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

Second meeting

Kuala Lumpur, 8-12 February 2010

### **REPORT OF THE GROUP OF THE FRIENDS OF THE CO-CHAIRS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY ON THE WORK OF ITS SECOND MEETING**

#### INTRODUCTION

1. The Group of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (hereinafter “Group of the Friends of the Co-Chairs”, or “the Group”) was established by decision BS-IV/12 of the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. The first meeting of the Group was held in Mexico City from 23 to 27 February 2009. Following the generous offer made by the Government of Malaysia to host it, the second meeting of the Group was held at the Putrajaya International Convention Centre from 8 to 12 February 2010.

2. The meeting was attended by representatives from the following Parties to the Protocol and other Governments: Argentina, Austria, Belgium, Brazil, Burkina Faso, China, Colombia, Comoros, Costa Rica, Cuba, Ecuador, Egypt, Ethiopia, European Union, France, Germany, Guatemala, India, Indonesia, Japan, Liberia, Malaysia, Mexico, Namibia, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Philippines, Portugal, Republic of Korea, Republic of Moldova, South Africa, Spain, Switzerland, Tajikistan, Uganda, the United Kingdom and the United States of America.

3. The Group of the Friends of the Co-Chairs consisted of six representatives of the Asia-Pacific region of which four, namely China, India, Malaysia and the Philippines, were represented at the current meeting of the Group; two representatives of the European Union; two representatives of Central and Eastern Europe; six representatives of the African Group; six representatives of the Latin America and Caribbean Group; and New Zealand, Norway, Switzerland and Japan.

4. Observers from the following intergovernmental and non-governmental organizations and other stakeholders also participated in the meeting: African Centre for Biosafety, Biotechnology Coalition of the Philippines, Desarrollo Medio Ambiental Sustentable, CropLife International, ECOROPA, Global Industry Coalition, Greenpeace International, Inter-American Institute for Cooperation on Agriculture, International Grain Trade Coalition, Instituto de Estudos do Comércio e Negociações Internacionais,

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Malaysian Biotechnology Corporation, Third World Network, Universidad Nacional Agraria La Molina, and Washington Biotechnology Action Council/49<sup>th</sup> Parallel Biotechnology Consortium.

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

5. The meeting was opened at 10 a.m. on Monday, 8 February 2010, by Ms. Jimena Nieto, Co-Chair of the Group. She welcomed the participants and expressed her and her Co-Chair's satisfaction to see so many of the Friends around the table thereby showing their ongoing commitment to the process. She reminded them that intensive negotiations would be necessary in order for the Friends to complete their work.

6. Mr. Charles Gbedemah, Senior Environmental Affairs Officer at the Secretariat of the Convention on Biological Diversity, made an opening statement on behalf of the Executive Secretary of the Convention. He thanked the Government of Malaysia for hosting the meeting and the Governments of Finland, Germany and Japan for their financial contributions towards its organization. He reminded delegates that 2010 was the International Year of Biodiversity and urged them to finalize the negotiating text for its possible adoption at the fifth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol.

## **ITEM 2. ORGANIZATIONAL MATTERS**

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

7. The Group adopted the following agenda on the basis of the provisional agenda (UNEP/CBD/BS/GF-L&R/2/1) 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. Further negotiations on international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms in the context of the Cartagena Protocol on Biosafety.
4. Other matters.
5. Adoption of the report.
6. Closure of the meeting.

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

8. The Group adopted its programme of work as proposed in annex I of the annotated agenda (UNEP/CBD/BS/GF-L&R/2/1/Add.1). The organization of work included three sessions a day.

**ITEM 3. FURTHER NEGOTIATIONS ON INTERNATIONAL RULES AND PROCEDURES IN THE FIELD OF LIABILITY AND REDRESS FOR DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY**

9. The Group of the Friends of the Co-Chairs began consideration of agenda item 3 at the first session of its meeting on Monday, 8 February 2010. Mr. René Lefeber, Co-Chair of the Group, invited the Secretariat to introduce the documents that were before the Group.

