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CONFERENCE OF THE PARTIES TO THE CONVENTION
ON BIOLOGICAL DIVERSITY SERVING AS THE
MEETING OF THE PARTIES TO THE CARTAGENA
PROTOCOL ON BIOSAFETY

Fourth meeting

Bonn, 12-16 May 2008

Item 12 of the provisional agenda*

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

Note by the Executive Secretary

1. In Article 27 of the Cartagena Protocol on Biosafety, the Parties agreed that the Conference of the Parties serving as the meeting of the Parties to the Protocol would, at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms and would endeavour to complete the process within four years.
2. Accordingly, at their first meeting, held in Kuala Lumpur in February 2004, the Parties, in paragraph 1 of decision BS-I/8, decided to establish an Open-ended Ad Hoc Working Group of Legal and Technical Experts to carry out the process pursuant to Article 27 of the Protocol (the Working Group, herein below), and provided its terms reference as contained in the annex to the same decision.
3. Since that time, the Working Group met five times under the co-chairmanship of Mr. René Lefeber (Netherlands) and Ms. Jimena Nieto (Colombia): in Montreal from 25 to 27 May 2005, from 20 to 24 February 2006, from 19 to 23 February 2007, and from 22 to 26 October 2007, and in Cartagena, Colombia, from 12 to 19 March 2008. The Executive Secretary also convened, based on the request of the Parties to the Protocol at their first meeting, a Technical Group of Experts on Liability and Redress in Montreal from 18 to 20 October 2004, to undertake preparatory work for the first meeting of the Working Group.
4. The last three meetings of the Working Group were held after the third meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol, where the Working Group had submitted its last report. Accordingly, at its third meeting, the Working Group continued reviewing information relevant to liability and redress. Expert presentations were made on: (i) tools for the valuation of biodiversity and biodiversity resources and functions; (ii) transnational procedures; and (iii) financial security to cover liability resulting from transboundary movements of living modified organisms. As regards its analytical work, it continued to review, based on a working draft prepared by the Co-Chairs, elements of options and approaches on rules and procedures on liability and redress and compiled further

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operational texts submitted by experts. At that meeting, the Co-Chairs presented the Working Group with a blueprint of possible scenarios of a decision on international rules and procedures in the field of liability and redress.

5. At its fourth meeting, the Working Group focused on the elaboration of options and approaches for rules and procedures referred to in Article 27 of the Protocol, based on a working draft synthesised by the Co-Chairs, with the assistance of the Secretariat. At its fifth meeting the Working Group considered a presentation on settlement of claims by an expert from the Permanent Court of Arbitration. The Working Group continued with its task of elaborating options for international rules and procedures on liability and redress for damage resulting from transboundary movements of living modified organisms based on a revised working draft further streamlined by the Co-Chairs inter-sessionally. The Working Group worked hard, including through a Group of Friends of the Co-Chairs, to narrow down the options and operational texts before it and to reach agreement on certain core elements with a view to facilitating the consideration of the proposed rules and procedures by the Conference of the Parties serving as the meeting of the Parties to the Protocol at its fourth meeting.

6. The full text of the reports of the third, fourth and fifth meetings of the Working Group is contained in documents UNEP/CBD/BS/WG-L&R/3/3, UNEP/CBD/BS/WG-L&R/4/3, and UNEP/CBD/BS/WG-L&R/5/3, and can be accessed from the Secretariat's website at: <http://www.cbd.int/doc/?mtg=BSWGLR-03>, <http://www.cbd.int/doc/?mtg=BSWGLR-04>, <http://www.cbd.int/doc/?meeting=BSWGLR-05>, respectively.

7. The substantive output of the negotiations of the Working Group is attached as annexes I and II hereto.

8. At its fifth meeting, the Working Group also requested the Co-Chairs to convene a meeting of the Friends of the Co-Chairs prior to the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety, with the following terms of reference:

(a) The Friends of the Co-Chairs will further negotiate the rules and procedures on liability and redress in the context of the Cartagena Protocol on Biosafety on the basis of annexes I and II of the report of the present meeting;

(b) The meeting will be held in Bonn for a period of three days, from 7 to 9 May 2008, subject to the availability of funds, and that it would be preceded by a single day of meetings of regional groups; and

(c) The composition of the Friends of the Co-Chairs will be as follows: six representatives of the Asia-Pacific region, namely Bangladesh, China, India, Malaysia, Palau, and the Philippines; two representatives of the European Union; two representatives of Central and Eastern Europe; six representatives of the African Group; six representatives of the Latin American and Caribbean Group; and New Zealand, Norway, Switzerland and Japan;

(d) The Friends of the Co-Chairs may be accompanied by advisors from Parties as selected by the Friends; and

(e) The outcome will be presented by the Co-Chairs to the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety for its consideration.

