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CONFERENCE OF THE PARTIES TO THE CONVENTION ON BIOLOGICAL DIVERSITY SERVING AS THE MEETING OF THE PARTIES TO THE CARTAGENA PROTOCOL ON BIOSAFETY
Third meeting
Curitiba, Brazil, 13-17 March 2006
Item 12 of the provisonal agenda*

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 SECOND MEETING

INTRODUCTION

A. Background

1. Article 27 of the Cartagena Protocol on Biosafety required the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP/MOP) to adopt, at its first meeting, a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from the transboundary movements of living modified organisms (LMOs). Accordingly, at its first meeting the Conference of the Parties serving as the meeting of the Parties to the Protocol established, in its decision BS-I/8, an Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress to carry out the process pursuant to Article 27 of the Protocol.

2. The Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress held its first meeting in Montreal from 25 to 27 May 2005, at which time it considered and further developed scenarios of damage resulting from the transboundary movement of LMOs, as well as options, approaches and issues that had been initially identified by the technical group of experts that had met earlier to prepare for the first meeting of the Working Group. The Working Group identified several documents, as well as information covering a range of areas relevant to its future work, and requested that the Secretariat make the information and documents available for consideration at its second meeting. The Working Group also invited Parties, other Governments, relevant international organizations and stakeholders to submit further views on the matter covered by Article 27 of the Protocol and requested the Co-Chairs of the Working Group to synthesize the submissions and produce, with the assistance of the Secretariat, a working draft for consideration at its second meeting.

* UNEP/CBD/COP-MOP/3/1.

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B. Officers and attendance

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

4. The meeting was attended by representatives from the following Parties and other Governments:, Algeria, Argentina, Australia, Austria, Bahamas, Bangladesh, Barbados, Benin, Bhutan, Brazil, Burkina Faso, Cambodia, Canada, Chile, China, Cuba, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, European Community, Finland, France, Germany, Guinea, Iran (Islamic Republic of), Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malaysia, Mali, Mauritius, Mexico, Mozambique, Namibia, Netherlands, New Zealand, Norway, Palau, Philippines, Portugal, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Seychelles, South Africa, Spain, Sweden, Switzerland, Thailand, Togo, Trinidad and Tobago, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Zambia, Zimbabwe.

5. Observers from the following intergovernmental and non-governmental organizations and other stakeholders also participated in the meeting: African Centre for Biosafety, Ban Terminator Campaign, Biotechnology Industry Organization, Carleton University, Crop Life Canada, CropLife International, Global Industry Coalition, Greenpeace International, Observatoire de l'Écopolitique Internationale, Public Research and Regulation Foundation, Third World Network, Universidad Nacional Agraria La Molina, Université de Montréal, University of Minnesota, Washington Biotechnology Action Council/49th Parallel Biotechnology Consortium.

ITEM 1. OPENING OF THE MEETING

6. The meeting was opened at 10 a.m. on Monday 20 February 2006 by Ms. Nieto (Colombia), Co Chair of the Working Group. She then invited Mr. Olivier Jalbert, on behalf of the Executive Secretary of the Secretariat of the Convention on Biological Diversity, to address the Working Group.

7. In his statement, Mr. Jalbert welcomed the participants and expressed his gratitude to the Governments of Denmark, Slovenia, Spain and Sweden, as well as the European Community, for the financial contributions made to support the participation of experts from developing countries. He regretted that despite that generosity, there had been insufficient funds to support a representative from every eligible country and that as a result financial support had been limited to least developed countries and small island developing States. He also said that discussions of liability and redress under both the Cartagena Protocol and the Convention on Biological Diversity were representative of a new maturity in international environmental law and that the issues of liability and redress were being discussed in the context of several multilateral environmental agreements. He reminded the participants that their deliberations could make important contributions to international law by exploring new facets of liability and redress as those related to the potential damage resulting from the transboundary movements of living modified organisms.

ITEM 2. ORGANIZATIONAL MATTERS

2.1. Adoption of the agenda

8. The Meeting adopted the following agenda on the basis of the provisional agenda (UNEP/CBD/BS/WG-L&R/2/1) prepared by the Executive Secretary.

1. Opening of the meeting.
2. Organizational matters:
    - 2.1. Adoption of the agenda;
    - 2.2. Organization of work.
3. Review of information relating to liability and redress for damage resulting from transboundary movement of living modified organisms.

4. Analysis of issues and 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

9. 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/2/1/Add.1).

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

10. Agenda item 3 was taken up at the 1st session of the meeting, on Monday, 20 February 2006.

11. A representative of the Secretariat recalled that at its first meeting the Working Group had requested the Secretariat to make available a number of documents and to gather information on the determination of damage to the conservation and sustainable use of biodiversity, financial security to cover liability resulting from the transboundary movement of LMOs, transnational procedures and recent developments in international law relating to liability and redress. In response to that request the Executive Secretary had prepared a number of information documents for consideration by the Working Group. Document UNEP/CBD/BS/WG-L&R/2/INF3) reviewed work and put together further information concerning the concept of the determination of damage to the conservation and sustainable use of biological diversity while document UNEP/CBD/BS/WG-L&R/2/INF4 provided an overview of the relevant concepts in transnational procedures and included two case-studies of courts applying those concepts in practice. Document UNEP/CBD/BS/WG-L&R/2/INF5 reported recent developments in international law relating to liability and redress, including the status of international environment-related third party liability, while document UNEP/CBD/BS/WG-L&R/2/INF6 contained a compilation of relevant documents from the work of the International Law Commission. Document UNEP/CBD/BS/WG-L&R/2/INF7 contained a submission by the European Union on financial guarantees and liability for damage resulting from LMOs as well as a compilation of documents relevant to the issue of financial security obtained from the Swiss Re-insurance Company. The meeting also had before it the Report of the Group of Legal and Technical Experts on Liability and Redress in the Context of Paragraph 2 of Article 14 of the Convention on Biological Diversity (UNEP/CBD/COP/8/27/Add.3).

12. Ms. Nieto, Co-Chair, thanked the Secretariat and asked Ms. Anne Daniel (Canada), Chair of the Group of Legal and Technical Experts on Liability and Redress in the Context of Paragraph 2 of Article 14 of the Convention on Biological Diversity, to brief the meeting on developments under that process.

13. Ms. Daniel recalled that, at its sixth meeting, the Conference of the Parties in decision VI/11 had requested the Executive Secretary to convene a group of legal and technical experts to conduct further analysis of pertinent issues relating to liability and redress in the context of paragraph 2 of the Article 14 of the Convention. The group of experts had been requested to clarify basic concepts and to propose the possible introduction of elements, as appropriate, into existing liability and redress regimes, as well as considering preventive measures on the basis of the responsibility recognized under Article 3 of the Convention. Ms Daniel drew the attention of the Working Group to the conclusions in the annex of the report of that meeting, contained in document UNEP/CBD/COP/8/27/Add.3, and expressed the hope that it would be of use in its deliberations.

14. A statement was also made by the representative of Senegal.

15. The Co-Chair noted that the Working Group appeared satisfied with the information collected by the Secretariat. Obviously, there continued to be a need to collect information on the further

developments in international law relating to liability and redress, including the status of international environment-related third party liability instruments. She also regretted that it had been impossible to arrange for an expert presentation on the availability of financial security to cover liability for damage resulting from the transboundary movements of living modified organisms and she urged the Secretariat to spare no effort to organize such an expert presentation for the next meeting of the Working Group.

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

16. Agenda item 4 was taken up at the 1st session of the Working Group on Monday, 20 February 2006.

17. A representative of the Secretariat reminded the Working Group that at its first meeting it had invited Parties, other Governments, relevant international organizations and stakeholders to submit further views on the matter covered by Article 27 of the Protocol. He said that the submissions had been compiled into an information document, UNEP/CBD/BS/WG-L&R/2/INF1, and that the views and submissions had also been organized into a working draft, UNEP/CBD/BS/WG-L&R/2/2. All substantive submissions of views and proposed text had been included in the document, with some adjustments to better structure the focus and coverage of the elements. He also said that document UNEP/CBD/BS/WG-L&R/2/INF2 contained a compilation of submission on experiences and views on criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Protocol. That document contained a submission by the Government of the United States of America as well as a submission by the Government of New Zealand that had only been recently received. A revised English version of the submission by the Government of Argentina had also been circulated to the Working Group.

Criteria for the assessment of effectiveness

18. Ms. Nieto, Co-Chair, thanked the Secretariat and invited the representatives of New Zealand and the United States of America to introduce the submissions contained in document UNEP/CBD/BS/WG-L&R/2/INF2.

19. The representative of New Zealand said that it was important to consider the criteria for assessing the effectiveness of liability rules and that a similar process had been an important part of New Zealand's creation of a regulatory and liability regime for managing genetically modified organisms. She drew the attention of the Working Group to a table that set out criteria that had been used to assess the effectiveness of liability rules. She also expressed the hope that one of the tangible outcomes of the meeting would be an agreement on effectiveness criteria.

20. The representative of the United States of America said that there were five benchmarks for analysing the effectiveness of the rules and procedures to be developed under Article 27 of the Protocol. These were that the type and scope of activities covered would be clearly understood; that the scope of damage covered would be clearly defined; and that the rules and procedures would be easy to implement, would provide an incentive for actors to act with caution and care, and would assign liability to the individual that caused the harm.

21. Statements were made by the representatives of Australia, Austria (on behalf of the European Union), Bangladesh, Brazil, Canada, Iran (Islamic Republic), Norway, Senegal and Switzerland.

22. Statements were also made by observers from the Global Industry Coalition and Greenpeace International.

23. At the 2nd session of the meeting, on 20 February 2006, the Working Group continued its discussion of criteria for the assessment of the effectiveness of the rules and procedures referred to in Article 27 of the Protocol.

24. Statements were made by representatives of Austria (on behalf of the European Union), Brazil, Burkina Faso, Canada, China, the European Community, Iran (Islamic Republic), Malaysia, Mexico, New Zealand, Norway, Senegal, South Africa, and Switzerland.

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

26. Following the statements Ms. Nieto, Co-Chair, said that the Co-Chairs would informally consult on the development of criteria for effectiveness.

27. At the 3rd session of the Working Group, on Tuesday 21 February 2006, Ms. Nieto, Co-Chair, said that there had been agreement among the experts to develop the criteria for effectiveness. She asked the representative of Switzerland to facilitate consultations and prepare an indicative list of criteria for consideration by the Working Group.

28. At the 8th session of the meeting, on Thursday 23 February 2006, the representative of Switzerland presented an indicative list of criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Cartagena Protocol on Biosafety. The list was finalized after informal consultations and on the basis that it was not negotiated and is non-exhaustive. The Working Group invited Parties, other Governments, relevant international organizations and stakeholders to take into account the indicative list of criteria, contained in annex I of the present report, in elaborating options for elements for rules and procedures referred to in Article 27 of the Protocol.

Scope: Functional Scope

29. At its 1st session, on 20 February 2006, the Working Group was also invited by Mr. Lefeber, Co-Chair, to consider document UNEP/CBD/BS/WG-L&R/2/2 which synthesized the submissions on approaches, options and issues into a working draft. He said that the working draft was being submitted by the Co-Chairs to the Working Group for its consideration. The working draft followed the structure of the annex contained in the report of the first meeting of the Working Group and he suggested that the Working Group consider the working draft by the sections and subsections that it contained. He reminded the Working Group that it had the mandate to build understanding and consensus and he encouraged interventions that would further that mandate.

30. The Working Group took up the consideration of the scope of damage resulting from the tranboundary movements of LMOs at its 1st session.

31. Statements were made by the representatives of Argentina, Australia, Austria (on behalf of the European Union), Brazil, Burkina Faso, Canada, Cuba, Iran, (Islamic Republic), Malaysia, Mexico, New Zealand, Norway, Palau, Senegal, South Africa, Switzerland, Uganda and Zambia.

32. Statements were also made by the observers from Greenpeace International and La Molina National Agricultural University of Peru.

33. Following the statements Mr. Lefeber, Co-Chair, said that although the majority had spoken in favour of one of the options there was as yet no consensus on the issue. He asked that the Working Group continue to consider the issue and submit operational text to further develop the scope of the rules and procedures.

Scope: Optional components for geographical scope

34. The Working Group took up consideration of optional components for geographical scope at its 1st session.

35. Statements were made by the representatives of Argentina, Austria (on behalf of the European Union), the Bahamas, Brazil, Canada, Iran (Islamic Republic), Malaysia, Mexico, New Zealand, Norway, Senegal and Switzerland.

36. Statements were also made by the observers from Greenpeace International and La Molina National Agricultural University of Peru.

37. Following the statements Mr. Lefeber, Co-Chair, said that there was a need for additional information on damage that was caused or suffered in areas beyond the limits of national jurisdiction or control of States and that there had only been consensus on the application of rules and procedures on liability and redress to damage caused within the limits of national jurisdiction or control of Parties.

Scope: Issues for further consideration

38. At its 2nd session, on 20 February 2006, the Working Group continued its discussion of the sections and subsections of the working draft proposed by the Co-Chairs.

39. Statements were made by the representatives of Austria (on behalf of the European Union), Canada, Liberia, Malaysia, Palau, Senegal and Switzerland.

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

41. Following the statements Mr Lefeber, Co-Chair, said that there had been agreement to eliminate the option for limitation on the basis of geographical scope, i.e. protected areas or centres of origin, from the working draft. He asked the Working Group to submit operational text to further develop the scope of the rules and procedures.

Damage: Optional components of the definition of damage

42. The Working Group also took up consideration of the optional components of the definition of damage at its 2nd session.

43. Statements were made by the representatives of Argentina, Australia, Austria (on behalf of the European Union), Benin, Brazil, Burkina Faso, Canada, Iran (Islamic Republic), Lesotho, Liberia, Malaysia, Mexico, Norway, Senegal, Switzerland and Zimbabwe.

44. Statements were also made by observers from the Conservation Biology Graduate Program of the University of Minnesota, the Global Industry Coalition, Greenpeace International and the Washington Biotechnology Action Council.

45. Following the statements Mr Lefeber, Co-Chair, asked the Working Group to submit operational text to further develop the operational components of the definition of damage relating to damage to conservation and sustainable use of biodiversity or its components; damage to environment; damage to human health and socio-economic damage, especially in relation to indigenous and local communities.

46. The Working Group continued its discussion of the optional components of the definition of damage at its 3rd session on Tuesday, 21 February 2006.