10. The representative of the Secretariat indicated that the working document for the meeting was document UNEP/CBD/BS/GF-L&R/2/2, containing the draft texts for further negotiations agreed upon by the first meeting of the Group. He also mentioned the availability of an information document (UNEP/CBD/BS/GF-L&R/2/INF/1), which contained an update on recent developments in international law relating to liability and redress, including the status of international environment-related liability instruments.

11. After the introduction by the Secretariat, the Co-Chair invited the Friends to turn to the working document and begin their work. Mr. Lefeber proposed an outline of work for the first three days as well as procedures for how the Friends may make proposals in the course of the negotiations.

12. The Group first considered the title, preamble, objective, definitions and scope of the draft supplementary protocol. The Group then discussed the draft text on response measures. At its third session, the Group considered the final clauses of the draft supplementary protocol as contained in draft articles 16 to 24 of the working document. The Group continued its first reading of the text of the draft supplementary protocol at subsequent sessions.

13. The Group also considered a draft decision to be forwarded to the Conference of the Parties serving as the meeting of the Parties to the Protocol.

14. Starting on Wednesday evening, 10 February 2010, the Group continued its work in closed sessions.

***Conclusions***

15. The Group of the Friends of the Co-Chairs:

(a) *Agreed* to further negotiate the rules and procedures on liability and redress in the context of the Cartagena Protocol on Biosafety on the basis of:

- (i) Appendix I to this report which contains:
  - a. A draft decision for submission to the fifth meeting of the Parties to the Protocol;
  - b. Annex I, draft supplementary protocol, which was further negotiated during this meeting with the exception of one draft article as indicated in the text itself;
  - c. Annex II, draft guidelines on civil liability, which was not discussed during this meeting; and
- (ii) Appendices II and III to this report, containing proposed operational texts in the context of working towards non-legally binding provisions on civil liability, and other provisions, respectively;

(b) *Requested* the Co-Chairs to convene another meeting of the Group of Friends of the Co-Chairs prior to the fifth meeting of the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety;

(c) *Agreed* to have the meeting in Montreal for a period of three days, from 17 to 19 June 2010, subject to the availability of funds and an offer to host the meeting. The meeting would be preceded by a single day of consultation meetings of regional groups. The composition of the Group will be in accordance with paragraph 1 (e) of decision BS-IV/12 of the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. The representative of Malaysia informed the Group that Bangladesh and Palau from the Asia and the Pacific region had not been represented in the two meetings of the Group held to date. He therefore requested and the Group agreed that these two countries would be replaced by the Islamic Republic of Iran and the Republic of Korea;

(d) *Agreed* to the following number of advisors to accompany the Friends to the next meeting: African Group (six), Latin America and Caribbean Group (seven), European Union (four), China (two), Japan (two); and one each from the following countries: India, Islamic Republic of Iran, Malaysia, Philippines, Republic of Korea, New Zealand, Norway and Switzerland. Observers are not invited to this meeting;

(e) *Requested* the Co-Chairs to prepare draft guidelines on the basis of appendix II to the present report and circulate them to the Friends prior to the next meeting of the Group;

(f) *Requested* the Secretariat to prepare an information document on the concept of imminent threat of damage and its legal and technical implications for consideration by the Group at its next meeting;

(g) *Further requested* the Executive Secretary to communicate to Parties to the Protocol the proposal for a supplementary protocol contained in annex I to appendix I to this report, in accordance with the six-month rule under paragraph 3 of Article 28 of the Convention to Biological Diversity;

(h) *Requested* the Executive Secretary to notify Parties to the Protocol of the need to submit to the Secretariat the credentials of their representatives to the fifth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol as well as full powers to adopt a supplementary protocol on liability and redress in the context of the Cartagena Protocol of Biosafety;

(i) *Recommended* to the Conference of the Parties serving as the meeting of the Parties to the Protocol that it establish a legal drafting group at the beginning of its fifth meeting to look into the legal consistency and accuracy of the text of the proposed supplementary protocol in all the six official languages of the United Nations. The legal drafting group should be convened during the fifth meeting of the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety;

(j) *Called upon* Parties and other Governments to consider providing voluntary contributions to facilitate participation by Friends from eligible Parties in the meeting of the Group of the Friends of the Co-Chairs referred to above.