Annex I

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*

Annex 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*

Administrative Approach and Civil Liability: Broad functional scope as set out in Article 4 of the Protocol, provided that these activities find their origin in transboundary movement

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.

B. Geographical scope

Administrative Approach and Civil Liability: Narrow geographical scope: 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.

C. Limitation in time

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

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 4

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 5

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

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

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 3(k) of the Biosafety Protocol.

III. DAMAGE

A. *Definition of damage*

Administrative Approach: Damage to the conservation and the sustainable use of biological diversity, taking also into account risks to human health

Civil Liability: Damage resulting from the transboundary movement of LMOs to legally protected interests as provided for by domestic law, including damage not redressed through administrative approach (no double recovery)

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] [considering previous diagnosis/studies of biodiversity available for the affected area acknowledged or undertaken by the competent national authority] that takes into account natural variation and human-induced variation. [The mere presence of an LMO in the environment does not [necessarily] constitute damage].

Operational text 2

1. These rules and procedures apply to damage to the conservation and sustainable use of biological diversity[, taking also into account [damage] [risks] to] [and] human health [resulting from transboundary movement of LMOs].

2. 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 [direct or indirect] result of human activities involving [transboundary movement of] LMOs; and]

(b) [Relates in particular to species and habitats protected under national, regional or international law; and]

(bbis) [Is not an intended effect of the genetic modification of the LMO; 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.

3. 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 [direct or indirect] result of human activities involving [transboundary movement of] LMOs; and]

- (b) Is related to a sustainable use of biodiversity; and
- (bbis) [Is not an intended effect of the genetic modification of the LMO; and]
- (c) Has resulted in loss of income; and
- (d) Is significant [or serious] as set out in paragraph 3 below.

[3bis. Damage to conservation and sustainable use of biological diversity also includes any socio-economic considerations consistent with Article 26 of the Protocol.]

4. [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 [; and

(c) A proven effect on human health]]

Option 2

Operational text 3

1. Damage means any [measurable] adverse effect on[, including but not limited to,] conservation and sustainable use of biological diversity, human health [and socio-economic conditions during and after the development handling, transport, use, transfer and release of LMO][and complementary products] 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.

(i) [Is a result of human activities involving LMOs; and]

(ii) [Is an unintended effect of the genetic modification of the LMO; and]

(iii) 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]

(b) Is significant [or serious] as set out in paragraph 3 below.

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

(a) [Is a result of human activities involving LMOs; and]

(b) [Is an unintended effect of the genetic modification of the LMO; and]

(c) [Is related to a sustainable use of biodiversity; and]

(d) [Has resulted in loss of income; and]

(e) Is significant [or serious] as set out in paragraph 3 below.

3. [Damage to human health[, including loss of life, personal injury, impairment of health, loss of income and public health measures.]

4. [Damage to socio-economic conditions includes

- (a) Damage to or impaired use of or loss of property;
- (b) 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;
- (c) 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.]

[5. Damage to the environment]

<p><i>B. Special measures in case of damage to centres of origin and centres of genetic diversity to be determined</i></p>

Operational text 1

If any damage is caused to centres of origin or centres of genetic diversity [including endemic and threatened species], 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 [may] pay particular regard to any relevant centre of origin or centre of genetic diversity.

<p><i>C. Valuation of damage</i></p>

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,] the following 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 [costs] [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.]

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

[(j) All costs and expenses arising from damage to human health, [include] [including] appropriate medical treatment and compensation for impairment, disability and loss of life.]

[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.]

[2bis. In the case of centres of origin and/or genetic diversity, the unique value of these should be considered, including the costs of investments]

[3. (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.]

[4. In the case of harm to biological diversity due to transboundary movement of LMOs, compensation shall include the costs of [restoration] reinstatement, rehabilitation or clean-up measures which actually are being incurred and, where applicable [necessary], at costs of preventive measures. Damage to biodiversity will be assessed to identify the nature and significance of change.]

Operational text 2

Damage to conservation of biological diversity shall be valued on the cost of restoration [/response measures] only.

D. Causation

Administrative Approach: Domestic law approach

Civil Liability: Burden of proof lies on the claimant, burden of proof lies on the respondent or domestic law approach

Option 1 – Burden of proof lies on the claimant*Operational text 1*

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.
- (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 2*

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

[1bis. A causal link needs to be established between the damage and the activity in question [in accordance with domestic procedural rules.]]

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.]

