



Convention on Biological Diversity

Distr.
GENERAL

UNEP/CBD/BS/WG-
L&R/5/2/Rev.1
8 February 2008

ORIGINAL: ENGLISH

OPEN-ENDED AD HOC WORKING GROUP OF LEGAL
AND TECHNICAL EXPERTS ON LIABILITY AND
REDRESS IN THE CONTEXT OF THE CARTAGENA
PROTOCOL ON BIOSAFETY

Fifth meeting

Cartagena, 12-19 March 2008

Item 4 of the provisional agenda

**REVISED WORKING DRAFT OF PROPOSED OPERATIONAL TEXTS ON APPROACHES
AND OPTIONS IDENTIFIED PERTAINING TO LIABILITY AND REDRESS IN THE
CONTEXT OF ARTICLE 27 OF BIOSAFETY PROTOCOL**

Note by the Co-Chairs

I. INTRODUCTION

1. The Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (hereinafter, “the Working Group”) was established by decision BS-I/8 of the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. The Working Group has held four meetings so far.
2. The fourth meeting of the Working Group was held in Montreal, from 22 to 26 October 2007. During the meeting, experts addressed most sections of the working document prepared by the Co-Chairs. They, however, focused primarily on streamlining options and approaches for operational texts related to possible approaches to liability and redress, damage, and administrative approaches and civil liability, i.e. sections I, III and IV, respectively of the synthesis of proposed operational texts on approaches and options identified pertaining to liability and redress in the context of Article 27 of the Biosafety Protocol (UNEP/CBD/BS/WG-L&R/4/2). The operational texts related to scope and the supplementary compensation scheme, i.e. sections II and V were also considered and revised.
3. The Working Group also considered the blueprint for a decision by the Conference of the Parties serving as the meeting of the Parties to the Protocol on international rules and procedures in the field of liability and redress which was revised in accordance with the changes made to the sections addressed by the Working Group. Experts agreed to keep the revised blueprint as an annex to the report of their meeting for subsequent reference. The blueprint is reproduced and annexed to this document for ease of reference.
4. In its conclusions, the fourth meeting of the Working Group has, among other things, requested the Co-Chairs to streamline the proposed operational texts in sections IV.4 (a), VI and VII of the working document (annex II to the report of the meeting (UNEP/CBD/BS/WG-L&R/4/3)), during the inter-sessional period, by grouping and editing them without altering the substance, and to produce a revised working draft for consideration at its fifth meeting.

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5. Accordingly, the Co-Chairs streamlined the proposed operational texts contained in the sections referred to in the paragraph above and prepared the following working draft for consideration by the Working Group at its present meeting, which is also the last meeting mandated by decision BS-I/8.

II. PROPOSED OPERATIONAL TEXTS ON APPROACHES AND OPTIONS IDENTIFIED PERTAINING TO LIABILITY AND REDRESS IN THE CONTEXT OF ARTICLE 27 OF THE BIOSAFETY PROTOCOL

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

Operational text

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.

Preambular text

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.

II. SCOPE

A. *Functional scope*

Option 1: Broad scope

Operational text 1

These rules and procedures shall apply to damage resulting from the transport, transit, handling and/or use of living modified organisms and products thereof resulting from transboundary movements of living modified organisms and products thereof, including unintentional and illegal transboundary movements of living modified organisms and products thereof, or in the case of preventive measures, is threatened to be so caused.

Operational text 2

These rules and procedures shall apply to any damage resulting from an intentional, unintentional or illegal transboundary movement, from the point where the living modified organism leaves an area which is under the national jurisdiction of one Party to the Protocol, through to the point where the living modified organism enters an area which is under the national jurisdiction of a Party to the Protocol for its use within that Party's jurisdiction.

Operational text 3

1. These rules and procedures apply to shipments, transit, handling and use of living modified organisms (LMOs), provided that these activities find their origin in a transboundary movement.
2. With respect to intentional transboundary movements, these rules and procedures apply to damage resulting from any authorized use of the LMO listed in paragraph 3, as well as to any use in violation of such authorization (i.e. illegal uses).
3. These rules and procedures apply to LMOs that are:
 - (a) Intended for direct use as food and feed or for processing;
 - (b) Destined for contained use;
 - (c) Intended for intentional introduction into the environment.

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

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

Operational text 4

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

2. With respect to intentional transboundary movements, these rules and procedures apply to damage resulting from any authorized use of the LMO, as well as any use in violation of such authorization.

3. These rules and procedures also apply to unintentional transboundary movements and transboundary movements in contravention of domestic measures to implement the Protocol.

Option 2: Narrow scope

Operational text 5

The liability regime covers damage resulting from transboundary movement of LMOs.

Operational text 6

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

1. “Biological diversity” is defined in Article 2 of the Convention on Biological Diversity.

2. “Transboundary movement” means the intentional movement of LMOs from the territory of a Party to the Protocol to the territory of another Party to the Protocol.

3. “Resulting from” means that the damage was:

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

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

Operational text 7

1. These rules and procedures shall apply to damage to biodiversity resulting from the transboundary movement of Living Modified Organisms (LMOs).

2. These rules and procedures do not apply to cases of personal injury, to damage to private property or to economic loss, and does not affect any right or obligation under existing civil liability systems regarding these types of damages.

3. These rules and procedures shall only apply to damage to biodiversity, where it is possible to establish a causal link between the damage, the genetic modification and the activities or omissions of the operator(s).

4. In the context of these rules and procedures ‘LMO’ means living modified organism as defined in the Cartagena Protocol on Biosafety.

Operational text 8

These rules and procedures should apply to damage resulting from transboundary movements of living modified organisms.

B. Geographical scope

Option 1: Damage in Parties

Operational text 1

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

Operational text 2

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

Operational text 3

Damage that is caused within the limits of national jurisdiction or control of Parties.

Option 2: Damage in Parties and areas beyond national jurisdiction

Operational text 4

These rules and procedures shall apply only to damage suffered in an area under the national jurisdiction of a Contracting Party or in areas beyond any national jurisdiction arising from an incident referred under [sub article X of this Article].

Operational text 5

1. These rules and procedures apply to:

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

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

2. These rules and procedures do not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to jurisdiction.

Operational text 6

1. The following definition is used for the purpose of this document: area within the limits of national jurisdiction: Territory and Exclusive Economic Zone within the limits of jurisdiction of a State Party and any other over which said State Party has sovereignty or exclusive jurisdiction under international legislation.

2. These rules and procedures will apply to damage suffered in areas within the jurisdiction or control of a State Party to the Cartagena Protocol on Biosafety and in areas beyond their jurisdiction that are recognized as international areas.

3. The provisions of these rules and procedures do not apply to damage suffered within the territorial limits of non-Parties to the Cartagena Protocol.

Option 3: Damage in Parties, non-Parties and areas beyond national jurisdiction

Operational text 7

1. 'Area under national jurisdiction' shall mean the territory of a Contracting Party and any other areas over which the Contracting Party has sovereignty or jurisdiction according to international law.

2. These rules and procedures shall apply to any damage described by [paragraph (a)] wherever suffered including in areas

- (a) Within limits of national jurisdiction or control of Contracting Parties;
- (b) Within the limits of national jurisdiction or control of non-Contracting Parties; or
- (c) Beyond the limits of national jurisdiction or control of States.

3. Nothing in these rules and procedures shall affect in any way the sovereignty of States over their territorial seas and their jurisdiction and the right in their respective exclusive economic zones and continental shelves in accordance with international law.

C. <i>Limitation in time</i>

Operational text 1

Unless a different intention appears from these rules and procedures, or is otherwise established, the provisions of these rules and procedures do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the rules and procedures with respect to that Contracting Party.

Operational text 2

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

Operational text 3

There should be a five (5) year time limit between the transboundary movement which causes damage and the commencement of a process to establish liability in respect of that damage.

Operational text 4

These rules and procedures apply to damage resulting from a transboundary movement of LMOs that started after the entry into force of these rules and procedures.

Operational text 5

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

Operational text 6

These rules and procedures shall apply only to damage to biodiversity resulting from transboundary movements that occur following entry into force of these rules and procedures.

D. <i>Limitation to the authorization at the time of the import of the LMOs</i>
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Operational text 1

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

Operational text 2

Damage shall only relate to activities that have been authorized in accordance with terms of the Biosafety Protocol.

Operational text 3

Activities taken in accordance with the provisions of the Protocol or activities taken pursuant to a permit issued by an appropriate authorized official are outside the scope of these rules and procedures.

Operational text 4

These rules and procedures shall apply to all damage resulting from the transboundary movement of a living modified organism and any different or subsequent use of the living modified organism or any characteristics and/or traits of or derived from the living modified organism.

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

Operational text 1

1. Whenever a transboundary movement is effected by transport:

(a) When the State of export is a Contracting Party to these rules and procedures, these rules and procedures shall apply with respect to damage arising from an occurrence which takes place from the point where the living modified organisms are loaded on the means of transport in an area under the national jurisdiction of the State of export.

(b) When the State of import, but not the State of export, is a Contracting Party to these rules and procedures, these rules and procedures shall apply with respect to damage arising from an occurrence which takes place after the time at which the importer has taken possession of the living modified organism.

2. In any other case, these rules and procedures shall apply when there is a movement of a Living Modified Organism from within an area under national jurisdiction of a Contracting Party to an area outside its national jurisdiction.

Operational text 2

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

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

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

Operational text 3

1. An intentional transboundary movement of an LMO starts at the point at which the LMO leaves the national jurisdiction of the Party of export (classification required for air/sea/terrestrial) and stops at the point at which responsibility for the carriage of the LMO transfers to the importing State.

