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

Third meeting

Montreal, 19-23 February 2007

### REPORT OF THE OPEN-ENDED AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY ON THE WORK OF ITS THIRD MEETING

#### INTRODUCTION

##### *A. Background*

1. Article 27 of the Cartagena Protocol on Biosafety required the Conference of the Parties serving as the meeting of the Parties to the Protocol to adopt, at its first meeting, a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs). Accordingly, at its first meeting the Conference of the Parties serving as the meeting of the Parties to the Protocol established, in its decision BS-I/8, an Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress to carry out the process pursuant to Article 27 of the Protocol. At its third meeting, the Conference of the Parties serving as the meeting of the Parties to the Protocol considered the progress report of the Working Group and decided, in its decision BS-III/12, that three further meetings of the Working Group would take place before the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol in order to allow the Working Group to complete its work.

2. At its second meeting, the Working Group had analysed issues and elaborated options for elements of rules and procedures referred to in Article 27 of the Protocol for damage resulting from the transboundary movements of living modified organisms, and had considered submissions of proposed operational texts and views on approaches, options and issues identified pertaining to liability and redress in the context of Article 27 of the Protocol. It had reviewed information relating to liability and redress for damage resulting from transboundary movements of living modified organisms and had also developed an indicative list of criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Cartagena Protocol on Biosafety, on the understanding that it had not been negotiated and was non-exhaustive.

3. At its second meeting the Working Group had also noted that there was still the need for further information covering a range of areas that were considered relevant and informative to its future work. Accordingly, it identified some documents and sets of information and had requested the Secretariat to make them available for consideration at its third meeting. The Working Group had invited Parties, other Governments, relevant international organizations and stakeholders to submit further views on the matter

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covered by Article 27 of the Protocol, in particular with respect to approaches, options and issues in sections IV to XI of the working draft annexed to the report of its second meeting, preferably in the form of operational text which the Co-Chairs of the Working Group were requested to synthesize, with the assistance of the Secretariat, and produce a working draft for consideration at its third meeting.

### ***B. Officers and attendance***

4. Mr. René Lefeber (Netherlands) and Ms. Jimena Nieto (Colombia) served as Co-Chairs and Ms. Maria Mbengashe (South Africa) as Rapporteur.

5. The meeting was attended by representatives from the following Parties to the Protocol: Armenia, Austria, Bangladesh, Belgium, Belize, Benin, Bhutan, Brazil, Burkina Faso, Cambodia, Cameroon, Chad, China, Colombia, Congo, Cuba, Czech Republic, Djibouti, Dominica, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, European Community, Finland, France, Germany, Grenada, Guatemala, India, Indonesia, Japan, Jordan, Kenya, Kyrgyzstan, Lao People's Democratic Republic, Liberia, Madagascar, Malaysia, Maldives, Mali, Mexico, Mozambique, Namibia, Netherlands, New Zealand, Nigeria, Niue, Norway, Palau, Peru, Portugal, Republic of Moldova, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, Yemen, Zambia.

6. Representatives of the following Governments not party to the Protocol participated as observers: Argentina, Canada, Republic of Korea, Saudi Arabia, United States of America.

7. The United Nations Environment Programme (UNEP) was also represented.

8. The following intergovernmental and non-governmental organizations and other stakeholders were also represented at the meeting: Consultative Group on International Agricultural Research (CGIAR), The Hague Conference on Private International Law, Inter-American Institute for Cooperation on Agriculture, CropLife International, Global Industry Coalition, Marsh Europe S.A., Canada's Political Channel, Center for International Sustainable Development Law, ECOROPA, Greenpeace International, Public Research and Regulation Initiative, Third World Network, Université de Montréal, University of Malaya, University of Ottawa.

### **ITEM 1. OPENING OF THE MEETING**

9. The meeting was opened at 10:30 a.m. on Monday, 19 February 2007, by Ms. Jimena Nieto (Colombia), Co-Chair of the Working Group, who welcomed the participants and said that although the Working Group was open-ended in terms of participation, it was not open-ended in terms of time, and that in addition to the present meeting it had only two further meetings to finalize its work before it had to submit the result to the fourth meeting of the Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Protocol. She also recalled that it has been agreed at the second meeting of the Working Group that the present meeting would focus primarily on sections IV to XI of the working draft in the annex to the synthesis of proposed operational texts on approaches, options and issues identified (sections IV to XI) pertaining to liability and redress in the context of Article 27 of the Biosafety Protocol (UNEP/CBD/BS/WG-L&R/3/2) that had been prepared for the meeting. She thanked those Governments and organizations that had made submissions of views and operational text which constituted the synthesis that had been prepared by the Co-Chairs.

10. Formal opening statements were then made by Mr. Eric Thérout, Director General, Multilateral and International Affairs of the Ministry of International Affairs of the Government of Quebec; Mr. Shafkat Kakakhel, Deputy Executive Director of the United Nations Environment Programme (UNEP); Mr. Taïeb Chérif, Secretary General of the International Civil Aviation Organization (ICAO); and Mr. Ahmed Djoghla, Executive Secretary of the Secretariat of the Convention on Biological Diversity.

11. Mr. Thérault welcomed the participants to Montreal and observed that as the city now welcomed many international environmental organizations, Montreal had become an international environmental centre. He also announced that the Government of Quebec had renewed its financial commitment to the Secretariat until 2012 and that the Government supported the objectives of both the Convention of Biological Diversity and the Cartagena Protocol on Biosafety. He informed the Working Group that the National Assembly of Quebec had approved the Protocol on 10 May 2005. In addition, on 25 May 2005, the Government of Quebec had issued a decree supporting the ratification of the Protocol by Canada and had committed itself to be bound by the Protocol once it had entered into force in Canada.

12. Mr. Kakakhel welcomed the participants and said that modern biotechnology had great potential for human well-being, but that it also needed to be developed and used with adequate safety measures for the environment and human health. The challenge was to find a balance that would maximize the benefits of that technology but would also provide protection from any damage that might be caused by its products. UNEP had played a leading role during the negotiation of the Cartagena Protocol on Biosafety and since its adoption had supported its implementation through a US\$ 60 million capacity-building programme financed through the Global Environment Facility. UNEP fully supported the activities of the Working Group and hoped, in the spirit of principle 13 of the Rio Declaration, that these would result in both further understanding and development of liability and redress issues, and better implementation of already existing regimes in that area. He said that UNEP attached great importance to the Biosafety Protocol and pledged his full support, and that of Mr. Achim Steiner, Executive Director of UNEP, for the work of Secretariat of the Convention on Biological Diversity as well as the leadership of Mr. Ahmed Djoghlaoui, its Executive Secretary, to which he paid special tribute. He said that Mr. Djoghlaoui's dynamism and innovative approach all boded well for the fullest implementation of the Protocol.

13. Mr. Taïeb Chérif also welcomed the participants and noted that ICAO and the Secretariat of the Convention on Biological Diversity shared a number of common objectives such as safety in the movement of living modified organisms and a clean and healthy environment. He said that one of the strategic objectives of ICAO was to minimize the adverse effects of aviation on the environment in terms of noise and aircraft engine emissions, and that the movement of genetically modified organisms was covered under Annex 18 to the Convention on International Civil Aviation. He also noted that in addition to common goals and objectives, ICAO and the Secretariat had for some time shared the same meeting facilities and he announced that a Memorandum of Understanding would be signed to formalize the availability of ICAO conference premises and other related services to the Convention on Biological Diversity.

14. Mr. Djoghlaoui welcomed the participants and thanked the Governments of Finland, the Netherlands, Norway, Sweden and Iceland, as well as the European Commission for the financial contributions made to support the participation of experts from developing countries. He commended Canada for its support to the Convention on Biological Diversity and expressed his gratitude to the Government of Quebec. He also thanked UNEP for its continued support which was demonstrated by the attendance of Mr. Kakakhel at the meeting. He thanked him for his support as well as the support recently expressed at the Governing Council of UNEP and said that the Secretariat of the Convention on Biological Diversity was proud to be hosted by that organization. He also assured the Secretary General of ICAO of his continued collaboration. That collaboration had existed on an ad hoc basis from 1996 but was to be formalized at the present meeting with the signing of a Memorandum of Understanding between ICAO and the Secretariat of the Convention on Biological Diversity. He also thanked Mr. Worku Damena Yifru for his management, as officer in charge, of the Biosafety Unit over the previous year and introduced Mr. Charles Gbedemah, Senior Environmental Affairs Officer, to the meeting as the new head of the Biosafety Unit.

15. He recalled that the Working Group was meeting for discussions aimed at building a consensus on liability and redress issues. He also noted that it was the anniversary of the birth of Nicolaus Copernicus, who had once said that he was not so enamoured of his own opinions that he disregarded what others might think of them. He therefore urged the participants to undertake their discussions in a

spirit of solidarity and in that spirit thus be open to the opinions of others as they built understanding, solidarity and consensus on the complex subject of liability and redress.

16. Following the opening statements, Mr. Ahmed Djoghlaif, Executive Secretary of the Convention on Biological Diversity, and Mr. Taïeb Chérif, Secretary General of the International Civil Aviation Organization, signed a Memorandum of Understanding regarding conference-servicing and other arrangements in Montreal.

## **ITEM 2. ORGANIZATIONAL MATTERS**

### ***2.1. Adoption of the agenda***

17. The Working Group adopted the following agenda on the basis of the provisional agenda (UNEP/CBD/BS/WG-L&R/3/1) prepared by the Executive Secretary.

1. Opening of the meeting.
2. Organizational matters:
  - 2.1. Adoption of the agenda;
  - 2.2. Organization of work.
3. Review of information relating to liability and redress for damage resulting from transboundary movement of living modified organisms.
4. Elaboration of options for elements of rules and procedures referred to in Article 27 of the Protocol.
5. Other matters.
6. Adoption of the report.
7. Closure of the meeting.

### ***2.2. Organization of work***

18. At the opening session of the meeting, participants adopted the organization of the work proposed by the Executive Secretary in annex I to the annotated provisional agenda (UNEP/CBD/BS/WG-L&R/3/1/Add.1).

## **ITEM 3. REVIEW OF INFORMATION RELATING TO LIABILITY AND REDRESS FOR DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS**

19. Agenda item 3 was taken up at the 1st session of the meeting, on Monday, 19 February 2007. In considering this item, the Working Group had before it notes by the Executive Secretary on recent developments in international law relating to liability and redress, including the status of international environment-related third party liability instruments (UNEP/CBD/BS/WG-L&R/3/INF/2), experience of other international instruments and forums as regards damage suffered in areas beyond national jurisdiction (UNEP/CBD/BS/WG-L&R/3/INF/3), documents of the Convention on Biological Diversity relating to the application of tools for valuation of biodiversity and biodiversity resources and functions (UNEP/CBD/BS/WG-L&R/3/INF/4) and financial security to cover liability resulting from transboundary movements of living modified organisms (UNEP/CBD/BS/WG-L&R/3/INF/5). The documents had been prepared in response to requests for such information made by the Working Group at its second meeting.

20. Ms. Nieto, Co-Chair, reminded the Working Group that at its second meeting it had requested the Secretariat to arrange for expert presentations on transnational procedures and on financial security to cover liability resulting from transboundary movements of living modified organisms. Accordingly, the Secretariat had invited Mr. Christopher Bryce, a senior Vice-President of Marsh Limited, as well as the First Secretary of the Hague Conference on Private International Law, Mr. Christophe Bernasconi, to

address the Working Group. She said that a representative of the Secretariat would also address the meeting on the subject of tools for the valuation of biodiversity and biodiversity resources and functions.

21. In his presentation, the representative of the Secretariat outlined the basic concepts of economic evaluation and gave an overview of valuation tools and their application to liability and redress. He said that economic value was a measure based on individual preferences. It was therefore both an anthropogenic and subjective measure. Economic valuation was important because it elicited hidden biodiversity values. Different motives for valuing environmental assets were also reflected in the concept of total economic value. Several types of valuation tools existed which, depending on the values being measured, could also be used in selecting the options for restoration and compensation. He informed the meeting that a technical paper on the subject (CBD Technical Series No. 28 *An Exploration of Tools and Methods for Valuation of Biodiversity and Biodiversity Resources and Functions*) had been made available to the Working Group together with a wall chart showing options for the application of tools for biodiversity and biodiversity resources and functions.

22. Statements were made by the representative on Argentina, Armenia, China, Japan and Liberia.

23. The Co-Chair then asked Mr. Christopher Bryce to make a presentation on financial security to cover liability resulting from the transboundary movement of living modified organisms.

24. In his presentation, Mr Bryce said that providing financial security for liabilities associated with living and genetically modified organisms would require a mixture of techniques and that while currently the insurance market was underdeveloped, it was likely that the market would respond to the needs of business for insurance to cover against the possible losses related to the development, manufacture, distribution and cultivation of living and genetically modified organisms. The risks that the insurance market would be asked to accept would need to be defined or have boundaries.

