementary Protocol on [Liability and Redress for] Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety].</p>
<p><b>Scope</b>                  1. These Guidelines apply to damage resulting from transport, transit, handling and use of living modified organisms [and products thereof] provided that these [living modified organisms][activities] find their origin in a transboundary movement. The living modified organisms referred to are those:                  (a) Intended for direct use as food or feed, or for processing;</p>	<p>- The term “Products thereof”, should be considered in this Guidelines as they should be in the Supplementary Protocol.                  The main reasons to include this terms are:                  We can find the term in Article 20. 3 (c), Annex I and Annex III of the Cartagena Protocol.                  In Article 1 of the Cartagena Protocol, we find that the Objective of the Protocol is to <i>contribute to ensuring and adequate level of protection in the field of the safe transfer, handling and use of</i></p>	<p><b>Scope</b>                  1. These Guidelines apply to damage resulting from 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;</p>

<p>(b) Destined for contained use; (c) Intended for intentional introduction into the environment.</p> <p>2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1 above.</p> <p>3. These Guidelines also apply to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.</p>	<p><i>living modified organisms(...)</i></p> <p>By pointing out the action of <i>using</i> Living Modified Organisms, it should be also considered the kind of use the Industry is going to give to the LMOs that can result in a product containing LMOs or products thereof, and should be in the Scope of civil liability if a damage occurs.</p> <p>In Annex III regarding Risk Assessment we can find the General Principles of this activity. One of the principles is to evaluate the risks associated with products thereof (5). After the Risk Assessment is done, there should be a risk Management. If that's the case, we can conclude that, in different levels, there is an existing risk that is going to be assumed. Therefore, it's a logical conclusion, that damages can occur when risks are present, and all the LMOs or products thereof that were part of the Risk Assessment should be considered in the Liability Regime. -It is not right to say that the <i>living modified organisms find their origin in a transboundary movement</i>. The activities (transport, transit, handling and use) must be the ones that find their origin in a transboundary movement.</p>	<p>(c) Intended for intentional introduction into the environment.</p> <p>2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any <b>authorized</b> use of the living modified organisms and products thereof referred to in paragraph 1 above.</p> <p>3. These Guidelines also apply to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.</p>
<p><b>Liability</b></p> <p>1. The standard of liability should be strict where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous.</p> <p>2. In cases where the standard of liability is strict, liability should be channelled to the operator.</p> <p>3. In cases where the standard of</p>	<p>- Paragraph 1 should include Products thereof. - The term "hazardous" must be defined; the lack of definition would give the chance to all domestic laws to assume different levels of risks as "hazardous" or none at all.</p>	<p><b>Liability</b></p> <p>1. The standard of liability should be strict where the damage has been caused by a living modified organism <b>or products thereof</b> that a risk assessment has identified as <b>highly probable to generate damage</b>.</p> <p>2. In cases where the standard of liability is strict, liability should be channelled to the operator.</p>

<p>liability is strict and two or more operators have caused the damage, their liability should be joint and several.</p> <p>4. In cases where the standard of liability is strict, the right of recourse or indemnity that an operator may have against another person should not be limited or restricted.</p>		<p>3. In cases where the standard of liability is strict and two or more operators have caused the damage, their liability should be joint and several.</p> <p>4. In cases where the standard of liability is strict, the right of recourse or indemnity that an operator may have against another person should not be limited or restricted.</p>
<p><b>Exemptions</b> Parties should consider the application of exemptions from liability, in particular: (a) Act of God or <i>force majeure</i>; (b) Act of war or civil unrest.</p>	<p>It is not possible to accept the use of LMO's on war and civil unrest without being responsible,</p>	<p><b>Exemptions</b> Parties should consider the application of exemptions from liability, in particular: (a) Act of God or <i>force majeure</i>; <del>(b) Act of war or civil unrest.</del></p>
<p><b>Time Limits</b> Parties should consider the application of relative and/or absolute time limits, including the commencement of the period to which a time limit applies.</p>	<p>All LMOs can't have the same time limits</p>	<p><b>Time Limits</b> Parties should consider the application of relative and/or absolute time limits, including the commencement of the period to which a time limit applies. <b>Considering the live cycle of the LMO's in discussion.</b></p>
<p><b>Financial Limits</b> Parties should consider the application of financial limits in cases where the standard of liability is strict.</p>	<p>No comments</p>	



<p><b>Financial Security</b></p> <p>1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]</p> <p>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.]</p>	<p>No comments</p>	<p>. [Parties <del>shall may</del>, consistent with international <del>law</del> [obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]</p> <p>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.]</p>
<p><b>Claims for Compensation</b></p> <p>1. Any person or group of persons, including public authorities, should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and <del>pure</del> economic loss in consequence of the occurrence of damage resulting from the transboundary movement of living modified organisms in addition to, where appropriate, the reimbursement of the costs of response measures.</p> <p>2. Parties may allow claims for compensation of damage to the conservation and sustainable use of biological diversity.</p>	<p>No comments</p>	
<p><b>Settlement of Claims</b></p> <p>1. Parties should provide for civil law procedures to settle claims for compensation of damage.</p> <p>2. Where agreed by both or all parties, claims for compensation of damage may be submitted to</p>	<p>No comments</p>	