#### **ITEM 4. OTHER MATTERS**

16. Agenda item 4 was taken up at the last session of the meeting, on Saturday, 13 February 2010.

17. Co-Chair Lefeber asked the Friends to provide their e-mail addresses so that the Co-Chairs could communicate with the Friends further to the request in paragraph 15 (e), above.

18. The representative of Mexico requested that Parties have the opportunity to review the Spanish version of the text of the draft supplementary protocol in order to ensure its accuracy prior to its possible adoption. The representative of China made a similar request regarding the Chinese version of the text. The Secretariat informed the Friends that documents for the Conference of the Parties serving as the meeting of the Parties would be available in all six United Nations languages in accordance with the rules of procedure.

#### **ITEM 5. ADOPTION OF THE REPORT**

19. The Group adopted the present report as orally amended at the last session of the meeting held on 13 February 2010.

#### **ITEM 6. CLOSURE OF THE MEETING**

20. The Co-Chairs expressed their gratitude to Malaysia for the excellent facilities provided over the course of the week, the Friends for their hard work, observers for their attendance at the meeting and their patience during the closed sessions and thanked the Secretariat for its support. Co-Chair Lefeber also thanked the staff of the Earth Negotiations Bulletin who provided reporting services throughout the meeting and invited them to attend the next meeting of the Group.

21. The representative of Japan as host of the upcoming fifth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol expressed his hope to see Friends again at the next meeting in Montreal and also invited participants to Nagoya in October 2010.

22. The representative of Malaysia thanked the Co-Chairs for their outstanding work in guiding the negotiation process and the Secretariat for its facilitation of the meeting. He expressed his gratitude to the dedication of staff members from the Ministry of Natural Resources and Environment of Malaysia and the Centre for Excellence for Biodiversity Law of the University of Malaya.

23. Mr. René Lefeber, Co-Chair of the Group, declared the second meeting of the Group of the Friends of the Co-Chairs closed at 2:30 a.m. on Saturday, 13 February 2010.

*Appendix I*

***Draft decision BS-V/--***

***International rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms***

*The Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety,*

*Recalling* Article 27 of the Cartagena Protocol on Biosafety,

*Recalling* its decision BS-I/8 by which it established an Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety, with the terms of reference set out in the annex to the decision, to carry out the process pursuant to Article 27 of the Cartagena Protocol on Biosafety,

*Noting with appreciation* the work 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, as contained in the reports of its five meetings,

*Recalling also* its decision BS-IV/12 by which it established a Group of the Friends of the Co-Chairs to further negotiate international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms in the context of the Cartagena Protocol on Biosafety on the basis of the annex to the decision,

*Noting with appreciation* the work of the Group of the Friends of the Co-Chairs, as contained in the reports of its meetings,

*Noting* the valuable work carried out by the two Co-Chairs of the Working Group, Ms. Jimena Nieto (Colombia) and Mr. René Lefeber (Netherlands), over the past six years in steering the process in the context of Article 27 of the Cartagena Protocol on Biosafety, through both formal and informal ways,

*Recalling* Article 22 of the Cartagena Protocol on Biosafety, which calls upon Parties to cooperate in the development and/or strengthening of human resources and institutional capacities in biosafety,

*Recognizing* the need to facilitate the implementation of this decision through complementary capacity building measures,

*[[Welcoming]]**[[Noting]]* the private-sector initiative to provide for a contractual compensation mechanism concerning recourse in the event of damage to biological diversity caused by living modified organisms,]

**A. [SUPPLEMENTARY PROTOCOL ON [LIABILITY AND REDRESS FOR] DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS TO THE CARTAGENA PROTOCOL ON BIOSAFETY]**

1. *Decides* to adopt the [Supplementary Protocol on [Liability and Redress for] Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety], as contained in annex I to the present decision (hereinafter referred to as “the Supplementary Protocol”);

/...