25. The slowness in responding to date had been inevitable because insurers had not been comfortable risking their own capital until they had more experience with those organisms and the risks arising from their use. He explained that insurance from the commercial market remained a matter of contract and that for most policies there was also a financial ceiling. All insurance contracts also had terms, conditions, limits, operative periods and exclusions and local insurers were constrained in the terms they could offer because of their need to use the capital and expertise of reinsurers to support the underwriting of insurance. He also stressed that continuity of insurance coverage and policy limits were ultimately the most important issue in any financial security paradigm. In closing he said that those who exploited the new technologies needed to develop a portfolio of measures to manage the risks involved and that while commercial insurance would play an important role, there was also a need for alternative sources of financial security to cover the normal shortfall between insurance and exposure, cyclical shortages in the supply of insurance and social, ethical and moral claims that were not usually the role of insurance.

26. At its 2nd session, on 19 February 2007, the Working Group continued its discussion of the agenda item.

27. Ms. Nieto, Co-Chair of the Working Group, asked the participants for their views on the issues raised in the presentation on insurance and financial security.

28. Statements were made by the representatives of the Canada and the United States of America.

29. The Co-Chair then called on Mr. Christopher Bernasconi to make a presentation on the private international law analysis of cross-border environmental damage.

30. In his presentation, Mr. Bernasconi commended the Secretariat for its information document, on transnational procedures, including the work of the Hague Conference on Private International Law, in this field, including case-studies (UNEP/CBD/WG-L&R/2/INF/4) and said that private international law rules existed to achieve solutions for cross-border multi-State problems for which no comprehensive and uniform substantive law regime had been developed. He stressed that private international law rules were not international rules but rather were national rules for international situations which acted as traffic

signs to steer the issue at stake toward the appropriate legal order. He also suggested that the meeting consider a number of such rules of private international law when considering liability and redress issues. In particular he drew the attention of the meeting to the issues of the choice of jurisdiction to adjudicate a dispute, the choice of the applicable law to settle the dispute, and the rules for the recognition and enforcement of any awards resulting from the settlement of the dispute.

31. In the discussion that followed statements were made by the representatives of Belize, Canada, India, Japan, Switzerland, and the United States of America.

32. A statement was also made by the observer from the Public Research and Regulation Initiative.

33. The Co-Chair noted that the Working Group appeared satisfied with both the information collected by the Secretariat and the presentations which she felt had been excellent. She invited both Mr. Bryce and Mr. Bernasconi to attend the next meeting of the Working Group.

#### **ITEM 4. ELABORATION OF OPTIONS FOR ELEMENTS OF RULES AND PROCEDURES REFERRED TO IN ARTICLE 27 OF THE PROTOCOL**

34. Agenda item 4 was taken up at the 2nd session of the Working Group on Monday, 19 February 2007. In considering the item, the Working Group had before it notes by the Co-Chairs containing a synthesis of proposed operational texts on approaches, options and issues identified (Sections IV to XI) pertaining to liability and redress in the context of Article 27 of the Biosafety Protocol (UNEP/CBD/BS/WG-L&R/3/2) and a synthesis of proposed operational texts on approaches, options and issues identified (Sections I to III) pertaining to liability and redress issues in the context of Article 27 of the Biosafety Protocol (UNEP/CBD/BS/WG-L&R/3/2/Add.1) as well as an information document containing a compilation of submissions of further views and proposed operational texts with respect to approaches, options and issues identified as regards matter covered by Article 27 of the Protocol (UNEP/CBD/BS/WG-L&R/3/INF/1).

35. A representative of the Secretariat stated that it had received submissions from the Governments of Argentina, Colombia, Ethiopia, the European Union, Norway and Thailand. Submissions had also been received from the Global Industry Coalition, Greenpeace International, the International Grain Trade Coalition and Public Research and Regulation Initiative. The Co-Chairs, with the assistance of the Secretariat, had incorporated only those texts submitted in the form of operational texts in the synthesis document.

#### ***Synthesis of proposed operational texts on approaches, options and issues identified (sections I to III) pertaining to liability and redress in the context of Article 27 of the Biosafety Protocol***

36. The Working Group took up revised draft text of the Co-Chairs at its 4th session on 21 February 2007. Ms. Jimena Nieto, Co-Chair of the Working Group, said that the synthesis contained in document UNEP/CBD/BS/WG-L&R/3/2/Add.1 had been revised to streamline the text and had been presented as a conference room paper. She asked the participants to review the revised draft text and conduct regional and other informal consultations to ensure that the co-chairs had not inadvertently removed any text. She also noted that further submissions could be made during the inter-sessional period.

37. Statements were made by the representatives of Brazil (on behalf of the Latin American and Caribbean Group), Egypt (on behalf of the African Group), the European Community, Japan and Malaysia (on behalf of the Asia Pacific Group).

38. The Working Group continued its discussion of the draft text at its 5th session on 22 February 2007. Ms. Nieto, Co-Chair of the Working Group, said that the Co-Chairs suggested that the operational text found in the working draft on administrative response measures be moved to section VI.

***Synthesis of proposed operational texts on approaches, options and issues identified (sections IV to XI) pertaining to liability and redress in the context of Article 27 of the Biosafety Protocol***

*Section IV. Channelling of liability, role of Parties of import and export, standard of liability*

*(a) Possible approaches to liability*

39. The Working Group took up consideration of possible approaches to liability at its 2nd session, on 19 February 2007. Mr. Lefeber, Co-Chair of the Working Group, reminded the participants that in accordance with the programme of work agreed to at the first session, discussion would start with section IV of the draft text of the Co-Chairs. He noted however that section IV raised a number of issues that were interrelated with other sections of the working draft and asked the participants to consider that when discussing section IV. He also drew the attention of the meeting to resolution 61/36 of the General Assembly of the United Nations on allocation of loss in the case of transboundary harm arising out of hazardous activities. That resolution contained an annex and he said that principle seven of that annex was of particular relevance to the work of the meeting. The first paragraph of principle 7 stated that that where, in respect of particular categories of hazardous activities, specific global, regional or bilateral agreements would provide effective arrangements concerning compensation, response measures and international and domestic remedies, all efforts should be made to conclude such specific agreements. The second paragraph of principle seven also stated that, such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, were insufficient to cover the damage suffered as a result of an incident. Any such funds might be designed to supplement or replace national industry-based funds. The Co-Chair suggested that the resolution should guide the meeting in its work.

40. One participant suggested that it would be useful to discuss section XI before taking up section IV. In response to that suggestion, the Co-Chair reiterated the need to consider the implications of all the sections of the draft text when discussing any particular section and he allowed the participants to make comments on section XI when discussing section IV.

41. Statements were made by the representatives of Canada, China, Germany (on behalf of the European Union), India, Japan, Norway, Trinidad and Tobago, and Uganda.

42. At its 3rd session, on 20 February 2007, the Working Group continued its discussion on possible approaches to liability.

43. Statements were made by representatives of Bangladesh, Brazil, Canada, Colombia, Egypt, Ethiopia, the European Community, Malaysia, Palau and South Africa.

44. A statement was also made by the observers from Consultative Group on International Agricultural Research (CGIAR), Greenpeace International and the Public Research and Regulation Initiative.

45. Following the statements the Co-Chair said that there seemed to be agreement among the participants that there was no need for special rules on state responsibility. Although the Co-Chair noted that there was no legal necessity to make that explicit, it appeared to him that participants would be more comfortable if it were noted that the rules being developed were without prejudice to the rules of general international law with respect to state responsibility. He also said that although the option of primary state liability had been removed from the working draft at the second meeting of the Working Group, one Party had submitted operational text on that subject. He also noted that the Party in question had been unable to attend the second meeting of the Working Group when that decision had been taken. He therefore proposed to reintroduce that option into the working draft. He also urged participants to submit operational text, especially with respect to possible administrative approaches.

*(b) Issues relating to civil liability*

46. At its 3rd session, on 20 February 2007, the Working Group was also considered issues relating to liability. Mr. Lefeber, Co-Chair of the Working Group, reminded the meeting that the section was further divided into five sub-sections, and that the Co-Chairs had not yet received any operational text on the first sub-section. He asked the participants for their views on the first and second sub-sections of the section on issues relating to civil liability.

47. Statements were made by the representatives of Bangladesh, Canada, Ethiopia, and Japan.

48. A statement was also made by the observer from the Global Industry Coalition,

49. Following the statements the Co-Chair asked the participants for their views on the third sub-section.

50. Statements were made by the representatives of Argentina, Brazil, Ecuador, Egypt, El Salvador, Ethiopia, India, Norway, Malaysia, Mexico and Trinidad and Tobago.

51. Statements were also made by the observers from Ecoropa, Greenpeace International, and the Public Research and Regulation Initiative.

52. Following the statements the Co-Chair asked the participants for their views on the fourth and fifth sub-sections of the section relating to liability.

53. Statements were made by the representatives of India, Japan, Malaysia and Norway.

54. Statements were also made by the observers from Greenpeace International and the Public Research and Regulation Initiative.

55. The Co-Chair said that it appeared from the discussion that the section should relate not only to civil liability but to other approaches to liability as well and he said that he would change the title accordingly. He also thanked the participants for their interventions and said that the operational text that had been incorporated into section IV of the working draft would now be removed. He asked the participants to conduct regional and other informal consultations with a view to preparing new operational text for inclusion in the working draft.

*Section V. Limitation on liability*

56. The Working Group took up consideration of limitation on liability at its 4th session, on 21 February 2007. Mr. Lefeber, Co-Chair of the Working Group, reminded the participants that the issue of limitations on liability related to both financial limits and time limits and that the two issues were related to the other sections of the working draft.

57. Statements were made by the representatives of Cameroon, Germany (on behalf of the European Union) and India.

58. Following the statements, the Co-Chair thanked the participants for their interventions and said that the operational text that had been incorporated into section V of the working draft would now be removed. He asked the participants to conduct regional and other informal consultations with a view to preparing new operational text for inclusion in the working draft.

*Section VI. Mechanism of financial security*

59. The Working Group took up consideration of coverage of liability at its 4th session, on 21 February 2007.

60. Statements were made by the representatives of Argentina, Germany (on behalf of the European Union), Japan, Norway and Palau.

61. Statements were also made by the observers from the Global Industry Coalition, Greenpeace International and the Public Research and Regulation Initiative



62. The Working Group also took up consideration of supplementary collective compensation arrangements at its 4th session, on 21 February 2007. Mr. Lefeber, Co-Chair of the Working Group, noted that the sub-sections were interconnected, for in the absence of coverage of liability victims might not be compensated for the damage suffered. He said that in other cases, such as those where the person causing the damage could not be identified, or was exempt from liability or else was financially unable to address the damage some form of supplementary collective compensation arrangement might be thought beneficial. However such a compensation scheme might also be thought to undermine the polluter pays principle and so any such collective compensation arrangement would also have to be supplementary to the primary compensation scheme. He reminded the participants of General Assembly resolution 61/36, on allocation of loss in the case of transboundary harm arising out of hazardous activities. According to principle 3 of the annex to the resolution, the principles had been drafted both to ensure the prompt and adequate compensation to victims of transboundary damage and to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement. He also reminded the participants of principle 7 of the annex to the resolution, on the development of specific international regimes, which he had referred to at the 2nd session of the meeting. Paragraph 2 of principle 3 stated that such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, were insufficient to cover the damage suffered as a result of an incident. Any such funds might be designed to supplement or replace national industry-based funds.

63. Statements were made by the representatives of Argentina, Armenia, Burkina Faso, Ethiopia, Germany (on behalf of the European Union), Japan, Kenya, Liberia, Malaysia, Mexico and Senegal.

64. A statement was also made by the observer from Greenpeace International.

65. Following the statements the Co-Chair said that he wished to clarify that, when referring to the General Assembly resolution on allocation of loss in the case of transboundary harm arising out of hazardous activities, it had not been the intention of either co-chair to suggest that living modified organisms were hazardous material. The Co-Chairs had referred to the principles in the annex to that resolution because it was their belief that they would also be useful in the discussion of hazardous and non-hazardous activities alike. He noted that one participant had requested an information document for the next meeting of the Working Group on supplementary collective compensation arrangements and he asked the Secretariat to make that document available for that meeting. He also reminded the participants that the operational text which had been incorporated into section VI of the working draft would now be removed. He asked the participants to conduct regional and other informal consultations with a view to preparing new operational text for inclusion in the working draft.

#### *Section VII. Settlement of claims*

66. The Working Group took up the settlement of claims at its 4th session, on 21 February 2007. Mr. René Lefeber, Co-Chair of the Working Group, said that the options procedures being considered were related to the issues that had been discussed under other sections and in particular section IV.

67. Statements were made by the representatives of the European Community, India and Norway.

68. A statement was also made by the observer from Greenpeace International.

69. Following the statements the Co-Chair said that the operational text which had been incorporated into section VII of the working draft would now be removed. He asked the participants to conduct regional and other informal consultations with a view to preparing new operational text for inclusion in the working draft.

#### *Section VIII. Standing/right to bring claims*

70. The Working Group took up consideration of standing and the right to bring claims at its 4th session, on 21 February 2007. Mr. Lefeber, Co-Chair of the Working Group, said that the issue was connected to the issue of the settlement of claims and that as yet little operational text had been received

by the co-chairs. He said that the issue needed further consideration as it was important to determine those who were entitled to bring claims, particularly in relation to damage to the environment and damage to biodiversity.

71. Statements were made by the representatives of Burkina Faso, Ethiopia, the European Community, India, Malaysia and Norway.

