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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

Fifth meeting

Cartagena, Colombia, 12-19 March 2008

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 FIFTH MEETING

INTRODUCTION

A. Background

1. The Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety was established by decision I/8 of the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. Following the generous offer made by the Government of Colombia to host it, the fifth meeting of the Working Group was held at the Julio César Turbay Ayala Convention Centre in Cartagena de Indias, Colombia from 12 to 19 March 2008. Further information on the previous meeting of the Working Group can be found in paragraphs 1 to 6 of the annotated provisional agenda of the fifth meeting of the Working Group (UNEP/CBD/BS/WG-L&R/5/1/Add.1).

B. Officers and attendance

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

3. The meeting was attended by representatives from the following Parties to the Protocol and other Governments: Argentina, Austria, Bangladesh, Belgium, Benin, Bhutan, Bolivia, Brazil, Bulgaria, Burkina Faso, Cambodia, Canada, China, Colombia, Cuba, Czech Republic, Democratic Republic of the Congo, Ecuador, Egypt, El Salvador, Ethiopia, European Community, Finland, France, Gabon, Germany, Guatemala, India, Indonesia, Japan, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Liberia, Madagascar, Malaysia, Mali, Mauritius, Mexico, Namibia, Netherlands, New Zealand, Norway, Palau, Panama, Paraguay, Peru, Philippines, Portugal, Republic of Korea, Republic of Moldova, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Slovenia, South Africa, Spain, Sudan, Sweden, Switzerland, Tajikistan, Thailand, Togo, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United States of America, Zambia.

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

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5. Observers from the following intergovernmental and non-governmental organizations and other stakeholders also participated in the meeting: African Centre for Biosafety, African Union, Biotechnology Coalition of the Philippines, Centre of Excellence for Biodiversity Law, Corporacion para Investigaciones Biologicas, CropLife International, Desarrollo Medio Ambiental Sustentable, ECOROPA, Friends of the Earth International, Global Industry Coalition, Greenpeace International, Grupo Semillas, Instituto Interamericano of Cooperacion para la agricultura, International Federation of Organic Agriculture Movements, International Grain Trade Coalition, Kobe University Research Institute on MEAs, Malaysian Biotechnology Corporation, Permanent Court of Arbitration, Pontificia Universidad Javeriana, Public Research and Regulation Initiative, Red de Acción en Plaguicidas y sus Alternativas para América Latina, Red por une América Latina Libre de Transgénicos, Third World Network, Universidad Nacional Agraria La Molina, Universidade Federal de Santa Catarina, Washington Biotechnology Action Council / 49th Parallel Biotechnology Consortium, WWF International.

ITEM 1. OPENING OF THE MEETING

6. The meeting was opened at 10.30 a.m. on Wednesday 12 March, 2008 by Ms. Nieto, Co-Chair of the Working Group. She welcomed the participants and recalled that they had been requested to come to the meeting with an extremely flexible mandate for negotiation. She said that the meeting would be the last chance for the participants to produce proposed rules and procedures in the field of liability and redress for damage resulting from the transboundary movement of living modified organisms before the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. She also reminded the participants that the meeting had been financed entirely from extra-budgetary contributions and she thanked the Governments of Austria, Finland, France, Germany, the Netherlands, Norway, Spain, Sweden and Switzerland, as well as the European Community for their generous contributions. She also reminded the participants that at the request of the fourth meeting of the Working Group, the Government of Colombia had made special efforts to facilitate the issuance of visas in order for participants to attend the meeting. She expressed her regret that some delegates from Parties eligible for funding had not been able to receive timely financial support and so had been unable to attend.

7. Opening statements were also made by Mr. Juan Lozano Ramirez, Minister of the Environment, Housing and Territorial Development of Colombia and Mr. Charles Gbedemah, Head of the Biosafety Unit, on behalf of Mr. Ahmed Djoghlaif, Executive Secretary of the Convention on Biological Diversity.

8. Mr. Gbedemah said that as a result of the work at its fourth meeting, and the efforts of the Co-Chairs during the intersessional period, the Working Group had before it a comprehensive document as a basis for its deliberations. He was confident that the city of Cartagena would provide the right ambiance to advance the process on liability and redress so that the Working Group could complete its work at its fifth meeting. He reminded the participants that the meeting had been entirely funded by voluntary contributions and he thanked the Government of the Netherlands for its generous contribution toward the organization of the meeting as well as the Government of Colombia for agreeing to host the meeting and for providing the logistics to ensure its success. He also thanked the Governments of Austria, Finland, France, Germany, Norway, Spain, Sweden, and Switzerland as well as the European Community for their financial support. However, despite that generosity it had not been possible to extend funds to all eligible Parties even though the Bureau of the Conference of the Parties serving as the meeting to the Parties to the Protocol, at the request of the Co-Chairs, had kindly agreed, on an exceptional basis, to advance funds against pledges to overcome the delay and shortage in the flow of voluntary contributions. In closing he paid tribute to the Co-Chairs, who had spared no pains in the organization of the meeting through ingenious, resourceful and innovative means and he called upon the participants to ensure that the Working Group completed its work at the same time that its mandate ended.

9. Mr. Ramirez welcomed the participants to Cartagena, a city that had been declared part of the world's cultural heritage. He recalled that the present meeting was taking place at a time when there was a need to reconcile biotechnology with the concerns of the public, and said that achieving that balance presented a challenge for effective international agreements. Biodiversity belonged to humanity as a whole, as well as to future generations, and he hoped that the meeting would help to protect the world's

heritage. At a time when global warming, the conservation of water, the fight against poverty and the achievement of the Millennium Development Goals were key issues on the international agenda, issues of sustainable development were fundamental for the future of humanity. He also reminded the participants that Colombia was a precious repository of biological diversity and that at the national level, under President Alvaro Uribe Velez, Colombia had continued to strengthen its institutions to protect the environment, as was shown by the creation of the amalgamated Ministry of Environment, Housing and Territorial Development. The Minister also thanked those countries that had made financial contributions, and especially the Government of the Netherlands for its generous financial support in helping Colombia to host the meeting, as well as the Executive Secretary and the Secretariat of the Convention on Biological Diversity for their assistance in organizing the meeting, and he thanked the participants for coming all the way to Colombia to participate in and contribute to the meeting.