<p>arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.</p>		
<p><b>Access to Information</b>                  Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent authority in possession of such information, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties.</p>	<p>No comments</p>	

GLOBAL INDUSTRY COALITION

[26 MAY 2010]  
[SUBMISSION: ENGLISH]

**GLOBAL INDUSTRY COALITION VIEWS ON THE ARTICLE 27 NEGOTIATION PROCESS UNDER THE  
CARTAGENA PROTOCOL ON BIOSAFETY (BIOSAFETY PROTOCOL)  
RELATED TO THE DRAFT GUIDELINES ON CIVIL LIABILITY**

The Co-Chairs of the Group of Friends of the Co-Chairs (GFOCC) negotiating the Supplementary Protocol on Liability and Redress for Damage Resulting from Transboundary Movements of Living Modified Organisms (LMOs) agreed at the second meeting of the GFOCC to elaborate guidelines on civil liability and redress in the field of damage resulting from transboundary movements of LMOs (“Draft Guidelines”). The Draft Guidelines are available for comment by Parties and Observers by 28 May 2010 and will be discussed at the third meeting of the GFOCC (15-19 June 2010 in Kuala Lumpur, Malaysia).

**Non-binding guidance on civil liability being negotiated by the Parties in the Biosafety Protocol Article 27 process must in fact be actual “guidance” that provides Parties with options and enables the flexibility to adopt civil liability provisions consistent with their domestic civil liability law.**

“Guidance” to Parties on civil liability for damage to biological diversity must first direct each Party to analyze its domestic legal system to determine whether there are gaps in that system related to potential damages resulting from damage to biological diversity, then to define what those gaps are, and finally provide the full range of options to address each element of liability so that each Party can adopt provisions to supplement its existing domestic civil liability laws consistent with that existing law and legal system.

For example, the choice between establishing fault-based or strict liability should not be imposed on Parties, but should be decided by each Party in light of its national policies and goals, and its unique laws and legal system. By including a complete array of choices for each element of liability, the Draft Guidelines would actually assist countries to better assess and analyze the implications of each option within its legal system, including potential impacts on trade, legal and judicial resources, domestic research and development, sustainable agriculture, and food security. Existing civil liability systems in most of the countries of the world already would cover traditional damages, such as personal injury or economic harm, if they were to occur, resulting from damage to biological diversity resulting from the transboundary movement of LMOs.

**To this end, the GIC has several suggested edits to the Civil Liability Text provided by the Co-Chairs. GIC input is summarized as follows:**

1. **Link the elements of “damage” in Guideline 2 to “damage to the conservation and sustainable use of biodiversity”:** The bracketed text in Guideline 2 must be retained, reflecting the appropriate linkage of the Draft Guidelines to the scope of the Biosafety Protocol, namely, the “conservation and sustainable use of biodiversity”.
2. **Delete “products thereof” language in Guideline 3:** The inclusion of “and products thereof” would broaden the scope of the Draft Guidelines beyond potential damage to biological diversity, because processed and manufactured products that do not contain viable organisms cannot affect biological diversity. To the extent any processed product does contain viable organisms that have been genetically modified, the product would be considered an LMO and already would be within the clearly defined scope of the Biosafety Protocol.

3. **Expand options for standard of liability in Guideline 4:** The GFOCC has discussed numerous options for standard of liability with respect to Guideline 4, as reflected in the prior text. As stated above, the Parties must have the full range of options available to them with respect to standard of liability so that they can make a decision consistent with their unique domestic legal systems. As such, the guidance should recognize that the Party may adopt fault-based liability based on its domestic legal system.
4. **Restore options for exemptions in Guideline 5:** In order to ensure that the guidance recognize the diversity of existing domestic law, and provide a broader range of options, the GIC proposes the inclusion of additional options previously discussed by and available to the Parties regarding additional exemptions and mitigating factors for consideration in elaborating their domestic law.

*For more information, please contact Sarah Lukie (sarah.lukie@croplife.org).*

### **Proposed Edits from the Global Industry Coalition (GIC)**

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

### **Proposal of Co-Chairs\***

#### **Guideline 1 Objective**

The objective of these Guidelines is to provide guidance to Parties regarding domestic rules and procedures on civil liability for damage resulting from transboundary movements of living modified organisms, taking also into account risks to human health.