2. An unintentional transboundary movement starts at the point at which the LMO leaves the national jurisdiction of a Party of export and stops at the point at which it enters the jurisdiction of another State.

Operational text 4

For the purposes of these rules and procedures, a transboundary movement starts from the following points:

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

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

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

Operational text 5

A transboundary movement commences when the LMO leaves the territorial jurisdiction of a State (to be clarified for different forms of transport), and ends when the LMO enters the jurisdiction of the other State.

Operational text 6

The rules and procedures should cover “transboundary movement” defined in Article 3(k) of the Protocol as “the movement of a living modified organism from one Party to another Party”.

<i>F. Non-parties</i>

Operational text 1

These rules and procedures in the field of liability and redress in relation to LMOs shall not apply when neither the state of export nor the state of import is a contracting party.

Operational text 2

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

Operational text 3

These rules and procedures apply to "transboundary movements" of LMOs, as defined in Article 3k of the Biosafety Protocol.

III. DAMAGE

A. *Definition of damage*

Option 1

Operational text 1

1. Damage covered under the rules and procedures is /restricted to/ measurable loss or damage caused by the transboundary movements of living modified organisms that has adverse and significant impact upon the conservation and sustainable use of biological diversity, taking into account the definitions of “sustainable use” and “biological diversity” in Article 2 of the Convention on Biological Diversity and includes the costs of response measures.

2. To constitute damage to the conservation and sustainable use of biological diversity, there must be a change to the conservation and sustainable use of biological diversity that is adverse, significant and measurable, within a timescale meaningful in the particular context, from a baseline established by a competent national authority that takes into account natural variation and human-induced variation.

Operational text 2

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

Option 2

Operational text 3

These rules and procedures cover damage to conservation and sustainable use of biological diversity and to human health as follows:

(a) Damage to the conservation of biological diversity means any measurable significant change in the quantity or quality of organisms within species, of species as such or ecosystems.

(b) Damage to the sustainable use of biological diversity means any quantitative or qualitative reduction of the component of biological diversity which negatively affect the continued use of those components in a sustainable way and thereby leads to economic loss, loss of, damage to, or impaired use of property, loss of income, disruption of the traditional way of life in a community or hinders, impedes or limits exercising of the right of common.

(c) Damage to human health, including loss of life, personal injury, impairment of health, loss of income and public health measures.

Operational text 4

1. “Damage” includes/means:

(a) Damage to human health including:

(i) Loss of life or personal injury or disease together with medical costs including costs of diagnosis and treatment and associated costs;

(ii) Impairment of health;

(iii) Loss of income;

- (iv) Public health measures;
- (b) Damage to or impaired use of or loss of property;
- (c) Loss of income /directly/derived from an economic interest in any use of the environment/biological diversity, incurred as result of impairment of the environment/biological diversity/ taking into account savings and costs;
- (d) Loss of income, loss of or damage to cultural, social and spiritual values, loss of or reduction of food security, damage to agricultural biodiversity, loss of competitiveness or other economic loss or other loss or damage to indigenous or local communities.
- (e) Damage to the environment, including:
 - (i) The costs of reasonable measures of reinstatement or remediation of the impaired environment/biological diversity, /where possible/, measured by the costs of measures actually taken or to be undertaken, including introduction of original components;
 - (ii) Where reinstatement or remediation to the original state is not possible, the value of the impairment of the environment, taking into account any impact on the environment, and the introduction of equivalent components at the same location, for the same use, or on another location for other types of use, and
 - (iii) The costs of response measures, including any loss or damage caused by such measures; and
 - (iv) The costs of preventive measures, including any loss or damage caused by such measures;
 - (v) The costs of any interim measures; and
 - (vi) Any other damage to or impairment of the environment, taking into account any impact on the environment;

provided that the damage was caused directly or indirectly by living modified organisms during or following a transboundary movement of the living modified organisms, or in the case of preventive measures, is threatened to be so caused.

2. “Impaired” in relation to the environment shall include any adverse effects on the environment;
3. “Measures of reinstatement” means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment/biological diversity/ domestic law may indicate who will be entitled to take such measures;
- 3bis. “Preventive measures” means any reasonable measures taken by any person, in response to an incident, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up.
4. “Compensation” shall include compensation for damage, restoration and remediation and other amounts payable under this Protocol.
5. “Environment” includes all natural resources, including (i) air, water, soil, fauna and flora, and the interaction between the same factors, (ii) ecosystems and their constituent parts, (iii) biological diversity, (iv) amenity values, (v) indigenous or cultural heritage, and (vi) social, economic, aesthetic, and cultural conditions which are affected by the matters stated in paragraphs (i) to (v) of this definition.
6. “Biological diversity” means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

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

8. A “centre of origin” means a geographical area where a species first developed its distinctive properties.

9. “Centre of diversity” means a geographic area containing a high level of genetic diversity for species in *in situ* conditions.

Operational text 5

1. For the purpose of these rules and procedures, damage to the conservation of biological diversity as defined in Article 2 of the Convention on Biological Diversity, means an adverse or negative effect on biological diversity that:

- (a) Is a result of human activities involving LMOs; and
- (b) Relates in particular to species and habitats protected under national, regional or international law; and
- (c) Is measurable or otherwise observable taking into account, wherever available, baseline conditions/ scientifically/ established/ by a competent national authority that takes into account natural variation and human induced variation; and
- (d) Is significant or serious as set out in paragraph 3 below.

2. For the purposes of these rules and procedures, damage to the sustainable use (as defined in Article 2 of the Convention on Biological Diversity) of biological diversity means an adverse or negative effect on biological diversity that:

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

2bis. Damage to conservation and sustainable use of biological diversity also includes any socio-economic considerations consistent with Article 26 of the Protocol.

3. A “significant or serious” adverse or negative effect on the conservation and sustainable use of biological diversity as defined in Article 2 of the Convention on Biological Diversity is to be determined on the basis of factors, such as:

- (a) The long term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonably short/reasonable period of time/ within a time scale meaningful in the particular context; and/or
- (b) A qualitative or quantitative reduction of components of biodiversity and their potential to provide goods and services.

<p>B. Valuation of damage to conservation of biological diversity/environment</p>
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Operational text 1

1. In the valuation /on a case by case basis/ of the damage /harm to the environment/ conservation and sustainable use of biological diversity/or biological diversity/conservation of biological diversity the following, amongst other matters, shall be taken into account/ for compensation:

(a) Costs of reasonable measures of restoration/ reinstatement, remediation /rehabilitation or clean-up of the impaired environment/conservation and sustainable use of biological diversity /or biological diversity, where possible, measured by the costs of measures actually taken or to be undertaken, including introduction of original components;

(b) Where reinstatement or remediation to the original state is not possible, the value of the impairment of the environment/ conservation and sustainable use of biological diversity/ or biological diversity, taking into account any impact on the environment/conservation and sustainable use of biological diversity/ or biological diversity, and the introduction of equivalent components at the same location, for the same use, or on another location for other types of use;

(c) Costs of response measures eventually undertaken or to be undertaken, including any loss or damage caused by such measures. For the purpose of these rules and procedures, response measures are actions to minimize, contain or remedy damage, as appropriate.

(d) Costs of preventive measures/ where applicable, including any loss or damage caused by such measures;

(e) A monetary value for the loss during the period when the damage/harm occurs and the environment/conservation and sustainable use of biological diversity/ or biological diversity is restored as required in (a) and (b);

(f) A monetary value representing the difference in the value of the environment/ conservation and sustainable use of biological diversity/ or biological diversity as reinstated under (a) or (b), and the value of the environment/ conservation and sustainable use of biological diversity/ or biological diversity in its undamaged or impaired state; and

(g) Any other matters not referred to in (a) – (f).

(i) Exchange value (relative price in the market);

(ii) Utility (the use value, which can be very different from the market price);

(iii) Importance (appreciation or emotional value attached);

(iv) The complexity of the biological system.

2. (a) Any monetary damages recoverable in respect of the restoration of the environment shall, wherever possible, be applied for that purpose and aimed at returning the environment to its baseline condition.

(b) Where baseline conditions cannot be restored, alternative mechanisms for evaluating further monetary conditions may be considered, including market valuation or value of replacement services.

Operational text 2

Damage to conservation of biological diversity shall be valued on the cost of restoration only.

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

Operational text 1

If any damage is caused to centres of origin or centres of genetic diversity, then and without prejudice to any rights or obligations hereinbefore stated:

(a) Additional monetary damage shall be payable representing the cost of the investment in the centres;

(b) Any other monetary damage shall be payable representing the unique value of the centres;

(c) Any other measures may be required to be taken, taking into account the unique value of the centres.

Operational text 2

Any competent Court or Tribunal shall pay particular regard to any relevant centre of origin or centre of genetic diversity.

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

Operational text 1

1. In the case of harm to human health, compensation shall include:

(a) All costs and expenses incurred in seeking and obtaining the necessary and appropriate medical treatment;

(b) Compensation for any disability suffered, for diminished quality of life, and for all costs and expenses incurred in reinstating, as far as possible, the quality of life enjoyed by the person before the harm was suffered;

(c) Compensation for loss of life and all costs and expenses incurred and other related expenses;

2. Liability shall also extend to harm or damage caused directly or indirectly by the LMO or its product to:

(a) The livelihood or indigenous knowledge systems of local communities,

(b) Technologies of a community or communities,

(c) Damage or destruction arising from incidence of public disorder triggered by the LMO or its product,

(d) Disruption or damage to production or agricultural systems,

(e) Reduction in yields,

(f) Soil contamination,

(g) Damage to the biological diversity,

(h) Damage to the economy of an area or community, and

any other consequential economic, social or cultural damages.

Operational text 2

Compensation for damage shall cover the costs of the necessary measures taken or to be taken to assess, reduce or repair the damage, and any loss of or damage to property and loss of income.