ITEM 2. ORGANIZATIONAL MATTERS

2.1. Adoption of the agenda

10. The Meeting adopted the following agenda on the basis of the provisional agenda (UNEP/CBD/BS/WG-L&R/5/1) prepared by the Executive Secretary in consultation with the Co-Chairs:

1. Opening of the meeting.
2. Organizational matters:
 - 2.1. Adoption of the agenda;
 - 2.2. Organization of work.
3. 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

11. 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/5/1/Add.1). It was also agreed to conduct the work of the Working Group in both plenary session and in sub-working groups.

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

12. Agenda item 3 was taken up at the 1st session of the meeting on Wednesday, 12 March 2008 by Ms. Nieto, Co-Chair of the Working Group, who invited the Secretariat to introduce the documents that had been prepared as requested by the fourth meeting of the Working Group.

13. The representative of the Secretariat reminded the Working Group that at its fourth meeting it had requested the Executive Secretary to gather and make available at its fifth meeting: (i) information on recent developments in international law relating to liability and redress, including the status of international environment-related liability instruments; and (ii) a list of the documents available in the Biosafety Information Resource Centre of the Biosafety Clearing-House that addressed liability and redress for damage resulting from living modified organisms, as well as a list of national laws and regulations containing rules and procedures on damage resulting from living modified organisms.

Accordingly, the Working Group had before it, as information documents, a note 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/5/INF/1) and a list of documents, national laws and regulations on liability and redress for damage resulting from living modified organisms available in the Biosafety Clearing-House (UNEP/CBD/BS/WG-L&R/5/INF/2).

14. She also recalled that at its fourth meeting, the Working Group had requested the Secretariat to arrange for expert presentations on the settlement of claims by a representative of the Permanent Court of Arbitration, and on supplementary collective compensation arrangements by a representative of the International Oil Pollution Compensation Fund. The Secretariat had approached the International Oil Pollution Fund as well as the International Maritime Organization to organize such an expert presentation on supplementary collective compensation arrangements but, because of overlapping schedules of meetings, it had not been possible to do so. However, the Permanent Court of Arbitration responded positively to the Secretariat's request and Mr. Dane Ratliff, Legal Counsel to the Permanent Court of Arbitration, had agreed to address the Working Group.

15. The Co-Chair thanked the representative of the Secretariat for her presentation and invited Mr. Ratliff to address the Working Group.

16. In his presentation Mr. Ratliff explained the role that arbitration, conciliation and fact-finding could play in the context of a scheme of liability and redress. He also observed that the revised working draft of proposed operational texts on approaches and options identified pertaining to liability and redress in the context of Article 27 of Biosafety Protocol (UNEP/CBD/BS/WG-L&R/5/2/Rev.1) contained references to the possible use of the Optional Rules of the Permanent Court of Arbitration for the Arbitration of Disputes Relating to Natural Resources and/or the Environment. He said that the first reference, in section VI A of the revised working draft, also included a reference to the settlement of disputes under Article 27 of the Convention on Biological Diversity. He suggested that Parties that agreed to arbitration according to Article 27 of the Convention should consider submitting their disputes under the environmental rules of the Permanent Court of Arbitration, and added that the procedures under the Convention on Biological Diversity were not as current or developed as the environmental rules of the Permanent Court of Arbitration.

17. Section VI F of the revised working draft also made reference to the Permanent Court of Arbitration, although Mr. Ratliff considered that reference out of place as the section mixed inter-State proceedings with civil proceedings. Instead he thought that it might be useful to include a reference to optional arbitration in addition to civil procedures, such as was found in the 2003 Kiev Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents. He also informed the participants that an analysis of whether the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards would apply might also be necessary.

18. Mr. Ratliff then informed the participants that the environmental procedures of the Permanent Court of Arbitration were open to any State, as well as to private parties and States that agreed to use any of the optional rules of the Permanent Court of Arbitration for arbitration, conciliation or fact-finding. The Permanent Court of Arbitration was also willing to provide its facilities free of charge to States resolving disputes under its auspices and also financial assistance was available to the least developed countries in some cases. As an intergovernmental organization, the Permanent Court of Arbitration was well placed to offer a neutral forum for the resolution of biosafety disputes. Mr. Ratliff said that as transboundary movements of living modified organisms would likely be conducted on the basis of some form of contractual relationship, it seemed that a combination of fact-finding administered by the Permanent Court of Arbitration and arbitration would be beneficial in any system of liability and redress under the Cartagena Protocol on Biosafety. Such fact-finding and inquiry was often an efficient complement to other proceedings. He also observed that compulsory fact-finding, leading to a proposal

for an equitable settlement, was to be found in a number of instruments and had been used by various international courts. Fact-finding procedures were also often easier for private parties to agree to than the choice of domestic litigation or arbitral proceedings, as fact-finding procedures were non-adversarial and usually less costly, as well as more expeditious, than litigation.

19. In the discussion that followed statements were made by the representatives of Canada, Palau, Senegal, South Africa, and the United States of America.

20. In his response to the issues raised during the discussion, Mr. Ratliff said that the costs of the fact-finding exercise and of arbitration were often shared equally between the parties and that a small percentage of a party's total costs were attributable to the costs of arbitrators and administrative support. However, in some cases parties had agreed to pay the costs of private litigants. He also observed that it was up to the parties to select the arbitrators, although the Secretary General of the Permanent Court could assist with the selection of arbitrators from a roster of experts. He explained that cases before the Permanent Court were generally dealt with more expeditiously than those before other courts and tribunals, and that parties needed to give their consent before being brought into the arbitration process.