#### **Guideline 2 Use of Terms**

1. The terms used in Article 2 of the Convention, Article 3 of the Protocol and Article 2 of the Supplementary Protocol apply to these Guidelines except as otherwise defined in paragraph 2 below.
2. In addition, for the purposes of these Guidelines:
  - (a) “Damage” means;
    - (i) Loss of life or personal injury {incidental to damage to the conservation and sustainable use of biological diversity};
    - (ii) Loss of or damage to property {incidental to damage to the conservation and sustainable use of biological diversity};
    - (iii) Pure economic loss;
    - (iv) Costs of response measures;
    - (v) Damage to the conservation and sustainable use of biological diversity not redressed under the Supplementary Protocol.
  - (b) “Damage to the conservation and sustainable use of biological diversity” means damage as defined in Article 2, paragraph 2(c), of the Supplementary Protocol;
  - (c) “Pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the conservation and sustainable use of biological diversity;

---

\* The use of brackets appearing in the proposed text of the Guidelines is related to outstanding issues in the draft text of the Supplementary Protocol.

(d) “Supplementary Protocol” means {Supplementary Protocol on {Liability and Redress for} Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety.

### **Guideline 3** **Scope**

*The inclusion of “and products thereof” would broaden the scope of these Guidelines beyond potential damage to biological diversity, because processed and manufactured products that do not contain viable organisms cannot affect biological diversity. To the extent any processed product does contain viable organisms that have been genetically modified, the product would be considered an LMO and already would be within the clearly defined scope of the Biosafety Protocol.*

1. These Guidelines apply to damage resulting from transport, transit, handling and use of living modified organisms ~~{and products thereof}~~ provided that these living modified organisms and 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.
2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any authorized use of the living modified organisms ~~{and products thereof}~~ referred to in paragraph 1 above.
3. These Guidelines also apply to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.

### **Guideline 4** **Use of the Guidelines**

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

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

*The GIC strongly recommends that the Guidelines include a reference to the different options available for standard of liability, as discussed by the Group of Friends of the Co-Chairs. This additional information will allow Parties to have all the relevant options available to them that have been discussed by the Group of Friends when considering their domestic law in this area.*

1. Each Party should analyze its domestic legal system to determine the appropriate standard of liability for damage resulting from damage to biological diversity.
2. Where the appropriate standard is strict liability, then that standard should apply where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous.
3. In cases where the appropriate standard of liability is strict, liability should be channelled to the operator.

4. In cases where the appropriate standard of liability is strict and two or more operators have caused the damage, their liability should be joint and several.
5. The right of recourse or indemnity that an operator may have against another person should not be limited or restricted.

**Guideline 6**  
**Exemptions**

Parties should consider the application of exemptions from liability, in particular:

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

*GIC strongly recommends that this additional language from the Report of the second Group of Friends of the Co-Chairs meeting be included in any Guidelines on civil liability to be developed. This additional information will allow Parties to have all the relevant options available to them that have been discussed by the Group of Friends when considering their domestic law in this area.*

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

- (a) Intervention by a third party;
- (b) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;
- (c) An activity expressly authorized by and fully in conformity with an authorization given under domestic law; and
- (d) An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out.

**Guideline 7**  
**Time Limits**

Parties should consider the application of relative and/or absolute time limits, including the commencement of the period to which a time limit applies.

**Guideline 8**  
**Financial Limits**

Parties should consider the application of financial limits in cases where the standard of liability is strict.

**Guideline 9**  
**Financial Security**

*All countries have and should equitably apply their existing national corporate and other applicable laws concerning financial security to both domestic and foreign entities who conduct research and development and commercial business activities in their countries, including those engaged with LMOs. Under the Supplementary Protocol being developed, the Parties must take care to ensure that the requirements of the administrative approach are not uninsurable and do not impose onerous financial obligations which prevent or inhibit the Parties' ability to access and develop the technology.*

1. ~~[Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]~~
2. ~~[Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities.]~~

#### **Guideline 10**

##### **Claims for Compensation**

1. Any person or group of persons who have sustained actual damage, including public authorities, should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage resulting from the transboundary movement of living modified organisms in addition to, where appropriate, the reimbursement of the costs of response measures.
2. Parties may allow claims for compensation of damage to the conservation and sustainable use of biological diversity.

#### **Guideline 11**

##### **Settlement of Claims**

1. Parties should provide for civil law procedures to settle claims for compensation of damage.
2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

#### **Guideline 12**

##### **Access to Information**

Any person or group of persons sustaining damage or defending a claim for damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent authority, or relevant to the presentation of a defence of such claim from the person or group of persons alleging such damage in possession of such information, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties.

**INSTITUTE FOR INTERNATIONAL TRADE  
NEGOTIATIONS (ICONE BRAZIL)**

[28 MAY 2010]  
[SUBMISSION: ENGLISH]

The comments below are made based on the proposal on Draft Guidelines on Civil Liability and Redress presented on April 24<sup>th</sup> by the Co-Chairs of the Group of Friends on Liability and Redress, in the context of the Cartagena Protocol negotiations.

The analysis aims to contribute with the debate and design of guidelines on civil liability within the Supplementary Protocol, considering the need to advance this discussion with a view to allow the objective implementation of instruments related to Liability and Redress.

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

The following analysis considers that the guidelines on civil liability must incentive Parties to effectively implement regulations aiming to address cases of damages to the use and conservation of the biological diversity, the main goal of the Cartagena Protocol.