72. A statement was also made by the observer from the Public Research and Regulation Initiative.

73. Following the statements the Co-Chair, thanked the participants for their interventions and said that the operational text which had been incorporated into section VIII of the working draft would now be removed. He asked the participants to conduct regional and other informal consultations with a view to preparing new operational text for inclusion in the working draft.

*Section IX. Non-Parties*

74. The Working Group took up consideration of non-Parties at its 5th session, on 22 February 2007. Mr. Lefeber, Co-Chair of the Working Group, reminded the participants that it was not possible to impose obligations on non-parties.

75. Statements were made by the representatives of Canada, Ethiopia, Germany (on behalf of the European Union), Norway, and the United States of America.

76. A statement was also made by the observer from Greenpeace International.

77. Following the statements the Co-Chair thanked the participants and reminded them that the operational text which had been incorporated into section IX of the working draft would be removed. He asked the participants to conduct regional and informal consultations with a view to preparing new operational text for inclusion in the working draft.

*Section X. Complementary capacity-building measures*

78. The Working Group took up consideration of complementary capacity building measures at its 5th session, on 22 February 2007. Mr. Lefeber, Co-Chair of the Working Group, said that such capacity building could either use the measures adopted under Article 22 of the Biosafety Protocol or could be specific complementary capacity building measures based on national needs and priorities. He also said that the two approaches were not mutually exclusive and noted that participants had stressed that capacity building needed to be complementary to rules and procedures in the field of liability and redress for damage resulting from the transboundary movement of living modified organisms.

79. Statements were made by the representatives of Armenia, Brazil, Ethiopia, the European Community, Germany (on behalf of the European Union), Malaysia and Norway.

80. A statement was also made by the observer from the Consultative Group on International Agricultural Research.

81. A statement was also made by observer from Greenpeace International who suggested that the Secretariat be asked to make available through the Biosafety Clearing-House information on national rules and procedures in the field of liability and redress for damage resulting from the transboundary movement of living modified organisms as well as reports of judgements addressing that damage. He suggested that Parties ask the Secretariat to maintain a database of legislation, relevant case law, and incidents of contamination and liability or potential liability, and make it available on an ongoing basis.

82. After consultation with the Secretariat the Co-Chair informed the Working Group that it would be possible to provide that information within the existing mandate and existing resources on the understanding that the Secretariat would not seek out such information but would only make it available as it was received. He then asked the participants for their views on the proposal.

83. Statements were made by the representatives of the European Community, Malaysia, Norway, Palau, and Zambia.

84. The Co-Chair, said that as the Working Group was agreed on the issue, the Secretariat was requested to make available through the Biosafety Clearing-House information on national rules and procedures in the field of liability and redress for damage resulting from the transboundary movement of living modified organisms, reports of judgements addressing that damage, and relevant international rules and procedures in the field of liability and redress.

85. He also reminded the participants that the operational text which had been incorporated into section X of the working draft would be removed. He asked the participants to conduct regional and informal consultations with a view to preparing new operational text for inclusion in the working draft.

#### *XI. Choice of instrument*

86. The Working Group took up consideration of the choice of instrument at its 5th session, on 22 February 2007. In considering the issue the Working Group had before it, as a conference room paper, a Co-Chairs' text of a 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 for damage resulting from transboundary movements of living modified organisms, a revised version of which is contained in annex I of the present report. He said that the Co-chairs' text attempted to capture all the elements that had been discussed without prejudicing any future approaches, in particular the choice of instrument.

87. Statements were made by the representatives of Armenia, Bangladesh, Brazil, Cambodia, Cameroon, Canada, Colombia, Cuba, Ecuador, the European Community, Egypt, Germany (on behalf of the European Union), Malaysia, Mexico, Norway, India, Japan, Palau, Peru, Saudi Arabia, Switzerland, Trinidad and Tobago, Uganda, and the United States of America.

88. Statements were made by the observers from Greenpeace International and the Public Research and Regulation Initiative.

89. The Co-Chair reminded the participants that the operational text which had been incorporated under section XI of the working draft would be removed. He asked the participants to conduct regional and informal consultations with a view to preparing new operational text for inclusion in the working draft. He also observed that there appeared to be consensus that primary liability needed to be with the operator and noted that that was also the approach taken in principle 4 of Resolution 61/36 of the General Assembly, which stated that each State should take all necessary measures to ensure that prompt and adequate compensation be available for victims of transboundary damage caused by hazardous activities located within its territory or other wise under its jurisdiction or control and that the measures should include the imposition on the operator or where appropriate, other person or entity. He asked the participants to reflect on that during the inter-sessional period. He also asked the participants to reflect upon the utility of an administrative approach in cases of environmental damage and damage to biodiversity, and to consider reserving civil liability for cases of traditional damage, if it were decided to cover such damage in the rules and procedures under Article 27 of the Cartagena Protocol.

90. A statement was made by the representative of Argentina.

91. In response to the statement, Ms. Nieto, Co-Chair of the Working Group, explained that operational text from submissions made during the forthcoming inter-sessional period would be synthesized in a working draft for consideration at the fourth meeting of the Working Group. That might involve minor changes to operational text submitted at the present meeting. However the Co-Chair assured participants that it would not lead to the removal of any approaches or options in the working draft contained in annex II to the present report.

#### ***Conclusions***

92. The Working Group:

(a) *Requested* the Secretariat to gather and make available at its fourth meeting, information on:

- (i) Recent developments in international law relating to liability and redress, including the status of international environment-related liability instruments; and
- (ii) Supplementary collective compensation arrangements in international environment-related liability instruments;

(b) *Invited Parties*, other Governments, relevant international organizations and stakeholders to submit further views on the matter covered by Article 27 of the Protocol, in particular with respect to approaches and options identified in sections I to VIII of the working draft, contained in annex II of the present report, preferably in the form of proposals for operational text, no later than three months before the fourth meeting of the Working Group; and requests the Secretariat to make the submissions available for its fourth meeting;

(c) *Requested* the Co-Chairs, with the assistance of the Secretariat, to synthesize the proposed operational texts submitted pursuant to paragraph (b) above, and produce a working draft for consideration at its fourth meeting; and

(d) *Requested* the Secretariat to make available through the Biosafety Clearing-House any information submitted to it, on existing national rules and procedures in the field of liability and redress for damage resulting from the transboundary movement of living modified organisms, reports of judgements addressing that damage, and relevant international rules and procedures in the field of liability and redress.

#### **ITEM 5. OTHER MATTERS**

93. Agenda item 5 was taken up at the 6th session of the Working Group, on 23 February 2007.

94. The representative of Uganda, on behalf of the Group of 77 and China, asked that a one day meeting for that group be organized preceding the next meeting of the Working Group. He requested facilitation to enable the participants to attend that meeting and appealed to well-wishers for funding for that very important meeting.

95. Mr. Lefeber, Co-Chair of the Working Group, said that he attached great importance to such meetings as they facilitated the work of the Working Group. He said that while he in principle supported the proposal, he noted that it would not be possible to organize such a meeting without additional funding. He said that if such funding were made available, then such a meeting could be scheduled. However if that proved impossible, he assured the members of the Group of 77 and China that the afternoon session of the first day of the next meeting would be reserved for such a meeting and that interpretation would be provided for it.

#### **ITEM 6. ADOPTION OF THE REPORT**

96. At the 6th session, on 23 February 2007 the Working Group considered annexes I and II of the draft report.

97. With respect to annex II, Mr. Lefeber, Co-Chair of the Working Group, said that the text now followed the blueprint contained in annex I. He noted that all headings in the submissions had been eliminated with one exception where they had been retained to help organize the text of that submission. He also noted that some cross-referencing in the submission had not yet been corrected but assured the participants that such cross-referencing would be done before the annex II was finalized.

98. A representative of the Secretariat drew the attention of the meeting two submissions that had been inadvertently omitted from annex II. After reading them to the Working Group he assured the participants that the submissions would be included in the final version of annex II.

99. In response to a statement by the observer of Greenpeace International, the Co-Chair said that while it would not be possible to produce a table of contents for annex II, the Co-Chairs undertook to

create such a table of contents for the working draft that they would produce during the inter-sessional period.

100. Annexes I and II of the present report were adopted at the 6th session of the Working Group, as orally amended.

101. The present report was adopted at the 7th session of the meeting, on 23 February 2007, on the basis of the draft report (UNEP/CBD/BS/WG-L&R/3/L.1) that had been prepared by the Rapporteur, as orally amended.

102. In response to a statement by the representative of Malaysia, Ms. Nieto, Co-Chair of the Working Group, explained that the reference made to recent developments in international liability and redress contained in paragraph (a) (i) of the conclusions of the Working Group (see para. 92 above) included information relating to the ongoing processes in international law.

103. In response to a statement by the representative of Palau, the Co-Chair explained that reference made to the reports of judgements contained in paragraph (d) of the conclusions of the Working Group included court decisions and the written reasons given in those decisions.

104. The Working Group authorized the Rapporteur, with the assistance of the Secretariat and in consultation with the Co-Chairs, to finalize the report of the meeting to reflect the proceedings of the final day of the meeting.

#### **ITEM 7. CLOSURE OF THE MEETING**

105. Ms. Nieto, on behalf of the Co-Chairs, thanked the Governments of Finland, Iceland, the Netherlands, Norway and Sweden and the European Community for the financial support that they extended to help support the organization of the meeting. She assured the participants that the money that had been spent on the meeting had been put to good use. She thanked the participants for their contributions and very productive discussion.

106. The Co-Chair stressed that the future work of the Working Group would be based on the annexes to the present report and asked the participants to reflect on them during the inter-sessional period. She said that they would be used as a basis for future decisions at the next meeting of the Working Group. She also said that the time for the compilation of information was behind the Working Group and that the moment had come to take decisions. She asked the participants to come to the next meeting with a flexible mandate for negotiation and said that it was only with such mandates that the current process could be continued.

107. After the customary exchange of courtesies, the Co-Chair declared the third meeting of the Ad Hoc Working Group closed at 1.30 p.m. on Friday 23 February 2007.

*Annex I*

**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>	1. Reference to existing rules and procedures				
<i>State liability</i>	1. Development of international rules and procedures (legally binding and/or non-legally binding) 2. No rules and procedures				
<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.*

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/...

*Annex II*

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

**I. POSSIBLE APPROACHES TO LIABILITY AND REDRESS**

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

*Operational text 1*

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

*Operational text 2*

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

*Operational text 3*

The Subprotocol shall not affect the rights and obligations of the Parties under the rules of general international law with respect to the international responsibility of States.

*Operational text 4*

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

*Operational text 5*

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

*Operational text 6*

A Party shall be liable for damage to biodiversity resulting from any breach of its obligations under the Protocol.

*Operational text 7*

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

*Operational text 8*

A Party shall be liable for damage to the conservation and sustainable use of biodiversity due to LMOs resulting from any breach of its obligations under the Protocol

***B. State liability (for acts that are not prohibited by international law, including cases where a State Party is in full compliance with its obligations of the Protocol)***

*Option 1*

Primary State liability 1/

*Option 2*

Residual State liability in combination with primary liability of operator 2/

*Option 3*

No State liability 3/

***C. Civil liability (harmonization of rules and procedures) 4/***

*Operational text 1*

Civil liability is appropriate for traditional damage, i.e. damage to persons, goods, and economic interests.

***D. Administrative approaches based on allocation of costs of response measures and restoration measures 5/***

*Operational text 1*

States may undertake administrative measures as appropriate based on allocation of cost of response and restoration measures in accordance with their domestic law and capacities.

*Operational text 2*

Where information becomes available after approval or authorization which indicates a possible adverse effect, operators would need to take such action as may be necessary in order to minimize the effects, and to inform national authorities

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1/ Operational text can be found in chapter IV.

2/ Operational text can be found in chapter V.

3/ Further operational text can be found in chapter IV.

4/ Further operational text can be found in chapter IV.

5/ Further operational text can be found in chapter IV.



## II. SCOPE

### A. *Functional scope*

#### *Operational text 1*

1. These rules and procedures apply to shipments, transit, handling and use of living modified organisms (LMO), 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, as well as to any use in violation of such authorization.
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; and
  - (c) Intended for intentional introduction into the environment.
4. These rules and procedures apply to unintentional transboundary movements. The point where they begin should be the same as for an intentional transboundary movement, [*paragraphs 2 to 4 of OT 1 of Section I.E*] apply *mutatis mutandis*.
5. These rules and procedures apply to transboundary movements in contravention of domestic measures to implement the Protocol.

#### *Operational text 2*

This Protocol 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 3*

1. Damage resulting from transboundary movement of LMOs, including transit to the extent that a Party causes damage in a State of transit.
2. In respect of an LMO for intentional introduction into the environment, damage caused by an LMO would be within the scope of the rules and procedures adopted under Article 27 only if the importing State has complied with the conditions of use of the LMO consistent with the AIA for that LMO.
3. In respect of an LMO for intentional introduction into the environment, damage caused by an LMO would be within the scope of the rules and procedures adopted under Article 27 only if the importing State has complied with the conditions of use of the LMO consistent with the AIA for that LMO.
4. The scope of the rules and procedures should not be limited to the first transboundary movement of an LMO.

5. In a situation in which an exporter has complied with the risk assessment requirements of an importing State pursuant to the AIA procedure, damage which occurs in the importing State and which is established to be as a result of inadequacies in the importing State's risk assessment process should be outside the scope of the rules and procedures adopted under Article 27.