47. Statements were made by the representatives of Argentina, Austria (on behalf of the European Union), Malaysia, Norway, Switzerland, and Zimbabwe (on behalf of the African Group).

48. Following the statements Mr. Lefeber, Co-Chair, pointed out that it was still necessary to refine the elements to bring out the issues that were hidden within them in order to give guidance to the legislators and judges who would have to apply them.

Damage: Possible approaches to valuation of damage to conservation of biological diversity

49. The Working Group also took up the discussion of possible approaches to valuation of damage to conservation of biological diversity at its 3rd session.

50. Statements were made by the representatives of Austria (on behalf of the European Union), Burkina Faso, Canada, Iran (Islamic Republic), Liberia, Malaysia, Norway, Palau, Senegal, the United States of America and Zimbabwe (on behalf of the African Group).

51. Statements were also made by observers from Greenpeace International, Public Research & Regulation Institute and the Washington Biotechnology Action Council.

52. Following the statements Mr. Lefeber, Co-Chair, noted that a number of important issues had been raised. It would be necessary to distinguish between damage to conservation on the one hand and

damage to sustainable use on the other. He also suggested that the work of the United Nations Compensation Commission was relevant to the consideration of the issue of valuation and that it would be useful to have more information on the application of tools for valuation of biodiversity and biodiversity resources and functions. He requested the Secretariat to gather information on that issue for consideration at the next meeting of the Working Group. He also requested that the Secretariat organize and expert presentation on that subject for the Working Group at its next meeting.

Damage: Issues for further consideration with respect to valuation of damage

53. The Working Group also took up consideration of issues for further consideration with respect to valuation of damage at its 3rd session.

54. Statements were made by the representatives of Austria (on behalf of the European Union), Canada, Djibouti, Iran (Islamic Republic), Liberia, Malaysia, Mexico, New Zealand, Norway, Senegal, Switzerland, the United States of America, Zambia and Zimbabwe (on behalf of the African Group).

55. Statements were also made by observers from Greenpeace International, La Molina National Agricultural University of Peru and the Washington Biotechnology Action Council.

56. Following the statements the Mr. Lefeber, Co-Chair, again reminded the Working Group of the work of the United Nations Compensation Commission and suggested that it had demonstrated creativity in dealing with the issues under consideration by the Working Group. He said that the Working Group had again raised a number of important issues and he asked them to submit operational text to further develop the issue under consideration.

Causation: Issues for further consideration

57. The Working Group took up consideration of issues for further consideration related to causation at its 4th session on 21 February 2006.

58. Statements were made by the representatives of Austria (on behalf of the European Union) and Malaysia.

59. Following the statements Mr. Lefeber, Co-Chair, said that although issues of causation were linked to channelling of liability the Working Group had considered, at its first meeting, it to be useful to address causation together with the issue of damage. In that sense, the cause of the damage referred to the transboundary movement of LMOs. He asked the Working Group to reflect on the issue of causation in light of that and submit operational text for consideration by the Working Group.

Channelling of liability, role of Parties of import and export, standard of liability: Possible approaches to channelling liability

60. The Working Group took up consideration of possible approaches to channelling of liability at its 5th session on Wednesday 22 February 2006.

61. Statements were made by the representatives of Argentina, Austria (on behalf of the European Union), Barbados, Burkina Faso, the European Community, Iran (Islamic Republic), Malaysia, Mexico, Namibia, Norway, Palau, Senegal, Switzerland, Trinidad and Tobago, the United States of America and Zimbabwe (on behalf of the African Group).

62. Statements were also made by observers from Greenpeace International and the Washington Biotechnology Action Council.

63. Mr. Lefeber, Co-Chair, said that it had been agreed to strike though the option for primary state liability. He said that it had further been agreed that no special rules and procedures on state responsibility for internationally wrongful acts in relation to the transboundary movement of living modified organisms were required, but that it could be useful to clarify in any rules and procedures on the matter covered by Article 27 of the Protocol that the general rules of international law on state responsibility for internationally wrongful acts, including breach of obligations of the Protocol, will continue to be applicable. The text of the synthesis would be amended accordingly.

Channelling of liability, role of Parties of import and export, standard of liability: Issues relating to civil liability

64. The Working Group took up consideration of issues relating to civil liability at its 5th session.

65. A statement was made by the representative of Switzerland.

Channelling of liability, role of Parties of import and export, standard of liability: Standard of liability and channelling of liability

66. The Working Group took up consideration of standard of liability and channelling liability at its 5th session.

67. Statements were made by the representatives of Austria (on behalf of the European Union), Brazil, Malaysia, Mexico, New Zealand, Norway, Palau, Senegal, Switzerland, the United States of America, and Zambia.

68. The working Group continued its consideration of standard of liability and channelling liability at the 6th session of the meeting, on 22 February 2006.

69. Statements were made by the representatives of Palau, Switzerland and Zimbabwe (on behalf of the African Group).

70. Statements were also made by observers from the Global Industry Coalition, Greenpeace International, Public Research & Regulation Institute and the Washington Biotechnology Action Council.

Channelling of liability, role of Parties of import and export, standard of liability: Exemptions to or mitigation of strict liability

71. The Working Group took up consideration of exemptions to or mitigation of strict liability at the 6th session of the meeting, on 22 February 2006.

72. Statements were made by the representatives of Austria (on behalf of the European Union), Burkina Faso, Lesotho, Malaysia, Mexico, New Zealand, Norway, Senegal, Switzerland and Zambia.

73. Statements were also made by observers from the Global Industry Coalition, Greenpeace International and the Washington Biodiversity Action Council.

Channelling of liability, role of Parties of import and export, standard of liability: Additional tiers of liability

74. The Working Group took up consideration of additional tiers of liability at the 6th session of the meeting, on 22 February 2006.

75. Statements were made by the representatives of Australia, Palau and Zimbabwe.

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

Channelling of liability, role of Parties of import and export, standard of liability: Issues for further consideration

77. The Working Group took up consideration of issues for further consideration at the 6th session of the meeting.

78. Statements were made by the representatives of Malaysia, Namibia, New Zealand, Norway, Palau and Senegal.

Limitation of liability: Issues for further consideration

79. The Working Group took up consideration of limitation of liability, issues for further consideration at the 6th session of the meeting.

80. Statements were made by the representatives of Austria (on behalf of the European Union), Brazil, Burkina Faso, Djibouti, Iran (Islamic Republic), Liberia, Malaysia, New Zealand, Norway,

Senegal, Switzerland, Trinidad and Tobago (on behalf of the Caribbean Group), Zambia and Zimbabwe (on behalf of the African Group)

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

Mechanisms of Financial Security: Coverage of liability

82. The Working Group took up consideration of coverage of liability at the 6th session of the meeting.

83. Statements were made by the representatives of Australia, Austria (on behalf of the European Union), the Islamic Republic of Iran and Norway.

Mechanisms of Financial Security: Supplementary collective compensation arrangements

84. The Working Group took up consideration of supplementary collective compensation arrangements at the 7th session of the meeting on 23 February 2006.

85. Statements were made by the representatives of Senegal, Zambia (on behalf of the African Group) and Zimbabwe.

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

87. Mr. Lefeber, Co-Chair said that the Working Group had agreed to strike through option 3, a public fund, from the options for further consideration by the Working Group.

Mechanisms of Financial Security: Issues for further consideration

88. The Working Group took up consideration of issues for further consideration at the 7th session of the meeting.

89. A statement was made by the representative of Malaysia.

Settlement of claims: Optional procedures

90. The Working Group took up consideration of optional procedures at the 7th session of the meeting.

91. Statements were made by the representatives of Canada, Mexico, Namibia (on behalf of the African Group) Senegal and Switzerland.

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

93. Mr. Lefeber, Co-Chair, requested the Secretariat to arrange for an expert presentation on transnational procedures for the next meeting of the Working Group.

Standing/Right to bring claims: Issues for further consideration

94. The Working Group took up consideration of issues for further consideration at its 7th session. No statements were made by representatives.

Non-Parties: Issues for further consideration

95. The Working Group took up consideration of issues for further consideration at the 7th session of the meeting.

96. Statements were made by the representatives of Canada and Zimbabwe.

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

Use of terms: Issues for further consideration

98. The Working Group took up consideration of issues for further consideration at the 7th session of the meeting.

99. A statement was made by the representative of Switzerland.

100. Mr. Lefeber, Co-Chair, noted that the Working Group had agreed not to consider the use of terms further as a separate issue.

Complementary capacity building measures: Possible approaches

101. The Working Group took up consideration of possible approaches at the 7th session of the meeting.

102. A statement was made by the representative of Zambia.

Choice of instruments

103. The Working Group took up consideration of choice of instruments at the 7th session of the meeting.

104. No statements were made by representatives.

Compilation of operational text

105. At the 5th session of the meeting, on 22 February 2006, the Working Group considered a compilation of submissions of operational text on the scope of the rules and procedures submitted by the Co-Chairs of the meeting. Mr. Lefeber, Co-Chair, said that some of the submissions had been adjusted to reflect the sections and subsections of the working draft. Footnotes had also been removed and some of the submissions had not been included as they did not represent operational text. There had also been some minor editorial corrections. He said that as the Working Group was engaging in a new direction, it would be given the opportunity to submit further operational text that would be compiled by the co-chairs into a revised document for consideration by the Working Group.

106. A statement was made by the representative of Malaysia (on behalf of the Asian and Pacific Group).

107. Statements were also made by the observers from Greenpeace International and the Washington Biotechnology Action Council.

108. At the 7th session of the meeting, on 23 February 2006 the Working Group considered a revised compilation of submissions of operational text on scope as well as a compilation of submissions of operational text on damage and causation submitted by the Co-Chairs of the meeting. Mr. Lefeber, Co-Chair, said that some of the submissions had been adjusted to reflect the sections and subsections of the working draft. Footnotes had also been removed and some of the submissions had not been included as they did not represent operational text. There had also been some minor editorial corrections.

109. Statements were made by the representatives of the United States of America and Zambia (on behalf of the African Group).

110. Mr. Lefeber, Co-Chair, observed that the compilation of operational text on scope, damage and causation illustrated that, in spite of differences of opinion, views on these issues seemed to be converging and consensus on a number of these issues is emerging. In that light, he proposed that intersessional work before, and sessional work during, the third meeting of the Working Group should be focused on the elaboration of operational text on other issues.

Conclusions

The Working Group:

1. *Requests* the Secretariat to make available, at its third meeting, documents of the Convention on Biological Diversity relating to the application of tools for valuation of biodiversity and biodiversity resources and functions; and to arrange for an expert presentation on the matter;

2. *Requests* the Secretariat to gather and make available, at its third meeting, information on:

(a) Financial security to cover liability resulting from transboundary movements of living modified organisms, including information from Parties and other Governments on national experiences in this respect; and to arrange, if possible, for an expert presentation on this matter at its third meeting;

(b) Recent developments in international law relating to liability and redress, including the status of international environment-related liability instruments; and

(c) How damage suffered in areas beyond the limits of national jurisdiction or control of States is being addressed in other international instruments and forums;

3. *Requests* the Secretariat to arrange for an expert presentation on transnational procedures at its third meeting;

4. *Invites* Parties, other Governments relevant international organizations and stakeholders to take into account the indicative list of criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Protocol, contained in annex I to the present report, in elaborating options for elements for rules and procedures referred to Article 27 of the Protocol;

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

6. *Requests* the Co-Chairs, with the assistance of the Secretariat, to synthesize the proposed operational texts submitted pursuant to paragraph 5 above, and produce a working draft for consideration at its third meeting.

ITEM 5. OTHER MATTERS

111. No other matters were raised by the representatives.

ITEM 6. ADOPTION OF THE REPORT

112. The present report was adopted at the 9th session of the meeting, on 24 February 2006, on the basis of the draft report (UNEP/CBD/BS/WG-L&R/2/L.1 and Add.1) that had been prepared by the Rapporteur, as orally amended. The meeting authorized the Rapporteur, with the assistance of the Secretariat and in consultation with the Co-Chairs to finalize the report of the meeting to reflect the proceedings of the final day of the meeting.

ITEM 7. CLOSURE OF THE MEETING

113. The Co-Chair, Ms. Jimena Nieto, on behalf of the two Co-Chairs, thanked the participants for their contributions and very productive discussion. She also thanked the Secretariat for the good preparation for the meeting and the support provided to the Co-Chairs and the Rapporteur in the conduct of the meeting. Mr. Olivier Jalbert, also addressed the participants on behalf of the Executive Secretary and complimented them on their productive work during the meeting .

114. Several participants expressed their appreciation to the Co-Chairs, and the Rapporteur for the excellent conduct of the meeting. They also thanked the Secretariat for the preparation and facilitation of the meeting and the translators for their hard work. One participant also expressed his thanks to the Government of France for the bilateral contributions that had enabled his participation in the meeting.

115. After the customary exchange of courtesies, the Co-Chair declared the meeting of the Ad Hoc Working Group closed at 10.30 a.m. on Friday 24 February 2006.

Annex I

INDICATIVE LIST OF CRITERIA FOR THE ASSESSMENT OF THE EFFECTIVENESS OF ANY RULES AND PROCEDURES REFERRED TO IN ARTICLE 27 OF THE PROTOCOL

- All elements of the rules and procedures including scope and damage under Article 27 are clearly defined.
- Possible damages can be identified and quantified consistent with the rules and procedures.
- It is possible to remedy the damage or compensate accordingly.
- Appropriate and effective access to justice is available.
- The activities, entities and individuals to which the rules and procedures will apply are clearly determined and understood.
- The rules and procedures are meaningful, easy to implement and to apply.
- It is clear how Parties would implement the rules and procedures domestically.
- The relationship between the rules and procedure and the existing law (domestic and international) on liability and redress is clear.
- Financial securities to provide compensation and redress are available.
- The rules and procedures provide an incentive to act with caution and care and encourage therefore precaution.

Annex II

I. SCOPE OF "DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LMOS"

A. Functional scope

Option 1

Damage resulting from transport of LMOs, including transit

Option 2

Damage resulting from transport, transit, handling and/or use of LMOs that finds its origin in transboundary movements of LMOs, as well as unintentional transboundary movements of LMOs

Operational text 1

1. This decision applies to shipments, transit, handling and use of living modified organisms (LMO), provided that these activities find their origin in a transboundary movement.

2. With respect to intentional transboundary movements, this decision applies to damage resulting from any authorized use of the LMO, as well as to any use in violation of such authorization.