21. In response to questions on the utility of having an arbitration clause in a non-binding instrument, Mr. Ratliff said that if the scope of the obligations created by the instrument were to have application, and there was no other body to interpret those obligations, then an arbitral body might be useful as a means of doing so. However, the issue of whether those obligations were to be binding or non-binding, or whether those obligations were to be between States, or between private entities or between States and private entities remained for the Working Group to decide. On the issue of the difficulty of evaluating damage, Mr. Ratliff said that the Permanent Court of Arbitration had experience with such difficult cases as the 1904 Dogger Bank incident and the 1968 Red Crusader incident, among others. He explained that it might be advisable to appoint a fact-finding commission with expertise in dispute resolution which could then engage a biosafety expert to help in the evaluation of damage.

22. The Co-Chair said that the Working Group appeared satisfied with the information collected by the Secretariat. She thanked Mr. Ratliff for his presentation and informed the participants that Mr. Ratliff would remain in Cartagena until the closure of the meeting and be available to answer any further questions that the participants might have about the working of the Permanent Court of Arbitration.

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

23. Agenda item 4 was taken up at the 1st session of the Working Group on Wednesday, 12 March 2008. In his introduction Mr. Lefeber, Co-Chair of the Working Group, thanked the Government of Colombia for hosting the meeting of the Working Group, and in particular his Co-Chair for her assistance in organizing the meeting and informed the participants that by doing so Colombia had agreed to both the logistical organization of the meeting as well as to paying an important part of the cost of hosting the meeting. He reminded the participants that there would not be much time to discuss the issue of liability and redress at the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol at Bonn, Germany, from 12 to 16 May 2008, and that therefore significant progress had to be made during the present meeting.

24. The Co-Chair also recalled that at its fourth meeting the Working Group had requested the Co-Chairs to streamline the proposed operational texts in sections IV.4 (a), VI and VII of the working document (annex II of document (UNEP/CBD/BS/WG-L&R/4/3)) during the intersessional period and produce a revised working draft for consideration by the Working Group. Accordingly the Working Group had before it document, UNEP/CBD/BS/WG-L&R/5/2/Rev.1 which reproduced the previous working document as well as the text that had been streamlined by the Co-Chairs.

25. The Co-Chair then invited the participants to consider the scenarios that had been developed during the brainstorming session of the previous meeting and that were summarized in paragraph 33 of the report of the fourth meeting of the Working Group (UNEP/CBD/BS/WG-L&R/4/3), as well as in

paragraph 4 of the annotations to the provisional agenda of the meeting (UNEP/CBD/BS/WG-L&R/5/1/Add.1).

26. Statements were made by the representatives of Bangladesh, Bolivia, Brazil, Canada, the European Community (on behalf of the European Community and its member States), India, Japan, Malaysia, Mexico, Norway, Republic of Korea, Senegal, and Zambia (on behalf of the African Group).

27. Statements were also made by the observers from ECUROPA and the Public Research and Regulation Initiative.

28. At the 2nd session of the meeting on Thursday, 13 March 2008, the Working Group considered section VI, (Settlement of Claims) of the revised working draft.

29. At the 3rd session of the meeting on Thursday, 13 March 2008, the Working Group considered sections III, (Damage) and IV, (Primary Compensation Scheme) of the revised working draft.

30. At the 4th session of the meeting on Thursday, 13 March 2008, the Working Group completed its discussion on section IV, as well as section V, (Supplementary Compensation Scheme) of the revised working draft.

31. At the 4th session of the meeting on Thursday, 13 March 2008, Mr. René Lefebvre, Co-Chair of the Working Group, proposed that two informal sub-working groups be created. The Co-Chair provided the terms of reference for the sub-working groups which included streamlining the operational text of section VI, and further streamlining the operational text in sections III and IV by grouping and consolidating such texts, as well as negotiating an agreed text where possible, and reporting back within the deadline to the Working Group. The first sub-working group, with Mr. Jürg Bally (Switzerland) and Mr. Reynaldo Eborá (the Philippines) as co-chairs, considered sub-sections VI A, VI B, VI D, and VI E, as well as section III of the revised working draft. The second sub-working Group, with Ms. Jane Bulmer (United Kingdom) and Mr. Dire Tladi (South Africa) as co-chairs, considered section IV and sub-section VI C of the revised working draft.

32. At the 5th session of the meeting on Friday, 14 March 2008, the Working Group heard reports from Mr. Jürg Bally (Switzerland) and Mr. Dire Tladi (South Africa) on the progress in the sub-working groups. The Working Group also considered section VII, (Complementary Capacity-building Measures) and section II, (Scope) of the revised working draft. The Working Group agreed that the second sub-working group would consider sections V and VII of the revised working draft, together with a proposal made by Switzerland on supplementary collective compensation arrangements, and that the first sub-working group would consider section II of the revised working draft.

33. At the 6th session of the meeting on Saturday, 15 March 2008, the Working Group heard reports from Ms. Jane Bulmer (United Kingdom) and Mr. Jürg Bally (Switzerland) on the progress in the sub-working groups. The co-chairs of the sub-working groups submitted a further revised version of sections III to VII of the revised working draft for consideration by the Working Group, which together with sections II, as revised at the 5th session of the meeting, as well as sections I and VIII, constituted the further revised working draft.

34. At the 6th session of the meeting the Co-Chairs of the Working Group also introduced a Co-Chairs' text containing a core elements paper for consideration by the Working Group. Following the initial discussion of the core elements paper, a representative for industry, Mr. Thomas Carrato, said that the observers from industry welcomed the initiative that had been presented in the paper for a supplementary contractual compensation scheme by the private sector and said that industry looked forward to participating productively in the discussions.

35. At the 7th session of the meeting on Monday, 17 March 2008, the Working Group continued its discussion of the Co-Chairs' text of a core elements paper. Following the discussion, the Co-Chairs introduced a draft decision which contained four annexes arranged around the four sections of the core elements paper for consideration by the Working Group.