**Guideline 1**

Objective

The objective of these Guidelines is to provide guidance to Parties regarding domestic rules and procedures on civil liability for damage resulting from transboundary movements of living modified organisms, taking also into account risks to human health.

**Guideline 2**

Use of Terms

1. The terms used in Article 2 of the Convention, Article 3 of the Protocol and Article 2 of the Supplementary Protocol apply to these Guidelines except as otherwise defined in paragraph 2 below.
2. In addition, for the purposes of these Guidelines:
  - (a) "Damage" means;
    - (i) Loss of life or personal injury [incidental to damage to the conservation and sustainable use of biological diversity];
    - (ii) Loss of or damage to property [incidental to damage to the conservation and sustainable use of biological diversity];
    - (iii) Pure economic loss;
    - (iv) Costs of response measures;
    - (v) Damage to the conservation and sustainable use of biological diversity not redressed under the Supplementary Protocol.

**Definition and Scope of Damage**

1. The definition of damage in the Supplementary Protocol, appointed in the Article 2 (c) follows the scope of the Cartagena Protocol to seek to prevent damages to the use and conservation of the biological diversity, taking into account damages to the human health and to determine that these damages must be significant, serious and measurable. The adoption of guidelines on civil liability cannot broaden this scope as cited in the items 2(a) (i) (ii) and (iii) above;



---

2. To create *guidelines* that help Parties to adopt L&R regimes is very important to foster the implementation of the Cartagena Protocol, but this does not mean that these guidelines must exceed the predicted goals of the Protocol that has been extensively negotiated and discussed by the Parties.

---

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

(c) “Pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the conservation and sustainable use of biological diversity;

(d) “Supplementary Protocol” means [Supplementary Protocol on [Liability and Redress for] Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety].

### **Guideline 3**

#### Scope

1. These Guidelines apply to damage resulting from transport, transit, handling and use of living modified organisms [and products thereof] provided that these [living modified organisms][activities] find their origin in a transboundary movement. The living modified organisms referred to are those:

- (a) Intended for direct use as food or feed, or for processing;
- (b) Destined for contained use;
- (c) Intended for intentional introduction into the environment.

2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1 above.

3. These Guidelines also apply to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.

#### **Products Thereof**

1. To include products thereof in the scope of the guidelines on civil liability means to extrapolate the limits of the Cartagena Protocol since the LMO must have the ability to transfer or replicate its genetic material. Processed products or products thereof that are not able to transfer or replicate genetic material cannot affect the biological diversity and cannot be considered in the scope of any instrument adopted in the Cartagena Protocol;

2. The appropriate expression to embrace products that are able to transfer or replicate genetic material is "products that contains viable LMOs". A table made with a genetically modified tree cannot transfer or replicate its genetic material, unless this type of wood have not been processed and have sprouts; the table is a product thereof that cannot transfer or replicate genetic material in question and, for this reason, cannot be accepted in the context of the Protocol. However, a genetically modified enzymes or bacteria used to produce dairy products or beverages that have the ability to transfer or replicate genetic material must be considered in the context of the Protocol and the Supplementary Protocol. There are various examples that would need to be accessed, and this analysis must be taken into account in order to enable an accurate way to address LMOs in the context of the Cartagena Protocol and its decisions;

3. When the Annex III.4 of the Cartagena Protocol refers to products thereof, it refers expressly to products thereof originated from LMOs that contains new detectable combinations of replicable genetic material obtained from biotechnology; this reinforces that the ability to transfer and/or replicate genetic material is an essential requirement for the context of the Supplementary Protocol.

---

**Guideline 4**

## Liability

1. The standard of liability should be strict where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous.
2. In cases where the standard of liability is strict, liability should be channelled to the operator.
3. In cases where the standard of liability is strict and two or more operators have caused the damage, their liability should be joint and several.
4. In cases where the standard of liability is strict, the right of recourse or indemnity that an operator may have against another person should not be limited or restricted.

**Guideline 5**

## Exemptions

Parties should consider the application of exemptions from liability, in particular:

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

<b>Exemptions</b>
<p>1. The exemptions provided in the Report of the second Group of Friends of the Co-Chairs meeting should be included in any Guidelines on Civil Liability. Parties must have all relevant options available to handle exemptions in their domestic regulations, as the following options: (a) Intervention by a third party; (b) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage; (c) An activity expressly authorized by and fully in conformity with an authorization given under domestic law; and (d) An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out.</p>

**Guideline 6**

## Time Limits

Parties should consider the application of relative and/or absolute time limits, including the commencement of the period to which a time limit applies.

**Guideline 7**

## Financial Limits

Parties should consider the application of financial limits in cases where the standard of liability is strict.

**Guideline 8**

## Financial Security

1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]
2. [Parties are urged to take measures to encourage the development of financial security instruments and markets 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.]