3. This decision applies to LMOs that are:

   (a) Intended for direct use as food and feed or for processing;

   (b) Destined for contained use; and

   (c) Intended for intentional introduction into the environment.

4. This decision applies to unintentional transboundary movements. The point where they begin should be the same as for an intentional transboundary movement, *paragraphs 3 to 5 of OT 1 of Section I.C(d)* apply *mutatis mutandis*.

5. This decision applies to transboundary movements in contravention of domestic measures to implement the Protocol.

Operational text 2

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

Operational text 3

1. Damage resulting from transboundary movement of LMOs, including transit to the extent that a Party causes damage in a State of transit.

2. In respect of an LMO for intentional introduction into the environment, damage caused by an LMO would be within the scope of the rules and procedures adopted under Article 27 only if the importing State has complied with the conditions of use of the LMO consistent with the AIA for that LMO.

3. The scope of the rules and procedures should not be limited to the first transboundary movement of an LMO.

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

Operational text 4

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

Operational text 5

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

Operational text 6

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

Operational text 7

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

Operational text 8

Damage resulting from transboundary movement of living modified organisms.

Operational text 9

1. The following definitions are used for the purpose of this document:

   (a) Intentional transboundary movements: It is understood that the rules and procedures described in this instrument not only cover authorized movements but also all non-authorized movements and any unauthorized use of any kind.

   (b) Illegal transboundary movements: are movements which contravene national legal provisions, as long as the affected State is a Party to the Cartagena Protocol.

2. This legally-binding instrument will apply to damages resulting from intentional or unintentional transboundary movement of any LMO, including transport, use, and placing on the market.

3. This instrument takes into account equally the right of States regardless of whether they are importing or transit States.

Operational text 10

1. These rules and procedures shall apply to damage to biological diversity resulting from transboundary movements of living modified organisms.

2. "Biological diversity" -- as defined in Article 2 of the Convention on Biological Diversity.

3. "Living modified organism" -- as defined in Article 2 of the Cartagena Protocol on BioSafety

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

5. "Resulting from" means that the damage:

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

   (b) that the transboundary movement was the proximate cause of the damage without any superseding or intervening causes.

Operational text 11

1. These rules and procedures shall apply to:

   (a) any damage resulting from the packaging, transport, transit, handling and/or use of a living modified organism resulting from a transboundary movement of a living modified organism, and from failure to provide accurate information about the LMO or its movement;

   (b) any unintentional or illegal transboundary movement of a living modified organism;

   (c) in the case of preventive measures, any damage threatened to be caused;

   (d) any damage described by paragraphs (a),(b) or (c) wherever suffered.

B. Optional components for geographical scope

(a) Damage caused in areas within the limits of national jurisdiction or control of Parties;

(b) Damage caused in areas within the limits of national jurisdiction or control of non-Parties;

(c) Damage caused in areas beyond the limits of national jurisdiction or control of States.

Operational text 1

This decision applies to areas under the jurisdiction or control of the Parties to the Cartagena Protocol.

Operational text 2

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

2. This Protocol shall apply to any damage described by paragraph (a) wherever suffered including in areas:

    1. within limits of national jurisdiction or control of Contracting Parties;

    2. within the limits of national jurisdiction or control of non-Contracting Parties; or

    3. beyond the limits of national jurisdiction or control of States.

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

Operational text 3

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

Operational text 4

1. Any damage in areas within the limits of national jurisdiction or control of Parties;

2. Any damage caused in areas within limits of national jurisdiction or control of non-Parties;

3. Any damage caused in areas beyond the limits of national jurisdiction or control of States.

Operational text 5

1. The Protocol shall apply to damage resulting from an incident as referred to in paragraph 1 in an area which is under the national jurisdiction of a Party.

2. Notwithstanding paragraph 2, the Protocol shall also apply to damage which occurs in an area of a State of transit where such State is not a Party to the Protocol, but has however acceded to a multilateral, bilateral or regional agreement which concerns the transboundary movement of living modified organisms and is in force at the time of the occurrence of the damage.

3. Nothing in the Protocol shall be read or construed to affect in any way the Sovereignty of States, whether a Party to the Protocol or not, over their territorial seas and their jurisdiction and right in their respective exclusive economic zones and continental shelves in accordance with international law.

Operational text 6

1. This decision encourages regional and international agreements and organizations to address damage in areas outside national jurisdiction that these entities may presently strive to manage.

2. This decision encourages Parties to cooperate with regional and international agreements and organizations in an effort to address damage in areas outside of national jurisdiction.

Operational text 7

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

Operational text 8

1. Damage suffered in areas within the limits of national jurisdiction of Parties;

2. Damage suffered in areas within the limits of non-Parties;

3. Damage suffered in areas beyond the limits of national jurisdiction of States.

Operational text 9

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

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

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

Operational text 10

This instrument shall apply to any damage wherever suffered.

C. Issues for further consideration

(a) ~~Limitation on the basis of geographical scope, i.e. protected areas or centres of origin;~~

(b) Limitation in time ~~(related to section V on limitation of liability)~~;

(c) Limitation to the authorization at the time of the import of the LMOs;

(d) Determination of the point of the import and export of the LMOs.

(b) Limitation in time ~~(related to section V on limitation of liability)~~

Operational text 1

This decision applies to damage resulting from a transboundary movement of LMOs when that transboundary movement was commenced after this decision became operational.

Operational text 2

Unless a different intention appears from this Protocol, or is otherwise established, the provisions of this Protocol do not bind a Contracting Party in relation to any act or fact which took place or any situation

which ceased to exist before the date of the entry into force of the treaty with respect to that Contracting Party.

Operational text 3

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

Operational text 4

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

Operational text 5

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

Operational text 6

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

Operational text 7

These rules and procedures shall apply only to damage resulting from transboundary movements that occur following adoption of these rules.

Operational text 8

This instrument applies to damage caused, existing or arising on or after the date of entry into force of these rules and procedures/this Protocol/date this decision becomes operational.

(c) Limitation to the authorization at the time of the import of the LMOs

Operational text 1

This decision applies to intentional transboundary movement only in relation to the use for which LMOs are destined and for which authorization has been granted prior to the transboundary movement.

Operational text 2

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

Operational text 3

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

Operational text 4

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

Operational text 5

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

(d) Determination of the point of the import and export of the LMOs.

Operational text 1

1. This decision applies to damage of a LMO if:

   (a) That LMO has been subject to a transboundary movement, as defined in *paragraphs 2 to 5 below and OT 1 under Section I.C(c)*;

   (b) The first use for which the LMO has been destined and authorized is covered by the rules and procedures under Article 27 of the CPB, namely the uses set out in *paragraph* 3 *of OT 1 under Section I.A* above.

2. For the purpose of this decision, the definition of "transboundary movement" in Article 3(k) of the CPB is elaborated to provide further precision.

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

4. 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.

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

Operational text 2

1. Whenever a transboundary movement is effected by transport:

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

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

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

Operational text 3

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

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

Operational text 4

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

Operational text 5

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

Operational text 6

1. 'Territory' shall mean the territory of a Contracting Party, the internal and territorial waters and the airspace over the territory.

2. A "Transboundary Movement" commences either:

(a) when a living modified organism is prepared for export within the territory of a State by the preparation, handling, or packaging of the living modified organism for export by transport;

(b) In any other case, when an LMO leaves the territory of the State.

II. DAMAGE

A. Optional components of the definition of damage

(a) Damage to conservation and sustainable use of biological diversity or its components;

(b) Damage to environment;

- (i) Damage to conservation and sustainable use of biological diversity or its components;
- (ii) Impairment of soil quality;
- (iii) Impairment of water quality;
- (iv) Impairment of air quality;

(c) Damage to human health;

- (i) Loss of life or personal injury;
- (ii) Loss of income;
- (iii) Public health measures;
- (iv) Impairment of health;

(d) Socio-economic damage, especially in relation to indigenous and local communities;

- (i) Loss of income;
- (ii) Loss of cultural, social and spiritual values;
- (iii) Loss of food security;
- (iv) Loss of competitiveness;

(e) Traditional damage:

- (i) Loss of life or personal injury;
- (ii) Loss of or damage to property;
- (iii) Economic loss;

(f) Costs of response measures.

Operational text 1

1. "Environment" includes:

(a) the conservation and sustainable use of biological diversity or its components;
(b) natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors.

2. 'Impaired" in relation to the environment' shall include any adverse effects on the environment.

3. 'Damage' shall include:

(a) Damage to human health including:
(i) Loss of life or personal injury;
(ii) Impairment of health;
(iii)Loss of income;
(iv) Public health measures.

(b) damage to, or impaired use or loss of, property;

(c) damage to the environment, including, loss of income derived from an economic interest in any use of the environment incurred as a result of impairment of the environment;

(d) Loss of income, loss of cultural, social and spiritual values, loss of food security, or economic loss, loss of competitiveness or other damage to indigenous or local communities.

Operational text 2

The instrument shall apply to:

(a) damage to environment, conservation and sustainable use of biological diversity and its components as defined in Article 2 of the Convention of Biological Diversity including impairment of soil, water and air quality;

(b) damage to human health which shall include loss of life or personal injury; loss of income; impairment of health and costs of public health measures taken;

(c) socio-economic damage, which shall include but not be limited to:
(i) loss of income
(ii) loss of cultural, social, traditional and spiritual values
(iii) loss of food security
(iv) loss of economic markets

(d) *Actio legis aquiliae, Actio ex contractu (*Cartagena Protocol on Biosafety*), Actio damni injuriae;*

(e) Cost of response and preventative measures including remedial costs.

Operational text 3

For the purposes of these Rules:

(a) “Abiotic components” shall include air, soil and water;

(b) “Biotic components” include flora and fauna, damage to which shall be assessed from kingdom to genetic levels;

(c) “Damage” shall mean:

(i) Loss of life or personal injury;
(ii) Loss of or damage to property: provided that the property is not held by the person to be held liable in accordance with the Protocol;
(iii) Loss of income which was directly derived from an economic interest in any use of the environment within the scope of the Protocol and which loss has incurred as a

result of the impairment of the environment, taking into account loss of savings and costs;

(iv) Loss of cultural, social and spiritual values;

(v) Loss of the security of provision of food which is a staple or contains a socio-economic value to an indigenous or local community;

(vi) The costs of measures to respond to the damage caused or of reinstatement of the impaired environment, with such costs to be limited to the measures actually undertaken or which are deemed as necessary to be undertaken;

(vii) Loss of biological diversity and its components;

(viii) Loss of abiotic and biotic components of the environment; and

(ix) Impairment of the interactions and interrelationships between abiotic and biotic components of the environment.

Operational text 4

1. "Damage" means:

(a) Loss of life or personal injury;

(b) Loss of, or damage to, property other than property held by the person liable in accordance with the rules and procedures under article 27 of the Protocol;

(c) Loss of income directly deriving from an economic interest in the sustainable use of biological diversity, incurred as a result of impairment of the biological diversity, taking into account savings and costs;

(d) The cost of measures of reinstatement of the impaired biological diversity, limited to the costs of measures actually taken or to be undertaken; and

(e) The cost of response measures, including any loss or damage caused by such measures, to the extent that the damage was caused by living modified organisms due to the genetic modification.

2. "Measures of reinstatement" means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the biological diversity. Domestic law may indicate who will be entitled to take such measures;

3. "Response measures" means any reasonable measures taken by any person, including public authorities, following a damage, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up. Domestic law may indicate who will be entitled to take such measures.

Operational text 5

This instrument covers damage to conservation and sustainable use of biological diversity and to human health. For the purpose of this instrument;

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

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

(c) damage to human health means any personal injury whether or not it leads to loss of life.

Operational text 6

Damage to conservation and sustainable use of biological diversity, taking into account the definitions of 'sustainable use' and 'biological diversity' in article 2 of the Convention on Biological Diversity.

Operational text 7

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

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

Operational text 8

"Damage" means impacts on biological diversity that are:

(a) adverse;

(b) significant;

(c) measurable using objective scientific criteria (to be developed); and clearly caused by a specific LMO.

Operational text 9

1. 'Environment' includes all natural resources, including (i) air, water, soil, fauna and flora, and the interaction between the same factors, (ii) ecosystems and their constituent parts, (iii) biodiversity, (iv) amenity values, (v) indigenous or cultural heritage, and (vi) social, economic, aesthetic, and cultural conditions which are affected by the matters stated in paragraphs (i) to (v) of this definition.

2. 'Impaired" shall include any adverse effect and shall include contamination.

3. 'Damage' shall include:

(a) Damage to human health, including:

(i) Loss of life, personal injury, loss of wellbeing, and impairment of health; and medical costs including the cost of diagnosis and treatment and associated costs;
(ii) Loss or reduction of income;
(iii) Public health measures;

(b) damage to, impaired use or reduction of value of property;

(c) loss or reduction of income derived from environmental impairment;

(d) damage to the environment, including:

(i) the cost of measures of reinstatement or remediation of the impaired environment, where possible, as measured by the cost of action actually taken or to be undertaken, including the introduction or re-introduction of original components; and
(ii) where reinstatement or remediation to the original state is not possible, the introduction of equivalent components at the same location, for the same use, or on another location for other types of use; and
(iii) the costs of response measures, including any loss or damage caused by such measures; and
(iv) the costs of preventive measures, including any loss or damage caused by such measures; and
(v) the costs of any interim measures; and
(vi) any other damage to or impairment of the environment, taking into account any impact on the environment;

(e) Loss or reduction of income, loss of or damage to cultural, social and spiritual values, loss of or reduction to food security, damage to agricultural biodiversity used by local and indigenous communities, loss of competitiveness or other economic loss or other loss or damage to indigenous or local communities.

(a) Damage to conservation and sustainable use of biological diversity or its components: (i) Determination of biodiversity loss: it is essential to have baselines to measure loss, taking into account natural variations and human-induced variations other than those caused by LMOs; (ii) Formulation of qualitative threshold of damage to conservation and sustainable use of biological diversity.

Operational text 1

1. For the purposes of this decision, damage to the conservation of biological diversity means an adverse effect on biological diversity that:

(a) Is a result of human activities involving LMO's; and

(b) relates in particular to species and habitats protected under national law or international law; and

(c) Is measurable or otherwise observable taking into account, wherever available, baseline conditions; and

(d) Is significant as set out in paragraph 3 below.