E. Causation

Option 1 – Burden of proof lies on the claimant

Operational text 1

If the rules and procedures adopted under Article 27 are to be applied as an international regime, whether through national courts or an international entity: common test for causation based on principle that it should be established that the affected entity/individual would not have suffered the damage but for the actions of the entity/individual that is purported to be responsible for the damage.

Operational text 2

The entity/claimant seeking redress for a claim of damage/to biological diversity bears the burden of demonstrating all of the following:

(a) Proximate causation between the transboundary movement of an LMO and claimed damage;

(b) A direct causal link between an act or omission on the part of the persons involved with the transboundary movement and the claimed damage.

OR

(a) Proximate causation between the transboundary movement of an LMO and claimed damage;

(b) A direct causal link between an act or omission on the part of the persons involved with the transboundary movement and the claimed damage.

(c) That the parties alleged to have caused the harm acted wrongfully, intentionally, recklessly, or otherwise committed negligent or grossly negligent acts or omissions, (i.e., violated the accepted standard of care).

Option 2 – Burden of proof lies on the respondent

Operational text 3

1. Causation could be considered at international or national levels.

2. Any adverse effects that may have resulted from the introduction of a living modified organism that finds its origin in a transboundary movement shall be sufficient in the establishment of a causal link

3. There shall be a presumption that the operator is liable for harm or damage caused by living modified organisms which finds its origin in transboundary movement. Therefore the burden of proof for any damages reasonably resulting from transboundary movement of living modified organisms, shall be shifted to the operator.

Operational text 4

1. When considering evidence of the causal link between the LMO or the activity in relation to the LMO and the damage/adverse effect, due account shall be taken of the increased danger of causing such damage/adverse effect inherent in the LMO or the activity.

OR

1. To establish the causal link between the LMO or the activity in relation to the LMO and the damage, it shall be shown that the LMO or the activity in relation to the LMO materially increased the risk of danger of causing the damage/producing the adverse effect.

2. The effect referred to in (1) may be direct or indirect, temporary or permanent, chronic or acute, past, present or future, cumulative, arises over a period of time or is continuing. ^{1/}

3. Upon proof of the damage/adverse effect and the presence of the LMO by the legal person or entity making the claim, the evidentiary burden of disproving the causal link shall be on the person or entity alleged to have caused the damage/adverse effect.

^{1/} The Sub-Working Group feels that this paragraph does not belong to the section on causation. This also applies to operational texts 11.1 to 11.3 of section III.E of document UNEP/CBD/BS/WG-L&R/4/2: (1) “Effect” includes (a) any direct or indirect effect, (b) any temporary or permanent effect, (c) any chronic or acute effect, (d) any past, present, or future effect; and (e) any cumulative effect which arises over time or in combination with other effects; (2) “Occurrence” means any occurrence or incident, or series of occurrences or incidents having the same origin, that causes damage or creates a serious threat of damage; and includes any act, omission, event or circumstance, foreseen or unforeseen, resulting from or following any transboundary movement of any living modified organism; (3) Damage shall include direct or indirect damage.

4. There shall be presumption that:

(a) The living modified organism which was the subject of a transboundary movement caused the damage where there is a reasonable possibility that it could have done so; and

(b) That any damage caused by a living modified organism which was the subject of a transboundary movement was the result of its biotechnology-induced characteristics.

5. To rebut the presumption, a person must prove to the standard required by the procedural law applied that the damage was not due to the characteristics of the living modified organism resulting from the genetic modification, or in combination with other hazardous characteristics of the living modified organism.

Option 3 – Where the issue is left to domestic law

Operational text 5

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

Operational text 6

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

Operational text 7

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

IV. PRIMARY COMPENSATION SCHEME

A. Elements of Administrative Approach based on allocation of costs of response measures and restoration measures

1. *Standard of liability and channelling of liability*

1. Obligation imposed by national law on the operator to inform competent authorities of the occurrence of damage to the conservation and sustainable use of biological diversity

Operational text 1

In the event of damage or imminent threat of damage, an operator shall immediately inform the competent authority of the damage.

Operational text 2

Where there occurs or is a likelihood of damage to the conservation of biological diversity as a result of the transboundary movement of an LMO, the operator shall, as soon as possible, notify the competent authority.

Operational text 3

The Parties should endeavor to require the operator to inform the competent authority of an accident which causes or threatens to cause significant adverse damage to the conservation and sustainable use of biological diversity.

2. Obligation imposed by national law on the operator to take response and restoration measures to address such damage

Operational text 4

In the event of damage, an operator shall in consultation with the competent authority investigate, assess and evaluate the damage caused by the activity on the biological diversity and human health and implement measures including, but not limited to:

- (a) Cease, modify or control any act, activity or process causing the damage;
- (b) Minimize, contain or prevent the movement of any living modified organisms causing the damage in the event that an activity cannot reasonably be avoided or stopped;
- (c) Eliminate any source of the damage; or
- (d) Remedy the effects of the damage caused by the activity.

Operational text 5

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

Operational text 6

1. The operator shall take reasonable measures of reinstatement in case damage resulting from transport, handling and/or use of living modified organisms occurs.

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

Operational text 7

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

Operational text 8

1. Where there occurs or is a likelihood of damage to the conservation of biological diversity as a result of the transboundary movement of an LMO, the operator shall, as soon as possible, take all reasonable measures consistent with the conservation of biodiversity to reduce or mitigate any threat of a significant adverse effect on the conservation of biological diversity or to remedy any such significant adverse effect.

2. Measures to remedy damage shall comprise assessment, reinstatement or restoration through the introduction of original components of biological diversity, or, if this is not possible, introduction of equivalent components on the same location, for the same use, or in another location for other types of use. The competent authority may at any time review remedial actions proposed or taken, and order other actions as appropriate.

Operational text 9

Subject to any requirement of domestic law, any operator shall take all reasonable measures to mitigate, restore, or reinstate damage arising from the occurrence in order:

- (a) To ensure prompt and adequate compensation to victims of damage; and/or
- (b) To preserve and protect the environment.

Operational text 10

Operators shall ensure that appropriate measures are taken to avoid an adverse impact on the biological diversity and human health which may arise from the transboundary movement of living modified organisms.

Operational text 11

The operator shall take reasonable measures to prevent damage resulting from transport, transit, handling and/or use of living modified organisms that finds its origin in such movements.

Operational text 12

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

3. Discretion of States to take response and restoration measures, including when the operator has failed to do so and to recover the costs

Operational text 13

The operator/importer should be required to take all necessary preventive and remedial measures and to bear their costs. Competent authorities should establish which operator/importer has caused the damage (or the imminent threat of damage). They should assess the significance of the damage and determine which remedial measures should be taken. Competent authorities may themselves also take the necessary preventive or remedial measures.

Operational text 14

1. Where the operator fails to take or inadequately implements the measures required, the competent authority of the State in which the damage occurs may take those measures, cause them to be taken or direct the operator to take them.
2. The competent authority may recover the costs and expenses of, and incidental to, the taking of any such measures, from the operator.

Operational text 15

1. The competent authority may, at any time:
 - (a) Require the operator to provide information on any imminent threat of damage to biodiversity or in suspected cases of such an imminent threat
 - (b) Require the operator to take the necessary preventative measures;
 - (c) Give instructions to the operator on the necessary preventative measures to be taken; or
 - (d) Itself take the necessary preventative measures.
2. Where damage to the conservation and sustainable use of biodiversity has occurred, the competent authority may, at any time:
 - (a) Require the operator to provide supplementary information on any damage that has occurred;
 - (b) Take, require the operator to take, or give instructions to the operator concerning, all practicable steps to immediately control, contain, remove or otherwise manage the damage factors in order to limit or to prevent further damage to conservation and sustainable use of biodiversity;
 - (c) Require the operator to take the necessary remedial measures; and/or
 - (d) Itself take the necessary preventative measures.

Operational text 16

Each State shall adopt the necessary measures to ensure that the necessary steps are taken to prevent, remedy, restore or reinstate the environment where an operator does not do so, and to recover the costs of doing so from an operator.

Operational text 17

Where damage to the conservation and sustainable use of biodiversity has occurred, the competent authority may, at any time require the operator to take the necessary remedial measures.

4. The term operator needs to be defined

Operational text 18

“Operator” means the developer, producer, notifier, exporter, importer, carrier, or supplier.

Operational text 19

“Operator” means the person responsible for intentional or unintentional transboundary movements of living modified organisms.

Operational text 20

“Operator” means any person or entity which has the control of the LMO at the time of the incident causing damage occurs, owns or has the charge or management of an LMO during its transboundary movement.

Operational text 21

An ‘operator’ includes any person in operational control of a living modified organism at the time of an occurrence.

B. Civil Liability (harmonization of rules and procedures)

1. Standard of liability and channelling of liability

Option 1: Strict liability

Operational text 1

1. The operator shall be liable for damages resulting from transport, transit, handling and/or use of living modified organisms that finds its origin in such movements, regardless of any fault on his part.

2. “Operator” means [person responsible for intentional or unintentional transboundary movements of living modified organisms][any legal or natural person in command or control of the activity at the time the incident causing the damage occurs; or the importer {*any legal or natural person, under the jurisdiction of the Party of import, who arranges for a living modified organism to be imported* }][any legal or natural person in operational control of the living modified organisms at the time of the incident causing the damage occurs, during its transboundary movement].

Operational text 2

1. ‘Notifier’ means the person who notifies the competent national authority of the Party of import prior to the intentional transboundary movement of a living modified organism that falls within the scope of Article 7, paragraph 1 of the Cartagena Protocol.