2. *Requests* the Secretary-General of the United Nations to be the Depositary of the Supplementary Protocol and to open it for signature at ... by Parties to the Cartagena Protocol on Biosafety from [...] to [...], and at the United Nations Headquarters in New York from [...] to [....];

3. *Encourages* Parties to the Cartagena Protocol on Biosafety to implement the Supplementary Protocol pending its entry into force;

4. *Calls upon* the Parties to the Cartagena Protocol on Biosafety to sign the Supplementary Protocol from [...] or at the earliest opportunity thereafter and to deposit instruments of ratification, acceptance or approval or instruments of accession, as appropriate, as soon as possible;

**[B. GUIDELINES ON CIVIL LIABILITY AND REDRESS IN THE  
FIELD OF DAMAGE RESULTING FROM TRANSBOUNDARY  
MOVEMENTS OF LIVING MODIFIED ORGANISMS]**

5. *Decides* to adopt the Guidelines on Civil Liability and Redress in the Field of Damage Resulting from Transboundary Movements of Living Modified Organisms, as contained in annex II to the present decision;]

**[C. ADDITIONAL AND SUPPLEMENTARY COMPENSATION  
MEASURES]**

6.

**Option 1**

1. Where the costs of response measures to redress damage to the conservation and sustainable use of biological diversity have not been redressed by response measures as defined in the Supplementary Protocol or by any other applicable supplementary compensation scheme, additional and supplementary compensation measures aimed at ensuring adequate and prompt compensation may be taken.

2. These measures may include a supplementary collective compensation arrangement whose terms of reference will be decided upon by the Conference of the Parties serving as the meeting of the Parties.

3. [Parties, other Governments as well as governmental, intergovernmental and non-governmental organizations, the private sector and other sources will be invited to contribute to such supplementary collective compensation arrangement in accordance with their national capacity to contribute.][Parties shall consider who should contribute to such a supplementary collective compensation arrangement.]

**Option 2**

No provision

**Option 3**

The Parties may consider the necessity of any solidarity arrangement for cases of damage which are not redressed through this decision in light of the experience gained through the implementation of the rules and procedures set out in this decision.

## **D. COMPLEMENTARY CAPACITY-BUILDING MEASURES**

7.

### **Option 1**

*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, this decision 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 domestic liability rules and procedures, (ii) foster inter-sectoral coordination and partnership among regulatory organs at the domestic level, (iii) ensure [appropriate][effective] public participation, and (iv) enhance the skills of the judiciary in handling issues pertaining to liability and redress.

### **Option 2**

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

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

### **Option 3**

The Conference of the Parties serving as the meeting of the Parties to the Protocol decides that, under its overall guidance, [the Parties shall cooperate in the development and/or strengthening of human resources and institutional capacities related to liability and redress on the Cartagena Protocol on Biosafety, including through existing global, regional, subregional and domestic institutions and organizations and, as appropriate, through facilitating private sector involvement.][activities performed by experts selected from the roster of experts may include, upon request of the interested Party, the provision of advice:] [the Committee has the following functions:]

- (a) Parties on their domestic legislation in draft or existing form;
- (b) Capacity building workshops on legal issues relating to liability and redress;
- (c) [Identification of best practices related to national legislation on liability and redress;]
- (d) [Support to national capacity’s self-assessment activities;]
- (e) [Advice on providers of adequate technology and procedures to access it].



*Annex I*

**[SUPPLEMENTARY PROTOCOL ON [LIABILITY AND REDRESS FOR] DAMAGE  
RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED  
ORGANISMS TO THE CARTAGENA PROTOCOL ON BIOSAFETY]**

*The Parties to this Supplementary Protocol,*

*Being Parties to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity,  
hereinafter referred to as “the Protocol”,*

*Recalling Article 27 of the Protocol,*

*Have agreed as follows:*

**Article 1 \***

[The objective of this Supplementary Protocol is to contribute to ensuring that prompt, adequate and effective response measures are taken in the event of damage or imminent threat of damage to the conservation and sustainable use of biological diversity resulting from living modified organisms that finds its origin in transboundary movements.]

**Article 2**

1. The terms used in Article 2 of the Convention and Article 3 of the Protocol shall apply to this Supplementary Protocol.