36. At the 7th session of the meeting the Working Group also heard an offer made by Mr. Thomas Carrato of the Global Industry Coalition, on behalf of BASF, Bayer CropScience, Dow AgroSciences, DuPont/Pioneer, Monsanto and Syngenta. In his presentation, Mr. Carrato said that all the companies that provided agricultural biotechnology traits and products were absolutely confident of the safety of their products and their risk assessment processes. That confidence was affirmed by the hundreds of independent national risk assessments and approvals of those products for release into the environment for production and for the importation of living modified organisms that are intended for direct use as food or feed or for processing. He also said that the products of agricultural biotechnology had been grown and consumed for almost fifteen years on over a billion acres in countries with over one half of the world's population, and that contrary to assertions that had been made, there had been no harm to human health or damage to the environment or biological diversity. He said that the six corporations he represented stood by their products and were committed to remediate damage if their products actually caused damage to biodiversity. He also said that the companies in question had been considering compensation mechanism approaches that would demonstrate that commitment.

37. Mr. Carrato said that the companies had been seriously considering options and discussing arrangements for compensation, and that the concept most seriously being considered was a binding contractual obligation among the six companies, and any other companies that chose to sign it, to remediate actual damage to biological diversity caused by their products. He referred to the arrangement as a "compact" and said that it would set forth the conditions for a Party to submit a claim and for the approval of such a claim. The compact would also provide that only the responsible company would remediate or pay a claim after the actual damage to biological diversity had been proven pursuant to the claim procedures detailed in the compact. As such the compact would not be a fund such as had been considered in the discussions of the Working Group, but rather would be a form of self insurance that the companies that joined the compact would undertake. He also stressed that the compact would be a binding contract among its members and that a Party whose claim was allowed would be a third party beneficiary.

38. In closing Mr. Carrato said that for the directors of any company to justify making such a financial commitment they needed to understand the value of such an agreement in the context of the negotiations of the Working Group on Liability and Redress. The concept of the compact was being considered in order to contribute to negotiations that provided for a reasonable compensation mechanism and approach to liability for damage to biodiversity that was acceptable to all Parties and interested parties.

39. Mr. Lefeber, Co-Chair of the Working Group, thanked Mr. Carrato for his statement and observed that the companies represented by Mr. Thomas Carrato had responded to the problem of developing a private compensation mechanism. That was an historic moment for the Cartagena Protocol on Biosafety. He said that the multinational corporations were reaching out and offering to become part of the biosafety community. He observed that it meant that industry had responded even before the Parties represented at the meeting had agreed on that element of the paper, and he asked the participants to warmly welcome the statement of Industry. The participants then applauded the initiative of the multinational corporations.

40. At the 8th session of the meeting on Monday, 17 March 2008, Ms. Nieto, Co-Chair of the Working Group, asked the participants for their preferences on the way forward in the discussions of the Working Group. She asked whether the participants wished to continue with the discussion of the core elements paper and a draft decision, circulated by the Co-Chairs to illustrate the integration of the core elements paper, the further revised working draft and the blueprint contained in annex II of the report of the fourth meeting of the Working Group (UNEP/CBD/BS/WG-L&R/4/3), or whether they wished to revert to a discussion of the further revised working draft as submitted by the co-chairs of the sub-working groups. She also reminded the participants that, as it was procedural, the issue was only for consideration by the Parties to the Protocol.

41. Statements were made by the representatives of Bangladesh, Brazil, China, Egypt, Ethiopia, the European Community (on behalf of the European Community and its member States), India, Japan, Malaysia (on behalf of the Group of 77 and China), Mexico (on behalf of the Latin American and Caribbean Group), New Zealand, Norway, Panama, Senegal, and Switzerland.

42. Following the exchange of views, and the proposal by the representative of Switzerland to establish a group of friends of the Co-Chairs, it was decided to create a Group of Friends of the Co-Chairs consisting of the representatives of China, India, Japan, Malaysia, New Zealand, Norway, the Philippines, Switzerland, as well as two representatives of the European Union, four representatives of the Latin American and Caribbean Group and four representatives of the African Group. It was also decided that the Group of the Friends of the Co-Chairs would meet to discuss the way forward for the discussions of the meeting and report back to the Working Group at its next session.

43. At the 9th session of the meeting on Wednesday, 19 March 2008 Mr. Lefeber, Co-Chair of the Working Group reported on the progress of the Group of the Friends of the Co-Chairs. He said that the Group had held two rounds of negotiations on Monday, 18 March 2008. The first round had been open and had taken place from 8 a.m. to 6 p.m. The second round had been limited to Parties to the Protocol and had lasted from 6 p.m. until 4.30 a.m. the following morning. He reported that the Group of the Friends of the Co-Chairs had agreed to work on the basis of the core elements paper that had been submitted by the Co-Chairs for consideration by the Working Group and that agreement had been reached on a substantial number of core elements. He also reported those core elements had been merged into the further revised working draft. Good progress had been made by the Group of the Friends of the Co-Chairs, although some bracketed text remained. He proposed that the further revised working draft, including the core elements, be attached to the report of the present meeting as annex II. He also proposed that the blueprint for a COP-MOP decision, annex I to the report of the fourth meeting of the Working Group (UNEP/CBD/BS/WG-L&R/4/3), also be included as annex I to the report of the present meeting.

44. Following a discussion the Working Group agreed to attach the further revised working draft, "Proposed operational texts on approaches and options identified pertaining to liability and redress in the context of Article 27 of the Biosafety Protocol", as annex II to the present report, and the revised blueprint for a COP-MOP decision on international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, as annex I to the present report.

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

Section VI Settlement of Claims

45. The Working Group took up consideration of section VI of the revised working draft at the 2nd session of the meeting on Thursday, 13 March 2008. Mr. Lefeber, Co-Chair of the Working Group, reminded the participants that section VI had not been considered at the fourth meeting of the Working Group and he asked for their views on each of the sub-sections of section VI.

46. The Co-Chair also said that under section VI A the participants were presented with the option of either using existing procedures with reference to Article 27 of the Convention on Biological Diversity or developing special procedures. He explained that by virtue of Article 32 of the Cartagena Protocol on Biosafety, Article 27 of the Convention applied to the operation of the Protocol. Under section VI B the participants were presented with three options for consideration: binding provisions on private international law, non-binding provisions on private international law and binding arbitration. The Co-Chair observed that the option of binding arbitration might present constitutional problems for some States, as well as difficulties with some human rights conventions, and he asked the participants for their views.