*Operational text 4*

Any damage resulting from, but not limited to, transport, transit, handling and/or use of LMOs that finds its origin in transboundary movement as well as unintentional transboundary movement of LMOs.

*Operational text 5*

The Protocol 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 6*

The instrument shall apply to damage caused by living modified organisms that were originally either imported or unintentionally released across the border. The damage must be a result of the genetic modification.

*Operational text 7*

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

*Operational text 8*

Damage resulting from transboundary movement of living modified organisms.

*Operational text 9*

1. The following definitions are used for the purpose of this document:
  - (a) Intentional transboundary movements: It is understood that the rules and procedures described in this instrument not only cover authorized movements but also all non-authorized movements and any unauthorized use of any kind.
  - (b) Illegal transboundary movements: are movements which contravene national legal provisions, as long as the affected State is a Party to the Cartagena Protocol.
2. This legally-binding instrument will apply to damages resulting from intentional or unintentional transboundary movement of any LMO, including transport, use, and placing on the market.
3. This instrument takes into account equally the right of States regardless of whether they are importing or transit States.

*Operational text 10*

1. These rules and procedures shall apply to damage to biological diversity resulting from transboundary movements of living modified organisms.
2. "Biological diversity" -- as defined in Article 2 of the Convention on Biological Diversity.
3. "Living modified organism" -- as defined in Article 2 of the Cartagena Protocol on Biosafety

4. “Transboundary movement” means the intentional movement of LMOs from the territory of a Party to the Protocol to the point of entry at which customs formalities take place within the territory of another Party to the Protocol.
5. “Resulting from” means that the damage:
  - (a) Would not have occurred but for the transboundary movement of the LMO; and
  - (b) That the transboundary movement was the proximate cause of the damage without any superseding or intervening causes.

*Operational text 11*

This Protocol shall apply to damage resulting from the transport, transit, handling and/or use of living modified organisms resulting from transboundary movements of living modified organisms, including unintentional and illegal transboundary movements of living modified organisms,

*Operational text 12*

This Protocol shall apply to damage due to any occurrence, or series of occurrences having the same origin that causes damage or creates a grave and imminent threat of causing damage during transboundary movement, transit, handling and use of LMOs, including illegal traffic from the point where the LMOs are loaded on the means of transport in an area under the national jurisdiction of a Party of export.

*Operational text 13*

1. This instrument applies to transport, transit, handling and use of living modified organisms (LMO) that finds its origin in a transboundary movement. It applies to all LMOs covered by the Cartagena Protocol.
2. With respect to intentional transboundary movements, this instrument applies to damage resulting from any authorized use of the LMO, as well as any use in violation of such authorization.
3. This instrument also applies to unintentional transboundary movements and transboundary movements in contravention of domestic measures to implement the Protocol.

*Operational text 14*

This instrument shall apply to adverse effects of living modified organisms resulting from intentional or unintentional transboundary movement on the conservation and sustainable use of biodiversity

<b><i>B.      Geographical scope</i></b>
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*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*

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. This Protocol 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 the Protocol 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.

*Operational text 3*

The rules and procedures adopted under Article 27 apply to damage caused by a Party which occurs/manifests in areas within the limits of national jurisdiction of another Party or non-Party.

*Operational text 4*

1. Any damage in areas within the limits of national jurisdiction or control of Parties;
2. Any damage caused in area within limits of national jurisdiction or control of non-Parties;
3. Any damage caused in areas beyond the limits of national jurisdiction or control of States.

*Operational text 5*

1. The Protocol shall apply to damage resulting from an incident as referred to in paragraph 1 in an area which is under the national jurisdiction of a Party.
2. Notwithstanding paragraph 2, the Protocol shall also apply to damage which occurs in an area of a State of transit where such State is not a Party to the Protocol, but has however acceded to a multilateral, bilateral or regional agreement which concerns the transboundary movement of living modified organisms and is in force at the time of the occurrence of the damage.
3. Nothing in the Protocol shall be read or construed to affect in any way the Sovereignty of States, whether a Party to the Protocol or not, over their territorial seas and their jurisdiction and right in their respective exclusive economic zones and continental shelves in accordance with international law.

*Operational text 6*

1. This decision encourages regional and international agreements and organizations to address damage in areas outside national jurisdiction that these entities may presently strive to manage.
2. This decision encourages Parties to cooperate with regional and international agreements and organizations in an effort to address damage in areas outside of national jurisdiction.

*Operational text 7*

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

*Operational text 8*

1. Damage suffered in areas within the limits of national jurisdiction of Parties;
2. Damage suffered in areas within the limits of non-Parties;
3. Damage suffered in areas beyond the limits of national jurisdiction of States.

*Operational text 9*

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. This instrument 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 this instrument do not apply to damage suffered within the territorial limits of non-Parties to the Cartagena Protocol.

*Operational text 10*

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. This Protocol 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. In any other case, this Protocol shall apply when there is a movement of a living modified organism from within an area under national jurisdiction of a Contracting Party.
4. Nothing in the Protocol 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.

*Operational text 11*

The Protocol 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 [subarticle 1 of this Article].

*Operational text 12*

1. This instrument applies to:
  - (a) Damage caused by a transboundary movement and suffered within an area under national jurisdiction or control of Parties to the instrument, and
  - (b) Damage caused an operator of a State party to this instrument by a transboundary movement and suffered beyond areas of national jurisdiction or control, provided that it is caused by a transboundary movement of LMOs originating from an area covered by point 1.
2. This instrument does not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to jurisdiction.

<b><i>C.      Limitation in time</i></b>
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*Operational text 1*

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

*Operational text 2*

Unless a different intention appears from this Protocol, or is otherwise established, the provisions of this Protocol 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 treaty with respect to that Contracting Party.

*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*

The Protocol shall not apply to damage arising from a transboundary movement of a living modified organism that commenced prior to the entry into force of the Protocol for the Party under whose national jurisdiction the damage is said to have occurred.

*Operational text 5*

Any decisions made in relation to Article 27 shall only apply from the time the decision takes effect.

*Operational text 6*

Liability rules and procedures should be prospective in nature and not retroactive, in order to ensure that fair notice of behavioural expectations has been given.

*Operational text 7*

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

*Operational text 8*

Unless a different intention appears from this Protocol, or is otherwise established, the provisions of this Protocol 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 treaty with respect to that Contracting Party.

*Operational text 9*

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

<b><i>D.      Limitation to the authorization at the time of the import of the LMOs</i></b>
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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.

*Operational text 2*

If an importing State uses an LMO for a purpose different to that specified at the time of the transboundary movement of the LMO, damage caused as a result of that different use should not be within the scope of the rules and procedures adopted under Article 27.

*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*

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

*Operational text 5*

This instrument 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.

<p><b><i>E. Determination of the point of the import and export of the LMOs.</i></b></p>
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*Operational text 1*

1. These rules and procedures apply to damage resulting from a LMO if:
  - (a) That LMO has been subject to a transboundary movement, as defined in [paragraphs 2 to 4 below and OT 1 under Section I.D];
  - (b) The first use for which the LMO has been destined and authorized is covered by the rules and procedures under Article 27 of the CPB, namely the uses set out in [paragraph 3 of OT 1 under Section I.A above].
2. With respect to sea borne 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.
3. 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.
4. With respect to air borne 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 2*

1. Whenever a transboundary movement is effected by transport:
  - (a) When the State of export is a Contracting Party to this Protocol this Protocol 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 this Protocol, this Protocol 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, this Protocol 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 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*

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 5*

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”.

*Operational text 6*

Whenever a transboundary movement is effected by transport:

When the State of export is a Contracting Party to this Protocol this Protocol 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.

*Operational text 7*

For the purposes of this instrument, a transboundary movement starts from the following points:

- (a) In cases of sea borne transport, where a LMO leaves the exclusive economic zone of the State, or in the absence of such zone, the territorial sea of a State;
- (b) In cases of land borne transport, where a LMO leaves the territory of a State;
- (c) In cases of air borne transport, where a LMO leaves the exclusive economic zone, the territorial sea or the territory of the State, depending on the route.

*Operational text 8*

“Transboundary movement” means the intentional movement of LMOs from the territory of a Party to the Protocol to the point of entry at which customs formalities take place within the territory of another Party to the Protocol.



<p><b><i>F. Non-parties</i></b></p>
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*Operational text 1*

National rules on liability and redress implementing this decision 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 2*

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 3*

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

*Operational text 4*

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

*Operational text 5*

Whenever a transboundary movement is effected by transport:

When the State of import, but not the State of export, is a Contracting Party to this Protocol, this Protocol shall apply with respect to damage arising from an occurrence which takes place after the time at which the importer has taken ownership or possession of the living modified organism.

### III. DAMAGE

#### A. *Definition of damage*

*Operational text 1*

1. “Environment” includes:
  - (a) The conservation and sustainable use of biological diversity or its components;
  - (b) Natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors.
2. “Impaired” in relation to the environment’ shall include any adverse effects on the environment.
3. “Damage” shall include:
  - (a) Damage to human health including:
    - (i) Loss of life or personal injury;
    - (ii) Impairment of health;
    - (iii) Loss of income;
    - (iv) Public health measures.
  - (b) Damage to, or impaired use or loss of, property;
  - (c) Damage to the environment, including, loss of income derived from an economic interest in any use of the environment incurred as a result of impairment of the environment;
  - (d) Loss of income, loss of cultural, social and spiritual values, loss of food security, or economic loss, loss of competitiveness or other damage to indigenous or local communities.

*Operational text 2*

The instrument shall apply to:

- (a) Damage to environment, conservation and sustainable use of biological diversity and its components as defined in article 2 of the convention of biological diversity including impairment of soil, water and air quality;
- (b) Damage to human health which shall include loss of life or personal injury; loss of income; impairment of health and costs of public health measures taken;
- (c) Socio-economic damage, which shall include but not be limited to:
  - (i) Loss of income;
  - (ii) Loss of cultural, social, traditional and spiritual values;

- (iii) Loss of food security;
- (iv) Loss of economic markets;
- (d) *Actio legis aquiliae*, *Actio ex contractu* (Cartagena Protocol on Biosafety), *Actio damni injuriae*;
- (e) Cost of response and preventative measures including remedial costs.

*Operational text 3*

For the purposes of these Rules:

- (a) “Abiotic components” shall include air, soil and water;
- (b) “Biotic components” include flora and fauna, damage to which shall be assessed from kingdom to genetic levels;
- (c) “Damage” shall mean:
  - (i) Loss of life or personal injury;
  - (ii) Loss of or damage to property: provided that the property is not held by the person to be held liable in accordance with the Protocol;
  - (iii) Loss of income which was directly derived from an economic interest in any use of the environment within the scope of the Protocol and which loss has incurred as a result of the impairment of the environment, taking into account loss of savings and costs;
  - (iv) Loss of cultural, social and spiritual values;
  - (v) Loss of the security of provision of food which is a staple or contains a socio-economic value to an indigenous or local community;
  - (vi) The costs of measures to respond to the damage caused or of reinstatement of the impaired environment, with such costs to be limited to the measures actually undertaken or which are deemed as necessary to be undertaken;
  - (vii) Loss of biological diversity and its components;
  - (viii) Loss of abiotic and biotic components of the environment; and
  - (ix) Impairment of the interactions and interrelationships between abiotic and biotic components of the environment.

*Operational text 4*

1. “Damage” means:

- (a) Loss of life or personal injury;
- (b) Loss of, or damage to, property other than property held by the person liable in accordance with the rules and procedures under Article 27 of the Protocol;
- (c) Loss of income directly deriving from an economic interest in the sustainable use of biological diversity, incurred as a result of impairment of the biological diversity, taking into account savings and costs;
- (d) The cost of measures of reinstatement of the impaired biological diversity, limited to the costs of measures actually taken or to be undertaken; and

- (e) The cost of response measures, including any loss or damage caused by such measures, to the extent that the damage was caused by living modified organisms due to the genetic modification.
- 2. “Measures of reinstatement” means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the biological diversity. Domestic law may indicate who will be entitled to take such measures.
- 3. “Response measures” means any reasonable measures taken by any person, including public authorities, following a damage, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up. Domestic law may indicate who will be entitled to take such measures.

*Operational text 5*

This instrument covers 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.

OR

- 1. “Damage” means:
  - (a) Loss of life or personal injury;
  - (b) Loss of or damage to property;
  - (c) Loss of income directly deriving from an economic interest in the use of biological diversity, incurred as a result of impairment of the biological diversity, taking into account savings and costs;
  - (d) The costs of measures of reinstatement or remediation of the impaired biological diversity actually taken or to be undertaken;
  - (e) The costs of preventive measures, including any loss or damage caused by such measures.
- 2. “Measures of reinstatement” means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of biological diversity. Domestic law may indicate who will be entitled to take such measures;
- 3. “Preventive measures” means any reasonable measures taken by any person, in response to an incident, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up.

*Operational text 6*

Damage to 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.

*Operational text 7*

1. Damage covered under the rules and procedures is restricted to damage to the conservation and sustainable use of biological diversity.
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 8*

1. Damage covered under these rules and procedures is limited to damage to biodiversity.
2. “Damage” means impacts on biological diversity that are:
  - (a) Adverse;
  - (b) Significant;
  - (c) Measurable using objective scientific criteria (to be developed); and
  - (d) Clearly caused by a specific LMO.