2. In addition, for the purposes of this Supplementary Protocol:

(a) “Conference of the Parties serving as the meeting of the Parties to the Protocol” means the Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety;

(b) “Convention” means the Convention on Biological Diversity;

(c) “Damage” means an adverse effect on the conservation and sustainable use of biological diversity, taking also into account risks to human health, that:

(i) Is measurable or otherwise observable taking into account, wherever available, scientifically-established baselines recognized by a competent national authority that takes into account any other human induced variation and natural variation; and

(ii) Is significant as set out in paragraph 3 below;

[(d) “Imminent threat of damage” is an occurrence or occurrences determined, on the basis of best available scientific and other relevant information, to be likely to result in damage if not addressed in a timely manner;]

[(e) “Incident” means any occurrence or series of occurrences, [originating [in]][from] a transboundary movement of LMOs][having the same origin] that causes damage[ or creates [a grave and] an imminent threat of causing damage];]

(f) “Operator” [in relation to response measures] means any person in [direct or indirect] [operational] control of [the activity at the time of the incident causing damage resulting from the

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\* This paragraph has neither been discussed nor negotiated.

transboundary movement of living modified organisms][the living modified organism at the time that the condition giving rise to the damage arose] [and could include, as appropriate and as determined by domestic law, the permit holder, person who placed the living modified organism on the market, developer, producer, notifier, exporter, importer, carrier or supplier];

(g) “Protocol” means the Cartagena Protocol on Biosafety to the Convention on Biological Diversity;

(h) “Response measures” means reasonable actions, in the event of damage [or imminent threat of damage], to:

- (i) Avoid, minimize, contain or mitigate damage[, or take the necessary preventive measures in case of imminent threat of damage], as appropriate;
- (ii) Restore biological diversity through actions to be undertaken in the following order of preference:
  - a. Restoration of biological diversity to the condition that existed before the damage occurred, or its nearest equivalent; and where the competent authority determines this is not possible,
  - b. Restoration by, *inter alia*, replacing the loss of biological diversity with other components of biological diversity for the same, or for another type of use either at the same or, as appropriate, at an alternative location.

3. A “significant” adverse effect 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 reasonable period of time;
- (b) The extent of the qualitative or quantitative changes that adversely affect the components of biological diversity;
- (c) The reduction of the ability of components of biological diversity to provide goods and services;
- (d) The extent of any adverse effects on human health in the context of the Protocol.

### Article 3

1. This Supplementary Protocol applies to damage to the conservation and sustainable use of biological diversity, taking also into account risks to human health.

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

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

3. With respect to intentional transboundary movements, this Supplementary Protocol applies to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 2.

4. This Supplementary Protocol also applies to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.

#### **Article 4 (adopted)**

1. This Supplementary Protocol applies to damage that occurred in areas within the limits of the national jurisdiction of Parties resulting from activities as referred to in Article 3.

2. Parties may use criteria set out in their domestic law to address damage that occurs within the limits of their national jurisdiction.

3. Domestic law implementing this Supplementary Protocol shall also apply to damage resulting from the transboundary movements of living modified organisms from non-Parties.

#### **Article 5 (adopted)**

This Supplementary Protocol applies to damage resulting from a transboundary movement of living modified organisms that started after the entry into force of this Supplementary Protocol for the Party into whose jurisdiction the transboundary movement was made.

#### **Article 6 (adopted)**

A causal link shall be established between the damage and the activity in question in accordance with domestic law.

#### **Article 7**

1. A Party shall[, consistent with international obligations,] provide for response measures consistent with the provisions outlined below and shall implement them in accordance with its domestic law.

2. Parties shall require the operator, in the event of damage [or imminent threat of damage], subject to any requirements of the competent authority, to:

- (a) Immediately inform the competent authority;
- (b) Evaluate the damage [or imminent threat of damage]; and
- (c) Take appropriate response measures.

3. The competent authority shall:

- (a) Identify the operator which has caused the damage [or the imminent threat of damage];
- (b) Evaluate the damage and determine which response measures should be taken by the operator.

4. The competent authority may implement appropriate response measures including in particular when the operator has failed to do so.

5. The competent authority has the right to recover from the operator the costs and expenses of, and incidental to, the evaluation of the damage and the implementation of any such appropriate response measures. Parties may provide, in their domestic law, for other situations in which the operator may not be required to bear the costs and expenses.