47. Statements were made by the representatives of Argentina, Bangladesh, Bolivia, Brazil, Canada, China, Colombia, Cuba, Ecuador, Egypt, Ethiopia (on behalf of the African Group), the European

Community (on behalf of the European Community and its member States), India, Indonesia, Japan, Liberia, Malaysia, Mexico, (on behalf of the Group of Latin America and the Caribbean), Norway, Palau, the Philippines, Senegal, South Africa, and the United States of America.

48. A statement was also made by the observer from the Permanent Court of Arbitration.

49. A statement was also made by the observer from the Washington Biotechnology Action Council.

50. Based on the discussions, it was agreed to refer section VI to the first sub-working group with the exception of sub-section C (Administrative Procedures) which was referred to the second sub-working group.

51. At its 5th session on Friday, 14 March 2008, the Working Group heard a report on the progress made by the first sub-working group. In his report Mr. Jürg Bally (Switzerland) said that the sub-working group had addressed all the elements in sub-sections VI A and VI B and had merged a significant amount of the text in those sections. However sub-sections VI D and VI E still needed more discussion by the sub-working group.

Section III Damage

52. Ms. Nieto, Co-Chair of the Working Group, asked the participants to begin their consideration of section III of the revised working draft at the 3rd session of the meeting on Thursday, 13 March 2008.

53. Statements were made by the representatives of Argentina, Bangladesh, Bolivia, Brazil, Canada, China, Colombia, Cuba, Ecuador, Ethiopia (on behalf of the African Group), the European Community (on behalf of the European Community and its member States), India, Japan, Malaysia, Mexico (on behalf of the Group of Latin America and the Caribbean), New Zealand, Norway, Palau, Panama, Paraguay, Republic of Korea, Saint Lucia, and Saint Vincent and the Grenadines.

54. Statements were also made by the observers from the Public Research and Regulation Initiative and the Red por une América Latina Libre de Transgénicos.

55. Following the exchange of views it was agreed to refer section III to the first sub-working group.

56. At the 6th session of the meeting on Saturday, 15 March 2008, the Working Group heard a report on the progress made by the first sub-working group. In his report Mr. Jürg Bally (Switzerland) said that the sub-working group had addressed all the elements of section III and had managed to considerably reduce the text that had been assigned to it.

Section IV Primary Compensation Scheme

57. Ms. Nieto, Co-Chair of the Working Group, asked the participants to begin their consideration of sections IV A and IV B of the revised working draft at the 3rd session of the meeting on Thursday, 13 March 2008.

58. Statements were made by representatives of Argentina, Bangladesh, Bolivia, Brazil, Canada, China, Colombia, Ecuador, Egypt, Ethiopia (on behalf of the African Group), the European Community (on behalf of the European Community and its member States), India, Japan, Malaysia, Mexico, Namibia, Norway, Palau, Paraguay, Peru, the Philippines, Republic of Korea, Saint Vincent and the Grenadines, Senegal, South Africa, and the United States of America.

59. At its 4th session, on 13 March 2008, the Working Group continued its discussion of section IV.

60. Statements were made by representatives of Argentina, Bangladesh, Brazil, Canada, China, Colombia, Cuba, Ecuador, the European Community (on behalf of the European Community and its member States), India, Japan, Malaysia, Mexico, New Zealand, Norway, Paraguay, and Zambia (on behalf of the African Group).

61. A statement was also made by the observer from the Pontificia Universidad Javeriana.

62. Following the exchange of views it was agreed to refer section IV to the second sub-working group.

63. At its 5th session on Friday, 14 March 2008, the Working Group heard a report on the progress made by the second sub-working group. In his report Mr. Dire Tladi (South Africa) said that the sub-working group had merged section VI C into section IV and had also addressed the first elements of sub-section IV A.

64. At its 6th session on Saturday, 15 March 2008, the Working Group heard a further report on the progress made by the second sub-working group. In her report, Ms. Jane Bulmer (United Kingdom) said that the sub-working group had further refined the elements in section IV, but had not yet come to agreement on all the text.

Section V Supplementary Compensation Scheme

65. Mr. Lefeber, Co-Chair of the Working Group, asked the participants to begin their consideration of section V of the revised working draft at the 4th session of the meeting on Thursday, 13 March 2008. He said that unlike the other sections of the revised working draft, section V would benefit from the provision of additional operational text and he asked the participants for their views.

66. Statements were made by the representatives of Bangladesh, China, Colombia, Cuba, Ecuador, the European Community (on behalf of the European Community and its members States), India, Indonesia, Japan, Malaysia, Mexico, Norway, Palau, Republic of Korea, Switzerland, and Zambia (on behalf of the African Group).

67. A statement was also made by the observer from the Public Research and Regulation Initiative.
68. Following the exchange of views, it was agreed to delete the third operational text from section V A and the second and sixth operational texts from section V B of the revised working draft.
69. At the 5th session of the meeting, on Friday, 14 March 2008, the representative of Switzerland made a proposal for additional operational text to the Working Group. It was agreed that the second sub-working group would consider the Swiss proposal and further streamline the operational text contained in section V of the revised working draft.
70. At the 6th session of the meeting, on Saturday, 15 March 2008, the Working Group heard a report on the progress made by the second sub-working group. In her report, Ms. Jane Bulmer (United Kingdom) said that the sub-working group had taken up the Swiss proposal and had further refined the elements in section V, although work still needed to be done on that section.

Section VII Complementary capacity-building measures

71. At the 5th session of the meeting on Friday, 15 March 2008. Mr. Lefeber, Co-Chair of the Working Group, asked the participants to begin their consideration of section VII of the revised working draft. He reminded the participants that the section had also not been considered at the fourth meeting of the Working Group and he explained that the meeting had to consider whether complementary capacity-building measures would be with or without additional institutional arrangements.
72. Statements were made by the representatives of Brazil, Canada, China, Ethiopia and Zambia (on behalf of the African Group), the European Community (on behalf of the European Community and its member States), Japan, India, Norway, and Senegal.
73. Following the exchange of views it was agreed to refer section VII to the second sub-working group.
74. At the 6th session of the meeting, on Saturday, 15 March 2008, the Working Group heard a report on the progress made by the second sub-working group. In her report Ms. Jane Bulmer (United Kingdom) said that the sub-working group had started its discussion of section VII.