*Operational text 9*

1. “Damage” includes:
  - (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 derived from an economic interest in any use of the environment, incurred as result of impairment of the environment;
  - (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, 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;
4. "Compensation" shall include compensation for damage, restoration and remediation and other amounts payable under this Protocol.

*Operational text 10*

1. Damage to conservation and sustainable use of biological diversity or its components;
  - (a) Determination of biodiversity loss: [...]
  - (b) Formulation of a qualitative threshold of damage to conservation and sustainable use of biological diversity;
2. Damage to environment;
  - (a) Impairment of soil quality;
  - (b) Impairment of water quality;
  - (c) Impairment of air quality;
3. Damage to human health;
  - (a) Impairment of health;
  - (b) Loss of life or personal injury;
4. Socio-economic damage, especially in relation to indigenous and local communities;
  - (a) Loss of income;
  - (b) Economic loss;
  - (c) Impairment of cultural, social and spiritual values;
  - (d) Impairment of food security;
  - (e) Reduction or loss of competitiveness;
  - (f) Impairment of private property;

*Operational text 11*

For the purpose of this protocol damage means:

- (a) Loss of life or personal injury;
- (b) Loss of or damage to property other than property held by the person liable in accordance with this protocol;
- (c) Loss of income directly deriving from economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs;
- (d) The costs of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken.

*Operational text 12*

1. Damage to biodiversity is any damage that has significant adverse effects on the conservation of biodiversity in a particular place, but does not include damage resulting from those actions expressly authorised or required by a relevant national authority.
2. Except where national law extends this instrument, damage to private property shall not be within the scope of this instrument.

<p><b><i>A bis. Damage to conservation and sustainable use of biological diversity or its components</i></b></p>
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*Operational text 1*

1. For the purposes of these rules and procedures, damage to the conservation of biological diversity means an adverse effect on biological diversity that:
  - (a) Is a result of human activities involving LMOs; and
  - (b) Relates in particular to species and habitats protected under national law or international law; and
  - (c) Is measurable or otherwise observable taking into account, wherever available, baseline conditions; and
  - (d) Is significant as set out in paragraph 3 below.
2. For the purposes of these rules and procedures, damage to the sustainable use of biological diversity means an adverse effect on biological diversity that:
  - (a) Is related to a sustainable use of biodiversity; and
  - (b) Has resulted in loss of income; and
  - (c) Is significant as set out in paragraph 3 below.
3. A “significant” adverse effect on the conservation and sustainable use of biological diversity is to be determined on the basis of factors, such as:
  - (a) The long term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonably short period of time; and/or
  - (b) A qualitative or quantitative reduction of components of biodiversity, and in relation to sustainable use of biodiversity, their potential to provide goods and services.

*Operational text 2*

1. For purposes of the valuation of damages for ascertaining the loss of biodiversity, account must be taken of the baseline conditions obtaining before the damage, including the natural and human induced variations other than those caused by LMOs.
2. The baseline conditions may be proved by statistical, traditional, historical, or such other evidence as may be considered appropriate.

*Operational text 3*

For the purpose of this document:

- (a) Damage to biological diversity means any measurable change that result in adverse effect, considering the definition of “biological diversity” in article 2 of the Convention on Biological Diversity.
- (b) Damage to sustainable use of biological diversity means any decrease in the potential of the use of any of the components of the biological diversity, to meet the needs and aspirations of the present and future generations.

*Operational text 4*

1. Damage means an adverse or negative change in the conservation and sustainable use of biological diversity or its components, as well as any socio-economic considerations arising from damage to biological diversity consistent with Article 26 of the Protocol. The adverse or negative change in biological diversity must be present over a period of time and cannot be redressed through natural recovery within a reasonable period of time.
2. (a) In order for compensation to be available, a threshold of significant or substantial damage must be exceeded, as measured against a baseline of the condition or conditions that would have existed had the incident not occurred.  
(b) As part of this determination, both natural processes and those that result from human activities must be taken into account.

*Operational text 5*

1. Valuation of damage shall be measured in relation to established scientific baselines.
2. Damage to conservation and sustainable use of biological diversity will need to be “significant” or “serious”.

*Operational text 6*

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 7*

1. When valuing damage, damage to biodiversity may take into account any baseline information that the Competent National Authority took into account pursuant to any risk assessment required by the Protocol and any applicable national laws.
2. There shall be no threshold applicable to the assessment of damage.



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

*Operational text 1*

1. In the valuation of the damage to the environment the following, amongst other matters, shall be taken into account:
  - (a) Costs of reasonable measures of reinstatement or remediation of the impaired environment, 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, 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;
  - (c) Costs of response measures, including any loss or damage caused by such measures;
  - (d) Costs of preventive measures, including any loss or damage caused by such measures;
  - (e) A monetary value for the loss during the period when the damage occurs and the environment is restored as required in (a) and (b);
  - (f) A monetary value representing the difference in the value of the environment as reinstated under (a) or (b), and the value of the environment in its undamaged or impaired state; and
  - (g) Any other matters not referred to in (a) – (f).
2. 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.

*Operational text 2*

1. In the valuation of the damage to the conservation of biological diversity the following, among other, shall take into account:
  - (a) Exchange value (relative price in the market)
  - (b) Utility (the use value, which can be very different from the market price)
  - (c) Importance (appreciation or emotional value attached)
2. Damage to conservation of biological diversity shall be valued case by case on the cost of restoration and monetary compensation, taking into account the complexity of the biological systems.

*Operational text 3*

1. The primary mechanism for valuation of damage is to determine the cost of measures taken to restore the damage to biological diversity or its components to its baseline conditions.
2. After restoration is addressed, additional monetary compensation may be considered where baseline conditions cannot be restored. 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 4*

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

*Operational text 5*

The primary mechanism for the evaluation of damage shall take into account costs of reasonable measures taken or to be taken to restore the damaged components of biological diversity through:

- (a) Introduction of original components; or
- (b) Introduction of equivalent components on the same location, for the same use, or on another location for other types of use.

*Operational text 6*

In the case of harm to the environment or biological diversity, compensation shall include the costs of reinstatement, rehabilitation or clean-up measures which actually are being incurred and, where applicable, the costs of preventive measures.

*Operational text 7*

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

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

*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*

Valuation of damage will relate to the conservation and sustainable use of biological diversity, with no special measures for centres of origin and centres of genetic resources.

*Operational text 3*

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 determining damages for any socio - economic damage, the following:

- (a) Shall be taken into account:
  - (i)

- (ii) etc.
- (b) May be taken into account:
  - (i)
  - (ii) etc.

*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.

*Operational text 3*

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.

<b><i>E. Causation</i></b>
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*Operational text 1*

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.
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.

*Operational text 2*

*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.

OR

*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 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 a 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*

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

*Operational text 5*

The entity seeking redress for a claim of damage bears the burden of demonstrating all of the following:

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

*Operational text 6*

1. States shall decide whether to establish regulation at the national level only.

2. A causal link between the damage and the activity based on scientific evidence shall be required.
3. The burden of proof shall be on the entity alleging that damage has been suffered.

*Operational text 7*

1. There must be a causal link established between the activity/incident and the damage incurred.
2. When considering the causal link between an incident and the damage, the following must be taken into account, *inter alia*,
  - (a) Cumulative effects;
  - (b) Intervening events;
  - (c) Self-regeneration of ecosystems;
  - (d) Complexity of the interaction of LMOs with the receiving environment and timescales involved.

*Operational text 8*

Liability shall attach only on the establishment of both cause-in-fact and proximate cause of the damage alleged. The claimant shall bear the burden of proof.

*Operational text 9*

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.

*Operational text 10*

There should be considered a causal link between the damage and the act or omission of a person with operational control of the LMO if he fails to fulfil his obligations set by the applicable laws or approval procedures, unless he can prove otherwise.



#### IV. PRIMARY COMPENSATION SCHEME

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

- (a) Type of damage;
- (b) Places where damage occurs (e.g. centres of origin and centres of genetic diversity);
- (c) Degree of risk involved in a specific type of LMO as identified in risk assessment
- (d) Unexpected adverse effects;
- (e) Operational control of LMOs (stage of transaction involving LMOs).

##### *Operational text 1*

Either fault-based or strict liability may be [applied] to the person on the basis of factors determining the potential risks that might occur.

##### *Operational text 2*

Any legal or natural person who has the operational control of the living modified organisms that are subject to transboundary movements, and who does not comply with the requirements under this Protocol for transboundary movements of living modified organisms by an intentional or negligent act or omission, should be liable for significant damage resulting from such act or omission.

##### *Operational text 3*

Operational control of LMOs is the factor that determines the standard of liability and the identification of the liable operator.

##### 2. Standard of liability and channeling of liability

- Fault-based liability:
  - (i) Any person who is in the best position to control the risk and prevent the damage;
  - (ii) Any person who has operational control;
  - (iii) Any person who does not comply with the provisions implementing the Biosafety Protocol;
  - (iv) Any entity who has the responsibility to put in place the provisions for implementing the Protocol;
  - (v) Any person to whom intentional, reckless or negligent acts or omissions can be attributed;
- Strict liability:

##### *Option 1*

Liability to be channelled to one or more of the following persons, including persons acting on his or her behalf, on the basis of prior identification:

- (a) The developer;
- (b) The producer;
- (c) The notifier;
- (d) The exporter;

- (e) The importer;
- (f) The carrier;
- (g) The supplier.

*Option 2*

*Liability to be channelled on the basis of establishment of a causal link.*

- (a) Primary state liability

*Operational text 1*

1. Each Contracting Party shall take due care and measures with a view to ensuring that transboundary movement, transit, handling and use of LMOs by its nationals or persons under its jurisdiction or control are carried out in conformity with the provisions of this and the Cartagena Protocol.
2. Each Contracting Party shall, in respect to its nationals or persons under its jurisdiction or control, ensure the availability of adequate compensation for damage resulting from the failure to discharge the obligations contained in this or other relevant international laws during transboundary movement, transit, handling and use of any LMOs, including illegal traffic.
3. The Party of export shall ensure the availability of effective remedies for any damage ensued in other states or areas beyond the limits of national jurisdictions as a result of its activities or of acts or omissions of any one of its organs during transboundary movement, transit, handling and use of LMOs, including illegal traffic.
4. The contracting Parties shall ensure that any person in operational control of LMOs or its product at the time of emergency or incident occurring within its jurisdiction has implemented the risk management plan specifically approved for the use, handling and transboundary movement of the LMOs in question.
5. The Party of export that has notified to and obtained an advance informed agreement from the Party of import in accordance with Article 8 and 10 of the Cartagena Protocol shall be strictly liable for damage resulted in the Party of import, other states or areas beyond the limits of national jurisdictions until the importer has taken possession of the LMOs or its product. Thereafter the Party of import shall be liable for damage.
6. The Party of export shall be strictly liable for damage resulting from LMOs referred under article 7 (4) of the Cartagena Protocol only if the State of import or state of transit has categorized those LMOs as likely to have adverse effects on the conservation and sustainable use of biological diversity, entail risks to animal and human health and the environment, and if same is notified to other Parties through the Biosafety Clearing-House.
7. Should the LMOs be repatriated in accordance with Article 25 of the Cartagena Protocol, the Party that re-imports such LMOs shall be held strictly liable for damage until it has taken possession of the LMOs in question, if applicable, or by the disposer assigned to dispose of the said LMOs by the Party of import or transit.



8. The Contracting Parties shall not, oppose, hinder or prevent the return of the LMOs destined for repatriation to the Party of export in accordance with subarticle three of this Article.

*Operational text 2*

No State liability could be alleged.

*Operational text 3*

A State may only be liable when the State itself is the operator responsible for the damage. No other State liability is covered.

(b) Civil liability (harmonization of rules and procedures)

*Operational text 1*

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

*Operational text 2*

1. For damage resulting from transboundary movement of living modified organisms, primary liability shall be that of the operator with residual state liability.
2. Any person [who] can be shown to commit fault shall be liable for damages caused either by intentional or negligent conduct resulting from transboundary movement of living modified organisms.
3. One or more of the following persons including persons acting on his or her behalf, on the basis of prior identification shall be held strictly liable for damage to biodiversity resulting from transport, transit, handling and/or use of living modified organisms:
  - (a) The developer;
  - [(b) The producer;]
  - (c) The notifier;
  - (d) The exporter;
  - [(e) The importer;]
  - (f) The carrier;
  - (g) The supplier;
  - (h) The permit holder.
4. A person shall be liable on the basis of a causal link of their activities to damages to biological diversity. The causal link may be presumed and the person deemed liable would have to show that no causal link between their activities and damage exists.

*Operational text 3*

1. A person or legal entity shall be liable for any damage caused by that person or legal entity's intentional or negligent act or omission as a result of transboundary movement, transit, handling and use of LMOs.