2. For the purposes of this decision, damage to the sustainable use of biological diversity means an adverse effect on biological diversity that:

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

(b) Has resulted in loss of income; and

(c) Is significant as set out in paragraph 3 below.

3. A "significant" adverse effect on the conservation and sustainable use of biological diversity is to be determined on the basis of factors, such as:

(a) The long term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonably short period of time; and/or

(b) A qualitative or quantitative reduction of components of biodiversity, and in relation to sustainable use of biodiversity, their potential to provide goods and services.

Operational text 2

1. For purposes of the valuation of damages for ascertaining the loss of biodiversity, account must be taken of the baseline conditions obtaining before the damage, including the natural and human induced variations other than those caused by LMOs.

2. The baseline conditions may be proved by statistical, traditional, historical, or such other evidence as may be considered appropriate.

Operational text 3

For the purpose of this document:

(a) Damage to biological diversity means any measurable change that result in adverse effect, considering the definition of "biological diversity" in article 2 of the Convention on Biological Diversity.

(b) Damage to sustainable use of biological diversity means any decrease in the potential of the use of any of the components of the biological diversity, to meet the needs and aspirations of the present and future generation.

Operational text 4

1. Damage means an adverse or negative change in the conservation and sustainable use of biological diversity or its components, as well as any socio-economic considerations arising from damage to biological diversity consistent with Article 26 of the Protocol. The adverse or negative change in biological diversity must be present over a period of time and cannot be redressed through natural recovery within a reasonable period of time.

2. (a) In order for compensation to be available, a threshold of significant or substantial damage must be exceeded, as measured against a baseline of the condition or conditions that would have existed had the incident not occurred.

(b) As part of this determination, both natural processes and those that result from human activities must be taken into account.

Operational text 5

1. Valuation of damage shall be measured in relation to established scientific baselines.

2. Damage to conservation and sustainable use of biological diversity will need to be 'significant' or 'serious'.

Operational text 6

To constitute damage to the conservation and sustainable use of biological diversity, there must be a change to the conservation and sustainable use of biological diversity that is adverse, significant and

measurable, within a timescale meaningful in the particular context, from a baseline established by a competent national authority that takes into account natural variation and human-induced variation.

Operational text 7

1. When valuing damage, damage to biodiversity may take into account any baseline information that the Competent National Authority took into account pursuant to any risk assessment required by the Protocol and any applicable national laws.

2. There shall be no threshold applicable to the assessment of damage.

B. Possible approaches to valuation of damage to conservation of biological diversity/environment

(a) Costs of reasonable measures taken or to be taken to restore the damaged components of biological diversity/environment:

(i) Introduction of original components;

(ii) Introduction of equivalent components on the same location, for the same use, or on another location for other types of use;

(b) Monetary compensation to be determined on the basis of criteria to be developed.

Operational text 1

1. In the valuation of the damage to the environment the following, amongst other matters, shall be taken into account:

(a) costs of reasonable measures of reinstatement or remediation of the impaired environment, where possible, measured by the costs of measures actually taken or to be undertaken, including introduction of original components;

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

(c) costs of response measures, including any loss or damage caused by such measures;

(d) costs of preventive measures, including any loss or damage caused by such measures;

(e) a monetary value for the loss during the period when the damage occurs and the environment is restored as required in (a) and (b);

(f) a monetary value representing the difference in the value of the environment as reinstated under (a) or (b), and the value of the environment in its undamaged or impaired state; and

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

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

Operational text 2

1. In the valuation of the damage to the conservation of biological diversity the following, among other, shall take into account:

(a) exchange value (relative price in the market);

(b) utility (the use value, which can be very different from the market price);

(c) importance (appreciation or emotional value attached).

2. Damage to conservation of biological diversity shall be valued case by case on the cost of restoration and monetary compensation, taking into account the complexity of the biological systems.

Operational text 3

1. The primary mechanism for valuation of damage is to determine the cost of measures taken to restore the damage to biological diversity or its components to its baseline conditions.

2. After restoration is addressed, additional monetary compensation may be considered where baseline conditions cannot be restored. Where baseline conditions cannot be restored, alternative mechanisms for evaluating further monetary conditions may be considered, including market valuation or value of replacement services.

Operational text 4

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

Operational text 5

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

(a) Introduction of original components; or

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

C. Issues for further consideration ~~with respect to valuation of damage~~

(a) Obligations to take response and restoration measures

Operational text 1

1. In the event of damage, the liable person should take response measures.

2. The liable person should be required by domestic law to take such response measures. This is without prejudice to a primary and general obligation of affected persons to minimise damage as far as possible and feasible.

3. For the purposes of this decision, response measures are actions to minimise, contain or remedy damage, as appropriate.

4. The damage to conservation and sustainable use of biodiversity is valued on the basis of the costs of response measures, eventually undertaken or to be undertaken, to remedy it.

Operational text 2

1. The Contracting Party where the damage occurs may require any legal person or entity responsible for the damage to take response measures as may be required to abate, reinstate, or remediate the impaired environment.

2. The legal person or entity shall take the measures required.

3. If the legal person or entity fails to take the response measures as required, the Contracting Party where the damage occurs may undertake, or propose to undertake, the measures; in such an event, the legal person or entity shall pay the reasonable costs of these measures.

Operational text 3

1. Operators responsible for activities covered by this instrument that may cause or has caused damage as defined above, shall take the necessary measures to prevent, minimize, mitigate or repair the damage.

2. Such measures shall comprise assessment, reinstatement or restoration through the introduction of original components of biological diversity or, if this is not possible, introduction of equivalent components on the same location for the same use, or on another location for other types of use.

3. If the necessary measures are not taken by the operator responsible, the affected individuals, communities or the authorities of the State in which the damage occurs, may, in accordance with domestic law, take such measures at the cost of the responsible operator.

Operational text 4

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

Operational text 5

National law shall require that any person in operational control of LMOs at the time of an incident shall take all reasonable measures to mitigate the damage arising therefrom.

Operational text 6

1. Operators responsible for activities covered by this instrument that may cause or has caused damage as defined above, shall take the necessary measures to prevent, minimize, mitigate or repair the damage.

2. Such measures shall comprise assessment, reinstatement or restoration through the introduction of original components of biological diversity or, if this is not possible, introduction of equivalent components on the same location, for the same use, or on another location for other types of use.

3. If the necessary measures are not taken by the operator responsible, the affected individuals, communities or the authorities of the State in which the damage occurs, may, in accordance with domestic law, take such measures at the cost of the responsible operator.

Operational text 7

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

(b) Special measures in case of damage to centres of origin and centres of genetic diversity to be determined

Operational text 1

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

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

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

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

Operational text 2

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

Operational text 3

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

(c) Valuation of damage to sustainable use of biological diversity, human health, socio-economic damage and traditional damage

Operational text 1

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

(a) shall be taken into account:

(i)

(ii) etc.

(b) may be taken into account:

(i)

(ii) etc.

Operational text 2

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

III. CAUSATION

Issues for further consideration:

(a) Level of regulation (international/or domestic level);

(b) Establishment of the causal link between the damage and the activity:

(i) Test (e.g. foreseeability, direct/indirect damage, proximate cause, vulnerability clause);

(ii) Cumulative effects;

(iii) Complexity of interaction of LMOs with the receiving environment and time scales involved;

(c) Burden of proof in relation to establishing the causal link:

(i) Relaxation of burden of proof;

(ii) Reversal of burden of proof;

(iii) Burden of proof on exporter and importer.

Operational text 1

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

or

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

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

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

Operational text 2

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

or

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

Operational text 3

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

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

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

Operational text 4

1. Any operator that causes damage that alone or in combination with other causes may have caused the damage, shall be recognized as having caused such damage unless it is established that another cause is more likely.

2. Any operators responsible for activities covered by this instrument which individually or together are sufficient to cause the damage, shall be severally liable.

3. If it can be established that other causes of damage have predominantly contributed to the damage, liability for a less significant cause of damage may cease or be proportionately reduced to the extent reasonable. In evaluating the contribution of the operator causing such damage, the type and extent of the operators activity and other relevant circumstances shall be taken into account.

Operational text 5

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

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

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

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

Operational text 6

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

2. A causal link between the damage and the activity based on scientific evidence shall be required.

3. The burden of proof shall be on the entity alleging that damage has been suffered.

Operational text 7

1. There must be a causal link established between the activity/incident and the damage incurred.

2. When considering the causal link between an incident and the damage, the following must be taken into account, *inter alia*:

(a) Cumulative effects;
(b) Intervening events;
(c) Self-regeneration of ecosystems;
(d) Complexity of the interaction of LMOs with the receiving environment and timescales involved.

Operational text 8

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

Operational text 9

1. "Effect" includes (a) any direct or indirect effect, (b) any temporary or permanent effect, (c) any chronic or acute effect, (d) any past, present, or future effect; and (e) any cumulative effect which arises over time or in combination with other effects.

2. "Occurrence" means any occurrence or incident, or series of occurrences or incidents having the same origin, that causes damage or creates a serious threat of damage; and includes any act, omission, event or circumstance, foreseen or unforeseen, resulting from or following any transboundary movement of any living modified organism.

3. Damage shall include direct or indirect damage.

4. There shall be presumption that:

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

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

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

IV. CHANNELLING OF LIABILITY, ROLE OF PARTIES OF IMPORT AND EXPORT, STANDARD OF LIABILITY

A. Possible approaches to channelling of liability

(a) State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol);

(i) There is no need to develop special rules for State responsibility;

(ii) There is a need to clarify in any rules and procedures under Article 27 of the Protocol that the general rules of international law for State responsibility continue to apply.

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

~~*Option 1*~~

~~Primary State liability~~

Option 2

Residual State liability in combination with primary liability of operator

Option 3

No State liability

(c) Civil liability (harmonization of rules and procedures);

(d) Administrative approaches based on allocation of costs of response measures and restoration measures.

(a) State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol);

Argentina:
The current state of affairs is set out, to a great extent, in UNGA Resolution 56/83, which adopts the draft instrument on State Liability for Internationally Wrongful Acts, developed by the United Nations International Law Commission (ILC).

EU:
The EU fully acknowledges the applicability of the concept of state responsibility for internationally wrongful acts, including breach of obligations of the Protocol. There is no need to formulate special rules and procedures on state responsibility under Article 27 CPB. The concept of state responsibility by itself, however, does not suffice in addressing the pertinent issues related to Article 27 CPB.

Sri Lanka:
[a] and (b) taken.

Global Industry Coalition (GIC):
(a) State responsibility
Party (State) responsibility for wrongful acts that cause damage to the conservation and sustainable use of biological diversity resulting from the transboundary movements of LMOs should be ensured.

Greenpeace International:

Article 49. State Responsibility
The Protocol shall not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to State responsibility.

Public Research and Regulation Initiative (PRRI):
Finally, we note that views are requested on the topic of state responsibility (Section IV). We believe that whether and how this is addressed at the international level is a matter best left to governments to resolve. But we do wonder, if regulations or liability regimes block the use of biotechnology, who will be held liable for the loss of the opportunity for increased food production or better health care? Have States considered their responsibilities from this point of view?

South African Civil Society:
We believe (a) to be superfluous because the State is in any event responsible when it breaches an international obligation such as if it fails to comply with an existing duty under international law.

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

~~*Option 1*~~

~~Primary State liability~~

Option 2

Residual State liability in combination with primary liability of operator

Option 3

No State liability

Argentina:
The only case in which liability is directly attributed to the State is under the Convention on International Liability for Damage Caused by Space Objects, which can be explained by the special circumstances in which the Convention was adopted, since the States provided and desired, for political reasons inherent to space activities, that such activities be carried out by States, to the exclusion of individuals.

According to ILC reports, neither State practice nor international jurisprudence provide a clear and explicit basis for compensation for activities that involve risk and produce damage through accidents, when said accidents have occurred despite having taken advisable precautions.

We therefore support Option (3) No State liability.

EU:
The EU does not see merit in establishing primary or residual state liability in the rules and procedures under Article 27 CPB.3 Therefore the EU favours Option 3 – no State liability. All activities should internalise all their costs, in accordance with the polluter pays principle, and activities related to the transboundary movement of living modified organisms should not become an exception to this. Accordingly, liability for damage should primarily be vested in the person or persons responsible for the carrying out of an action related to the transboundary movement of living modified organisms that may be directly or indirectly at the origin of damage.

3/ See submission of the European Union of February 2005 and Council conclusions adopted on 10 March 2005.

Section IV.B (issues relating to civil liability) provides further elements with respect to the concept of a civil liability regime. However, in order to provide more information on the administrative approach set out in above, we thought it would be useful to provide an example of the EC Environmental Liability Directive (ELD), which does not provide for a classic 'civil liability regime' by which an injured party can claim compensation before a court of law (art. 3.3). Instead the ELD puts forward the concept of 'environmental liability' and focuses on the prevention and remediation of environmental damage by establishing a number of obligations on operators and on public authorities.

- The ELD is based on the "polluter pays principle": it stresses the need for the operator4 to take all necessary preventive and remedial measures and to bear their costs (Articles 5, 6). A different allocation of the costs is possible under the ELD but only under specific circumstances (Article8).
- "Competent (public) authorities" play a fundamental role in order to ensure that environmental damage is prevented and repaired and have specific duties under the ELD. These include the duty to establish which polluter has caused the damage (or the imminent threat of damage), to assess the significance of the damage, to determine which remedial measures should be taken (art 11). Competent authorities may also take themselves the necessary preventive or remedial measures on a subsidiary basis (Arts. 5.4 and 6.3) and then recover the costs from the operator.

Indonesia:
As to allocation of damage, we agree with that proposed by European Community, that liability for damage should primarily be vested in the person(s) responsible for the carrying out of an action related to the transboundary movement of LMOs that may be directly or indirectly at the origin of damage (polluter-pays-principle).

It is also possible that there may be other persons responsible depending on the nature of the measures to be taken and upon their role in LMO related activities causing damage to biological diversity or human and animal health.
We disagree with the notion of State liability and State responsibility stated in liability and redress regime, because it contradicts to our national laws and regulations concerned. The one who has the right to make claims for damage resulting from transboundary movements of LMOs is the government and or a provate organization or an association if the laws and regulations so provide.

Sri Lanka:
[a] and (b) taken.
In (b) option 1 and 2 taken, 3 excluded.

Global Industry Coalition (GIC):
Parties (States) have the legal responsibility and obligation under the Protocol for reviewing and permitting the use of LMOs within their sovereign domain and for decisions/approvals for imports on the basis of a scientific risk assessment. If the State is at fault, it is only logical that it bear the primary responsibility for any damage caused. Where both an operator and the State are found to be at fault, Option 2 would be appropriate.