Section II Scope

75. The Working Group took up consideration of section II of the revised working draft at the 5th session of the meeting on Friday 15 March 2008. Mr. Lefeber, Co-Chair of the Working Group, reminded the participants that the section had been considered at the fourth meeting of the Working Group and suggested that the participants indicate those operational texts which they wished to retain in the revised working draft.
76. Following the discussion, the Co-Chair said that there had been no support for the sixth operational text in section II A, the sixth operational text in Section II B, the third operational text in section II C, or the third operational text in section II D and that those operational texts would be deleted from the revised working draft. It was also agreed to refer section II to the first sub-working group.

Core elements paper submitted by the Co-Chairs of the Working Group

77. At the 6th session of the meeting on Saturday, 15 March 2008, Mr. Lefeber, Co-Chair of the Working Group, asked the participants to begin their consideration of the core elements paper. In his introduction to the paper the Co-Chair said that the core elements represented the Co-Chairs' perception of the lowest common denominator between the positions of the participants. To that end the core elements paper had been drafted to help the participants in their negotiations on the revised working draft, which remained the principal task of the Working Group.
78. The first section of the core elements paper addressed the primary compensation scheme and was based on the administrative approach, and would involve the negotiation of a supplementary protocol to the Cartagena Protocol on Biosafety. The second section of the paper provided for guidelines on civil

liability including an enabling clause on private international law. The Co-Chair also explained that the paper provided for a supplementary compensation scheme in its third section for damage to the conservation and sustainable use of biological diversity. Supplementary compensation was to be primarily based on a contractual compensation mechanism by the private sector, but supplementary compensation would also be provided by a collective compensation mechanism mandated by the Conference of the Parties serving as the meeting as the Parties to the Cartagena Protocol on Biosafety in the event that the damage had not been redressed by either the primary compensation scheme or the supplementary contractual compensation mechanism. The Co-Chair also observed that there had been support for an institutional arrangement for complementary capacity-building measures and, therefore, the final section of the core elements paper provided for such a mechanism.

79. Statements were made by the representatives of Bolivia, Brazil, Cambodia, China, Colombia, Ethiopia (on behalf of the African Group), the European Community (on behalf of the European Community and its member States), Malaysia, Mexico, India and Japan.

80. Statements were also made by the observers from the Global Industry Coalition, the Public Research and Regulation Initiative and Terra de Direitos.

81. At the 7th session of the meeting on Monday, 17 March 2008, the Working Group continued its discussion of the Co-Chairs' text of a core elements paper.

82. Statements were made by the representatives of Bangladesh, Ethiopia and Zambia (on behalf of the African Group), the European Community (on behalf of the European Community and its member States), India, Japan, Liberia, Malaysia, Mexico (on behalf of the Latin American and Caribbean Group), New Zealand, Norway, Palau, Senegal, and Switzerland.

83. Statements were also made by the observers from ECOROPA, Global Industry Coalition, Greenpeace International and the Red de Acción en Plaguicidas y sus Alternativas para América Latina, and the Universidad Nacional Agraria La Molina.

ITEM 5. OTHER MATTERS

84. The representative of the European Community (on behalf of the European Community and its member States) said that the work of the Group of the Friends of the Co-Chairs had been very productive and he thanked the participants and the Co-Chairs for their work in contributing to the outcome of the meeting. He said that although the Working Group had taken an immense step forward a great deal of work remained to be done before the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety. He asked the Co-Chairs to consider convening a further meeting of the Group of the Friends of the Co-Chairs to continue to work on the further revised working draft and report on the progress made at the fourth meeting of the Conference of the Parties serving and the meeting of the Parties to the Cartagena Protocol on Biosafety.

85. Statements were made by the representatives of Bangladesh, Bolivia, Brazil, Burkina Faso, China, Colombia, Egypt, Ethiopia (on behalf of the African Group), the European Community (on behalf of the European Community and its member States), India, Malaysia, Mexico (on behalf of the Latin America and Caribbean Group), New Zealand, Norway, Palau, Paraguay, Senegal, and Switzerland.

86. Following the exchange of views, the Co-Chairs circulated a proposal for holding an additional meeting of the Group of the Friends of the Co-Chairs immediately before the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety.

87. The meeting agreed to the proposal contained in the conclusions of the Co-Chairs as follows:

Conclusions

88. The Working Group:

1. *Requests* the Co-Chairs to convene a meeting of the Friends of the Co-Chairs prior to the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety;

2. *Agreed* to the following terms of reference for the meeting of the Friends of the Co-Chairs;

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

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

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

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

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

3. *Requests* the Secretariat to provide the necessary support for the meeting of the Friends of the Co-Chairs.

ITEM 6. ADOPTION OF THE REPORT

89. The present report was adopted, as orally amended, at the 9th session of the meeting, on 19 March 2008, on the basis of the draft report (UNEP/CBD/BS/WG-L&R/5/L.1) prepared by the Rapporteur, the proposed operational texts on approaches and options identified pertaining to liability and redress in the context of Article 27 of the Biosafety Protocol (annex II below) and the revised blueprint for a decision by the on international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms (annex I below).

90. Statements were made by the representatives of Bolivia, Ethiopia, New Zealand, Norway and Palau.

91. The representative of Bolivia wished it reflected that he considered that the report was an unbalanced presentation of the work of the meeting. In particular he observed that the report was only eleven pages long for a meeting that had lasted eight days, while paragraphs 36 to 38 of the present report gave a disproportionate description of a particularly short intervention by an observer. He requested that the intervention by that observer be summarized in a single paragraph.

ITEM 7. CLOSURE OF THE MEETING

92. Ms. Jimena Nieto, on behalf of the Co-Chairs, thanked the participants for their work at the meeting as well as the Ministry of the Environment for Colombia and those residents of Cartagena that had helped with the functioning of the meeting. She also thanked Mr. Jürg Bally (Switzerland), Ms. Jane Bulmer (United Kingdom), Mr. Reynaldo Eborá (Philippines) and Mr. Dire Tladi (South Africa) for their

assistance as co-chairs of the sub-working groups, as well as the interpreters and the staff of the Secretariat.