6. Decisions of the competent authority requiring the operator to take response measures should be reasoned. Such decisions should be notified to the operator. Domestic law shall provide for remedies,

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including the opportunity for an administrative or judicial review of such decisions. The competent authority shall, in accordance with domestic law, also inform the operator of the available remedies. Recourse to such remedies shall not impede the competent authority from taking response measures in appropriate circumstances, unless otherwise provided by domestic law.

7. In implementing this Article and with a view to defining the specific response measures to be required or taken by the competent authority, Parties may, as appropriate, assess whether response measures are already addressed by their domestic law on civil liability.

#### **Article 8 (adopted)**

1. Parties may provide, in their domestic law, for the following exemptions:

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

2. Parties may provide, in their domestic law, for any other exemptions or mitigations as they may deem fit.

#### **Article 9 (adopted)**

This Supplementary Protocol shall not limit or restrict any right of recourse or indemnity that an operator may have against any other person.

#### **Article 10 (adopted)**

Parties may provide, in their domestic law, for relative and/or absolute time limits including for actions related to response measures and the commencement of the period to which a time limit applies.

#### **Article 11 (adopted)**

Parties may provide, in their domestic law, for financial limits for the recovery of costs and expenses related to response measures.

#### **Article 12**

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

2. [Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic law implementing this Supplementary Protocol.]

#### **Article 13**

1. Parties shall provide, in their domestic law, for rules and procedures that address damage resulting from transboundary movements of living modified organisms. To implement this obligation, Parties shall provide for response measures in accordance with this Supplementary Protocol and may, as appropriate:

- (a) Apply their existing domestic laws, including where applicable general rules and procedures on civil liability;

- (b) Apply or develop civil liability rules and procedures specifically for this purpose; or
  - (c) Apply or develop a combination of both.
- [2. Parties [should][shall][may] assess whether their domestic law provides for adequate rules and procedures on civil liability for material or personal damage incidental to the damage as defined in Article 2, paragraph 2 (c), and consider:
- (a) Applying their existing domestic laws, including where applicable general rules and procedures on civil liability;
  - (b) Applying or developing civil liability rules and procedures specifically for this purpose;
- or
- (c) Applying or developing a combination of both.]\*
3. When developing rules and procedures as referred to in subparagraphs (b) or (c) of paragraph[s] 1 [or 2] above, Parties [should][shall][may], as appropriate, address, *inter alia*, the following elements:
- (a) Damage;
  - (b) Standard of liability including strict or fault-based liability;
  - (c) Channelling of liability, where appropriate;
  - (d) Right to bring claims.

#### **Article 14 (adopted)**

The Conference of the Parties serving as the meeting of the Parties to the Protocol shall undertake a review of the effectiveness of this Supplementary Protocol five years after its entry into force and every five years thereafter, provided information requiring such a review has been made available by Parties. The review shall be undertaken in the context of the assessment and review of the Protocol as specified in Article 35 of the Protocol, unless otherwise decided by the Parties to this Supplementary Protocol. The first review shall include a review of the effectiveness of Article 13.

#### **Article 15 (adopted)**

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

#### **Article 16 (adopted)**

1. Subject to paragraph 2 of Article 32 of the Convention, the Conference of the Parties serving as the meeting of the Parties to the Protocol shall serve as the meeting of the Parties to this Supplementary Protocol.
2. The Conference of the Parties serving as the meeting of the Parties to the Protocol shall keep under regular review the implementation of this Supplementary Protocol and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Supplementary Protocol and, *mutatis mutandis*, the functions assigned to it by paragraphs 4 (a) and (f) of Article 29 of the Protocol.

#### **Article 17 (adopted)**

The Secretariat established by Article 24 of the Convention shall serve as the secretariat to this Supplementary Protocol.

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\* The African Group reserves the right to re-visit the wording of this paragraph.

### **Article 18 (adopted)**

1. This Supplementary Protocol shall supplement the Protocol and shall neither modify nor amend the Protocol.
2. Nothing in this Supplementary Protocol shall derogate from the rights and obligations of the Parties to this Supplementary Protocol under the Convention and the Protocol.
3. Except as otherwise provided in this Supplementary Protocol, the provisions of the Convention and the Protocol shall apply to this Supplementary Protocol.

### **Article 19**

This Supplementary Protocol shall be open for signature at [...] by Parties to the Protocol from [...] to [...], and at the United Nations Headquarters in New York from [...] to [...].