Organic Agriculture Protection Fund (OAPF):
Option 1.

4/ For the purpose of the Directive 'Operator means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity" (art 2.6)

South African Civil Society:
In regard to (b), our understanding is that it is a general principle of international law that States are under an obligation to protect within their own territory the rights of other States to territorial integrity and inviobility (Trial Smelter Arbitration). Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration both recognise the general duty of States for transboundary harm. This obligation means that States must take measures to prevent the occurrence of transboundary environmental harm and where harm does occur, to redress the consequent damage. Even if private individuals cause the environmental injury in their personal capacity, States still have the obligation to prevent the harm by taking appropriate measures by exercising due diligence to prevent private individuals from causing environmental harm.

We do not, however, believe that if a State has discharged its international law "state responsibility" obligations that it should be liable for damages arising from GMOs. The central issue for us is, where does State responsibility end and the liability of a third party begin, if a decision is said to have been made on the basis of the precautionary principle to allow GMOs to be imported and used in the Party of import. This is extremely important because the pressures on governments in the South to approve GM applications are enormous, particularly when considering that many risk assessment, which ostensibly makes a prima facie case that the GMO is risk free?

Arguably, an aggrieved person will always have the right to sue its own government for failure to protect it from the risks posed by GMOs. An international regime cannot take away this right. Thus, we do not believe that an international regime should pin any liability on the State and we thus favour option [(b)]

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

Norway:
Favours option [(c)], namely civil liability. This is in line with the polluter pays principle and entails that all activities should internalise their costs, including activities related to transboundary movements of LMOs.

Global Industry Coalition (GIC):
As noted in the introduction, creation of a transnational process regime that helps to provide some harmonization of procedural aspects relating to liability for damage to the conservation and sustainable use of biodiversity and/or the administrative approach mentioned here may merit further exploration. These are possible outcomes, however, not elements of a liability system**.**

South African Civil Society:
We need more information on option [(c) and (d)], and therefore, make no comments here

(d) Administrative approaches based on allocation of costs of response measures and restoration measures.

Global Industry Coalition (GIC):
As noted in the introduction, creation of a transnational process regime that helps to provide some harmonization of procedural aspects relating to liability for damage to the conservation and sustainable use of biodiversity and/or the administrative approach mentioned here may merit further exploration. These are possible outcomes, however, not elements of a liability system**.**

South African Civil Society:
We need more information on option [(c) and (d)] and therefore, make no comments here

B. Issues relating to civil liability

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

(a) Type of damage;

(b) Places where damage occurs (e.g. centres of origin and centres of genetic diversity);

(c) Degree of risk involved in a specific type of LMO as identified in risk assessment

(d) Unexpected adverse effects;

(e) Operational control of LMOs (stage of transaction involving LMOs).

(a) Type of damage

Argentina:
Only damage to the conservation and sustainable use of biological diversity shall be considered.

Sri Lanka:
(a) to (e) all taken.

Organic Agriculture Protection Fund (OAPF):
All, from (a) to (e).

South African Civil Society:
We are not convinced of the relationship between the type of damage and the identity of the person liable. We are of the view that the nature of the liability should be strict irrespective of where that damage has occurred. The nature of the damage becomes important in respect to valuation of the damage and whether or not criminal sanctions should be imposed for instance, in the context of damage to centres of origin and diversity.

(b) Places where damage occurs (e.g. centres of origin and centres of genetic diversity);

Argentina:
It is not considered necessary to provide for special rules for certain types of places.

Sri Lanka*:*
(a) to (e) all taken.

Organic Agriculture Protection Fund (OAPF):
All, from (a) to (e).

(c) Degree of risk involved in a specific type of LMO as identified in risk assessment

Argentina:
This may be considered, taking into account that a given LMO may not have the potential to produce damage in a given country, but it may have it in another.

Sri Lanka:
(a) to (e) all taken.

Organic Agriculture Protection Fund (OAPF):
All, from (a) to (e).

South African Civil Society:
We are extremely wary of using risk assessment as a standard of measure for liability. It is common cause that testing and assessment of GMOs is left up to the developer of the transgenic organism because there are no standardised agreed-upon protocols for such testing. Many developing countries like South Africa rely heavily on the approvals granted by the Environment Protection Agency (EPA) in the US, who test *inter alia*, for allergenicity of pesticidal proteins etc. However, the protocols used by the EPA are out-dated and fail to meet international standards as expressed in FAO-WHO (Food and Agriculture Organistion, World Health Organisation).

We also note that "Degree of risk" also appears to convey notions of 'acceptable levels of risk' a concept we do not support in the context of GMOs, given the infancy of the technology and the significant gaps in current scientific knowledge about the safety of GMOs.

(d) Unexpected adverse effects

Argentina:
Effects that could not reasonably have been foreseen according to the "state of the art" should not generate liability.

Sri Lanka:
(a) to (e) all taken.

Organic Agriculture Protection Fund (OAPF):
All, from (a) to (e).

South African Civil Society:
We are not sure how the issue of unexpected adverse effects in (d) will be factored into the discussion underway. We, however, oppose any provision that mitigate liability on the grounds that unexpected adverse effects occurred, which were not/could not have been anticipated or identified during the risk assessment by the developer and risk evaluation by the authorising entity. Such an approach has the potential to undermine the legitimacy of the precautionary principle.

(e) Operational control of LMOs (stage of transaction involving LMOs)

Argentina:
Should be considered for the purpose of determining who is in the best position to prevent damage.

Sri Lanka:
(a) to (e) all taken.

Global Industry Coalition (GIC):
Operational control is a key factor in assigning liability: causation is the key to any liability system. No predetermination of liability linked to specific "stages" of transactions can therefore be made because where the fault lies, if at all, would depend on the facts and circumstances of a particular case.

Organic Agriculture Protection Fund (OAPF):
All, from (a) to (e).

South African Civil Society:
We appreciate the need to take into account the circumstances of operational control of LMOs and support this inclusion as is more fully discussed below. We are, however, mindful that damages are likely to manifest several years when several actors in the chain of liability may no longer exist.

2. Standard of liability and channelling of liability

(a) Fault-based liability:

(i) Any person who is in the best position to control the risk and prevent the damage;

(ii) Any person who has operational control;

(iii) Any person who does not comply with the provisions implementing the Biosafety Protocol;

(iv) Any entity who has the responsibility to put in place the provisions for implementing the Protocol.;

(v) Any person to whom intentional, reckless or negligent acts or omissions can be attributed;

(b) Strict liability:

Option 1

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

(a) The developer

(b) The producer

(c) The notifier

(d) The exporter

(e) The importer

(f) The carrier

(g) The supplier

Option 2

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

(a) Fault-based liability:

(i) Any person who is in the best position to control the risk and prevent the damage;

(ii) Any person who has operational control;

(iii) Any person who does not comply with the provisions implementing the Biosafety Protocol;

(iv) Any entity who has the responsibility to put in place the provisions for implementing the Protocol;

(v) Any person to whom intentional, reckless or negligent acts or omissions can be

attributed;

Argentina:
This type of liability is the one that most closely fits the current state of knowledge regarding the risks of transboundary movements of LMOs. It requires that the damage be caused by an intentional or negligent act or omission on the part of the liable person. Liability is channelled toward the person liable for the failure to comply with the duty of care or with obligations under the Protocol. Liability could be concurrent.

Option (ii) could coincide with option (i) and option (v), and these options could concur with option (iii). It would be a question of testing and verifying who is responsible in each specific case.

Option (iv) is not considered appropriate, since there is no necessary verification of a causal link to production of the damage.

The "state of the art" may be taken into consideration as grounds to exclude liability (an action would not generate liability if it could not have been considered dangerous at the time it was carried out)

Indonesia:
We agree with the notion of a fault based regime, so that any accusation to a person deemed liable for damage caused by LMO shall be proven. Besides, it should be some exemptions in cases of natural disasters, war, hostilities, and/or lawful reasons.

Sri Lanka:
Both fault based and strict liability taken.

Global Industry Coalition (GIC):
The normal standard of liability around the world is fault-based liability. As discussed below, departure from this standard is justified and in practice only for ultra-hazardous activities, which is not the case with respect to transboundary movement of LMOs.
To determine fault, courts must assess whether the defendant has breached his legal obligation or duty. The legal obligation or duty placed on technology developers is determined by the risk assessment process. The Parties have a legal obligation to review submissions, assess risk using sound science and make decisions regarding the permitting of LMOs. Persons or entities can only be held responsible for damage resulting from the realization of risks of which they were aware or should have been aware.

Any liability rules to be developed should properly be fault-based. This is the normal approach of virtually every legal system. Under this standard legal approach, liability can only be established over persons who had operational control and are found to have been at fault (intentional, reckless or negligent acts or omissions), based on proof of causation, for actual damage to biodiversity. Fault-based liability promotes care and preventive action both prior to commercialization and in the market place.

Greenpeace International:
Article 5. Fault-Based Liability
Without prejudice to article 4., any person shall be liable for damage caused or contributed to by that person's lack of compliance with the provisions implementing the Convention or the Protocol or by that person's wrongful intentional, reckless or negligent acts or omissions.

Breach of the Convention or Protocol or fault should give rise to liability.

Public Research and Regulation Initiative (PRRI):

If international liability rules are needed to protect biodiversity, the international community should lend support to their development under the CBD as a matter of priority. In all events, if rules are developed under either the CBD or Protocol, they should be based on findings of fault (Section IV.B.2). LMOs are neither inherently risky nor inherently safe. They cannot, with any scientific integrity, be treated the same as nuclear and space activities for which strict liability is reserved.

(b) Strict liability:

Option 1

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

(a) The developer

(b) The producer

(c) The notifier

(d) The exporter

(e) The importer

(f) The carrier

(g) The supplier

Option 2

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

Argentina:
(b) Strict liability (*sine delicto*). As explained in the introduction, this type of regime is only used for substances that are generally recognized as being hazardous, and is not suitable in the case of LMOs.

Ethiopia:
STRICT LIABILITY

1. In the case of LMO that has been commercialized, the holder of the permit to commercialize, and in the case of a LMO that has not been commercialized, the developer shall be liable for any damage caused by that LMO in the Party of import, in other states or areas beyond the limits of national jurisdiction.
2. The Party of export shall be liable for any damage caused by a LMO in the Party of import, in other states or areas beyond the limits of national jurisdiction if the person liable under subarticle 1 of this Article is no longer in existence.
3. The Party of export shall be liable for damage caused by its failure to act in accordance with the obligations under this Protocol or the Cartagena Protocol on Biosafety.

EU:
The EU's deliberations on this issue has been guided by a number of considerations. We have already made reference to the polluter pays principle at paragraph 2 under Section IV.A. We also believe that any regime should be workable and effective, in particular there should be an effective remedy where damage occurs.

The above considerations lead the EU to consider that strict liability should be the point of departure. This position is without prejudice to the allocation of the burden of proof, in respect of establishing the causal link, to either the applicant or defendant (see Section III(c)). Liability should be clearly channelled to one

person, noting that a differentiated approach may need to be taken for different activities relating to LMOS. The liable person should be in a position to pay, either directly or be able to seek recourse against another person or entity, so that the damage may be rectified.

In ensuring that there is an effective remedy, we consider that there is a close link to the issue of financial securities, which will be discussed further in Section VI.

We recognise that it may be necessary to differentiate the different kinds of activities relating to LMOs and identify the person liable accordingly.

Norway:
Favours strict liability, namely regardless of any fault on the person liable. This is also the principle applied in the Norwegian Gene Technology Act.

Norway is in favour of option 1. According to the Norwegian Gene Technology Act the duty to implement measures lies with "the person responsible for the activity", who is defined as the person who produces or uses GMOs within the meaning of the Act. "The person responsible" is a physical or legal person who operates the activity ("operator") from which the GMOs are discharged. In general the person with the duty to provide information or to obtain approval under the Act may be subject to orders under the Act. This is also in line with the polluter-pays-principle.

It is also possible that there may be other persons responsible depending on the nature of the measures to be taken. For example, a transporter would be responsible for taking immediate measures if GMOs escape by accident during transport. However, it is normally the owner or sender who has to pay for measures. Likewise several persons may be held liable for damage resulting from GMOs under the Cartagena Protocol for example the producer; the notifier; the exporter; the importer, the user, the State etc. depending upon their role in LMO related activities causing damage to biological diversity or human health.

Sri Lanka:
Both fault based and strict liability taken.
In strict liability, Option 1 taken, Option 2 excluded.

Global Industry Coalition (GIC):
Strict liability is reserved for activities that are ultra-hazardous and, therefore, is not appropriate in the context of liability rules relating to LMOs. There have been no cases of actual damage to biodiversity caused by LMOs to date, and it is widely recognized that activities involving LMOs are not inherently dangerous or ultra-hazardous. Furthermore, LMOs will have already undergone careful risk assessment procedures, multiple regulatory reviews, and be approved by the importing Party before their first transboundary movement. It should also be noted that strict liability inhibits development and deployment of new technologies because operators cannot avoid liability by exercising due care and rigorous product stewardship.

Greenpeace International:

Article 4. Absolute Liability

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

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

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

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

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

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

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

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

9. 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.

Any defence such as force majeure or Act of God shifts the risk to the victim, or to society or the environment. To allow exoneration from liability in the case of force majeure or Act of God shifts liability from the producer to the damaged farmer and/or public and amounts to a de facto subsidy to the LMO industry. In other words, in case of a natural exceptional phenomenon, the producer would escape liability but the GE-free farmer, or the public, would still suffer the damage, and receive no compensation. Liability should therefore be absolute. LMO exporters and importers have the choice of undertaking the activity and should pay for damage regardless of cause.

The relevance and importance of the precautionary principle is also important in the context of the shifting the burden of proof of damage to those introducing LMOs, and to proving causation.

The polluter pays principle means that all persons responsible for damage must pay (joint and several liability) so if one cannot or does not pay, the others responsible must pay, to ensure compensation is paid.

Liability should be channeled to all parties responsible for export, import and distribution (and related activities) of the LMO, except the farmer, as an end user of a LMO.