Option 3 – Where the issue is left to domestic law*Operational text 3*

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

IV. PRIMARY COMPENSATION SCHEME

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

Obligation imposed by national law on the operator to inform competent authorities in the event of damage or imminent threat of damage

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

Discretion of the competent authorities to take measures, including when the operator has failed to do so, and to recover the costs of such measures

[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.]

[The specific administrative procedures shall be provided by the domestic law of the Party. Such procedures [may] [shall] contain the following elements:]

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][should] immediately inform the competent authority of the damage or imminent threat of damage.

Operational text 2

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 3

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

(a) Cease, modify or control any act, activity or process causing the damage [or threat of damage, as appropriate];

(b) Minimize/[Mitigate], contain or prevent the movement of any living modified organisms causing the damage [or threat of damage as appropriate] in the event that an activity cannot reasonably be avoided or stopped;

(c) Eliminate any source of the damage [or threat of damage as appropriate];

(d) [If possible, remedy] [Remedy] the effects of the damage caused by the activity [in a reasonable way, satisfactory to the competent authority.]

[ALT: In the event of damage or imminent threat of damage caused by an operator/operators, activity which [has its origin in][is reasonably linked to] the transboundary movement of LMOs, that operator/operators shall, in consultation with the competent authority, and in accordance with the

requirements of domestic law, investigate, assess and evaluate the damage or imminent threat of damage and take response measures to prevent, minimize, contain or remedy damage, as appropriate.]

Operational text 4

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.

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 5

[1. Where the operator fails to take or inadequately implements the measures required, [Parties may, as appropriate, consider the adoption of measures through which] the competent authority of the State in which the damage occurs may take [, at any time,] those measures, cause them to be taken or direct the operator to take them.

[1 bis. The competent authority

a) should establish, in accordance with their domestic laws, which operator has caused the damage [or the imminent threat of damage];

b) should assess the significance of the damage and determine which remedial measures should be taken;]

c) [may itself also take the necessary preventive or remedial measures.]]

2. The competent authority may recover the costs and expenses of, and incidental to, the taking of any such measures, from the operator.]

OR

[1. Where the operator fails to take or implement, to the satisfaction of the competent authority, the measures decided in accordance with Article X, then the competent authority has the discretion of implementing such measures itself.

2. The competent authority may recover the costs and expenses of, and incidental to, the taking of any such measures, from the operator.]

4. The term operator needs to be defined

Operational text 6

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

OR

“Operator” means the person who

- a) Was responsible for the development of;
- b) Was responsible for the production of;
- c) Notified the competent authority of;
- d) Exported from a country for the purposes of importing into country X;
- e) Transported in any manner whatsoever in country X;
- f) Imported into country X;
- g) Supplied in country X;
- h) Is or was in country X in control of;
- i) In any other way was responsible for the promotion, advancement or spreading of,

a GMO which caused the damage in country X.

Operational text 7

“Operator” means any [person][or entity] in [command or][operational] control of the [living modified organism][activity] at the time of the incident causing damage occurs[.] [, owns or has the charge or management of a living modified organism during its transboundary movement.]

OR

“Operator” means any person in operational control of the activity at the time of the incident and causing damage from transboundary movement of living modified organisms.

5. Administrative procedures

Operational text 8

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 9

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.

B. Civil Liability (harmonization of rules and procedures)

(Operational text 12 from IV.A.1)

[The Parties would establish [elaborate] a [the] civil liability scheme to deal with the damage [compensation scheme] in accordance with domestic laws and regulations. Such a scheme [may] [shall] contain the following elements and procedures:]

1. Standard of liability and channelling of liability

Channeling of strict liability to the operator

Option 1: Strict liability

Operational text 1

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

Operational text 2

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

OR

“Operator” means the person who

- j) was responsible for the development of;
- k) was responsible for the production of;
- l) notified the competent authority of;

- m) exported from a country for the purposes of importing into country X;
- n) transported in any manner whatsoever in country X;
- o) imported into country X;
- p) supplied in country X;
- q) is or was in country X in control of;
- r) in any other way was responsible for the promotion, advancement or spreading of,

a GMO which caused the damage in country X.

Operational text 3

1. “Operator” means any person [or entity] in [command or][operational] control of the [living modified organism][activity] at the time of the incident causing damage occurs[.] [, owns or has the charge or management of a living modified organism during its transboundary movement.

OR

“Operator” means any person in operational control of the activity at the time of the incident and causing damage from transboundary movement of living modified organisms.

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

Option 2: Mitigated strict liability

Operational text 4

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; and/or]

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

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

2. In cases where a fault based standard of liability is applied, liability [shall][should] be channeled to the entity having operational control 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.