### Financial Security

1. To require that different operators maintain insurances or financial guarantees during the time limit that the Parties can define, that would not be the same in different Parties, will create high and unnecessary costs to prevent possible damages in the context of the Supplementary Protocol;
2. Considering the concept of operator in Article 2(c) of the Supplementary Protocol, and that the characterization of who is the operator will depend on a concrete and significant damage caused by a LMO in the light of provisions in the Article 3, it creates the need that all possible operators have insurances even without knowing if the LMO in question could cause a damage in the terms of the Protocol, what is against the goals that originated the Cartagena Protocol;
3. The possibility that food and feed products suffer an increase of costs to assure that the redress of possible damages, that are not known and are not quantifiable is very feasible and dangerous;
4. To become possible to create insurances of this nature, it is necessary to be clear what damages are possible to occur and the estimation of the costs of redress; without these requirements, it is not possible to think about the establishment of an insurance or a financial guarantee.
5. Alternative means of redress must be seek by the Supplementary Protocol and by the Parties.

#### Guideline 9

##### Claims for Compensation

1. Any person or group of persons, including public authorities, should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage resulting from the transboundary movement of living modified organisms in addition to, where appropriate, the reimbursement of the costs of response measures.
2. Parties may allow claims for compensation of damage to the conservation and sustainable use of biological diversity.

### Claims for Compensation

1. The goal of these Guidelines on Civil Liability and the Supplementary Protocol is to conduct the Parties to implement L&R rules to address possible damages of LMOs to the use and conservation of the biological diversity. When it occurs a damage, the involvement of the competent national authorities is extremely important;
2. The Brazilian Regulation, which determines the objective responsibility in cases of damages to the environment, the Federal Prosecution Service and the State Prosecution Service have the legitimacy to propose civil or criminal responsibility lawsuits for damages to the environment according to Article 14, (1), of the Law 6938/1981, which establishes the Environmental National Policy. Thus, it is not possible to accept the proposal expressed in the item (1), because besides of creating conflicts with the domestic legislation, it would allow unfounded questioning and demands about the effects allegedly harmful of biotechnology, involving products that are not able to multiple or transfer genetic material.

#### Guideline 10

##### Settlement of Claims

1. Parties should provide for civil law procedures to settle claims for compensation of damage.
2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

## Guideline 11

### Access to Information

Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent authority in possession of such information, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties.

## THIRD WORLD NETWORK

[31 MAY 2010]  
[SUBMISSION: ENGLISH]

### COMMENTS BY THIRD WORLD NETWORK (TWN) ON THE DRAFT GUIDELINES ON CIVIL LIABILITY AND REDRESS IN THE FIELD OF DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS – PROPOSAL OF CO-CHAIRS

Note: TWN comments are highlighted in the following ways:

- (i) Comments are in bold and italicized
- (ii) Additional text suggestions are in bold and italicized within the Guidelines
- (iii) Strikethrough is used for text suggested for deletion within the Guidelines

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

#### Proposal of Co-Chairs<sup>‡</sup>

*At the outset, TWN reiterates that a legally-binding international civil liability instrument would best fulfil the mandate of Article 27 of the Cartagena Protocol on Biosafety for international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organism (LMOs), and would best ensure an adequate level of protection in the field of the safe transfer, handling and use of LMOs.*

*Guidelines on Civil Liability must not substitute for the legally binding provision on civil liability in the Supplementary Protocol (SP), and the review of the effectiveness of the SP and the provision on civil liability which may lead to a binding international civil liability regime in the future.*

*The relationship between the draft Guidelines and the draft SP must be understood in light of the Bonn understanding for one binding provision on civil liability in the legally binding instrument, preserving the right of Parties to put in place domestic laws and policies on civil liability, and to review the Guidelines with a view to considering making them binding.*

*In this light, and in the interim, the Guidelines could be useful in providing guidance to Parties for their domestic civil liability regimes, with a view towards developing a legally-binding international civil liability regime. It is on this understanding that TWN would like to comment on these draft Guidelines.*

---

<sup>‡</sup> The use of brackets appearing in the proposed text of the Guidelines is related to outstanding issues in the draft text of the Supplementary Protocol.

## Guideline 1 Objective

The objective of these Guidelines is to provide guidance to Parties regarding domestic rules and procedures on civil liability for damage resulting from ~~transboundary movements of~~ living modified organisms **and products thereof**, taking also into account risks to human health.

*In line with the Bonn understanding, and with Article 14 of the draft SP on the review of the effectiveness of Article 13 on civil liability, these Guidelines should not be limited to providing guidance to Parties solely on domestic rules and procedures on civil liability. The Bonn understanding and the intention of Article 14 of the draft SP envisage the possible development of a legally-binding international instrument on civil liability in the future. The conclusions adopted by the 2<sup>nd</sup> meeting of the Group of the Friends of the Co-Chairs on Liability and Redress in paragraph (a) specify that, inter alia, the draft SP and the draft Guidelines are the basis of rules and procedures on liability and redress in the context of the Cartagena Protocol on Biosafety which has mandated the elaboration of international rules and procedures on this matter.*