International Federation of Organic Agriculture Movements (IFOAM):
Liable for any damage caused by genetic pollution are the owners of the LMOs. Ownership of natural resources, including seed, is not compatible with the principles of organic agriculture – at the same time however those who consider themselves to be owners of LMOs should be kept liable for any damage caused by their produce. Liability therefore should be considered very strict. It is the duty of owners of LMOs to instruct users (i.e. farmers, producers) of their produce in such a manner as to cause no damage. If these instructions fail, or cannot be secured, it is still the owner (rather than the user) who is to be kept liable for any damage caused. To be able to identify the owner of an LMO the LMOs as such should be identifiable in the filed; a precondition that can only be fulfilled through mandatory identification and PCR tests delivered with the release of the LMO by the owner.

Organic Agriculture Protection Fund (OAPF):
Option 1

South African Civil Society:
As we have already discussed, the State is liable in the event of it breaching the customary international law principles and standards and/or breach of any of its obligations under the Biosafety Protocol. Additionally, we have discussed that harm may still arise even in situations where the state has discharged its obligations. International legal instruments 'channel' liability to clearly identifiable person/s such as the 'operator' of the activity causing damage-the person who has the operational control of the activity at the same time of the incident causing damage. However the polluter pays principle demands that the persons who may be responsible for the harm must be held liable. In the case of GMOs, this may include the carriers if they are responsible for the incident that give rise to damage.

The principles of fairness and equity dictate that those who may never obtain control but who profit from the commerce involving GMOs should also be held liable including the producer of the GMO. At the same time, it may be inequitable to hold a host of actors involved in the international grains trade/food aid responsible for damage that occurred as a result of the import of GMOs in the country of import, whereas the liability should rest squarely on the developer of the technology for example.

In the case of commodity imports and commercial releases, it is a fairly simple exercise. The applicants who obtain the commodity import permit or permit to sell GM seeds are usually the patent holders acting on their own or in partnership with the seed company e.g Monsanto and Delta and Pinelands. These companies must be held liable, as the GMOs are theirs, so to speak.

It must also be noted that once a commercial permit to sell GMOs is granted, the Party of import does not have any control over the plantings by farmers and the biosafety measures being taken by them. Competent authorities in developing countries will not be able to track every sale of every bundle of GM seeds and the exchange that takes place thereafter between farmers. The same applies to the import of bulk shipments of GM grain into developing countries. The range of players involved in the handling of the grain is enormous. These people cannot be held liable for any damage that arises. This is common sense. Thus, the liability must attach to the developer of the technology.

For field trials, the situation is more complex because research institutions will most likely be the persons responsible for making the application. The argument that public research institutions will thus proffer in these circumstances is that this approach will stymie investment, research and development. However, safety must come first. So must principles of fairness, equity and justice. If one was to accept that the developer is responsible, than this would also include research institutions, especially for instance, if the transformation has taken place in the country where the release has taken place and the harm has arisen.

We must therefore, open up discussions about the relationship between intellectual property rights, patents and the liability of the patent holders.

We are also of the view that the approach to be taken is one that should be less concerned with tabulating the list of potential players that may be liable and rather look at the nature of the activity involved, the purpose of the transboundary movement and work on the basis of eliminating those players that should not and could not thus be held liable. For instance, the World Food Programme delivering GMO food aid to a country that allows the import of GMOs cannot be held liable for allergic reactions that may take place.

Third World Network (TWN):
Strict liability should apply.
Any one or more of the following, including persons or entities acting on his, her or its behalf, should be held liable depending on the circumstances, including:

(a) the exporter
(b) the Party of export
(c) any person who holds the approval in the Party of export
(d) the developer
(e) the producer
(f) the importer
(g) the carrier
(h) the supplier

The circumstances should include intentional, unintentional and illegal transboundary movement, and should be in respect of damage caused by LMOs for introduction into the environment, LMOs for direct use for food or feed or for processing, LMOs for contained use, and LMOs in transit.

Where the primary liable person cannot be identified, the Party of export should be held liable

3. Exemptions to or mitigation of strict liability

Option 1

No exemptions.

Option 2

Possible exemptions to or mitigations of strict liability:

(a) Act of God/force majeure;

(b) Act of war or civil unrest;

(c) Intervention by a third party (including intentional wrongful acts or omissions of the third party);

(d) Compliance with compulsory measures imposed by a competent national authority;

(e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator;

(f) The "state-of-the-art" in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

Option 1

No exemptions.

Sri Lanka:
Option 1 No exemptions taken.

Organic Agriculture Protection Fund (OAPF):
Option 1

South African Civil Society:
We believe that the issue of exemptions from liability should be carefully considered in the light of the nature of the technology, because whilst an act of God may be justifiable, will this also include the transfer of genetic material by wind?

We prefer that as a general rule, no exemptions or exceptions should be allowed. We thus favour absolute liability.

Option 2

Possible exemptions to or mitigations of strict liability:

(a)Act of God/force majeure;

(b)Act of war or civil unrest;

(c) Intervention by a third party (including intentional wrongful acts or omissions of the third party);

(d) Compliance with compulsory measures imposed by a competent national authority;

(e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator;

(f) The "state-of-the-art" in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

Argentina:
Option 2:
The following options are considered to be suitable:

(a) Act of God/force majeure;
(b) Act of war or civil unrest;
(c) Intervention by a third party
(d) Compliance with compulsory measures imposed by a competent national authority;
(f) The "state-of-the-art" in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

It does not seem appropriate to include e) Permission of an activity by means of an applicable law or a specific authorization issued by the operator, since this mechanism does not fit fault-based or negligence-based liability.

Ethiopia:
EXTENT OF REDRESS
1. Any damage shall be fully redressed or restored. Where complete restoration is not possible, the person that has caused or is liable for the damage shall provide equivalent compensation.

2. The extent of redress under sub-article 1 of this Article may be reduced if the damage occurred:

a. directly due to an act of armed conflict or a hostile activity, except for any armed conflict initiated by that Contracting Party itself;

b. directly due to a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or
c. as a result of a wrongful act of a third party, including the victim.

3. Sub-article 3 (c) of this Article shall not apply if the nature of the damage caused is different from what the Advance Informed Agreement had stated as likely to occur in cases of mishandling or accidental release.

4. Contracting Parties shall cooperate to harmonize their respective national system for assessing damage resulting from the transboundary movement, handling and use of LMOs or their products, and for rehabilitation or restoration of damaged ecosystems.

EU:
The EU recognises that most liability regimes contain a series of exemptions to and/or mitigation of strict liability and thus we favour Option 2 above.

By way of an example, the EU notes that in the EC Environmental Liability Directive the concepts in paragraphs (a) to (b) are classified as exemptions. The concepts in the remaining paragraphs are included in the EC Environmental Liability Directive but are not characterised as exemptions: paragraphs (c) and (d) are defences while (e) and (f) are optional defences.

Norway:
Favours option 2 meaning that some exemptions to or mitigations of strict liability should be allowed, in particular Acts of God/force majeure, Acts of war or hostilities etc.

Sri Lanka:
Option 2 excluded.

Global Industry Coalition (GIC):

The heading of this section incorrectly suggests that defenses and exemptions are relevant only to strict liability. Defenses and exemptions also are standard – and necessary – features in fault-based liability systems.

*(a), (b) and (c):*The identified exemptions and defences for acts beyond the control of a potentially liable party (force majeure, intervention of third parties etc.) are well known to legal systems and must be included in any liability rules to be developed. These exemptions and defences ensure that parties are only held responsible for things within their control and are required for fundamental fairness and to avoid undesired consequences such as discouraging innovation.

(d): A person who has complied with a compulsory order by a competent national authority cannot be held responsible for the consequences since he is compelled by law to comply with any such order

*(e) and (f):*Most legal systems (i.e., fault-based systems) provide for defences where all reasonable action has been taken to prevent damage. These include both the "permit defence," and the "state of the art" defence. These defences render the exposure to loss more predictable and are essential components for insurability. Both defences must be included in any liability rules to be developed.

Third World Network (TWN):
Liability may only be mitigated in the following cases:
1. Damage caused directly by an Act of God where such occurrences could not have been reasonably foreseen and are of an exceptional nature;
2. Damage caused directly by an unforeseeable act of war or civil unrest, unless this is instigated or initiated by the Party;

3. Damage caused wholly by the wrongful intentional act of a third party.
This shall not apply where the damage results from any false, misleading or fraudulent claim or the suppression or omission of any material facts by the person under the obligation to provide such information. - This shall not apply unless it can be shown that the person under the obligation to provide such information has ensured or has taken all reasonable steps to ensure that the third party has understood all material information.

4. Additional tiers of liability in situation where:

(a) The primary liable person cannot be identified;

(b) The primary liable person escape liability on the basis of a defence;

(c) A time limit has expired;

(d) A financial limit has been reached;

(e) Financial securities of the primary liable person are not sufficient to cover liabilities; and

(f) The provision of interim relief is required.

EU:
The issue of additional tiers of liability is closely linked to channelling. We recognise a second tier may be necessary but that further consideration is required.

Sri Lanka:
[(a)] to (f) taken.

Global Industry Coalition (GIC):
(a): It is a fundamental matter of law that where a potentially liable person cannot be identified, then no claim can be brought.

(b), (c) and (d): In situations (b) – (d), the law and fairness would dictate that liability simply does not attach. This is in fact the very essence of time and financial limits as well as exemptions and defences.

*(e):*If a Party (state) is primarily liable, then there should be no issue of financial security. If a private person is primarily liable, then it is imperative that any liability rules to be developed do not prevent that person from obtaining and maintaining insurance; and secondary liability and financial assurance should accrue to the Party (state) based on the legal responsibility to permit the LMO for production or to approve or consent to transboundary movement (export or import).

*(f):*Interim relief, which is of a temporary nature, is available in most, if not all, legal systems but only can be invoked in clear cases in which judicial review results in a finding of imminent and irreversible danger or threats, in this case, to biodiversity.

Organic Agriculture Protection Fund (OAPF):
All, from (a) to (f).

South African Civil Society:
We mention that many international legal instruments also contemplate subsidiary state liability to complement the liability of the operator. This means that the State is required to pay certain sums into funds in order to satisfy liability claims, for example, the Oil Fund Convention 1971 or where the state is held liable when the operator fails to provide adequate compensation under the liability regime as provide by the Vienna Convention 1963.

We believe that the State cannot escape all liability completely and should make contributions towards a compensation fund. However, we are mindful that ultimately, such costs are borne by society, a situation we do not favour either, which cannot be completely avoided if the GMO producing countries are to be singled out, as those that must make such contributions.

Third World Network (TWN):
There should be provision for interim relief, both monetary (e.g. if damage is established but the nature and extent are still unknown) and non-monetary (e.g. injunction). When damage has occurred, there should be an immediate obligation for cessation of the activity that could cause further damage.

5. Issues for further consideration

(a) Combination of fault liability and strict liability;

(b) Recourse against third party by the person who is liable on the basis of strict liability;

(c) Joint and several liability or apportionment of liability

(d) Vicarious liability.

Argentina:
Roles of the importing and exporting Parties
The Protocol recognizes the balance of liability between the exporter and importer within the transboundary movement process. It is therefore considered that this balance should also be maintained in the context of Article 27.

EU:
With respect to (a), the EU notes that if Country sets up a regime of strict liability then any existing national laws would co-exist. These existing laws may be applicable depending on the circumstances of a case. However, we recognise that not all Countries may have such national laws in place and so we are open discussing whether and/or how a regime addresses this issue. Furthermore, we consider that in some situations a differentiated approach may be required and are open to exploring this issue further.

With respect to (b), we think that recourse to a third Party by the person who is liable on the basis of strict liability is important to ensure the effective operation of a regime.

Sri Lanka:
[(a)] to (d) taken.

Global Industry Coalition (GIC):
As noted above, strict liability is not the appropriate standard of liability with respect to biotechnology activities and therefore a combination approach is not appropriate. Recourse against others at fault, however, is a standard legal feature and necessary for fairness in any liability rules to be developed. The doctrine of joint and several liability operates only in cases of indivisible harm. Here the usual requirements for establishing fault and causation for each potentially liable person would apply.

South African Civil Society:
We have already addressed this issue above.

Third World Network (TWN):
There should be a right of recourse among other wrong doers under the liability and redress protocol.

Joint and several liability should apply. If two or more persons are liable, full compensation can be sought from any or all of the persons liable.
Vicarious liability should apply.
There should be provision for the lifting of the corporate veil in order to ascertain the principals. This is for situations including where companies may set up shell companies or claim that they are separate legal entities to avoid liability.

V. LIMITATION OF LIABILITY

Issues for further consideration

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

(b) Limitation in amount including caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined, and to be considered in conjunction with section VI on mechanisms of financial security .

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

Argentina:
Limitation in time: a limitation period should be fixed in respect of the claim.

It would be necessary to set a maximum financial limit for compensation and a time limit for undertaking action to demand redress.

Both options shall be supported: a) Limitation in time, and option b) Limitation in amount including maximum caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined.

Ethiopia:
TIME LIMIT OF LIABILITY

1. No claim for compensation under this Protocol shall be admissible unless it is brought within 10 years from the date when the incident that caused it was first noticed, or within 10 years from the date on which the victim could reasonably be expected to have learned of the damage, taking due account of the time the damage may take to manifest itself or the time needed to correlate the damage with the incident.
2. Where the incident that caused damage consists of a series of occurrences having the same origin, the time limit established pursuant to subarticle 1 of this Article shall start from the date of the last of such occurrences. Where the incident consists of a continuous occurrence, such time limit shall start at the end of that continuous occurrence.

EU:
With respect to (a), limitation of liability in time is a common feature of liability and redress regimes.

In considering an absolute time limit, i.e. the time limit within which an action may be brought, for damage caused by LMOS, it should be taken into consideration that harmful effects may only manifest themselves after a long period of time, and damages due to biological activity of LMOs, or due to the fact that the organisms themselves are living and may reproduce, may only appear after several generations from the (intentional or unintentional) release of LMO. Absolute time limits are distinct from relative time limit, i.e. to the period during which a victim should be allowed to bring a claim after identification of the damage and the person liable. We believe it would be useful to include both relative time limits and absolute time limits in a regime.

Norway:
Both absolute and relative time limits should be considered. For example Norwegian legislation (Act No. 18 of 18 May 1979 relating to Statutory Limitation) has imposed the following time limits:

A statutory limitation which comes into force when the first of the time limits consisting of 3 or 20 years expires. The relative three-year time limit expires three years from the day the injured party obtained or should have obtained the necessary information about the damage and the person responsible. The claim becomes time-barred in any case at the latest 20 years after the damaging action or other grounds for liability ceased.