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

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

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

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

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

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

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

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

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

3. Without prejudice to *paragraph 2 above*, any person shall be liable for damage caused or contributed to by that person's lack of compliance with the provisions implementing the Convention or the Protocol or by that person's wrongful intentional, reckless or negligent acts or omissions.

Option 2: Mitigated strict liability

Operational text 3

1. A fault-based standard of liability [shall][should] be used except a strict liability standard shall be used in cases where a risk-assessment has identified an LMO as ultra-hazardous.

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

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

Operational text 4

Operators shall be held strictly liable for damage to biodiversity that results from acts or omissions in violation of national law or in violation of the written conditions of any approval.

Option 3: Fault-based liability

Operational text 5

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

- (a) Has operational control of the relevant activity;
- (b) Has breached a legal duty of care through intentional, reckless or negligent conduct, including acts or omissions;
- (c) Such breach has resulted in actual damage to biodiversity; and
- (d) Causation is established in accordance with section [] of these rules.

2. The provision of interim relief ^{2/}

Operational text 1

Interim relief may be granted by a competent court only in the case of an imminent, significant and likely irreversible damage to biodiversity. The defendant's costs and losses shall be paid by the claimant in any case where interim relief is granted but liability is not established subsequently in the case.

Operational text 2

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 threatened damage.

Abis and Bbis. Additional Elements of an Administrative Approach and/or Civil Liability

1. Exemptions to or mitigation of strict liability

Option 1: Exemptions to strict liability

Operational text 1 ^{3/}

Alternative 1: Liability shall not attach in the following circumstances:

Alternative 2: No liability in accordance with this article shall attach to the liable person according to paragraph one and two, if he or she proves that, despite there being in place appropriate safety measures, the damage was:

- (a) Act of God/*force majeure*;
- (b) Act of war or civil unrest;
- (c) Intervention by a third party is responsible for causing the damage;
- (d) Activities taken in compliance with compulsory measures issued by a competent national authority cause the damage;
- (e) The activities causing the damage were taken in accordance with permission of an activity by means of an applicable law or a specific authorization issued to the operator.

Option 2: Mitigation of strict liability

Operational text 2

Liability may be limited in cases where the person referred to in [operational text 5 of Section IV.2(b)] proves that the damage was:

- (a) The result of an act of armed conflict, hostilities, civil war or insurrection; or
- (b) The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character, provided that, (a) no mutation and no biological effect of any kind, including any change to an organism or an ecosystem whether due to evolution or otherwise and whether gradual or otherwise, shall be considered an Act of God or *force majeure*, and (b) no weather, meteorological disturbance or climatic occurrence or effect shall be considered Act of God or *force majeure*.

^{2/} Outstanding issue: provision applicable to civil liability; further consideration may be required in the administrative approach.

^{3/} Outstanding issue: this text may be more appropriate for civil liability; further consideration may be required for administrative approach, in particular referring to liability for costs.

Option 3: Exemptions to and mitigations of strict liability

Operational text 3

1. The operator/importer should not be liable to the extent that the damage was caused by an act of God/*force majeure*, an act of war or civil unrest, the intervention by a third party or compliance with compulsory measures imposed by a public national authority.
2. Where appropriate, the operator/importer may not have to bear the costs of remedial action when he proves that he was not at fault or negligent and the damage was caused: (a) by an activity expressly authorized by and fully in conformity with an authorization given under national law; or (b) by an activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out.

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

Operational text 1

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

Operational text 2

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

3. Joint and several liability or apportionment of liability

Option 1: Joint and several liability

Operational text 1

When damage results from the transboundary movement of LMOs for which two or more persons may be held liable,

Alternative 1: the claimant shall have the right to seek full compensation for the damage from any or all of the said persons.

Alternative 2: The persons referred to in [para. 3] ^{4/} are jointly and severally liable for such costs and expenses.

Operational text 2

1. All liability under this article shall be joint and several. If two or more persons are liable according to this article, the claimant shall have the right to seek full compensation for the damage from any or all of the persons liable.
2. If an occurrence consists of a continuous occurrence, all persons successively exercising the control of the living modified organism immediately before or during that occurrence shall be jointly and severally liable.
3. Where there is liability under [exporting State] and [state of national], the liability shall be joint and several.

Operational text 3

If two or more operators/importers are liable according to these rules and procedures, the claimant should have the right to seek full compensation for the damage from any or all operators/importers i.e. the latter

^{4/} The reference to '[para. 3]' corresponds to para. 2(g) of operational text 8 of section IV.2(c) in document UNEP/CBD/BS/WG-L&R/4/2 and reads: "The competent authority may recover the costs and expenses of, and incidental to, the taking of any measures under paragraph (e), from the operator, or any other person who caused or contributed to the damage or increased the likelihood of its occurrence, to the extent that such person knowingly or negligently caused or contributed to such damage".

should be liable jointly and severally without prejudice to domestic provisions concerning the rights of contribution or recourse.

Option 2: Apportionment of liability

Operational text 1

1. If damage results from an incident that consists of a continuous occurrence, all persons involved successively in exercising the control of the activity during that occurrence shall be jointly and severally liable. However, the person 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.

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

Operational text 2

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

Operational text 3

In the case of liability with multiple causes, liability shall be apportioned on the basis of relative degrees of fault where possible.

4. Limitation of liability

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

1. Relative time limit

Operational text 1 (from old OT 1)

Claims for compensation under these rules and procedures shall be made within 10 years from the date the claimant knew of the damage and its origin.

Operational text 2 (from old OT 2)

A claim for damages under these rules and procedures should be exercised within [X] years from the date by which the claimant knew or ought reasonably to have known of the damage and the person liable.

Operational text 3 (from old OT 3)

Claims for compensation under these rules and procedures shall not be admissible unless they are brought within 3 years from the date the claimant knew or ought reasonably to have known of the damage and the person responsible.

Operational text 4 (from old OT 4)

Liability shall be admissible within [3] years from the date the claimant knew or ought reasonably to have known of the damage subject to the time limits established pursuant to *operational text 9*.

Operational text 5 (from old OT 5)

Any claim for damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of living modified organisms shall be brought within three years from the date the damage is known or reasonably could have been known.

2. Absolute time limit

Operational text 6 (from old OT 1)

The liability of the user shall not be limited in time. However, once damage is established, the requirement for action to redress the damage shall be limited in time (10 years).

Operational text 7 (from old OT 2)

A claim for damages under these rules and procedures should in any event not be exercised later than [Y] years from the date of the transboundary movement of living modified organisms.

Operational text 8 (from old OT 3)

Claims for compensation under these rules and procedures shall not be admissible unless they are brought at the latest 20 years from the date on which the activity causing the damage ceased.

Operational text 9 (from old OT 4)

No liability could be alleged after [10] [15] years from the date of the incident.

Operational text 10 (from old OT 5)

Any claim for damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of living modified organisms shall in no case be recognized if not brought within twenty years of the conduct alleged to have caused the damage occurred.

3. Additional provisions

Operational text 11 (from old OTs 1 & 2)

Where the [incident][transboundary movement of living modified organisms] consists of a series of occurrences having the same origin, the time limits under this provision [shall][should] run from the date of the last of such occurrences. Where the incident consists of continuous occurrences, such time limits [shall][should] run from the end of that continuous occurrence.

Operational text 12 (from old OT 1)

The right to bring a civil action in respect of harm caused by any living modified organism or its product shall commence from the date on which the affected person(s) or the community or communities learned of the harm, taking due account of:

(a) The time the harm may take to manifest itself; and,

(b) The time that it may reasonably take to correlate the harm with the living modified organism or its product, taking into consideration the situation or circumstance of the person(s) or community or communities affected.

Operational text 13 (from old OT 1)

The person responsible for the damage shall be obliged to compensate for the damage that he caused within a period of no more than five years from the date of the claim.

4: Special provision for the administrative approach

Operational text 14 (from old OT 6)

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

(b) Limitation in amount

Option 1: Unlimited liability

Operational text 1

The amount of compensation for damage caused by the transboundary movements of living modified organisms shall be determined by the extent of damage caused as assessed by a competent court, based on the facts of the particular case, and fully compensated.

Operational text 2

There shall be no financial limit on liability for any damage recoverable under these rules and procedures.

Option 2: Limited liability

Operational text 3

1. The maximum amount for following damages under [Article X] shall be as follows:

[to specify with reference to the nature of the damage, example: to biological diversity and the environment, and the amount]

2. There shall be no limit in amount for any liability under these rules and procedures if it is proved that the damage resulted from any personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

3. In all other cases, there shall be no financial limit on liability.

Operational text 4

Any claim for damage covered under these rules and procedures shall be subject to a maximum amount of "...X".

5. Coverage of liability

Option 1: Compulsory financial security

Operational text 1

1. Any person that will be strictly liable under these rules and procedures shall establish and maintain during the period of the time of liability, insurance, bonds or other financial guarantees covering their liability for amounts not less than the minimum limits specified herein.

2. Insurance, bonds or other financial guaranties provided under subarticle one of this Article shall only be drawn upon to provide compensation for damage.

3. Proof of coverage of the liability shall be delivered to the competent authorities of the state of import/transit, and the same shall be notified to parties through the Biosafety Clearing-House.

4. Any claim under these rules and procedures may be asserted directly against any person providing insurance, bonds or other financial guarantees. The insurer or the person providing the financial guarantee shall have the right to require the person liable under these rules and procedures to be joined in the proceedings. Insurer and persons providing financial guarantees may invoke the defenses which the person liable under these rules and procedures would be entitled to invoke.

Operational text 2

1. These rules and procedures shall provide for mandatory or compulsory financial security for the damage caused by the operator, with residual liability being with the state.