*If the Guidelines provide guidance to Parties for their domestic civil liability regimes, all damage resulting from LMOs should be covered, not necessarily limited to damage resulting from the transboundary movement of LMOs. As such, the title of the draft Guidelines should also be modified to reflect this. If the Guidelines are later developed into an internationally binding civil liability regime, this scope can be modified accordingly.*

*Products thereof are referred to in the Cartagena Protocol in Article 20(3)(c) on information sharing and the Biosafety Clearing House in the context of risk assessment, in Annex I on information required in notifications, and in Annex III on risk assessment. This points to the fact that products thereof can cause damage, and liability and redress should apply whenever there is damage associated with LMOs and products thereof. In this regard, references to LMOs should be accompanied by “and products thereof”.*

## Guideline 2 Use of Terms

1. The terms used in Article 2 of the Convention, Article 3 of the Protocol ~~and Article 2 of the Supplementary Protocol~~ apply to these Guidelines except as otherwise defined in paragraph 2 below.

*The relationship between the draft Guidelines and the draft SP must be understood in light of the Bonn understanding and Article 14 of the draft SP. As such, nothing in the draft SP should be understood to obviate any provision in the draft Guidelines. In any case, until Article 2 of the SP is fully agreed, only then can a judgement be made about its merits and whether it can be usefully applied to the Guidelines, as a practical matter.*

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

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

- (v) Damage to the *environment and the* conservation and sustainable use of biological diversity; ~~not redressed under the Supplementary Protocol.~~
- (vi) *Loss of or damage to cultural, social and spiritual values, or other loss or damage to indigenous or local communities, or loss of or reduction of food security.*

*The categories of damage and scope of the categories of damage should be broadened to reflect the definition of damage contained in Appendix II of the report of the 2<sup>nd</sup> meeting of the Group of the Friends of the Co-Chairs on Liability and Redress. These are important areas of damage for developing countries, and the definition of damage in the Guidelines should be as wide as possible to capture any damage that may occur, given that the draft SP has a limited definition of damage.*

*References to the SP, and text that are contingent upon the SP should be deleted. There is no agreement that the Guidelines will only cover damage not covered by the SP. None of the use of terms in the Guidelines are contingent on or related to definitions in the SP.*

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

~~—(c) “Pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the conservation and sustainable use of biological diversity;~~

(d) “Supplementary Protocol” means [Supplementary Protocol on [Liability and Redress for] Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety].

*Relevant text from section III B on ‘Valuation of damage’ from Appendix II of the report of the 2<sup>nd</sup> meeting of the Group of the Friends of the Co-Chairs on Liability and Redress, in particular 1 (b), (c), (d), 2, 3 (i) and (ii) should be included as further clarification on the valuation on damage provides necessary guidance particularly for developing countries.*

*Further definitions may also be necessary as the draft Guidelines evolve. Guideline 3*

#### **Scope**

1. These Guidelines apply to damage resulting from transport, transit, handling and use of living modified organisms {and products thereof} ~~provided that these [living modified organisms][activities] find their origin in a transboundary movement.~~ The living modified organisms referred to are those:

- (a) Intended for direct use as food or feed, or for processing;
- (b) Destined for contained use;
- (c) Intended for intentional introduction into the environment.

2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any authorized or *unauthorized* use of the living modified organisms {and products thereof} referred to in paragraph 1 above.

3. These Guidelines also apply to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.

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

*Products thereof are referred to in the Cartagena Protocol in Article 20(3)(c) on information sharing and the Biosafety Clearing House in the context of risk assessment, in Annex I on information required in notifications, and in Annex III on risk assessment. This points to the fact that products*

*thereof can cause damage, and liability and redress should apply whenever there is damage associated with LMOs and products thereof.*

*If the Guidelines provide guidance to Parties for their domestic civil liability regimes, all damage resulting from LMOs and products thereof should be covered, not necessarily limited to damage resulting from the transboundary movement of LMOs and products thereof. If the Guidelines are later developed into an internationally binding civil liability regime, this scope can be modified accordingly.*

*An intentional transboundary movement i.e. which has been approved by a country of import, may still contain unauthorized LMOs, hence the scope of the Guidelines should cover both authorized and unauthorized use of LMOs and products thereof.*

*As specified in Article 24 of the Cartagena Protocol, transboundary movements of LMOs between Parties and non-Parties shall be consistent with the objective of the Protocol. Furthermore, Parties to the Convention on Biological Diversity that are not Parties to the Cartagena Protocol are still bound by the Convention's relevant provisions, including Article 8(g) and Article 19(4), which address LMOs. All this points to the necessity to include transboundary movements of LMOs and products thereof from non-Parties within the scope of the Guidelines. At the national level, LMOs should be regulated regardless of their origin. The bulk of LMOs and products thereof originate from countries which are not Parties to the Cartagena Protocol.*

#### **Guideline 4**

##### **Liability**

1. The standard of liability should be strict ~~where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous.~~
2. Liability should be channelled to the **operator**.
3. **Where** two or more operators have caused the damage, their liability should be joint and several.
4. The right of recourse or indemnity that an operator may have against another person should not be limited or restricted.