93. Mr. Rene Lefeber, Co-Chair of the Working Group, said that among the many people he would like to thank particularly his Co-Chair, Ms. Jimena Nieto, for co-chairing the Working Group and the preceding technical expert groups with him since 2002.

94. Several representatives expressed their appreciation to the Government and people of Colombia for the cordial welcome that they had accorded to the meeting and to those associated with its work and for their contribution to the success of the meeting.

95. After the customary exchange of courtesies, Ms. Nieto, Co-Chair of the Working Group, declared the fifth meeting of the Working Group closed at 7:15 p.m. on Wednesday, 19 March 2008.

Annex I

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

Optional components of the Decision

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

Optional components of annex(es) to the Decision

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

Notes

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

Annex II

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

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

Operational text

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

Preambular text

Recognizing that these rules and procedures would not affect the rights and obligations of States under the rules of general international law with respect to the responsibility of States for internationally wrongful acts.

II. SCOPE

A. Functional scope

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

Operational text 1

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

Operational text 2

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

Operational text 3

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

(c) Intended for intentional introduction into the environment.

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

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

Operational text 4

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

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

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

B. Geographical scope

Administrative Approach and Civil Liability: Narrow geographical scope: Damage in Parties

Operational text 1

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

Operational text 2

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

Operational text 3

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

C. Limitation in time

Operational text 1

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

Operational text 2

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

Operational text 3

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

Operational text 4

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

Operational text 5

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

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

Operational text 1

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

Operational text 2

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

Operational text 3

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

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

Operational text 1

1. Whenever a transboundary movement is effected by transport:

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

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

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

Operational text 2

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

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

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

Operational text 3

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

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

Operational text 4

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

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

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

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

Operational text 5

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

Operational text 6

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

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

Operational text 1

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

Operational text 2

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

Operational text 3

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

III. DAMAGE

A. *Definition of damage*

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

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

Option 1

Operational text 1

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

2. To constitute damage to the [conservation and sustainable use of] biological diversity, there must be a change to the conservation and sustainable use of biological diversity that is adverse[, significant] and measurable[, within a timescale meaningful in the particular context, from a baseline established by a competent national authority] [considering previous diagnosis/studies of biodiversity available for the affected area acknowledged or undertaken by the competent national authority] that takes into account natural variation and human-induced variation. [The mere presence of an LMO in the environment does not [necessarily] constitute damage].

Operational text 2

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

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

(a) [Is a [direct or indirect] result of human activities involving [transboundary movement of] LMOs; and]

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

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

(c) Is measurable or otherwise observable taking into account, wherever available, baseline conditions/ scientifically/ established/ by a competent national authority that takes into account natural variation and human induced variation; and

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

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

(a) [Is a [direct or indirect] result of human activities involving [transboundary movement of] LMOs; and]

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

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

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

- (a) The long term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonably short/reasonable period of time/ within a time scale meaningful in the particular context; and/or

- (b) A qualitative or quantitative reduction of components of biodiversity and their potential to provide goods and services [; and

- (c) A proven effect on human health]]

Option 2

Operational text 3

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

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

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

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

- (iii) Is [measurable] or otherwise observable [taking into account, wherever available, baseline conditions/ scientifically/ established/ by a competent national authority that takes into account natural variation and human induced variation; and]

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

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

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

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

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

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

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

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

4. [Damage to socio-economic conditions includes

- (a) Damage to or impaired use of or loss of property;
 - (b) Loss of income /directly/derived from an economic interest in any use of the environment/ biological diversity, incurred as result of impairment of the environment/biological diversity/ taking into account savings and costs;
 - (c) Loss of income, loss of or damage to cultural, social and spiritual values, loss of or reduction of food security, damage to agricultural biodiversity, loss of competitiveness or other economic loss or other loss or damage to indigenous or local communities.]
- [5. Damage to the environment]

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

Operational text 1

If any damage is caused to centres of origin or centres of genetic diversity [including endemic and threatened species], then and without prejudice to any rights or obligations hereinbefore stated:

- (a) Additional monetary damage shall be payable representing the cost of the investment in the centres;
- (b) Any other monetary damage shall be payable representing the unique value of the centres;
- (c) Any other measures may be required to be taken, taking into account the unique value of the centres.

Operational text 2

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

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

Operational text 1

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

- (a) Costs of reasonable measures of restoration/ reinstatement, remediation /rehabilitation or clean-up [of the impaired environment/conservation and sustainable use of biological diversity /or biological diversity,] where possible, measured by the costs of measures actually taken or to be undertaken, including introduction of original components;
- (b) Where reinstatement or remediation to the original state is not possible, the [costs] [value] of the impairment [of the environment/ conservation and sustainable use of biological diversity/ or biological diversity, taking into account any impact on the environment/conservation and sustainable use of biological diversity/ or biological diversity], and the introduction of equivalent components at the same location, for the same use, or on another location for other types of use;
- (c) Costs of response measures eventually undertaken or to be undertaken, including any loss or damage caused by such measures. For the purpose of these rules and procedures, response measures are actions to minimize, contain or remedy damage, as appropriate.
- [(d) Costs of preventive measures/ where applicable, including any loss or damage caused by such measures;

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

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

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

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

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

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

(iv) The complexity of the biological system.]

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

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

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

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

(b) Technologies of a community or communities,

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

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

(e) Reduction in yields,

(f) Soil contamination,

(g) Damage to the biological diversity,

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

any other consequential economic, social or cultural damages.]

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

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

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

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

Operational text 2

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

D. Causation

Administrative Approach: Domestic law approach

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

Option 1 – Burden of proof lies on the claimant

Operational text 1

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

- (a) Proximate causation between the transboundary movement of an LMO and claimed damage;
- (b) A direct causal link between an act or omission on the part of the persons involved with the transboundary movement and the claimed damage.
- (c) That the parties alleged to have caused the harm acted wrongfully, intentionally, recklessly, or otherwise committed negligent or grossly negligent acts or omissions, (i.e., violated the accepted standard of care).