2. Any person that commits fault either intentionally or by negligence during the transboundary movement, transit, handling and use of LMOs shall be liable for damage resulting from an incident other than those specified [under Article 4 of this Protocol]. This Article shall not affect the domestic law of the Contracting Parties governing liability of servant and agents.
3. A person that takes or fails to take action required under this Protocol or other relevant international laws with full knowledge or being aware of that its act or omission may cause damage shall be deemed to have committed an intentional fault if, with full knowledge of the consequences of the incident, it takes or fails to take action regardless of that such damage may follow.
4. A person is proved negligent when, in the circumstances of the case, it fails to take such precautions as might reasonably be expected or it acts without consideration or in disregard of the possible consequences of its act or omission during a transboundary movement, transit, handling and use of LMOs, including illegal traffic.

*Operational text 4*

1. The exporter who ensures notification in accordance with article 8 of the Cartagena Protocol shall be liable for damage. If the Party of export is the notifier, the exporter shall be liable.
2. The operator or the user of living modified organisms in the Party of export shall be liable if the living modified organisms have been released unintentionally before crossing the border.
3. Without prejudice to [article 4], and in accordance with the relevant rules of applicable domestic law including laws on the liability of servants and agents, any person shall be liable for damage caused or contributed to by his or her wrongful intentional, reckless or negligent acts or omissions.

*Operational text 5*

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

*Operational text 6*

1. Liability regime shall cover damage caused only by an intentional or negligent act of omission on the part of the liable person.
2. Liability shall be attributed as a consequence of the failure to comply with the duty of care or with obligations under the Protocol.
3. Liability shall be attributed to the person who is in operational control of the LMO or in the best position to prevent/control damage.
4. No strict liability could be alleged by the affected party.

*Operational text 7*

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 ultrahazardous.
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 8*

1. 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.
2. Liability shall be established where the operator:
  - (a) has operational control of the relevant act which is not prohibited by international law and is in full compliance with the obligations of the Protocol; and
  - (b) has breached a legal duty of care through intentional, reckless or negligent conduct, including acts or omissions; or
  - (c) has operational control of the relevant act which is prohibited by international law or is in breach of the obligations of the Protocol; and
  - (d) such breach has resulted in actual damage to biodiversity; and
  - (e) causation is established in accordance with section [] of these rules.
3. "Operator" - the person or entity which has the operational control of the act at the time of the incident causing damage.
4. A Party shall be liable for failure to exercise reasonable care in carrying out its responsibilities pursuant to the Biosafety Protocol and national implementing legislation where such failure results in damage to biodiversity.
5. Liability shall be assigned on the basis of the establishment of a causal link between the damage to biodiversity and the intentional, reckless or negligent conduct of the operator.

*Operational text 9*

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 this Protocol, 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.

(c) Administrative approaches based on allocation of costs of response measures and restoration measures
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*Operational text 1*

1. In the event of damage, the liable person should take response measures.
2. The liable person should be required by domestic law to take such response measures. This is without prejudice to a primary and general obligation of affected persons to minimise damage as far as possible and feasible.
3. For the purposes of these rules and procedures, response measures are actions to minimise, contain or remedy damage, as appropriate.
4. The damage to conservation and sustainable use of biodiversity is valued on the basis of the costs of response measures, actually undertaken or to be undertaken, to remedy it.
5. In case civil liability is complemented by an administrative approach, the operator/importer should be required to take all necessary preventive and remedial measures and to bear their costs. Competent public authorities should establish which operator/importer has caused the damage (or the imminent threat of damage). They should assess the significance of the damage and determine which remedial measures should be taken. Competent authorities may themselves also take the necessary preventive or remedial measures and then recover the costs from the operator/importer.

*Operational text 2*

1. The Contracting Party where the damage occurs may require any legal person or entity responsible for the damage to take response measures as may be required to abate, reinstate, or remediate the impaired environment.
2. The legal person or entity shall take the measures required.
3. If the legal person or entity fails to take the response measures as required, the Contracting Party where the damage occurs may undertake, or propose to undertake, the measures; in such an event, the legal person or entity shall pay the reasonable costs of these measures.

*Operational text 3*

1. 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.
2. In the event of damage, an operator shall immediately inform the Competent National Authority/Executing Agency of the damage and in consultation with the Competent National 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) minimise, 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.
3. If an operator fails or inadequately implements the measures contemplated in *paragraph 2*, the Competent National Authority may take any reasonable measures to remedy the situation and recover all costs incurred from the operator.
4. The Competent National Authority may in respect of the recovery of costs claim proportionally from any other person who benefited from the measures undertaken in *paragraph 3*.
5. “Operator shall mean the developer, producer, notifier, exporter, importer, carrier, or supplier.”

*Operational text 4*

1. Each Contracting party shall in conformity with the Cartagena Protocol and other relevant international law cease activities that might cause significant damage and shall, as far as practicable, re-establish the situation that would have existed if the damage had not occurred.
2. Where restoration is not possible as provided under subarticle one of this Article, the Contracting Party which is responsible for the origin of the damage shall provide other remedies or substitutes deemed equivalent or relevant to make good the damage.
3. Contracting Parties shall cooperate to develop and improve means to remedy damage resulting from transboundary movements of LMOs, including measures for rehabilitation, restoration or reinstatement of habitats of particular conservation concern.

*Operational text 5*

1. The Party affected by an intentional or unintentional transboundary movement of living modified organisms may require the person responsible for the movement to take reasonable preventive measures and measures of reinstatement.
2. If the person responsible fails to take the measures as required, the Contracting Party may undertake the measures at his expense.

*Operational text 6*

Any obligation to take response and restoration measures shall be limited to reasonable measures.

*Operational text 7*

1. National law shall require that any person in operational control of LMOs at the time of an incident shall take all reasonable measures to mitigate the damage arising therefrom.
2. This approach to fault-based liability is ideally situated within an existing national law relating to biodiversity or biosafety (the “Act”), but could be a standalone approach in a statute.
  - (a) Where there occurs or is a likelihood of damage to the conservation or sustainable use of biological diversity as a result of the transboundary movement of an LMO in contravention of this Act or regulations, the operator shall, as soon as possible,
    - (i) notify the competent authority; and
    - (ii) take all reasonable measures consistent with the conservation and sustainable use of biodiversity to remedy any damage or reduce or mitigate any threat of a significant adverse effect on the conservation and sustainable use of biological diversity.
  - (b) Where any person fails to take measures required under *para.(a)*, the competent authority may take those measures, cause them to be taken or direct the operator to take them.
  - (c) The competent authority may recover the costs and expenses of, and incidental to, the taking of any measures under *para. (b)*, from the operator, or any other person who causes 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.
  - (d) For purposes of this section, “operator” means any person who owns or has the charge, management or control of an LMO during its transboundary movement.

*Operational text 8*

1. Operators responsible for activities covered by this instrument that may cause or has caused damage as defined above, shall take the necessary measures to prevent, minimize, mitigate or repair the damage.
2. Such measures 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 on another location for other types of use.
3. If the necessary measures are not taken by the operator responsible, the affected individuals, communities or the authorities of the State in which the damage occurs, may, in accordance with domestic law, take such measures at the cost of the responsible operator.

*Operational text 9*

1. An 'operator' includes any person in operational control of a living modified organism at the time of an occurrence.
2. 'Preventive measures' means any reasonable measures taken by any person in response to an occurrence, to prevent, minimize, or mitigate loss or damage, or to address damage or threatened damage to biodiversity, or to effect environmental clean-up.
3. 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.
4. Each State shall adopt the necessary legislative, regulatory and administrative measures to ensure that the necessary steps are taken to prevent, remedy, restore or reinstate the environment where where an operator does not do so, and to recover the costs of doing so from an operator.

*Operational text 10*

1. The operator shall bear the costs for the preventative and remedial actions taken pursuant to this XX.
2. This administrative system shall apply to damage to the conservation and sustainable use of biodiversity, or an imminent threat of such damage, resulting from the transboundary movement of LMOs.
3. This administrative system does not apply to cases of personal injury, to damage to private property or to economic loss, and does not affect any right under existing systems regarding these types of damages.
4. 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.
5. If the operator fails to comply with required preventative measures, cannot be identified or is not required to bear the costs under this XX, the Competent Authority shall take these measures itself.
6. 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.

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

### **3. Exemptions to or mitigation of strict liability**

#### *Option 1*

No exemptions.

#### *Option 2*

Possible exemptions to or mitigations of strict liability:

- (a) Act of God/*force majeure*;
- (b) Act of war or civil unrest;
- (c) Intervention by a third party (including intentional wrongful acts or omissions of the third party);
- (d) Compliance with compulsory measures imposed by a competent national authority;
- (e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator;
- (f) The “state-of-the-art” in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

#### *Operational text 1*

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 authorised by and fully in conformity with an authorization given under national law; (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.

#### *Operational text 2*

1. No Contracting Party can be held liable under this Article if without their being any fault on its part the damage occurred:
  - (a) directly due to an act of armed conflict or a hostile activity except an armed conflict initiated by the Contracting Party that is responsible for the damage;
  - (b) directly due to a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or
  - (c) wholly by an act of third party; or wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage.
2. Compensation may be reduced or disallowed if the victim or a person for whom he is responsible under the domestic law, by his own fault, has caused or contributed to the damage having regard to all circumstances.



3. The granting of an advance agreement by the Party of import does not exonerate the Party of export from being answerable for any damage resulting during transboundary movement, transit, handling and use of LMOs, including illegal traffic.

*Operational text 3*

1. 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) The result of an act of armed conflict, hostilities, civil war or insurrection;
  - (b) The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character;
  - (c) Wholly the result of compliance with a compulsory measure of a public authority of the Party where the damage has occurred or where the living modified organisms were unintentionally released across the border; or
  - (d) Wholly the result of the wrongful intentional conduct of a third party.
2. If the person who has suffered the damage or a person for whom he or she is responsible under domestic law has by his or her own fault caused the damage or contributed to it, the compensation may be reduced or disallowed having regard to all the circumstances.
3. If two or more exporters 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.
4. The liable person who proves that only part of the damage was caused by living modified organisms shall be liable for that part of the damage only.

*Operational text 4*

Liability shall be excluded/mitigated when damage was caused under the following circumstances:

- (a) Act of God/*force majeure*; or
- (b) Act of war or civil unrest; or
- (c) Intervention by a third party; or
- (d) Compliance with compulsory measures imposed by a competent national authority; or
- (e) The damage could not reasonably have been foreseen, according to the “state-of-the-art” at the time that the activities were carried out.

*Operational text 5*

Liability may be limited in cases where the person referred to [in paragraph 1 above] 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.

*Operational text 6*

Liability shall not attach in the following circumstances:

- (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 7*

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

- (a) Act of God/*force majeure*;
- (b) Act of war or civil unrest;
- (c) Intervention by a third party;
- (d) Compliance with compulsory measures imposed by a competent national authority;
- (e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator; and
- (f) The “state-of-the-art” in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

*Operational text 8*

1. Liability shall not attach to case of:

- (a) Act of God/*force majeure*;
- (b) Act of war or civil unrest;
- (c) Intervention by a third party (including intentional wrongful acts or omissions of the third party);
- (d) Compliance with compulsory measures imposed by a competent national authority;
- (e) Harm that could not have been foreseen given scientific and technical knowledge at the time they were carried out as determined by the risk assessments undertaken in conjunction with approval or authorisation of the activity by the competent authority;
- (f) Possible harm to biodiversity that was deemed acceptable by the competent authority in the approval process for the activity.

2. An operator shall not be required to bear the cost of preventative or remedial actions taken pursuant to this XX when he was not at fault nor negligent and the damage to biodiversity or imminent threat of such damage was caused by:

- Act of God/*force majeure*;
- Etc.

#### **4. The provision of interim relief**

*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.

#### **5. 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*

Nothing in this instrument shall prejudice the right of the defendant to institute a claim against a third party for the claim brought against the defendant or the amount awarded in respect of the said claim.

OR

Nothing in this instrument shall prejudice the right of recourse of the defendant against any third party.

*Operational text 3*

1. Any person liable under the Protocol shall be entitled to a right of recourse in accordance with the rules of procedure of the competent court:
  - (a) Against any other person also liable under the Protocol; and
  - (b) As expressly provided for in contractual arrangements.
2. Nothing in the Protocol shall prejudice any rights of recourse to which the person liable might be entitled pursuant to the law of the competent court.

*Operational text 4*

[This section] does not limit or restrict any right of recourse or indemnity that a person may have against any other person.

*Operational text 5*

Nothing in this decision shall prejudice any right of recourse of the operator/importer against the exporter.

#### **6. Joint and several liability or apportionment of liability**

*Operational text 1*

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

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

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 2*

1. When damage results from the transboundary movement of LMOs for which two or more persons may be held liable, the claimant shall have the right to seek full compensation for the damage from any or all of the said persons.

OR:

1. When damage results from the transboundary movement of LMOs for which two or more persons may be held liable, the said persons shall be jointly and severally liable for all such damage.
2. 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.
3. 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*

1. Where damage is caused by LMOs subject to the Advance informed agreement and LMOs identified as being not likely to have adverse effects pursuant Article 7(4) of the Cartagena Protocol, a person otherwise liable shall only be liable according to the Protocol in proportion to the contribution made by the LMOs covered under the Advance informed agreement.
2. In respect of damage where it is not possible to distinguish between the contribution made by LMOs covered by and LMOs identified as being not likely to have adverse effects pursuant Article 7(4) of the Cartagena Protocol, all damage shall be covered under this Protocol.
3. If there is more than one person responsible for the damage, injury or loss, the claimant shall have the right to seek full compensation from any or all of the persons liable for the damage, injury or loss.
4. Persons or legal entities shall be held jointly and severally liable where two or more persons or legal entities are liable in accordance with [Article 1] above.