Sri Lanka:
No limit.

Global Industry Coalition (GIC):

Both relative and absolute time limits are standard features of legal systems and essential components of any liability rules to be developed. A limitations period also promotes vigilance and care by potential claimants concerning their legal rights, results in fewer evidentiary problems, provides predictability for defendants, and, overall, contributes to a well-functioning legal system.

The existence of a statute of limitations also directly affects insurability. It is required in order to gain financial security from the market place, which will not provide coverage for liability for an unlimited amount of time.

Greenpeace International:
Article 14. Time Limitation of Liability

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

It may take time to discover damage. The limitation period should run from when the damage is found, not when it was caused, and should be sufficiently long to allow a reasonable time for a claim to be brought (see article 22.). The time must run from the date of the occurrence of the damage or the date of discovery of the occurrence of the damage, since the damage may take time to manifest itself.

Third World network (TWN):
Limitation in time to bring a claim should run at least 10 years after the person or entity who has suffered the damage knows or ought to have known about the damage, and that it was caused by the LMO in question.
There should be no absolute time limit to bring a claim.
If there are multiple incidents which caused the damage, the limitation in time should run from the last incident.
If the incident takes place over a period of time, the limitation in time should run from the end of the incident.

(b) Limitation in amount including caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined, and to be considered in conjunction with section VI on mechanisms of financial security

Argentina:

It would be necessary to set a maximum financial limit for compensation and a time limit for undertaking action to demand redress.

Both options shall be supported: a) Limitation in time, and option b) Limitation in amount including maximum caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined.

Ethiopia:
EXTENT OF REDRESS
1. Any damage shall be fully redressed or restored. Where complete restoration is not possible, the person that has caused or is liable for the damage shall provide equivalent compensation.
2. The extent of redress under subarticle 1 of this Article may be reduced if the damage occurred:
   a. directly due to an act of armed conflict or a hostile activity, except for any armed conflict initiated by that Contracting Party itself;
   b. directly due to a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or
   c. as a result of a wrongful act of a third party, including the victim.
3. Subarticle 3 (c) of this Article shall not apply if the nature of the damage caused is different from what the Advance Informed Agreement had stated as likely to occur in cases of mishandling or accidental release.
4. Contracting Parties shall cooperate to harmonize their respective national system for assessing damage resulting from the transboundary movement, handling and use of LMOs or their products, and for rehabilitation or restoration of damaged ecosystems.

EU:
With respect to (b), the EU notes that there has been a mixed practice with regard to limitation of liability of amount, some regimes include such a limitation and some do not. Where a limit is include, these are in the form of a fixed limit, which would provide for total harmonisation of national financial limits, or minimum limits, which would only provide for partial harmonisation of national financial limits (a floor). During our consideration of why certain liability instruments have not come into force, we note that providing for unlimited liability in amount is an issue of concern as it is difficult to find insurers willing to cover such unlimited liability. In this regard we note the paper "Status of Third Party Liability Treaties and Analysis of Difficulties Facing Their Entry into Force" (UNEP/CBD/BS/WG-L&R/1/INF/3) presented at the first Open-Ended Working Group on Liability and Redress noted the problems associated with insurability and the high or unlimited liability in amount. In particular, an issue raised with respect to the UNECE Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods By Road, Rail and Inland Navigation Vessels was that the limits of financial liability were too high thus having an impact on insurability.

Sri Lanka:
No limit.

Global Industry Coalition (GIC):
Maximum amounts for which any person could be held liability must be part of any liability rules that may be developed. They are a standard element of liability regimes, including in international instruments. Such liability limitations (also referred to as "caps" or "ceilings") are established in order to strike the right balance between holding persons responsible for harm they may cause and avoiding that legal consequences deter persons from innovation, technological advances and other pursuits that benefit the public as a whole. Establishment of a liability cap enhances legal security and thus creates a more stable environment in which researchers, developers and users can work. A cap on liability also is essential to render a system insurable, and hence, workable.

Public Research and Regulation Initiative (PRRI):

The elements paper seeks views on a variety of components of legal regimes including time limitations (Section V.A(a)), caps on liability (Section V.A(b), and defences (Section IV, 3) which are standard features of nearly all liability regimes. Creation of an international regime that fails to include these standard features, as well as any efforts to reverse the burden of proof (Section III (c)), would significantly restrict public research in modern biotechnology, because of the fear by public researchers and their host institutions of unknown and unlimited liability. As we understand from information provided by Swiss Re, even large companies would be affected because the possibility of limitless and unpredictable liability would prevent them from being able to obtain insurance.

South African Civil Society:
We have already addressed this issue above.

Third World network (TWN):
There should be no upper financial limit.

VI. MECHANISMS OF FINANCIAL SECURITY

A. Coverage of liability

Option 1

Compulsory financial security.

Option 2

Voluntary financial security.

Argentina:
These mechanisms are common elements of strict liability (*sine delicto*) schemes reserved for hazardous substances, and are not applicable in the context of fault-based liability.

Seeing as, in cases of environmental damage, generally more people are entitled to act, since publicly owned goods are affected, and because of the complexity of environmental damage (reflected not only in the impact on the environment as such, but also in the damage disseminated through the environment), coverage of environmental damage is not very attractive to insurance companies.

In Argentina, insurance policy forms approved by the *Superintendencia de Seguros de la Nación* (The Argentine Supervisory Authority for Insurance) are classic models of civil liability. So far, this agency has not authorized any clauses with environmental content that would make it possible to speak of reasonable requirements when requiring for insurance, for example, from a transporter of hazardous waste seeking coverage for environmental damage. In addition, aside from the large multinational companies that have their own reinsurance, national insurers lack the reinsurance that would enable them to cover risks of damage to the environment in an acceptable manner.

Ethiopia:
INSURANCE AND OTHER FINANCIAL GUARANTEES

1. For the purpose of fulfilling its obligation under Article 4 and 5 of this Protocol, the Party of export shall ensure the establishment and maintenance of bonds or other financial guarantees or arrangements that shall be no less than the minimum limit fixed by a decision of the Conference of the Parties serving as the Meeting of the Parties to this Protocol.
2. Proof of coverage of the liability of the persons referred under Article 5 of this Protocol shall be delivered to the Competent Authorities of the Party of import, and the same shall be notified to Parties through the Biosafety Clearing-House.
3. Any claim under this Protocol may be made directly against any person providing bond or other financial guarantees.

EU:
As noted above, we think it useful to examine the paper "Status of Third Party Liability Treaties and Analysis of Difficulties Facing Their Entry into Force" (UNEP/CBD/BS/WG-L&R/1/INF/3) which was presented at the first Open-Ended Working Group on Liability and Redress. In this paper, issues related to insurability were suggested as a reason for why the Basel Protocol on Liability and Compensation and the UNECE Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods By Road, Rail and Inland Navigation Vessels have not entered into force.

In the case of the Basel Protocol, the issue of lack of insurance policies, bonds and financial guarantees to cover the risks associated with transboundary movements of hazardous waste was cited. Along with the comment that many countries indicated that there is no appropriate domestic mechanism to address the financial guarantee/insurance requirements.

Again, the EU 's position is driven by the desire to create a regime that is effective and workable and so we favour Option 2 above. We consider it important to learn the lessons from previous attempts to deal with the complex and difficult issue of liability so that we avoid similar difficulties.

Norway:
According to the Norwegian Gene Technology Act a duty to take insurance or provide financial security for liability may be imposed as a condition in the approval for deliberate release or contained use of LMOs. There is thus a third option to be considered, namely the possibility to pose the requirement of financial security as a condition in the approval of GMOs. This option could take into consideration the likelihood, seriousness and possible costs of damage and the possibilities to offer financial security.

Sri Lanka:
Option 1 Compulsory financial security taken.
Option 2 excluded.
Comments
1. An International Liability fund should be established.
2. Introduction of mandated insurance.
3. Case by case basis depending on the damage caused.

Global Industry Coalition (GIC):
Under any liability rules to be developed, care must be taken to ensure that the requirements do not prevent or inhibit insurability.
The financial responsibility of private parties engaged in businesses involving products of biotechnology is a subject of national corporate law. Most jurisdictions have governing legislation under which companies may do business that includes provisions on financial responsibility. Neither option is therefore acceptable since this matter must be left to national law.

Greenpeace International:
Article 18. Insurance and other Financial Guarantees

1. Exporters, notifiers, importers, distributors, growers, carriers, and other persons liable under article 4. shall establish and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability under article 4. of this Protocol for amounts not less than the minimum limits specified in paragraph [] of Annex I according to the terms and conditions established by the Regulations passed by the Conference of the Parties serving as the meeting of the Parties to this Protocol.
2. A document reflecting the coverage of the liability of the exporter and the notifier under article 4. paragraph 1, of this Protocol or of the importer under article 4., paragraph 2, of this Protocol shall accompany the notification referred to in article 8 or Annex II of the Cartagena Protocol. Proof of coverage of the liability of the exporter and the notifier shall be delivered to the competent national authorities of the State of import.
3. Any claim under this Protocol may be asserted directly against any person providing insurance, bonds or other financial guarantees. The insurer or the person providing the financial guarantee shall have the right to require the person liable under article 4. to be joined in the proceedings.

This article ensures that persons who are liable for damage carry financial guarantees to ensure damages can be recovered from them.

Organic Agriculture Protection Fund (OAPF):
Option 1

Third World Network (TWN):
There should be a clear and mandatory obligation on Parties to ensure that insurance, bonds or other financial guarantees are established and maintained for amounts not less than a minimum limit. Proof of coverage should be provided before an activity takes place.

B. Supplementary collective compensation arrangements

Option 1

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

Option 2

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

~~*Option 3*~~

~~Public fund.~~

Option 4

Combination of public and private funds.

Ethopia:
FINANCIAL MECHANISMS

1. A sustainable and predictable financial mechanism for the implementation of this Protocol shall be established.
2. The financial mechanism shall be used to channel the financial resources necessary to compensate damage in cases where the entity being liable for the damage is entitled to mitigation measures pursuant to Article 4(5), or is no longer in existence, the time limit set under Article 12 has lapsed, or the financial guarantees under Article 8 (1) of this Protocol are insufficient.
3. The Conference of the Parties serving as the Meeting of the Parties to this Protocol shall keep under review the need for and possibility of improving the financial mechanism referred to under subarticle 1 of this Article.

EU:
The EU does not exclude exploring supplementary approaches, in exceptional cases of major accidents or disasters, to compensate for certain damages that could not be redressed otherwise.5

Norway:
Norway does not oppose consideration of possible supplementary approaches to be applied under certain circumstances.

Sri Lanka:
Only option 1 and 4 taken.
Comments:

5/ See submission of the European Union of February 2005 and Council conclusions adopted on 10 March 2005.

1. An International Liability fund should be established.
2. Introduction of mandated insurance.
3. Case by case basis depending on the damage caused.

Global Industry Coalition (GIC):
Funds have serious limitations:
They address damage only after the event and do not, by themselves, create incentives to prevent damage. Prevention of damage should be the focal point of any scheme developed under the auspices of the Protocol. The principle that "prevention is better than cure" is already well acknowledged in international, regional and national laws.

There are also key practical problems that would need to be overcome if funds are to be employed. The prerequisite to establishment of adequate funds is knowledge of the extent of the risk which they aim to cover. Much work still needs to be done to ensure that the risk of exposure to liability is predictable and the extent of potential damages easily quantifiable. Some solutions are discussed in other parts of this document. These difficulties have been discussed at length during the adoption of the EU Directive on Environmental Liability which do not impose any financial security to allow the necessary flexibility for business to operate responsibly.

Greenpeace International:
A fund is essential, to ensure that where a liable party is insolvent or for some other reason does not pay, that damage is not left uncompensated or unremedied. A fund would also cover major disasters or accidents or situations where no party is found liable for any reason.

Article 19. Fund Established

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

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

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

While capacity building is important, in the context of Article 27, so is access to justice, which in practical terms may mean developing States having the capacity to lodge and pursue claims in exporting States and otherwise providing legal aid to victims.

Much language for the Fund is taken from the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.

Article 20. Applicability of Fund
This Part shall apply with regard to compensation according to article 21. to damage caused in areas under the national jurisdiction of a Contracting Party or in areas beyond the limits of national jurisdiction, and to preventive measures taken to prevent or minimize such damage or for reinstatement or remediation of the environment following such damage.

This article ensures wide applicability of the Fund.

Article 21. Payment of compensation and Remediation

1. The Fund shall pay compensation to any person suffering damage if such person has been unable to obtain full and adequate compensation for the damage under this Protocol, either
   (a) because no liability for the damage arises under this Protocol;
   (b) because the party liable for the damage under this Protocol is financially incapable of meeting his obligations in full and any financial security that may be provided under this Protocol does not cover or is insufficient to satisfy the claims for compensation for the damage; a person being treated as financially incapable of meeting that person's obligations and a financial security being treated as insufficient if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under this Protocol after having taken all reasonable steps to pursue the legal remedies available to him;
2. The Fund shall pay the costs of prevention, remediation or reinstatement of the environment where payment for such remediation or reinstatement was not available under this Protocol.
3. The aggregate amount of compensation and prevention, remediation and reinstatement payable by the Fund under this article shall in respect of any one occurrence be limited, so that the total sum of that amount and the amount of compensation actually paid under this Protocol for an occurrence, shall not exceed the amount specified in Annex IV.
4. Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under this Protocol shall be the same for all claimants.
5. The Assembly of the Fund (hereinafter referred to as "the Assembly") may, having regard to the experience of incidents which have occurred and in particular the amount of damage resulting therefrom and to changes in the monetary values, decide that the amount referred to in paragraph 2, shall be increased; provided, however, that this amount shall in no case be decreased. The changed amount shall apply to incidents which occur after the date of the decision effecting the change.
6. The Fund shall, at the request of a Contracting Party, use its good offices as necessary to assist that State to secure promptly such personnel, material and services as are necessary to enable the State to take measures to prevent or damage arising from an occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol.
7. The Fund may on conditions to be laid down in Regulations provide credit facilities with a view to the taking of preventive measures against damage arising from a particular occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol.

This article provides the mechanism for the payment of compensation and remediation.
A maximum is necessary since the Fund's resources will be limited, and since the Fund has no control over activities of exporters, importers and other parties.

Article 22. Time Limitations

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

It may take time to discover damage. The limitation period should run from when the damage is found, not when it was caused, and should be sufficiently long to allow a reasonable time for a claim to be brought (see article 14.).