### **Article 20 (adopted)**

1. This Supplementary Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Protocol.
2. This Supplementary Protocol shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves it 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 the date on which the Protocol 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.

### **Article 21**

[No reservations may be made to this Supplementary Protocol.]

### **Article 22 (adopted)**

1. At any time after two years from the date on which this Supplementary Protocol has entered into force for a Party, that Party may withdraw from this Supplementary Protocol by giving written notification to the Depositary.
2. Any such withdrawal shall take place upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.
3. Any Party which withdraws from the Protocol in accordance with Article 39 of the Protocol shall be considered as also having withdrawn from this Supplementary Protocol.

### **Article 23 (adopted)**

The original of this Supplementary Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Supplementary Protocol.

DONE at [...] on this [...] day of [...] two thousand and [...].

*Annex II*

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



*Appendix II*

**2. Working Towards Non-Legally Binding Provisions on Civil Liability**

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

*{For operational and preambular texts, see sub-section I of section 1.A in the annex to decision BS-IV/12}*

**II. SCOPE**

*{For operational texts, see sub-section II of section 1.A in the annex to decision BS-IV/12}*

**III. DAMAGE**

***A. Definition of damage***

*Operational text 1*

[1. These rules and procedures apply to damage [resulting from the transboundary movement of living modified organisms] as provided for by domestic law.]

[2. For the purposes of these rules and procedures, damage [resulting from the transboundary movement of living modified organisms] as provided for by domestic law may, inter alia, include:

(a) Damage to the conservation and sustainable use of biological diversity not redressed through the administrative approach {For operational texts, see sub-section III.A of section 1.A, above};

(b) Damage to human health, including loss of life and personal injury;

(c) Damage to or impaired use of or loss of property;

(d) Loss of income and other economic loss [resulting from damage to the conservation or sustainable use of biological diversity];

[(e) Loss of or damage to cultural, social and spiritual values, or other loss or damage to indigenous or local communities, or loss of or reduction of food security.]]

***B. Valuation of damage***

*Operational text 2*

[1. Damage [resulting from the transboundary movement of living modified organisms] [shall][should] be valued in accordance with domestic laws and procedures, including factors such as:]

(a) The costs of response measures [in accordance with domestic law and [procedures] [regulations]];

/...

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

[(c) The costs and expenses arising from damage to human health including appropriate medical treatment and compensation for impairment, disability and loss of life;]

[(d) The costs and expenses arising from damage to cultural, social and spiritual values, including compensation for damage to the lifestyles of indigenous and/or local communities.]

2. In the case of centres of origin and/or genetic diversity, their unique value should be considered in the valuation of damage, including incurred costs of investment.

3. For the purposes of these rules and procedures, response measures are reasonable actions to:

(i) [Prevent,] minimize or contain damage, as appropriate;

[(ii) Restore to the condition that existed before the damage or the nearest equivalent, by the replacement of the loss by other components of the biological diversity at the same location or for the same use or at another location or for another type of use.]]

### ***C. Causation***

#### ***Operational text 3***

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

## **IV. PRIMARY COMPENSATION SCHEME**

### ***A. Civil liability (harmonization of rules and procedures)***

#### ***Operational text 4***

Parties [may][shall][should] have civil liability rules and procedures for damage [resulting from the transboundary movement of living modified organisms] in accordance with domestic law. Parties [should consider the inclusion of][shall include][may include] the following [minimum] elements and procedures.

### ***1. Standard of liability and channelling of liability***

#### ***Operational text 5***

[The standard of liability, whether fault-based liability, strict liability or mitigated strict liability, needs to be established in accordance with domestic law.]

### **Option 1: Strict liability**

#### *Operational text 6*

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

*{For operational texts on “operator”, see sub-section IV.A of section 1.A in the annex to decision BS-IV/12}*

### **Option 2: Mitigated strict liability**

#### *Operational text 7*

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

- [(a) a risk-assessment has identified a living modified organism as ultra-hazardous; and/or]
- [(b) acts or omissions in violation of national law have occurred; and/or]
- [(c) violation of the written conditions of any approval has occurred.]