*Operational text 4*

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

*Operational text 5*

Where more than one entity is determined to be liable, in accordance with [paragraphs 1 and 2], all such entities shall be held jointly and severally liable.

*Operational text 6*

The persons referred to in [para. 3] are jointly and severally liable for such costs and expenses.

*Operational text 7*

1. In the case of liability of more than one person, liability shall be apportioned on the basis of relative degrees of fault.
2. A Party shall be liable for failure to exercise reasonable care in carrying out its responsibilities pursuant to the Biosafety Protocol and national implementing legislation where such failure results in damage to biodiversity. Where another operator also is at fault, liability shall be apportioned based on degree of fault.

*Operational text 8*

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 9*

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

<b>7. Limitation of liability</b>
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(a) Limitation in time (relative time-limit and absolute time-limit)
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*Operational text 1*

1. A claim for damages under these rules and procedures should be exercised within [x] years from the date by which the claimant knew or ought reasonably to have known of the damage and the person liable, in any event not later than [y] years from the date of the transboundary movement of LMOs.
2. Where the transboundary movement of LMOs consists of a series of occurrences having the same origin, time limits under this rule should run from the date of the last such occurrence. Where the effect of the transboundary movement consists of a continuous occurrence, such time limits should run from the end of the continuous occurrence.

*Operational text 2*

1. (a) Actions for damages under this Instrument shall be subject to a limitation period of [X] years from the date on which the claimant knew or ought reasonably to have known of the damage and the identity of any person responsible.  
(b) The laws of the Parties regulating suspension or interruption of limitation periods shall apply to the limitation period prescribed in this paragraph.
2. In no case shall actions be brought after [X] years from the date of the incident which caused the damage.

3. (a) Where the incident consists of a continuous occurrence the thirty years' period shall run from the end of that occurrence.
- (b) Where the incident consists of a series of occurrences having the same origin the thirty years' period shall run from the date of the last of such occurrences.

*Operational text 3*

Any claim for compensation (damage) shall be subject to a limitation period of "...X" years, from the date on which the damage has or ought to have come to the knowledge of the claimant. Such claims to damage shall be brought within a maximum limitation period of "...X" years.

*Operational text 4*

1. Claims for compensation under the rules and procedures in the field of liability and redress for damage resulting from the transboundary movement of living modified organisms shall be made within ten years from the date the claimant knew of the damage and its origin.
- [2. Where the incident consists of a series of occurrences having the same origin, time limits established pursuant to this Article shall run from the date of the last of such occurrences. Where the incident consists of continuous occurrences, such time limits shall run from the end of that continuous occurrence. ]
3. The right to bring civil action in respect of harm caused by any LMO 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 LMO or its product, taking into consideration the situation or circumstance of the person(s) or community or communities affected.
4. 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). 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.

*Operational text 5*

1. Claims for redress and compensation under the Subprotocol shall not be admissible unless they are brought within [...] years from the date of the moment when the living modified organisms have crossed the border.
2. Claims for compensation under the Subprotocol shall not be admissible unless they are brought within three years from the date that the claimant knew or ought reasonably to have known of the damage and of the person liable, provided that the time limits established pursuant to paragraph 1 are not exceeded.
3. Where the damage has been caused by a series of occurrences having the same origin, time limits established pursuant to this article shall run from the date of the last of such occurrences. Where the damage has been caused by a continuous occurrence, such time limits shall run from the end of that continuous occurrence.

*Operational text 6*

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

2. Liability shall be admissible within [3] years from the date the claimant knew or ought reasonably to have known of the damage provided that the time limits established pursuant to the previous paragraph.

*Operational text 7*

1. Any claims for compensation under this instrument are not admissible unless they are brought within five years from the date of the incident.
2. Any claims for compensation under this instrument are not admissible unless they are brought within one year from the date the claimant knew or ought reasonably to have known of the damage provided that the time limits established pursuant to paragraph 1 of this section are not exceeded.

*Operational text 8*

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

*Operational text 9*

Where the incident giving rise to a claim under this section has occurred, no proceedings in respect of the claim may be instituted after 5 years from the date on which the events occurred, or became evident to the competent authority, whichever is later.

*Operational text 10*

Any claim for damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of LMOs shall be brought within three years from the date the damage is known or reasonably could have been known but shall in no case be recognized if not brought within twenty years of the conduct alleged to have caused the damage occurred.

*Operational text 11*

1. Claims for compensation under this Protocol shall not be admissible unless they are brought within ten years from (a) the date of the occurrence of the damage, or (b) from the date the damage becomes known or reasonably should have become known by the claimant and is known by the claimant to be attributable to the occurrence or should reasonably have been known to be so by the claimant, whichever occurs later.
2. Where the occurrence consists of a series of occurrence having the same origin, the date of occurrence under this article shall be the date of the last of such occurrence. Where the occurrence consists of continuous occurrence, such time limit shall run from the end of that continuous occurrence.

*Operational text 12*

Claims in relation to damage to biodiversity shall be brought within three years from the date the damage is identified or reasonably could have been identified but shall in no case be recognized if not brought within twenty years of the transboundary movement that caused the damage occurred unless it can be shown that the damage could not have been identified within the twenty year period.

(b) Limitation in amount
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*Operational text 1*

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 this instrument 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.

OR

There shall be no financial limit on liability for any damage recoverable under this instrument.

*Operational text 2*

Any claim for damage covered under the instrument shall be subject to a maximum amount of "...X".

*Operational text 3*

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 4*

1. The liability under [article 4] is limited to the amounts specified in [part one of annex II]. Such limits shall not include any interests or costs awarded by the competent court.
2. The limits of liability specified in [part one of annex II] shall be reviewed by the Meeting of the Parties on a regular basis taking into account the risks of living modified organisms.
3. There shall be no financial limit on liability under [article 5].

*Operational text 5*

Financial limits for liability shall be specified by agreement of [Contracting Parties] through the mechanism considered appropriate.

*Operational text 6*

Each claim may result in a maximum of \$500,000 total compensation.

*Operational text 7*

Total costs of compensation and redress measures shall be for remediation of actual damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of LMOs and shall not exceed \_\_\_\_XXX \_\_United States dollars.

**8. Coverage of liability**

*(Insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees)*

*Operational text 1*

1. The persons liable under Article X shall maintain adequate insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover liability under Article X up to the limit as may be prescribed by the Parties or as set out in Article X.

/...



2. Notwithstanding paragraph 1, a Party may maintain self-insurance in respect of its State operators, including those carrying out activities in the furtherance of scientific research.
3. Notwithstanding paragraph 1, the Parties to the Instrument may exempt any person from the obligations under this Article.

OR

1. Each Party shall ensure that where appropriate, taking due account of the risks of the activity, any person involved in the transboundary movement of living modified organisms be required to participate in a financial security scheme or to have and maintain a financial guarantee up to a certain limit, of such type and terms as specified by its national law, to cover the liability under this instrument.
2. Notwithstanding paragraph 1, a Party may maintain self-insurance in respect of its State operators, including those carrying out activities in the furtherance of scientific research.
3. Notwithstanding paragraph 1, the Parties to the Instrument may exempt any person from the obligations under this Article.

OR

1. The persons liable under Article X may maintain adequate insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover liability under Article X up to the limit as may be prescribed by the Parties or as set out in Article X.
2. Notwithstanding paragraph 1, a Party may maintain self-insurance in respect of its State operators, including those carrying out activities in the furtherance of scientific research.

*Operational text 2*

1. The Instrument shall provide for mandatory or compulsory financial security for the damage caused by the operator, with residual liability being with the state.
2. The Instrument may also provide for voluntary financial security mechanisms to supplement the damage caused.

*Operational text 3*

1. The Party of export or any other person that will be strictly liable pursuant Article ----- herein 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. The Party of export may, by notifying a declaration of self insurance through the Biosafety clearing-House, fulfill its obligation provided under subarticle one of this Article.
3. Insurance, bonds or other financial guaranties provided under subarticle one of this Article shall only be drawn upon to provide compensation for damage.
4. Proof of coverage of the liability of the Party of export or any other person 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.

5. Any claim under this Protocol 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 this Protocol to be joined in the proceedings. Insurer and persons providing financial guarantees may invoke the defenses which the person liable under this Protocol would be entitled to invoke.

*Operational text 4*

1. The exporter shall ensure that liability under [article 4] for amounts not less than the minimum limits for financial securities specified in [part two of annex II] is and shall remain covered by financial security such as insurance, bonds or other financial guarantees including financial mechanisms providing compensation in the event of insolvency. In addition, Parties may fulfil their obligation under this paragraph with respect to State-owned operators by a declaration of self-insurance.
2. The minimum limits for financial securities specified in [part two of annex II] shall be reviewed by the meeting of the Parties on a regular basis taking into account the risks of living modified organisms.
3. Any claim under the Subprotocol may be asserted directly against any person providing financial cover under paragraph 1. The insurer or the person providing the financial cover shall have the right to require the person liable under [article 4] to be joined in the proceedings. Insurers and persons providing financial cover may invoke the defences that the person liable under [article 4] would be entitled to invoke. Nothing in this paragraph shall prevent the use of deductibles or co-payments as between the insurer and the insured, but the failure of the insured to pay any deductible or co-payment shall not be a defence against the person who has suffered the damage.
4. Notwithstanding paragraph 3, a Party shall by written notification to the Depositary at the time of signature, ratification, approval of or accession to the Subprotocol, indicate if it does not provide for a right to bring a direct action pursuant to paragraph 3. The Secretariat shall maintain a record of the Parties that have given notification pursuant to this paragraph.

*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 procedures in *section IV.2 (c)*, competent authorities are encouraged to require operators to obtain financial security for the activities identified by the competent authority.

*Operational text 7*

National corporate and other applicable laws concerning financial security for the conduct of commercial and research and development activities in the Party where the damage exists shall apply.

*Operational text 8*

1. Exporters, notifiers, importers, distributors, growers, carriers, and other persons liable under [article 4] shall establish and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability under [article 4] of this Protocol for amounts not less than the minimum limits specified in paragraph [] of [Annex I] according to the terms and

conditions established by the Regulations passed by the Conference of the Parties serving as the meeting of the Parties to this Protocol.

2. A document reflecting the coverage of the liability of the exporter and the notifier under [article 4 paragraph 1], of this Protocol or of the importer under [article 4, paragraph 2], of this Protocol shall accompany the notification referred to in article 8 or Annex II of the Cartagena Protocol. Proof of coverage of the liability of the exporter and the notifier shall be delivered to the competent national authorities of the State of import.
3. Any claim under this Protocol 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 [article 4] to be joined in the proceedings.

## V. SUPPLEMENTARY COMPENSATION SCHEME

### **Additional tiers of liability in situation where:**

- (a) The primary liable person cannot be identified;
- (b) The primary liable person escape liability on the basis of a defence;
- (c) A time limit has expired;
- (d) A financial limit has been reached;
- (e) Financial securities of the primary liable person are not sufficient to cover liabilities; and
- (f) The provision of interim relief is required.

### ***A. Residual state liability***

#### *Operational text 1*

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

#### *Operational text 2*

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 3*

1. If liability for damage to biodiversity cannot be established because (a) no person can be identified; (b) a complete defence applies; or (c) the claim is time-barred, the Party in which the damage exists shall be responsible for any necessary restoration or other remedial action in accordance with its obligations under the Convention on Biological Diversity.
2. Where liability is assigned to a person but the financial limit provided for in Rule [] has been reached, the Party in which the damage exists shall be responsible for any additional remedial action that may be necessary in accordance with its obligations under the Convention on Biological Diversity.
3. National corporate and other applicable laws concerning financial insufficiencies in the Party where the damage exists shall apply.

#### *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.

*Operational text 5*

1. If liability for damage to biodiversity cannot be established, the Party in which the damage exists shall be responsible for any necessary restoration or other remedial action in accordance with its obligations under the Convention on Biological Diversity.
2. National corporate and other applicable laws concerning financial insufficiencies in the Party where the damage exists shall apply.

***B. Supplementary collective compensation arrangements***

*Option 1*

Fund financed by contributions from biotechnology industry to be made in advance on the basis of criteria to be determined.

*Option 2*

Fund financed by contributions from biotechnology industry to be made after the occurrence of the damage on the basis of criteria to be determined.

~~*Option 3*~~

~~Public fund.~~

*Option 4*

Combination of public and private funds.

*Operational text 1*

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 this Instrument;
  - (c) Any time limit provided by this Instrument has expired;
  - (d) Any financial limit provided by this Instrument has been reached;
  - (e) Any financial securities required by this Instrument 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 this instrument.
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 this Instrument if the person liable is unable to provide the whole or any part of the said sum.
3. The Secretariat of the CBD/Instrument 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/Instrument for reimbursement to be paid to persons from the fund.
- 5. (a) The CBD/Instrument 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 the Instrument.  
(b) The amount of the contribution shall be determined by a decision of the Parties to the Instrument  
(c) The Parties to the Instrument may exempt any person from making contributions to the fund.
- 7. Any State or person may make voluntary contributions to the fund.