2. These rules and procedures may also provide for voluntary financial security mechanisms to supplement the damage caused.

Option 2: Voluntary financial security

Operational text 3

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.

Operational text 4

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

Option 3: Domestic law approach

Operational text 5

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

Operational text 6

For purposes of the administrative approach, competent authorities are encouraged to require operators to obtain financial security for the activities identified by the competent authority.

V. SUPPLEMENTARY COMPENSATION SCHEME

A. *Residual State liability*

Operational text 1

Where a claim for damages has not been satisfied by a person or legal entity liable, the unsatisfied portion of that claim shall be fulfilled by the State where the person or legal entity is domiciled or resident.

Operational text 2

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

Operational text 3

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

Operational text 4

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

2. Where payments by the Fund under Article 21 for damage, including compensation and the costs of prevention, remediation, restoration or reinstatement of the environment, are insufficient, the exporting Contracting Party shall be liable to pay the residual amount payable under this Protocol.

B. *Supplementary collective compensation arrangements*

Operational text 1

1. Where compensation under this Protocol does not cover the costs of damage, additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using the fund established here under.

2. A fund is to be created in advance on the basis of guarantees and contributions put forward by biotechnology industry and other operators. The amount of such a guarantee and contribution can be determined on the basis of identified criteria.

Operational text 2

1. Any person unable to claim the full or any amount of the damage awarded because:

- (a) The person liable cannot be identified;
- (b) The person liable escapes liability on the basis of a defense available under these rules and procedures;
- (c) Any time limit provided by these rules and procedures has expired;
- (d) Any financial limit provided by these rules and procedures has been reached;
- (e) Any financial securities required by these rules and procedures to be provided or maintained by the person liable are not available or not sufficient to satisfy the award of damages;

shall be entitled to claim the full measure or a sum representing the balance sum of the award from the supplementary collective compensation arrangements established under these rules and procedures.

2. Any person who has applied for and been awarded interim monetary relief may claim the sum from the supplementary collective compensation arrangements established under these rules and procedures if the person liable is unable to provide the whole or any part of the said sum.
3. The Secretariat of the CBD/these rules and procedures shall maintain and administer the Fund, in accordance with Decisions including terms of reference to be adopted by the Parties, to provide, *inter alia*, for
 - (a) The reimbursement of the reasonable and justified costs incurred by a Party or Parties in taking response action pursuant to Article X.
 - (b) Matters set out in *paragraph 1*.
4. Any Party or Parties may make a proposal to such body of the CBD/these rules and procedures for reimbursement to be paid to persons from the fund.
5.
 - (a) The CBD/these rules and procedures may establish special circumstances and criteria to be taken into account in its decisions relating to the disbursements from the Fund.
 - (b) The special circumstances and criteria may include the following:
[to establish: example: size of damage; area of damage; where damage occurred; use (social or commercial); type of plant; type of gene; or the unforeseen failure of any relevant insurance company or financial institution.]
6.
 - (a) Contributions to the Funds shall be made by such members of the biotechnology industry as may be determined by a decision of the Parties to these rules and procedures.
 - (b) The amount of the contribution shall be determined by a decision of the Parties to these rules and procedures
 - (c) The Parties to these rules and procedures may exempt any person from making contributions to the fund.
7. Any State or person may make voluntary contributions to the fund.

Operational text 3

1. Where the claims for damage under these rules and procedures do not adequately cover the costs of damage, additional/supplementary funding mechanisms may be provided to ensure appropriate payments of such costs.
2. These rules and procedures shall provide for mandatory or compulsory financial security for the damage caused by the operator, with residual liability being with the state.

Operational text 4

No provision

OR

Parties may discuss the modalities of a voluntary arrangement to supplement the compensation for cases where the damage exceeds the financial limit as set out in this document.

OR

The Parties may consider the necessity of any supplementary financial arrangement in light of the experience gained through the implementation of the rules set out in this document.

Operational text 5

Article 6 - Preventive, mitigating, restoring and reinstating measures required

Where the financial resources of an operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident, the Fund shall pay the costs of prevention,

remediation, restoration or reinstatement of the environment where payment for such is not available under this Protocol.

Article 19 - Fund established

1. An International Fund for compensation for damage, to be named “The International Living Modified Organism Compensation Fund” and hereinafter referred to as “The Fund”, is hereby established with the following aims:

- (a) to provide compensation for and prevention, remediation or reinstatement of damage to the extent that the protection afforded by this Protocol is inadequate;
- (b) to provide legal aid to claimants;
- (c) to give effect to the related purposes set out in this Convention.

2. The Fund shall in each Contracting Party be recognized as a legal person capable under the laws of that State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State. Each Contracting Party shall recognize the Director of the Fund (hereinafter referred to as “The Director”) as the legal representative of the Fund.

Article 20 - Applicability of the Fund

This Part shall apply with regard to compensation according to article 21 to damage caused in areas under the national jurisdiction of a Contracting Party or in areas beyond the limits of national jurisdiction, and to preventive measures taken to prevent or minimize such damage or for reinstatement or remediation of the environment following such damage.

Article 21 - Payment of Compensation and Remediation

1. The Fund shall pay compensation to any person suffering damage if such person has been unable to obtain full and adequate compensation for the damage under this Protocol, either

- (a) Because no liability for the damage arises under this Protocol;
- (b) Because the party liable for the damage under this Protocol is financially incapable of meeting his obligations in full and any financial security that may be provided under this Protocol does not cover or is insufficient to satisfy the claims for compensation for the damage; a person being treated as financially incapable of meeting that person’s obligations and a financial security being treated as insufficient if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under this Protocol after having taken all reasonable steps to pursue the legal remedies available to him;

2. The Fund shall pay the costs of prevention, remediation or reinstatement of the environment where payment for such remediation or reinstatement was not available under this Protocol.

3. The aggregate amount of compensation and prevention, remediation and reinstatement payable by the Fund under this article shall in respect of any one occurrence be limited, so that the total sum of that amount and the amount of compensation actually paid under this Protocol for an occurrence, shall not exceed the amount specified in annex IV.

4. Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under this Protocol shall be the same for all claimants.

5. The Assembly of the Fund (hereinafter referred to as “the Assembly”) may, having regard to the experience of incidents which have occurred and in particular the amount of damage resulting therefrom and to changes in the monetary values, decide that the amount referred to in paragraph 2, shall be increased; provided, however, that this amount shall in no case be decreased. The changed amount shall apply to incidents which occur after the date of the decision effecting the change.

6. The Fund shall, at the request of a Contracting Party, use its good offices as necessary to assist that State to secure promptly such personnel, material and services as are necessary to enable the State to take measures to prevent or damage arising from an occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol.

7. The Fund may on conditions to be laid down in Regulations provide credit facilities with a view to the taking of preventive measures against damage arising from a particular occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol.

Article 22 - Time limitations

Rights to compensation under article 21 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 23, paragraph 6, within ten years from the date when the damage occurred or from when the damage is discovered.

Article 23 - Jurisdiction

1. Subject to the subsequent provisions of this article, any action against the Fund for compensation under article 21 of this Protocol shall be brought only before a court competent under article 8 of this Protocol in respect of actions against a person who is or who would be been liable for damage caused by the relevant occurrence.

2. Each Contracting Party shall ensure that its courts possess the necessary jurisdiction to entertain such actions against the Fund as are referred to in paragraph 1.

3. Where an action for compensation for damage has been brought before a court competent under article 8 of this Protocol, such court shall have exclusive jurisdictional competence over any action against the Fund for compensation under the provisions of article 21 of this Convention in respect of the same damage.

4. Each Contracting State shall ensure that the Fund shall have the right to intervene as a party to any legal proceedings before a competent court of that State against a person who may be liable under article 4 of this Protocol.

5. Except as otherwise provided in paragraph 6, the Fund shall not be bound by any judgment or decision in proceedings to which it has not been a party or by any settlement to which it is not a party.

6. Without prejudice to the provisions of paragraph 4, where an action under this Protocol for compensation for damage has been brought before a competent court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgment rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgment was given, become binding upon the Fund in the sense that the facts and findings in that judgment may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.

Article 24 - Enforcement

Subject to any decision concerning the distribution referred to in article 21, paragraph 4, any judgment given against the Fund by a court having jurisdiction in accordance with article 23, paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in [article 12] of this Protocol.

Article 25 - Subrogation

1. The Fund shall, in respect of any amount of compensation for damage paid by the Fund in accordance with article 21, paragraph 1, of this Protocol, acquire by subrogation the rights that the person so compensated may enjoy under the Protocol against any person who may be liable under article 4 of this Protocol.

2. Nothing in this Convention shall prejudice any right of recourse or subrogation of the Fund against persons other than those referred to in the preceding paragraph. In any event the right of the Fund to subrogation against such person shall not be less favourable than that of an insurer of the person to whom compensation or indemnification has been paid.

3. Without prejudice to any other rights of subrogation or recourse against the Fund which may exist, a Contracting Party or agency thereof which has paid compensation for damage in accordance with provisions of national law shall acquire by subrogation the rights which the person so compensated would have enjoyed under this Protocol.

Article 26 - Assessment of Contributions

1. Contributions to the fund shall be made in respect of each Contracting Party by any person who, in the calendar year referred to in article 27, paragraph 1, as regards initial contributions and in article 28, paragraphs 2 (a) or (b), as regards annual contributions, has exported living modified organisms in total quantities exceeding the amount specified in annex II.

2. For the purposes of paragraph 1, where the value of living modified organisms exported by any person in a calendar year when aggregated with the value of living modified organisms by any associated person or persons exceeds the amount specified in annex II, such person shall pay contributions in respect of the actual quantity received by him notwithstanding that that value did not exceed the amount specified in annex II.