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

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

### **Option 3: Fault-based liability**

#### *Operational text 8*

[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 biological diversity; and]
- (d) Causation is established in accordance with section [] of these rules.]

<b>2. The provision of interim relief</b>
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#### *Operational text 9*

Any competent court or tribunal may issue an injunction or declaration or take such other appropriate interim or other measure as may be necessary or desirable with respect to any damage or imminent threat of damage.

<i>A bis. Additional elements of civil liability</i>
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<b>1. Exemptions or mitigation</b>
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*Operational text 10*

[Domestic law may provide for] exemptions or mitigations [that] may be invoked by the operator in the case of strict liability. Exemptions or mitigations [may be][are] based on [any one or more elements of] the following [exhaustive] list:

- (a) Act of God or *force majeure*;
- (b) Act of war or civil unrest;
- [(c) Intervention by a third party [that caused damage despite the fact that appropriate safety measures were in place];]
- [(d) Compliance with compulsory measures imposed by a public authority;]
- [(d alt) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;]
- [(e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;]
- [(f) An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out;]
- [(g) National security exceptions [or international security];]
- [(h) Where the operator could not have reasonably foreseen the damage.]

<b>2. Recourse against third party by the person who is liable on the basis of strict liability</b>
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*Operational text 11*

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

<b>3. Joint and several liability or apportionment of liability</b>
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*Operational text 12*

In case two or more operators have caused the damage, joint and several liability or apportionment of liability may, as appropriate, apply in accordance with domestic law.

*Operational text 12 alt*

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

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

liable. However, the operator who proves that the occurrence during the period when he was exercising the control of the activity caused only a part of the damage shall be liable for that part of the damage only.

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

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

#### **4. Limitation of liability**

##### **a. Limitation in time (relative time-limit and absolute time-limit)**

###### *Operational text 13*

Domestic law may provide for relative and/or absolute time limits for the submission of claims in the case of civil liability[, provided that such limits shall not be less than:

(a) [Three] years from the date the claimant knew or reasonably could have known of the damage and its origin; and/or

(b) [Fifteen] years from the date of the occurrence of the damage].

##### **b. Limitation in amount**

###### *Operational text 14*

[Domestic law may provide for financial limits for strict liability[, provided that such limits shall not be less than [z] special drawing rights].]

#### **5. Coverage**

###### *Operational text 15*

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

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

## V. SETTLEMENT OF CLAIMS

### A. *Civil procedures*

#### *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] [place where the damage occurred]. Alternative grounds of jurisdiction may be provided for well-defined cases according to national legislation, e.g., in relation to the place where a harmful event occurred. Special rules for jurisdiction may also be laid down for specific matters, e.g., relating to insurance contracts.

#### *Operational text 1 alt*

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

#### *Operational text 1 second alt*

No provision.

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

#### *Operational text 2*

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 alt*

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 2 second alt*

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

#### *Operational text 2 third alt*

No provision.

<p><b>C.      <i>Standing/Right to bring claims</i></b></p>
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*Operational text 3 (civil liability)*

1.        Subject to domestic law, Parties should provide for a right to bring claims by [affected] natural and legal persons [with a legal interest in the matter] [, including those with an interest in [the conservation and sustainable use of biological diversity] [environmental [and socio-economic] matters and meeting relevant requirements under domestic law]]. Those persons should have access to remedies in the State of export that are no less prompt, adequate and effective than those available to victims that suffer damage from the same incident within the territory of that State.

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

*Operational text 3 alt (civil liability)*

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

*Operational text 4 (administrative approach)*

[Natural and legal persons[, including [those] non-governmental organizations promoting environmental protection and meeting relevant requirements under domestic law,] should have a right to [require][request] the competent authority to act according to [domestic law, or in the absence thereof,] these rules and procedures [and to challenge], through a review procedure, the competent authority's decisions, acts or omissions as appropriate under domestic law.]

*Appendix III*

**3.     *Other Provisions***

**I.     SUPPLEMENTARY COMPENSATION SCHEME**

**A.     *Residual State liability***

*Operational text 1*

[Where a claim for damages has not been satisfied by an operator, the unsatisfied portion of that claim shall be fulfilled by the State where the operator is domiciled or resident.]

*Operational text 1 alt*

[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]].

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