*Strict liability is the appropriate standard of liability for LMOs and products thereof, in accordance with the Precautionary Principle that underpins both the Cartagena Protocol and the Convention on Biological Diversity.*

*Damage may occur even if no risk assessment has been conducted e.g. in cases where there is unintentional or illegal release of experimental LMOs or products thereof that have yet to undergo a risk assessment or in cases where no risk assessment was conducted but release occurred due to human error such as in the Bt 11 case where Bt 11 was mixed up with Bt 10 which had been approved in some countries.*

*Damage may occur even if a risk assessment does not identify a LMO or product thereof as 'hazardous', given the dynamic state of current scientific knowledge on LMOs and products thereof and the uncertainty and gaps in knowledge that exist.*

*Liability and redress should therefore apply whenever there is damage; this should not be qualified.*

*The operator should be defined to include any person in direct or indirect control of the activity at the time of the incident causing damage resulting from LMOs or products thereof, or any person in direct or indirect control the LMO or product thereof at the time that the condition giving rise to the damage arose, and could include the permit holder, person who placed the LMO or product thereof on the market, developer, producer, notifier, exporter, importer, carrier or supplier.*

### Guideline 5

#### Exemptions or mitigation

Parties ~~should~~ *may* consider the application of exemptions *or mitigation* from liability, in particular:

- (a) Act of God or *force majeure of an exceptional, inevitable and uncontrollable nature*;
- (b) Act of war or civil unrest, *except in the case of the hostile use of LMOs*.

*If a country allows for exemptions or mitigation from liability on the basis of (a), this should only be allowed in the case where the operator proves that the damage was caused by natural phenomena of an exceptional, inevitable and uncontrollable nature.*

*If a country allows for exemptions or mitigation from liability on the basis of (b), this should not be allowed to exempt or mitigate the operator from liability for damage in the case of deliberate use of LMOs in an act of war or civil unrest.*

### Guideline 6

#### Time Limits

Parties ~~should~~ *may* consider the application of relative and/or absolute time limits, including the commencement of the period *and the life cycle of the LMO* to which a time limit applies.

*The consideration of the life cycle of different LMOs must be taken into account in cases where there is an application of time limits, as some LMOs (e.g. transgenic trees) have extremely long life cycles and it may take decades before damage is known to have been caused by it.*

### Guideline 7

#### Financial Limits

*Parties should consider the application of minimum financial limits.* Parties ~~should~~ *may* consider the application of *maximum* financial limits .

*Minimum financial limits are necessary to attempt to ensure that the damage is sufficiently redressed and that the burden is not passed on to the public or the authorities. Maximum financial limits should be large enough to attempt to ensure that the damage is sufficiently redressed and that the burden is not passed on to the public or the authorities.*

### Guideline 8

#### Financial Security

1. {Parties *should* ~~may~~, consistent with international ~~law~~ ~~obligations~~,} require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.}
2. {Parties are urged to take measures to encourage the development of financial security instruments and markets 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.}

*Given that the operator may be unable to meet his or her liability, financial security should be required. A minimum of amount of financial security should be determined.*



### **Guideline 9 Claims for Compensation**

1. Any person or group of persons, including public authorities, should be entitled to claim compensation for ~~loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage resulting from the transboundary movement of living modified organisms~~ **and products thereof** in addition to, where appropriate, the reimbursement of the costs of response measures.
2. ~~Parties may allow claims for compensation of damage to the conservation and sustainable use of biological diversity.~~

***Claims for liability and redress by any persons should be allowed for all types of damage; this should not be qualified.***

***If the Guidelines provide guidance to Parties for their domestic civil liability regimes, all damage resulting from LMOs and products thereof should be covered, not necessarily limited to damage resulting from the transboundary movement of LMOs and products thereof. If the Guidelines are later developed into an internationally binding civil liability regime, this scope can be modified accordingly.***

***Products thereof are referred to in the Cartagena Protocol in Article 20(3)(c) on information sharing and the Biosafety Clearing House in the context of risk assessment, in Annex I on information required in notifications, and in Annex III on risk assessment. This points to the fact that products thereof can cause damage, and liability and redress should apply whenever there is damage associated with LMOs and products thereof.***

### **Guideline 10 Settlement of Claims**

1. Parties should provide for civil law procedures to settle claims for compensation of damage.
2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

### **Guideline 11 Access to Information**

Any person or group of persons ~~sustaining~~ **claiming compensation for** damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent authority in possession of such information, ~~unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties.~~

***Any information directly relevant to the claim for compensation of damage must be made available to any person or group of persons claiming compensation for damage. This is in order to ensure that the victims are enabled to seek full redress for the damage.***

**Further additions:**

*In addition, the text from Section IV A 2 on the provision of interim relief from Appendix II of the report of the 2<sup>nd</sup> meeting of the Group of the Friends of the Co-Chairs on Liability and Redress should be included: “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”. This is to ensure that the damage or the threat of damage does not continue or perpetuate.*