3. "Associated person" means any subsidiary or commonly controlled entity. The question whether a person comes within this definition shall be determined by the national law of the Party concerned.

Article 27 - Quantum of Contributions

1. In respect of each Contracting Party initial contributions shall be made of an amount which shall for each person referred to in article 26 be calculated on the basis of a fixed sum proportionate to the value of the living modified organisms exported during the calendar year preceding that in which this Convention entered into force for that State.

2. The sum referred to in paragraph 1 shall be determined by the Assembly within three months after the entry into force of this Protocol. In performing this function the Assembly shall, to the extent possible, fix the sum in such a way that the total amount of initial contributions would, if contributions were to be made in respect of 90 per cent of the quantities of living modified organisms exported throughout the world, equal ____ million SDR.

3. The initial contributions shall in respect of each Contracting Party be paid within three months following the date at which the Protocol entered into force for that Party.

Article 28 - Budget

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

(i) Expenditure

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

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

(ii) Income

(a) Surplus funds from operations in preceding years, including any interest;

- (b) Initial contributions to be paid in the course of the year;
 - (c) Annual contributions, if required to balance the budget;
 - (d) Any other income.
2. For each person referred to in article 26 the amount of his annual contribution shall be determined by the Assembly and shall be calculated in respect of each Contracting Party.
 3. The sums referred to in paragraph 2 above shall be arrived at by dividing the relevant total amount of contributions required by the total amount of living modified organisms exported by all Contracting States in the relevant year.
 4. The Assembly shall decide the portion of the annual contribution which shall be immediately paid in cash and decide on the date of payment. The remaining part of each annual contribution shall be paid upon notification by the Director.
 5. The Director may, in cases and in accordance with conditions to be laid down in the Regulations of the Fund, require a contributor to provide financial security for the sums due from him.
 6. Any demand for payments made under paragraph 4 shall be called rateably from all individual contributors.

Article 29 - Assessment of Contributions

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

Article 30 - Fund Bodies

1. The Fund shall have an Assembly, a Secretariat headed by a Director and an Executive Committee.
2. The Assembly shall consist of all Contracting States to this Protocol.

Article 31 - Assembly Functions

The functions of the Assembly shall be:

1. To elect at each regular session its Chair and two Vice-Chairmen who shall hold office until the next regular session;
2. To determine its own rules of procedure, subject to the provisions of this Protocol;
3. To adopt Internal Regulations necessary for the proper functioning of the Fund;
4. To appoint the Director and make provisions for the appointment of such other personnel as may be necessary and determine the terms and conditions of service of the Director and other personnel;

5. To adopt the annual budget and fix the annual contributions;
6. To appoint auditors and approve the accounts of the Fund;
7. To approve settlements of claims against the Fund, to take decisions in respect of the distribution among claimants of the available amount of compensation in accordance with article 21, paragraph 3, and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of damage are compensated as promptly as possible;
8. To elect the members of the Assembly to be represented on the Executive Committee.
9. To establish any temporary or permanent subsidiary body it may consider to be necessary;
10. To determine which non-Contracting States and which inter-governmental and international non-governmental organizations shall be admitted to take part, without voting rights, in meetings of the Assembly, the Executive Committee, and subsidiary bodies;
11. To give instructions concerning the administration of the Fund to the Director, the Executive Committee and subsidiary bodies;
12. To review and approve the reports and activities of the Executive Committee;
13. To supervise the proper execution of the Convention and of its own decisions;
14. To perform such other functions as are allocated to it under the Convention or are otherwise necessary for the proper operation of the Fund.

Article 32 - Sessions of Assembly

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

Article 33 - Quorum

A majority of the members of the Assembly shall constitute a quorum for its meetings.

[other mechanical provisions as necessary]

Operational text 6

Where compensation under this Protocol does not cover the costs of damage, additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using existing mechanisms.

VI. SETTLEMENT OF CLAIMS

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

Option 1: Existing procedure(s) with reference to Article 27 CBD

Operational text 1 (old OT 1)

In the event of a dispute between Parties concerning the interpretation or application of these rules and procedures, the provisions of Article 27 of the Convention on Biological Diversity shall apply *mutatis mutandis*.

Operational text 2 (old OT 2)

Parties may/shall settle any dispute arising out of the application and/or interpretation of these rules and procedures through the dispute settlement mechanism/s provided under Article 27 of the Convention on Biological Diversity and its Annex.

Operational text 3 (old OT 3)

Any State-to-State dispute arising under these rules and procedures is to be handled through established inter-State procedures, including where appropriate the procedures established in Article 27 of the Convention on Biological Diversity.

Operational text 4 (old OT 4)

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

Operational text 5 (old OT 5)

Any Party claiming damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of living modified organisms shall seek settlement of its claim pursuant to the inter-state dispute resolution process under Article 27 of the Convention on Biological Diversity (CBD). Any Party claiming such damage that is not satisfactorily resolved under the procedure set forth in Article 27 of the CBD shall submit its claim for resolution to the Permanent Court of Arbitration (PCA) subject to the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment. Any claim for damage to conservation and sustainable use of biodiversity resulting from the transboundary movement of living modified organisms shall be cognizable by a competent court only after applicable CBD and PCA procedures have been exhausted.

Option 2: Special procedure

Operational text 6 (old OT 6)

Section 1: General provisions

Article 34 - Obligation to settle disputes by peaceful means

Parties shall settle any dispute between them concerning the interpretation or application of this Protocol by peaceful means in accordance with article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in article 33, paragraph 1, of the Charter

Article 35 - Settlement of disputes by any peaceful means chosen by the Parties

Nothing in this Part impairs the right of any Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Protocol by any peaceful means of their own choice.

Article 36 - Procedure where no settlement has been reached by the Parties

1. If the Parties which are parties to a dispute concerning the interpretation or application of this Protocol have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
2. If the parties have also agreed on a time limit, paragraph 1 applies only upon the expiration of that time-limit.

Article 37 - Obligation to exchange views

1. When a dispute arises between Parties concerning the interpretation or application of this Protocol, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
2. The Parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Article 38 - Conciliation

1. A Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation under annex II.
2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.
3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.
4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.

Section 2: Compulsory procedures entailing binding decisions

Article 39 - Application of procedures under this Section

Subject to section 3 of this Part, any dispute concerning the interpretation or application of this Protocol shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Article 40 - Choice of procedure

1. When signing, ratifying or acceding to this Protocol or at any time thereafter, a Party shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
 - (a) The International Tribunal for the Protection of Biodiversity established in accordance with annex III.
 - (b) The International Court of Justice;
 - (c) An arbitral tribunal constituted in accordance with annex IV;
 - (d) A special arbitral tribunal constituted in accordance with annex IV for one or more of the categories of disputes specified therein.
2. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted the International Tribunal for the Protection of Diversity in accordance with annex III.
3. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

4. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to the International Tribunal for the Protection of Biodiversity in accordance with annex III, unless the parties otherwise agree.

5. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.

6. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.

7. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

Article 41 - Jurisdiction

1. A court or tribunal referred to in article 40 shall have jurisdiction over any dispute concerning the interpretation or application of this Protocol which is submitted to it in accordance with this Part.

2. A court or tribunal referred to in article 40 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

3. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Article 42 - Experts

In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or proprio motu, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with annex V, to sit with the court or tribunal but without the right to vote.

Article 43 - Provisional measures

1. If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the environment, pending the final decision.

2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.

3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.

Article 44 - Access

1. All the dispute settlement procedures specified in this Part shall be open to Parties.

2. The dispute settlement procedures specified in this Part shall be open to entities other than States Parties as specifically provided for in this Protocol or as provided in Rules passed by the Assembly under article [x].

Article 45 - Applicable law

1. A court or tribunal having jurisdiction under this section shall apply this Protocol and other rules of international law not incompatible with this Protocol.

2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.

Article 46 - Preliminary proceedings

1. A court or tribunal provided for in article 40 to which an application is made in respect of a dispute referred to in article 39 shall determine at the request of a party, or may determine *proprio motu*, whether

the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case.

2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time limit within which they may request it to make a determination in accordance with paragraph 1.

3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure.

Article 47 - Exhaustion of local remedies

Any dispute between Parties concerning the interpretation or application of this Protocol may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.

Article 48 - Finality and binding force of decisions

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.

2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

B. Civil procedures

Option 1: Special provisions on private international law

A. Jurisdiction of courts

Operational text 1 (from old OTs 1, 2, 4 & 6)

1. Claims for [compensation][any relief] [under these rules and procedures] may be brought in the courts [of a Party] [only] where [either]:

(a) The damage was suffered; or

(b) [The incident occurred][The unintentional release across the border occurred]; or

(c) The [defendant][plaintiff] has his or her habitual residence, or[, if the defendant is a company or other legal person or an association of natural or legal persons, where it has] its principal place of business[, statutory seat or central administration].

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

Operational text 2 (from old OT 9)

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

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

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

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

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

Operational text 3 (from old OT 11)

1. Primary jurisdiction over actions under these rules and procedures shall lie with the courts of the Party where the damage occurs.

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

3. Jurisdiction over actions under these rules and procedures shall also lie with the courts of the Party where the occurrence took place, where the defendant has his habitual residence or has his principal place of business.

4. Each Party shall: (a) ensure that its courts possess the necessary competence to entertain claims for compensation under these rules and procedures; and (b) shall adopt the legislative measures necessary to ensure that the laws provide for compensation according to these rules and procedures and according to any harmonizing recommendations made by the Assembly under *Article [x]*.

B. Related actions

Operational text 4 (from old OT 2)

1. Where related actions are brought in the courts of different Parties, any court other than the court first seized of the matter may, while the actions are pending at first instance, stay its proceedings.