Option 2 – Burden of proof lies on the respondent

Operational text 2

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

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

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

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

Option 3 – Where the issue is left to domestic law

Operational text 3

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

IV. PRIMARY COMPENSATION SCHEME

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

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

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

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

[Parties may, as appropriate, provide for such administrative remedies as may be deemed necessary for liability and redress in respect of all matters arising under these rules and procedures.]

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

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

Operational text 1

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

Operational text 2

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

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

Operational text 3

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

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

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

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

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

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

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

Operational text 4

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

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

Operational text 5

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

[1 bis. The competent authority

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

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

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

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

OR

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

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

4. The term operator needs to be defined

Operational text 6

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

OR

“Operator” means the person who

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

a GMO which caused the damage in country X.

Operational text 7

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

OR

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

5. Administrative procedures

Operational text 8

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

Operational text 9

1. Natural or legal persons affected or likely to be affected by damage to biodiversity shall be entitled to request the competent authority to take action under these rules and procedures.

2. In such circumstances, the competent authority shall give the relevant operator an opportunity to respond to the request for action before making a decision on such request for action.

3. Persons who have requested action under *paragraphs 1 and 2* shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority.

4. Operators required by the competent authority to take remedial action or to bear the costs of any such actions taken by the competent authority shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions and/or orders of the competent authority under these rules and procedures.

<i>B. Civil Liability (harmonization of rules and procedures)</i>
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(Operational text 12 from IV.A.1)

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

<i>1. Standard of liability and channelling of liability</i>

Channeling of strict liability to the operator
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Option 1: Strict liability

Operational text 1

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

Operational text 2

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

OR

“Operator” means the person who

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

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

a GMO which caused the damage in country X.

Operational text 3

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

OR

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

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

Option 2: Mitigated strict liability

Operational text 4

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

[a risk-assessment has identified an LMO as ultra-hazardous; and/or]

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

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

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

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

Option 3: Fault-based liability

Operational text 5

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

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

2. The provision of interim relief

Operational text 1

Any competent Court or Tribunal [authority] may issue an injunction or declaration or take such other appropriate interim or other measure as may be necessary or desirable with respect to any damage or

/...

threat of damage [and/or in the case of imminent, significant and likely irreversible damage to biodiversity.][The defendant's costs and losses shall be paid by the claimant in any case where interim relief is granted but liability is not established subsequently in the case.]

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

1. Exemptions or mitigation

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

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

Operational text 1

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

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

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

Operational text 2

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

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

Operational text 3

1. The operator/importer should not be liable to the extent that the damage was caused by an act of God/*force majeure*, an act of war or civil unrest, the intervention by a third party or compliance with compulsory measures imposed by a public national authority.

2. Where appropriate, the operator/importer may not have to bear the costs of remedial action when he proves that he was not at fault or negligent and the damage was caused: (a) by an activity expressly authorized by and fully in conformity with an authorization given under national law; or (b) by an activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out.

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

Operational text 1

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

3. Joint and several liability or apportionment of liability

Option 1: Joint and several liability*Operational text 1*

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

Option 2: Apportionment of liability*Operational text 2*

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

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

Operational text 3

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

Operational text 4

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

4. Limitation of liability

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

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

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

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

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

1. Relative time limit*Operational text 1*

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

Operational text 2

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

Operational text 3

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

2. Absolute time limit

Operational text 4

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

3. Additional provisions

Operational text 5

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

Operational text 6

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

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

Operational text 7

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

(b) Limitation in amount

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

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

Option 1: Unlimited liability

Operational text 1

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

Operational text 2

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

Option 2: Limited liability

Operational text 3

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

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

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

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

Operational text 4

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

5. Coverage

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

Option 1: Voluntary financial security

Operational text 1

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

Operational text 2

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

Option 2: Domestic law approach

Operational text 3

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

V. SUPPLEMENTARY COMPENSATION SCHEME

A. *Residual State liability*

[[No] residual state liability]

Operational text 1

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

Operational text 2

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

Operational text 3

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

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

B. *Supplementary collective compensation arrangements*

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

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

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

Operational text 1

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

Operational text 2

No provision

OR

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

OR

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

Operational text 3

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

VI. SETTLEMENT OF CLAIMS

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

Operational text 1

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

Operational text 2 (new)

No provision

B. *Civil procedures*

Enabling clause on private international law

Operational text 1

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

Operational text 2

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

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

Operational text 1

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

Operational text 2

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

Operational text 3

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

Operational text 4 (new)

No provision.

<i>D. Standing/Right to bring claims</i>

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

Operational text 1

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

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

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

- (a) In that person's or group or class of persons' interest;
- (b) In the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (c) In the interest of, or on behalf of, a group or class of persons whose interests are affected;
- (d) In the public interest; and
- (e) In the interest of protecting the environment or biological diversity.]

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

Option 2: Special provisions (diplomatic protection)

Operational text 2

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

Option 3: Domestic law approach

Operational text 3

1. (a) Parties should provide for a right to bring claims by affected natural or legal persons as appropriate under domestic law. Those persons should have access to remedies in the State of export that are no less prompt, adequate and effective than those available to victims that suffer damage from the same incident within the territory of that State.

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

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

Operational text 4

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

VII. COMPLEMENTARY CAPACITY-BUILDING MEASURES

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

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

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

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

1. Without an institutional arrangement

Operational text 1

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

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

Operational text 2

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

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

2. With an institutional arrangement

Operational text 3

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

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

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

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

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

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

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

VIII. CHOICE OF INSTRUMENT

Option 1

One or more legally binding instruments.

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

Option 2

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

Option 3

One or more non-binding instruments:

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

Option 4

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

Option 5

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

Option 6

No instrument.

Operational text 1

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

Recalling Article 27 of the Protocol,

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

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

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

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

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

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

Operational text 2

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

Operational text 3

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

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

Recalling Article 27 of the Protocol,

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

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

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

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

Decides that:

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

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

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

Operational text 4

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

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

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

Operational text 5

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

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

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

Operational text 6

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