*Additional and supplementary compensation measures should also be included, in the event that cases of damage are not redressed through the primary compensation scheme.*

WASHINGTON BIOTECHNOLOGY ACTION  
COUNCIL/ 49<sup>TH</sup> PARALLEL BIOTECHNOLOGY  
CONSORTIUM

[31 MAY 2010]  
[SUBMISSION: ENGLISH]

### COMMENTS ON CIVIL PROCEDURE GUIDELINES

1. The necessity for this document would seem to depend upon whether there is a civil liability provision in Article 13 of the Supplementary Protocol; if there is, the rationale for this document may be reduced, although some elaboration outside the formal SP text may be appropriate.
2. The main text of the Supplementary Protocol focuses on administrative remedies—how the state can regulate and intervene to protect biodiversity, etc. While it is far from perfect, a major problem is that many States, especially developing ones, do not have the capacity for technically sophisticated public administration, and often experience widespread corruption. For these and other reason, countries from the South have always been interested in a *civil liability regime*, whereby those individuals suffering the damages could sue for redress.

Of course, every State is competent to create such a regime whenever it likes; it doesn't need an international treaty to do so. But a resort to domestic law nullifies the purposes of having a SP; countries with the greatest biodiversity are politically and economically often among the weakest nations. The same could be said, of course, of the need for the Protocol itself. In any event, by standing together within a SP, these less developed nations gain a measure of strength to protect against damages and to obtain redress. Thus a strong civil liability provision in the SP is the just and equitable approach, and these Guidelines then would be elaboration (not replacement).

3. The text of Article 27 was itself a compromise. Going into the Bonn meeting the text of the SP had brackets, and Bonn may be said to have produced a second compromise, but many Parties—and our organizations—understood that there was a commitment to “work towards a binding provision on civil liability,” i.e., to develop and **adopt** a civil liability regime. Thus, our organizations **support the African reservation to the current text for the civil liability article of the SP.**
4. With these considerations in mind, these are some of our reactions to the current draft of the guidelines:

- Objective (1)—this is dependent upon the actual purpose of these "Guidelines" as noted above. How will they help to protect the weak (and biodiverse) nations? This provision refers to "domestic rules and procedures on civil liability"--how does this mesh with Guideline 10's reference to "civil law procedures" (which is an ambiguous term, especially in "common law" countries where it can have at least 2 meanings)?
- Use of Terms (2) Why does this text use "personal injury" rather than "health"? The common meaning of the former term only covers damages from a discrete insult, while the latter would include long-term exposures, etc. Thus it is far too narrow and should be replaced by **"health."**
- Scope (3) In paragraph 2, there is a limitation to "authorized" uses, which is too narrow and should be eliminated. The largest share of damages to date (amounting, we should recall, to billions of US dollars) are from **unauthorized uses** (e.g., Starlink maize, LL rice, etc)
- The discussion of liability (4) refers only to "strict liability", but civil liability procedures in most nations cover negligence as well. **Both** forms must be included in the SP and its subsidiary documents; however, if liability is "strict" it will include liability where the person has acted negligently. Strict liability must not be limited to only certain scenarios, since in terms of the usual tort criteria about the parties to the incident—superior knowledge of the hazard, ability to control the hazard, ability to spread the loss through insurance and other financial measures, and the crudely named "deep pocket," etc—all point to making the operator bear the loss rather than the victim. We oppose any interpretation of this section where strict liability would be limited to only rare circumstances.
- In item #1, what is meant by "hazardous"? What about liability for all the damages from a GMO that receives a probabilistic assessment, that is, the LMO that has a known (or unknown) risk? This is a far more common scenario---i.e., if so-and-so occurs, the GMO might cause damage. See the report of the AHTEG which will be submitted to the MOP in Nagoya and has been posted by the Secretariat:  
<http://bch.cbd.int/protocol/meetings/documents.shtml?eventid=3409>  
We must **cover damages which occur in fact**, even if the LMO was considered "non-hazardous." Liability and redress pertain to actual real-world events, not paper assessments made in advance, no matter how "expert" the assessors; experience has shown too many times that assessments fail to foresee real accident scenarios.
- Financial security (8). The reference to "other international obligations" is superfluous, since this always applies. We do not believe that there are any relevant international rules anyway, since the closest—the WTO's Technical barriers to Trade (TBT), would seem to have allowed insurance and other financial security for many years now. This is common current practice as regards all sorts of items moving across international borders; why should this document raise a non-necessary warning flag for LMOs?
- Claims (9). In paragraph #1, we should **substitute "health" for "personal injury"**. In #2, the "may" is better replaced by "should".
- Settlement of Claims (10). See our discussion of terminology under "Objective," above.

- Access to Information (11). The last phrase is an open-ended invitation for industry to use claims of “confidential business information” to block oversight, and should be eliminated. The many incidents of damages which have already occurred to date show that oversight (including **full transparency to both governmental agencies and to the public**) are necessary to secure redress.

-----