2. A court may, on the application of one of the Parties, decline jurisdiction if the law of that court permits the consolidation of related actions and another court has jurisdiction over both actions.

3. For the purpose of *paragraphs 1 and 2*, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Operational text 5 (from old OTs 4 & 6)

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

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

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

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

5. For the purposes of *paragraphs 1 to 4*, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.

Operational text 6 (from old OT 11)

1. Where proceedings involving the same or similar cause of action and between the same or substantially the same parties are brought in the courts of another Party or Parties, any court other than the court described in *paragraphs 1 and 2 of operational text 3* shall of its own motion stay its proceedings unless and until the court described in *paragraphs 1 and 2 of operational text 3* rules that it does not have jurisdiction under this rules and procedures.

2. Where the jurisdiction of the court described in *paragraphs 1 and 2 of operational text 3* is established by that court, any court other than that court shall decline jurisdiction in favour of that court.
3. When there are two or more courts described in *paragraphs 1 and 2 of operational text 3*, then any court other than the court described in *paragraphs 1 and 2 of operational text 3* and first seized of the case shall of its own motion stay its proceedings unless and until the court first seized of the case rules that it does not have jurisdiction under this rules and procedures. Where the jurisdiction of the court first seized of the case is established by that court, any court other than that court shall decline jurisdiction in favour of that court.
4. Where related actions are brought in the different courts described in *operational text 3*, any court other than the court described in *paragraphs 1 and 2 of operational text 3* shall, while the actions are pending at first instance, stay its proceedings upon the motion of a party to any of the proceedings.
5. A court other than the court described in *paragraphs 1 and 2 of operational text 3* shall, on the application of one of the parties, decline jurisdiction if the law of the court described in *paragraphs 1 and 2 of operational text 3* permits the consolidation of related actions and the court first seized has jurisdiction over both or all actions.
6. When related actions are brought in the courts of different Parties, and all courts are described in *operational text 3*, then any court other than the court first seized of the case may of its own motion stay its proceedings until the court first seized of the case rules whether it has jurisdiction under this rules and procedures. Where the jurisdiction of the court first seized of the case is established by that court, any court other than that court may decline jurisdiction in favour of that court.
7. For the purposes of *paragraphs 4 to 6*, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

C. Applicable law

Operational text 7 (from old OTs 2, 4 & 6)

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

Operational text 8 (from old OT 9)

1. In any action for damage to biodiversity resulting from the transboundary movement of living modified organisms, as defined in Article 3(g) of the Biosafety Protocol, the courts having jurisdiction pursuant to *operational text 2(1)* hereof shall apply (i) the laws of the state where the damage occurred and, insofar as applicable, (ii) international law, including the Convention on Biological Diversity and the Biosafety Protocol.

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

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

Operational text 9 (from old OT 11)

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 procedural and substantive law of that court. The nature, form and extent of the compensation, as well as the equitable distribution thereof, shall be governed by that law, and shall be consistent with these rules and procedures.

D. Recognition and enforcement of judgments

Operational text 10 (from old OTs 1, 2, 4 & 6)

1. Any judgment of a court having jurisdiction in accordance with [these rules and procedures][*paragraph 1 of operational text 1*] [or any arbitral award], which is enforceable in the State [seized of original jurisdiction][of origin of the judgment] [and is no longer subject to ordinary forms of review], shall be recognized in any Party [as soon as the formalities required in that Party have been completed], except where:

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

2. A judgment [or arbitral award] recognized under *paragraph 1* shall be enforceable in each Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merit of the case to be re-opened.

3. The provisions of *paragraphs 1 and 2* shall not apply between [Parties that are] Parties to an agreement or arrangement in force on the mutual recognition and enforcement of judgments [or arbitral awards] under which the judgment [or arbitral award] would be recognizable and enforceable.

Operational text 11 (from old OT 9)

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

- (a) the court rendering the judgment did not have jurisdiction pursuant to *operational text 2*;
- (b) the court applied a law other than the law specified in *operational text 8*;
- (c) the court disregarded essential requirements of procedural justice;
- (d) an earlier judgment has been rendered in the same matter;
- (e) the judgment conflicts with the public policy or public order of the defendant's domicile, or with applicable provisions of international law; or
- (f) the judgment was rendered in default of the appearance of the defendant, unless the plaintiff shows that the defendant was properly served with documents initiating the proceedings and with adequate notice and opportunity for the defendant to properly appear and defend the claim.

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

Operational text 12 (from old OT 11)

1. Judgments entered by the competent court under *operational text 3* after trial, or by default or by consent, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory of any of the other Parties as soon as the formalities required by the Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgments.

2. The foregoing provisions shall not apply if (a) a decision was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence, or (b) the judgment was obtained by fraud.

3. If an action is brought against a Party under this Convention, such Party may not, except in respect of measures of execution, invoke any jurisdictional immunities before the court competent in accordance with this article.

E. Other rights of persons who have suffered damage

Operational text 13 (from old OT 1)

1. Subject to *paragraph 2*, nothing in these rules and procedures shall not affect any rights of persons who have suffered damage, or considered as limiting the protection or reinstatement of the environment which may be provided under domestic law.

2. No claims for compensation for damage based on the strict liability of the notifier or the exporter shall be made otherwise than in accordance with these rules and procedures.

Operational text 14 (from old OT 2)

Nothing in these rules and procedures shall be construed as limiting or derogating from any rights of persons who have suffered damage, or as limiting the protection or reinstatement of the environment which may be provided under domestic law.

Operational text 15 (from old OTs 4 & 6)

These rules and procedures are without prejudice to any rights of persons who have suffered damage or to any measures for the protection or reinstatement of the environment that may be provided under applicable domestic law.

F. Additional provisions

Operational text 16 (old OT 10)

1. Following exhaustion of inter-state procedures under Article 27 of the Convention on Biological Diversity (CBD) and pursuant to the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment of the Permanent Court of Arbitration, a Party may submit a claim for damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of living modified organisms to a competent court as determined by private international law.

2. Determination of applicable law shall be in accordance with private international law.

3. Following exhaustion of dispute resolution and arbitration requirements (*see operational text 5 of Section VI.A*), a Party to the Cartagena Protocol on Biosafety may bring a claim for damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of living modified organisms in a competent court.

4. Recognition and enforcement of judgments or awards shall be in accordance with private international law.

Operational text 17 (from old OT 11)

1. Courts shall have the power to order remediation and restoration as well as compensation and may order costs and interest.

2. The Court shall presume that (a) the living modified organism which was the subject of a transboundary movement caused the damage where there is a reasonable possibility that it could have done so and (b) that any damage caused by a living modified organism which was the subject of a transboundary movement is the result of its biotechnology-induced characteristics rather than any natural characteristics. To rebut the presumption a person must prove to the standard required by the procedural law applied pursuant to *operational text 9* that the damage is not due to the characteristics of the living

modified organism resulting from the genetic modification, or in combination with other hazardous characteristics of the living modified organism.

3. When considering evidence of the causal link between the occurrence and the damage, the court shall take due account of the increased danger of causing such damage inherent in undertaking the transboundary movement of or exercising ownership, possession or control over the living modified organism.

4. Orders for compensation for damage shall fully compensate affected persons and shall pay the cost of preventive measures and costs of reinstatement or remediation of the environment.

5. The Court shall have the power to order interim or preliminary measures to order any person to take or abstain from any act where necessary or desirable to prevent significant damage, to mitigate or avoid further damage.

Option 2: Enabling clause on private international law

Operational text 18 (old OT 3)

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

Operational text 19 (old OT 7)

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

2. The Parties to the Biosafety Protocol will review at the sixth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol the effectiveness of this decision in addressing cases of damage resulting from the transboundary movement of living modified organisms pursuant to Article 27, and whether further action should be considered, including work under the Hague Conference on Private International Law.

Operational text 20 (old OT 8)

Notwithstanding the administrative procedures in *section VI.C* below, civil procedures at the national level will continue to apply. For transboundary damage, rules of private international law are applicable and States are encouraged to improve these, as appropriate, to facilitate access to justice.

Option 3: Binding arbitration

Operational text 21 (old OT 5)

1. All disputes *other than State to State disputes* would be handled through binding international arbitration, unless all parties to the dispute decide otherwise.

2. The applicable law shall be UNIDROIT rules on commercial contracts.

3. Recognition and enforcements of judgments or arbitral awards shall be in accordance with international law, including the 1958 UN Convention on the Recognition and Enforcement of International Arbitral Awards and the 1975 Inter-American Convention on International Commercial Arbitration.

C. Administrative procedures

Operational text 1 (Old OT 1)

1. Parties may, as appropriate, provide for such administrative remedies as may be deemed necessary for liability and redress in respect of all matters arising under these rules and procedures.
2. The procedures for the preferring and determination of decisions of administrative authorities shall be as provided by the domestic law of the Party.

Operational text 2 (Old OT 2)

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

Operational text 3 (Old OT 3)

1. Natural or legal persons affected or likely to be affected by damage to biodiversity shall be entitled to request the competent authority to take action under these rules and procedures.
2. In such circumstances, the competent authority shall give the relevant operator an opportunity to respond to the request for action before making a decision on such request for action.
3. Persons who have requested action under *paragraphs 1 and 2* shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority.
4. Operators required by the competent authority to take remedial action or to bear the costs of any such actions taken by the competent authority shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions and/or orders of the competent authority under these rules and procedures.