*Operational text 2*

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

*Operational text 3*

- 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 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)*

#### *Operational text 1*

In the event of a dispute between Contracting Parties concerning the interpretation or application of this Instrument, the provisions of Article 27 of the CBD shall apply *mutatis mutandis*.

#### *Operational text 2*

Parties may/shall settle any dispute arising out of the application and/or interpretation of this Instrument through the dispute settlement mechanism/s provided under Article 27 of the CBD and its Annex.

#### *Operational text 3*

Any State to State dispute arising under this instrument 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*

Any Party claiming damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of LMOs 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 LMOs shall be cognizable by a competent court only after applicable CBD and PCA procedures have been exhausted.

#### *Operational text 5*

#### *Section 1: General provisions*

#### *Article 34.*

#### *Obligation to settle disputes by peaceful means*

Contracting 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 Contracting 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 Contracting 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 Contracting 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 Contracting 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 Contracting 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 biodiversity, 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.

4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other Contracting Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.
5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Protection of Biodiversity may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.
6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

*Article 44.*

*Access*

1. All the dispute settlement procedures specified in this Part shall be open to Contracting 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 31.

*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 Contracting 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***

- (i) Jurisdiction of courts or arbitral tribunals;
- (ii) Determination of the applicable law;
- (iii) Recognition and enforcement of judgments or arbitral awards.

*Operational text 1*

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

*Operational text 2*

1. Claims for any relief under the Instrument may be brought in the courts of a Contracting Party only where either:
  - (a) The damage was suffered; or
  - (b) The incident occurred; or
  - (c) The defendant has his habitual residence, or has his principal place of business.
2. Each Contracting Party shall ensure that its courts possess the necessary competence to entertain such claims for damage.
3. 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.
4. 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.
5. For the purpose of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

6. All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the Instrument shall be governed by the law of that court including any rules of such law relating to conflict of laws.
7. Nothing in the Instrument 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.
8. Any judgment of a court having jurisdiction in accordance with this Instrument, which is enforceable in the State seized of original jurisdiction and is no longer subject to ordinary forms of review, shall be recognized in any Contracting Party as soon as the formalities required in that Party have been completed, except:
  - (a) Where the judgment was obtained by fraud;
  - (b) Where the defendant was not given reasonable notice and a fair opportunity to present his case;
  - (c) Where the judgment is irreconcilable with an earlier judgment validly pronounced in another Contracting Party with regard to the same cause of action and the same parties; or
  - (d) Where the judgment is contrary to the public policy of the Contracting Party in which its recognition is sought.
9. A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be re-opened.
10. The provisions of *paragraph 8 and 9* of this Article shall not apply between Contracting Parties that are Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgments under which the judgment would be recognizable and enforceable.

*Operational text 3*

1. Claims for compensation under this Protocol may be brought in the courts where either the damage was suffered or the incident occurred or the plaintiff has his habitual residence or the defendant has his principal place of business.
2. Each contracting Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.
3. Subject to subarticle two of this Article, nothing in the Protocol 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.
4. 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 the Protocol.
5. Any judgment of a court having jurisdiction in accordance with Article --- herein, which is enforceable in the State of origin, shall be recognized in any Contracting Party, except where the judgment was obtained by fraud, the defendant was not given reasonable notice and a fair opportunity to present his case, the judgment is irreconcilable with an earlier judgment validly pronounced in another Contracting Party with regard to the same cause of action and same parties, or the judgment is contrary to the policy of the Contracting Party from which this recognition is sought.

6. A judgment recognized under subarticle one of this Article shall be enforceable in each Contracting 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.
7. The provisions of subarticle one and two of this Article shall not apply between Contracting Parties that are Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgments under which the judgment would be recognizable and enforceable.

*Operational text 4*

1. Claims for compensation under the Subprotocol may be brought in the courts of a Party only where:
  - (a) The damage was suffered;
  - (b) The unintentional release across the border occurred; or
  - (c) The defendant 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, its statutory seat or central administration.
2. Each Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.
3. 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.
4. 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.
5. Where related actions are pending in the courts of different Parties, any court other than the court first seized may stay its proceedings.
6. 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.
7. For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.
8. All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the Subprotocol shall be governed by the law of that court, including any rules of such law relating to conflict of laws.
9. The Subprotocol is without prejudice to any rights of persons who have suffered damage or to any measures for the protection or reinstatement of the environment that may be provided under applicable domestic law.
10. Any judgement of a court having jurisdiction in accordance with *paragraph 1* or any arbitral award which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms

of review shall be recognized in any Party as soon as the formalities required in that Party have been completed, except:

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

- 11. A judgement or arbitral award recognized under *paragraph 10* shall be enforceable in each Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be reopened.
- 12. The provisions of *paragraphs 10 and 11* shall not apply between Parties to an agreement or arrangement in force on the mutual recognition and enforcement of judgements or arbitral awards under which the judgement or arbitral award would be recognizable and enforceable.

*Operational text 5*

- 1. Claims for compensation may be brought in the courts of a Party only where either:
  - a) The damage was suffered; or
  - b) The incident occurred; or
  - c) The defendant has his habitual residence or principal place of business.
- 2. Each Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.
- 3. 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.
- 4. 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.
- 5. Where related actions are brought in the courts of different Parties, any court other than the court first seized may stay its proceedings.
- 6. 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.
- 7. For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.

8. All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the instrument shall be governed by the law of that court, including any rules of such law relating to conflict of laws, in accordance with generally accepted principles of law.
9. The instrument is without prejudice to any rights of persons who have suffered damage or to any measures for the protection or reinstatement of the environment that may be provided under applicable domestic law.
10. Any judgement of a court having jurisdiction in accordance with *paragraph 1* on competent courts which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms of review, shall be recognized in any Party as soon as the formalities required in that Party have been completed, except:
  - (a) Where the judgement was obtained by fraud;
  - (b) Where the defendant was not given reasonable notice and a fair opportunity to present his case;
  - (c) Where the judgement is irreconcilable with an earlier judgement validly pronounced in another Party with regard to the same cause of action and the same parties; or
  - (d) Where the judgement is contrary to the public policy of the Party in which its recognition is sought.
11. A judgement recognized under *paragraph 10* of this Article shall be enforceable in each Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be re-opened.
12. The provisions of *paragraphs 10 and 11* shall not apply between Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgements under which the judgement would be recognizable and enforceable.

*Operational text 6*

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.

*Operational text 7*

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.

*Operational text 8*

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 LMOs 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 section XX), 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 LMOs in a competent court.
4. Recognition and enforcement of judgments or awards shall be in accordance with private international law.

*Operational text 9*

*Article 8*

*Jurisdiction and applicable law*

1. Primary jurisdiction over actions under this Protocol shall lie with the courts of the Contracting Party where the damage occurs.
2. If the damage occurs only beyond the limits of national jurisdiction, primary jurisdiction over actions under this Protocol 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 this Protocol shall also lie with the courts of the Contracting Party where the occurrence took place, where the defendant has his habitual residence or has his principal place of business.
4. All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in this Protocol 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 this Protocol.
5. Each Contracting Party shall: (a) ensure that its courts possess the necessary competence to entertain claims for compensation under this Protocol; and (b) shall adopt the legislative measures necessary to ensure that the laws provide for compensation according to this Protocol and according to any harmonizing recommendations made by the Assembly under article 15.

*Article 9*

*Court powers and procedures*

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 article 8 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.

#### *Article 10*

##### *Lis Pendens*

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 Contracting Party or Parties, any court other than the court described in paragraphs 1 and 2 of article 8 shall of its own motion stay its proceedings unless and until the court described in paragraphs 1 and 2 article 8 rules that it does not have jurisdiction under this Protocol.
2. Where the jurisdiction of the court described in paragraphs 1 and 2 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 article 8, then any court other than the court described in paragraphs 1 and 2 of article 8 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 Protocol. 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.

#### *Article 11*

##### *Related Actions*

1. Where related actions are brought in the different courts described in article 8, any court other than the court described in paragraphs 1 and 2 of article 8 shall, while the actions are pending at first instance, stay its proceedings upon the motion of a party to any of the proceedings.
2. A court other than the court described in paragraphs 1 and 2 of article 8 shall, on the application of one of the parties, decline jurisdiction if the law of that court the court described in paragraphs 1 and 2 of article 8 permits the consolidation of related actions and the court first seized has jurisdiction over both or all actions.
3. When related actions are brought in the courts of different Parties, and all courts are described in article 8, 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 Protocol. 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.
4. For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

#### *Article 12*

##### *Enforcement*

1. Judgments entered by the competent court under article 8 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 Contracting Parties as soon as the formalities required by the Contracting

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 Contracting Party under this Convention, such Contracting Party may not, except in respect of measures of execution, invoke any jurisdictional immunities before the court competent in accordance with this article.

<b>C.     <i>Administrative procedures</i></b>
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*Operational text 1*

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 2*

1. Contracting 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 this Instrument.
2. The procedures for the preferring and determination of decisions of administrative authorities shall be as provided by the domestic law of the Contracting Party.

<b>D.     <i>Special tribunal (e.g. Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment)</i></b>
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*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 the Subprotocol and persons liable under the Subprotocol, 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*

Any Party claiming damage to the conservation and sustainable use of biodiversity resulting from transboundary movement of LMOs that is not satisfactorily resolved under the procedure set forth in



Article 27 of the Convention on Biological Diversity (CBD) shall submit its claim for resolution to the Permanent Court of Arbitration subject to the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment. Any claim for damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of LMOs shall be cognizable by a competent court only after applicable PCA procedures have been exhausted.

*Operational text 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.

<p><b><i>E. Standing/right to bring claims</i></b></p>
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*Operational text 1*

1. Parties should provide for a right 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 NGOs promoting environmental protection and meeting relevant requirements under domestic law, should have a right to require the competent authority to act according to these rules and procedures and to challenge, through a review procedure, the competent authority's decisions, acts or omissions as appropriate under domestic law.

*Operational text 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*

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

*Operational text 4*

1. Any person who has suffered loss or harm during a transboundary movement, transit, handling and use of any LMOs, 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 LMOs and its 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 LMO 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 this Protocol, 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 Contracting Party shall ensure that any person in another Contracting Party who is adversely affected has the right of access to administrative and judicial procedure equal to that afforded to nationals of the Contracting Party of origin in case of domestic environmental harm.
6. Each Contracting Party shall ensure that adversely affected persons due to damage resulted during transboundary movement, transit, handling and use of LMOs, 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 5*

Claims shall be brought by the affected person only.

*Operational text 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.

*Operational text 7*

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 NGOs promoting environmental protection and meeting relevant requirements under domestic law, should have a right to require the competent authority to act according to this decision and to challenge, through a review procedure, the competent authority's decisions, acts or omissions as appropriate under domestic law.

*Operational text 8*

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 this Protocol.
2. Nothing in the Protocol 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 Contracting Parties shall take appropriate steps to remove or reduce such barriers.

## VII COMPLEMENTARY CAPACITY BUILDING MEASURES

### *Operational text 1*

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

1. *Invites* Parties to take into account, as appropriate, the present decision including capacity building measures, such as assistance in the development of domestic "liability rules" and considerations such as "contributions in kind", "model legislation", or "packages of capacity building measures", in the next review of the Updated Action Plan for Building Capacities for the Effective Implementation of the Cartagena Protocol on Biosafety, as contained in the Annex to decision BS III/3;
2. *Invites* 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 to submit, through the Secretariat, draft legislation for advice to the [Committee responsible for the facilitation of the implementation of this decision];
3. *Requests* Parties to submit to the Secretariat, upon their adoption, 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;
4. *Requests* the Secretariat to bring all domestic legislation received under *paragraph 3* to the attention of the [Committee responsible for the facilitation of the implementation of this decision];
5. *Decides* that, under the COP/MOP's overall guidance, the [Committee responsible for the facilitation of the implementation of this decision] has the following functions:
  - (a) Provide, at the request of a Party, advice to that Party on any draft domestic legislation 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 2*;
  - (b) Provide, at the request of a Party, advice to that Party on questions relating to the implementation of this decision;
  - (c) Report to each ordinary meeting of the COP/MOP on its activities;
  - (d) Report to the seventh meeting of the COP/MOP on the implementation and effectiveness of this decision, including any recommendations for further action in this field, taking into account best practices;

### *Operational text 2*

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 should, as appropriate, take into account the present decision including capacity building measures such as assistance in the development of domestic "liability rules" and considerations such as "contributions in kind", "model legislation", or "packages of capacity building measures", including the provision of assistance to develop national laws; foster inter-sectoral coordination and partnership among regulatory organs at the national level; ensure effective public participation in damage assessment and

quantification; and to enhance the skills of the judiciary in handling issues pertaining to liability and redress.

## 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, .....,

*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

.....etc

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 in their domestic law, 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 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*

1. This instrument enters into force upon the fulfillment of XX ratifications, representing XX per cent of trade in LMOs and representing a balance of importing and exporting parties.
2. This instrument 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 this instrument 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, this instrument shall not apply provided the other agreement is in force for the Party or Parties concerned and had been opened for signature when the instrument was opened for signature, even if the agreement is amended afterwards.

*Operational text 4*

1. This Protocol 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. This Protocol shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves this Protocol 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 5*

This instrument shall not affect the rights and obligations of the Contracting Parties under the Protocol.