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

Operational text 1

Any competent Court or Tribunal [authority] 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

threat of damage [and/or in the case of 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.]

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

1. Exemptions or mitigation

Administrative Approach: Exemptions and mitigation, as provided for in domestic legislation, on the basis of an internationally agreed exhaustive list

Civil Liability: Exemptions and mitigation to strict liability, as provided for in domestic legislation on the basis of an internationally agreed exhaustive list

Operational text 1

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.]

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*.

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

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

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

Option 2: Apportionment of liability

Operational text 2

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 3

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

Operational text 4

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)

Administrative Approach: Limitation in time, as provided for in domestic legislation, as follows:

- a. relative time limit not less than [x] years
- b. absolute time limit not less than [y] years

Civil Liability: Limitation of strict liability in time, as provided for in domestic legislation, as follows:

- a. relative time limit not less than [x] years
- b. absolute time limit not less than [y] years

1. Relative time limit

Operational text 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

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

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 4

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.

3. Additional provisions

Operational text 5

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 6

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 7

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.

(b) Limitation in amount

Administrative Approach: Limitation in amount, as provided for in domestic legislation. [If limitation is established, it should be [not less than [z] SDRs]]

Civil Liability: [Limitation of strict liability in amount: not less than [z] SDRs]

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

Administrative Approach and Civil Liability: Domestic discretion regarding provision of evidence of financial security upon import of LMOs, including through self-insurance, bearing in mind the need to appropriately reflect that this will be consistent with international law.

Option 1: Voluntary financial security

Operational text 1

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 2

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 2: Domestic law approach

Operational text 3

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

V. SUPPLEMENTARY COMPENSATION SCHEME

A. *Residual State liability*

[[No] 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 [to the state of the operator].

Operational text 3

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*

Supplementary compensation schemes for the reimbursement of costs of response and restoration measures to redress damage to the conservation and sustainable use of biological diversity, taking also into account risks to human health

- a. Consideration of ways and means in accordance with the polluter pays principle to engage the private sector in voluntary compensation schemes including alternative and/or supplementary contractual compensation mechanism by the private sector.
- b. Consideration of Supplementary collective compensation mechanism of COP-MOP [based on voluntary contributions from Parties to the Protocol and other Governments] [, in accordance with their national capacity to contribute,] providing for the allocation of financial resources by COP-MOP at the request of the State in which the damage occurred, if damage has not been redressed through domestic law implementing these rules and procedures or supplementary contractual compensation mechanism of the private sector.

[Access to [voluntary] supplementary collective compensation mechanism of COP-MOP conditional on implementation of these rules and procedures in domestic law]

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.

Operational text 2

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 3

1. An affected Party may request the COP-MOP to allocate financial resources to redress damage in so far as such damage has not been redressed by the primary compensation scheme.
2. The COP-MOP may forward the request to the [*Committee responsible for the facilitation of the implementation of this decision*] for advice.
3. To this end the COP-MOP may establish a voluntary trust fund / financial mechanism and decide upon its terms of reference.
4. For the purpose of paragraph 3, States, private organizations and institutions are invited to contribute. Private organizations and institutions are invited to conclude contracts with the United Nations, through the CBD Secretariat, to demonstrate their willingness to do so.

VI. SETTLEMENT OF CLAIMS

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

Operational text 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 (new)

No provision

B. *Civil procedures*

Enabling clause on private international law

Operational text 1

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

Operational text 2

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.

C. *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

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

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

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 including in specific cases such as when a large number of victims are affected.

Operational text 4 (new)

No provision.

D. Standing/Right to bring claims

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

Operational text 1

1. The principle of wide access to justice shall be implemented [ensured]. 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.

[2bis. 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. 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 (diplomatic protection)

Operational text 2

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 3: Domestic law approach

Operational text 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 4

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.

VII. COMPLEMENTARY CAPACITY-BUILDING MEASURES

Review of Action Plan for Building Capacities for the Effective Implementation of the Cartagena Protocol on Biosafety to address liability and redress.

[Establishment of institutional arrangement with its terms of reference in main body of and/or annex IV to COP-MOP decision [based on the roster of experts]].

Functions of the institutional arrangement to include, upon request, [based on the availability of funds] the provision of advice to:

- a. Parties on their domestic legislation in draft or existing form
- b. [COP-MOP on access to [the voluntary] supplementary collective compensation mechanism of COP-MOP]
- c. Capacity building workshops on legal issues relating to liability and redress
- d. Reports on best practices related to national legislation on liability and redress
- e. [Support to national capacity's self-assessment activities]
- f. [Advice on providers of adequate technology and procedures to access it]

1. Without an institutional arrangement

Operational text 1

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

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

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.