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

Operational text 1 (old OTs 1 & 5)

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

Operational text 2 (old OT 2)

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

Operational text 3 (old OT 3)

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 the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

Operational text 4 (old OT 4)

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

E. Standing/Right to bring claims

Option 1: Special provisions (directly affected persons or entities and class actions)

Operational text 1 (old OT 1)

1. Any person who has suffered loss or harm during a transboundary movement, transit, handling and use of any living modified organisms, including illegal traffic, may institute a civil claim for damages in court, which may include a claim for:

(a) Economic loss resulting from the release of living modified organisms and their products or from activities undertaken to prevent, mitigate, manage, clean up or remediate any harm from such incident;

(b) Costs incurred in any inspection, audit or investigation undertaken to determine the nature of any release of living modified organisms or to investigate risk management options.

2. Any person, group of persons, or any private or state organization is entitled to bring a claim and seek redress in respect of the breach or threatened breach of any provision of these rules and procedures, including any provision relating to damage to human health, biological diversity, the environment, or to socio-economic or cultural conditions of local communities or to the economy of the country:

(a) In that person's or group or class of persons' interest;

(b) In the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;

(c) In the interest of, or on behalf of, a group or class of persons whose interests are affected;

(d) In the public interest; and

(e) In the interest of protecting the environment or biological diversity.

3. No costs shall be awarded against any of the above persons who fail in any action as aforesaid if the action was instituted reasonably out of concern for the public interest or in the interest of protecting human health, biological diversity or the environment.

4. The burden of proving that an action was not instituted out of public interest or in the interest of protecting human health, biological diversity or environment, rests on the person claiming that the case is otherwise.

5. Each Party shall ensure that any person in another Party who is adversely affected has the right of access to administrative and judicial procedure equal to that afforded to nationals of the Party of origin in case of domestic environmental harm.

6. Each Party shall ensure that adversely affected persons due to damage resulted during transboundary movement, transit, handling and use of living modified organisms, including illegal traffic, have a right of recourse for the wrongful act of that person or entity associated with the Party of export.

Operational text 2 (old OT 2)

1. Each Party shall, within the framework of its national legislation, ensure that standing to institute action before a court of law and/or any other independent and impartial body established by law or administrative body, ensure that standing is granted to persons or entities

(a) having sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition.

2. What constitutes a ‘sufficient interest’ and ‘impairment of a right’ shall be determined in accordance with requirements of national law and consistently with the objective of giving wide access to justice.

3. Without prejudice to the generality of the above, the following person(s) or entity(ies) may institute an action:

- (a) With respect to traditional damage: affected persons, dependents, or any other persons acting on behalf of, or in the interest of that person/entity;
- (b) With respect to costs of response measures: person or entity incurring the costs;
- (c) With respect to damage to the environment and/or the conservation and sustainable use of biodiversity:
 - (i) The affected State
 - (ii) Groups acting in vindication of common interests;
 - (iii) Person or entity incurring the costs of restoration measures;
- (d) With respect to damage to human health:
 - (i) The affected States;
 - (ii) Affected person or any other person entitled to act on behalf of that person;
- (e) With respect to socio-economic damage:
 - (i) The affected State;
 - (ii) Groups acting in vindication of common interests or communities.

Operational text 3 (old OT 9)

1. The principle of wide access to justice shall be implemented. To this end, persons and groups with a concern for or interest in environmental, social or economic matters, persons and groups representing communities or business interests and local, regional and national governmental authorities, shall have standing to bring a claim under these rules and procedures.

2. Nothing in these rules and procedures shall be construed as limiting or derogating from any rights of persons who have suffered damage, or as limiting the protection or reinstatement of the environment which may be provided under domestic law.

3. Financial and other barriers to justice shall not impede access to justice under this article and Parties shall take appropriate steps to remove or reduce such barriers.

Option 2: Special provisions (only directly affected persons or entities)

Operational text 4 (old OTs 5 & 6)

Claims may only be brought by persons or entities [directly] affected by the damage. Claims may not be brought by third parties acting on behalf of such persons or entities.

Option 3: Special provisions (diplomatic protection)

Operational text 5 (old OT 4)

States shall bring forth claims on behalf of their nationals for the damage caused and they shall adopt appropriate national legislations to this effect.

Option 4: Domestic law approach

Operational text 6 (old OT 3)

1. (a) Parties should provide for a right to bring claims by affected natural or legal persons as appropriate under domestic law. Those persons should have access to remedies in the State of export that

are no less prompt, adequate and effective than those available to victims that suffer damage from the same incident within the territory of that State.

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

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

Operational text 7 (old OT 7)

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

Operational text 8 (old OT 8)

1. Parties should provide for standing to bring claims by affected natural or legal persons as appropriate under domestic law.

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

VII. COMPLEMENTARY CAPACITY-BUILDING MEASURES

1. Without an institutional arrangement

Operational text 1 (from old OTs 1, 2 and 4)

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

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

Operational text 2 (old OT 3)

1. Recognizing the crucial importance of building capacities in biosafety, the Parties are encouraged to strengthen their efforts in implementing relevant COP/MOP decisions on capacity building under Article 22 of the Biosafety Protocol.

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

2. With an institutional arrangement

Operational text 3 (old OT 2)

The Conference of the Parties serving as the meeting of the Parties,

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

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

(a) To provide, at the request of a Party, advice to that Party on any draft domestic measure relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms submitted to it in accordance with paragraph 4;

(b) To provide, at the request of a Party, advice to that Party on questions relating to the implementation of this decision;

(c) To report to each ordinary meeting of the COP/MOP on its activities;

(d) To report to the [seventh] meeting of the COP/MOP on the implementation and effectiveness of this decision on the basis, *inter alia*, of the information available in the Biosafety Clearing House and from Parties' reports in accordance with Article 33 of the Biosafety Protocol. The report of the Committee should include any recommendations for further action in this field, including in relation to the development of a legally binding instrument, taking into account best practices.

VIII. CHOICE OF INSTRUMENT

Option 1

One or more legally binding instruments.

- (a) A liability Protocol to the Biosafety Protocol;
- (b) Amendment of the Biosafety Protocol;
- (c) Annex to the Biosafety Protocol;
- (d) A liability Protocol to the Convention on Biological Diversity.

Option 2

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

Option 3

One or more non-binding instruments:

- (a) Guidelines;
- (b) Model law or model contract clauses.

Option 4

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

Option 5

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

Option 6

No instrument.

Operational text 1

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

Recalling Article 27 of the Protocol,

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

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

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

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

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

3. *Decides* to review the implementation and effectiveness of the present decision at its [seventh] meeting, taking into account experience at the domestic level to implement this decision and the report of the Committee according to [operational text 2, paragraph 3 lit.(d) of section VII] with a view to considering the need to take further action in this field.

Operational text 2

The Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety/Conference of the Parties to the Convention on Biological Diversity, recalling Article 27 of the Protocol, recalling also its decisions BS/I/8 and BS/II/11, adopts the Liability Protocol to the Biosafety Protocol/Amendment of the Biosafety Protocol/Annex to the Biosafety Protocol/Liability Protocol to the Convention on Biological Diversity as contained in the Annex.

Operational text 3

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

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

Recalling Article 27 of the Protocol,

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

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

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

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

Decides that:

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

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

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

Operational text 4

1. These rules and procedures enter into force upon the fulfilment of XX ratifications, representing XX per cent of trade in LMOs and representing a balance of importing and exporting Parties.

2. These rules and procedures shall not be interpreted as implying any change in the rights and obligations of a Party under international law including any international agreements.

3. Whenever the provisions of these rules and procedures and the provisions of a bilateral, multilateral or regional agreement apply to liability and compensation for damage caused by an incident arising during the same portion of a transboundary movement, these rules and procedures shall not apply provided the other agreement is in force for the Party or Parties concerned and had been opened for signature when these rules and procedures were opened for signature, even if the agreement is amended afterwards.

Operational text 5

1. These rules and procedures shall enter into force on the ninetieth day after the date of deposit of the [fiftieth] instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Convention.

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

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

Operational text 6

These rules and procedures shall not affect the rights and obligations of the Contracting Parties under the Protocol.

Annex

REVISED BLUEPRINT FOR A COP/MOP DECISION ON INTERNATIONAL RULES AND PROCEDURES IN THE FIELD OF LIABILITY AND REDRESS FOR DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS

Optional components of the Decision

- Preambular paragraphs
- Operative paragraph(s) on the adoption of International Rules and Procedures in the Field of Liability and Redress for Damage Resulting from Transboundary Movements of Living Modified Organisms, as contained in annex(es) [...]
- Operative paragraph(s) on institutional arrangements
- Operative paragraph(s) on complementary capacity-building measures
- Operative paragraph(s) on provisional arrangements
- Operative paragraph(s) on review of the Decision

Optional components of annex(es) to the Decision

<i>Possible approaches to liability and redress</i>	<i>Scope</i>	<i>Damage</i>	<i>Primary compensation scheme</i>	<i>Supplementary compensation scheme</i>	<i>Settlement of claims</i>
<i>State responsibility</i>	Reference to existing rules and procedures				
<i>State liability</i>	No rules and procedures on primary State liability				
<i>Civil liability</i>	1. Development of international rules and procedures (legally binding and/or non-legally binding) 2. Development of international guidance for national rules and procedures 3. Combination 4. No rules and procedures				
<i>Administrative approach</i>	1. Development of international rules and procedures (legally binding and/or non-legally binding) 2. Development of international guidance for national rules and procedures 3. Combination 4. No rules and procedures				

Notes

1. *This blueprint does not prejudge the outcome of the discussion on the choice of instrument. A legally binding instrument will also have to be adopted by means of a COP/MOP Decision.*
2. *This blueprint covers all approaches and options in sections I-VIII, including with respect to private international law.*
3. *One annex may cover one or more approaches to liability. One approach to liability may be covered by one or more annexes.*
4. *This blueprint does not prejudge the outcome of the discussions on residual State liability.*