Article 23. Jurisdiction

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

2. Each Contracting Party shall ensure that its courts possess the necessary jurisdiction to entertain such actions against the Fund as are referred to in paragraph 1.
3. Where an action for compensation for damage has been brought before a court competent under article 8. of this Protocol, such court shall have exclusive jurisdictional competence over any action against the Fund for compensation under the provisions of article 21. of this Convention in respect of the same damage.
4. Each Contracting State shall ensure that the Fund shall have the right to intervene as a party to any legal proceedings before a competent court of that State against a person who may be liable under article 4. of this Protocol.
5. Except as otherwise provided in paragraph 6, the Fund shall not be bound by any judgment or decision in proceedings to which it has not been a party or by any settlement to which it is not a party.
6. Without prejudice to the provisions of paragraph 4, where an action under this Protocol for compensation for damage has been brought before a competent court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgment rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgment was given, become binding upon the Fund in the sense that the facts and findings in that judgment may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.

These provisions establish jurisdiction over actions for compensation against the Fund.

Article 24. Enforcement

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

This article provides for enforcement of judgments against the Fund.

Article 25. Subrogation

1. The Fund shall, in respect of any amount of compensation for damage paid by the Fund in accordance with article 21., paragraph 1, of this Protocol, acquire by subrogation the rights that the person so compensated may enjoy under the Protocol against any person who may be liable under article 4. of this Protocol.
2. Nothing in this Convention shall prejudice any right of recourse or subrogation of the Fund against persons other than those referred to in the preceding paragraph. In any event the right of the Fund to subrogation against such person shall not be less favourable than that of an insurer of the person to whom compensation or indemnification has been paid.
3. Without prejudice to any other rights of subrogation or recourse against the Fund which may exist, a Contracting Party or agency thereof which has paid compensation for damage in accordance with provisions of national law shall acquire by subrogation the rights which the person so compensated would have enjoyed under this Protocol.

This article ensures the Fund can recover damages against those responsible.

Article 26. Assessment of Contributions

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

2. For the purposes of paragraph 1, where the value of living modified organisms exported by any person in a calendar year when aggregated with the value of living modified organisms by any associated person or persons exceeds the amount specified in Annex II, such person shall pay contributions in respect of the actual quantity received by him notwithstanding that that value did not exceed the amount specified in Annex II.
3. "Associated person" means any subsidiary or commonly controlled entity. The question whether a person comes within this definition shall be determined by the national law of the Party concerned.

This article makes provision for contributions to the Fund.

Article 27. Quantum of Contributions

1. In respect of each Contracting Party initial contributions shall be made of an amount which shall for each person referred to in article 26. be calculated on the basis of a fixed sum proportionate to the value of the living modified organisms exported during the calendar year preceding that in which this Convention entered into force for that State.
2. The sum referred to in paragraph 1 shall be determined by the Assembly within three months after the entry into force of this Protocol. In performing this function the Assembly shall, to the extent possible, fix the sum in such a way that the total amount of initial contributions would, if contributions were to be made in respect of 90 per cent of the quantities of living modified organisms exported throughout the world, equal ____ million SDR.
3. The initial contributions shall in respect of each Contracting Party be paid within three months following the date at which the Protocol entered into force for that Party.

This article sets contributions to the fund according to exports of LMOs.

Article 28. Budget

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

(i) Expenditure

(a) costs and expenses of the administration of the Fund in the relevant year and any deficit from operations in preceding years;
(b) payments to be made by the Fund in the relevant year for the satisfaction of claims against the Fund due under article 21., including repayment on loans previously taken by the Fund for the satisfaction of such claims, to the extent that the aggregate amount of such claims in respect of any one incident does not exceed the amount specified in Annex I;

(ii) Income

(a) surplus funds from operations in preceding years, including any interest;
(b) initial contributions to be paid in the course of the year;
(c) annual contributions, if required to balance the budget;
(d) any other income.

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

This article sets a Budget for Fund and sets allocations of contributions

Article 29. Assessment of Contributions

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

This article sets mechanisms for the collection of assessed contributions and enforcement action.

Article 30. Fund Bodies

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

This article establishes the institution of the Fund.

Article 31. Assembly Functions

The functions of the Assembly shall be:

1. to elect at each regular session its Chair and two Vice-Chairmen who shall hold office until the next regular session;
2. to determine its own rules of procedure, subject to the provisions of this Protocol;
3. to adopt Internal Regulations necessary for the proper functioning of the Fund;
4. to appoint the Director and make provisions for the appointment of such other personnel as may be necessary and determine the terms and conditions of service of the Director and other personnel;
5. to adopt the annual budget and fix the annual contributions;
6. to appoint auditors and approve the accounts of the Fund;
7. to approve settlements of claims against the Fund, to take decisions in respect of the distribution among claimants of the available amount of compensation in accordance with article 21., paragraph 3, and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of damage are compensated as promptly as possible;
8. to elect the members of the Assembly to be represented on the Executive Committee.
9. to establish any temporary or permanent subsidiary body it may consider to be necessary;
10. to determine which non-Contracting States and which inter-governmental and international non-governmental organizations shall be admitted to take part, without voting rights, in meetings of the Assembly, the Executive Committee, and subsidiary bodies;
11. to give instructions concerning the administration of the Fund to the Director, the Executive Committee and subsidiary bodies;
12. to review and approve the reports and activities of the Executive Committee;
13. to supervise the proper execution of the Convention and of its own decisions;

14. to perform such other functions as are allocated to it under the Convention or are otherwise necessary for the proper operation of the Fund.

This article establishes the functions of the Assembly.

Article 32. Sessions of Assembly

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

This article establishes the Assembly sessions.

Article 33. Quorum

A majority of the members of the Assembly shall constitute a quorum for its meetings.
[other mechanical provisions as necessary]

Organic Agriculture Protection Fund (OAPF):
Option 1

South African Civil Society:
We are aware of the submissions made by Swiss Re (May 2005), which clearly imply that the risks associated with GMOs under a liability Protocol are uninsurable. Furthermore, even if such risks were insurable, when a risk manifests itself as a loss, insurance can only pay indemnity in the form of money, and therefore, the only risks that qualify as insurable are those that are generally accepted, and about which there is consensus as to the value of a damaged entity and the way a loss can be compensated. Crucially, if the liability instrument should demand compulsory insurance, this requirement will only bind the liable party, and the insurance company may still limit or decline to provide cover.

In the circumstances we are of the view that issues of coverage of liability should go beyond merely requiring compulsory insurance by the identified liable person. We are of the view that an international indemnification fund should be established with contributions from the biotechnology industry, and other actors benefiting from the international commerce involving GMOs, as well as those countries that have approved activities (imports, exports, release) in relation to GMOs. However, since the contributions by the State come from public spending budgets, we believe that their contributions should only be used in circumstances where the liable person is unable to meet its obligations. We are aware that the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (also referred to as the HNS Convention) creates an international indemnification fund.

Third World Network (TWN):
There should be a fund set up under the liability and redress protocol. The fund can be used to ensure redress in situations where redress was not fully obtainable including where:

- the liable person is bankrupt or ceases to exist
- a time limit has expired
- financial securities of the primary liable person are not sufficient to cover liabilities
- the primary liable person escapes liability on the basis of a defence.

B. Issues for further consideration

(a) Modes of financial security (insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees).

(b) Institutional modalities for the operation of a fund.

Sri Lanka:
(a) and (b) taken.

Global Industry Coalition (GIC):
See response to A above.

South African Civil Society:
We have already discussed our reservations concerning compulsory insurance, although we are aware that these have been imposed by the Oil Pollution Liability and Compensation: Convention on Civil Liability for Oil Pollution Damage 1969 ("CLC") and Basel Protocol on Liability and Compensation Resulting from the Transboundary Movement of Hazardous Wastes and their Disposal ("Basel Liability Protocol"). Elaborate rules already exist under the CLC for States to ensure that the person/s potentially liable take out the compulsory insurance and provide adequate evidence of the insurance or other cover.

Whilst bonds or other financial guarantees may also be acceptable if the insurers or other financial institutions can be sued directly, and in circumstances where the defences available to these institutions are circumscribed to limit their opportunities to avoid lengthy litigation and avoidance of liability.

We reiterate though, that we prefer the establishment of a fund. Access to justice is a critically important principle that must be factored into these discussions. The establishment of *inter alia*, strict liability, clearly identifiable persons who will be liable, clear criteria for the valuation of liability and speedy access to a compensation fund without recourse to courts and litigation, is of utmost importance.

VII. SETTLEMENT OF CLAIMS

Optional procedures

(a) Inter-State procedures (including settlement of disputes under Article 27 of the Convention on Biological Diversity);

(b) Civil procedures:

(i) Jurisdiction of courts or arbitral tribunals;

(ii) Determination of the applicable law;

(iii) Recognition and enforcement of judgments or arbitral awards.

(c) Administrative procedures;

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

Argentina:
It is premature to move forward with regard to these procedures until other elements are defined, such as the type of instrument.

Ethiopia:
MUTUAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS
A judgment awarded by a competent court of a Contracting Party shall be enforced by other Contracting Parties, except where the judgment is irreconcilable with an earlier judgment validly pronounced in another Contracting Party with regard to the same incident and the same litigants.

EU:
By way of an example, it might be useful to share experience of the EC Regulation on jurisdiction, recognition and enforcement of judgements on civil and commercial matters, whose objectives are to determine the international jurisdiction6 of the courts in the Member States which are bound by it and to facilitate recognition and enforcement of judgments issued in another Member State by creating a simple and uniform procedure and by limiting the grounds on which recognition and enforcement of a foreign judgment can be refused.

Indonesia:
In regard to dispute settlement, we fully agree with the provision of Article 27 CBD.

Norway:
Like any civil liability regime, also the Cartagena Protocol regime should contain provisions with regard to recognition and enforcement of judgments in relation to damage caused by transboundary movements of LMOs. The issue of jurisdiction has two aspects: a) determining the competent court to entertain claims for compensation and b) ensuring the recognition and enforcement of judgments arrived at by such a competent court in the territories of the contracting Parties. Examples of relevant provisions can be found in *inter alia* the Basel Protocol dealing with liability for transboundary movements of hazardous

6/ Under Regulation 44/2001 the competent jurisdiction is generally based on principle of the defendants' domicile, alternative grounds of jurisdiction are provided for well-defined cases[1] i.e. for the place where an harmful event occurred (art 5.3). Special rules for jurisdiction are also laid down for specific matters i.e. relating to insurance and consumer contracts.

waste, which leaves to the victim the choice of which competent court to seize. Once judgment is delivered it should be recognised as binding in the respecting territories of Parties, and a victim should be able to enforce it in any of those Parties.

Sri Lanka:
(a) to (d) all taken.

Greenpeace International:
Article 8. Jurisdiction and Applicable Law

1. Primary jurisdiction over actions under this Protocol shall lie with the courts of the Contracting Party where the damage occurs.

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

3. Jurisdiction over actions under this Protocol shall also lie with the courts of the Contracting Party where the occurrence took place, where the defendant has his habitual residence or has his principal place of business.7/

4. All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in this Protocol shall be governed by procedural and substantive law of that court.8/ The nature, form and extent of the compensation, as well as the equitable distribution thereof, shall be governed by that law, and shall be consistent with this Protocol.

5. Each Contracting Party shall (a) ensure that its courts possess the necessary competence to entertain claims for compensation under this Protocol and (b) shall adopt the legislative measures necessary to ensure that the laws provide for compensation according to this Protocol and according to any harmonizing recommendations made by the Assembly under article 15.

This article allocates jurisdiction, firstly to where the damage occurred, and if the damage occurred e.g. in the high seas, to the State most closely connected with the damage.

Jurisdiction where the defendant is resident may be necessary to ensure recovery of damages.

Article 10. Lis Pendens

1. Where proceedings involving the same or similar cause of action and between the same or substantially the same parties are brought in the courts of another Contracting Party or Parties, any court other than the court described in paragraphs 1 and 2 of article 8. shall of its own motion stay its proceedings unless and until the court described in paragraphs 1 and 2 article 8. rules that it does not have jurisdiction under this Protocol.
2. Where the jurisdiction of the court described in paragraphs 1 and 2 is established by that court, any court other than that court shall decline jurisdiction in favour of that court.
3. When there are two or more courts described in paragraphs 1 and 2 of article 8, then any court other than the court described in paragraphs 1 and 2 of article 8. and first seized of the case shall of its own motion stay its proceedings unless and until the court first seized of the case rules that it does not have jurisdiction under this Protocol. Where the jurisdiction of the court first seized of

7/ Basel Protocol art 17.

8/ Basel Protocol art 19.

the case is established by that court, any court other than that court shall decline jurisdiction in favour of that court.14/

These provisions are drawn mainly from the Lugano Convention, and are addressed at resolving scenarios where claims are brought in different countries about the same or similar matters.

Article 11. Related Actions

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

These provisions are taken mainly from the Lugano Convention, and are addressed at closely connected cases that should be heard in the same proceedings.

Article 12. Enforcement

1. Judgments entered by the competent court under article 8 after trial, or by default or by consent, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory of any of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgments.
2. The foregoing provisions shall not apply if (a) a decision was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defense, or (b) the judgment was obtained by fraud. 15/
3. If an action is brought against a Contracting Party under this Convention, such Contracting Party may not, except in respect of measures of execution, invoke any jurisdictional immunities before the court competent in accordance with this article.

These provisions broadly follow the Basel Liability Protocol provisions on the enforcement of judgments. No public policy exception should be permitted, since such an exception may interfere with fair application of this protocol.

14/ This may arise for instance with damage caused in two states or principally beyond national jurisdiction

15/ Broadly following Basel Liability protocol art 21

Settlement of Disputes
The following articles establish a disputes mechanism, modelled largely on the dispute settlement provisions of the Law of the Sea Convention, focused on an International Tribunal for the Protection of Biodiversity.

General Provisions
Article 34. Obligation to Settle Disputes by Peaceful Means
Contracting Parties shall settle any dispute between them concerning the interpretation or application of this Protocol by peaceful means in accordance with article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in article 33, paragraph 1, of the Charter

Article 35. Settlement of disputes by any peaceful means chosen by the parties
Nothing in this Part impairs the right of any Contracting Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Protocol by any peaceful means of their own choice.

Article 36. Procedure where no settlement has been reached by the parties
1. If the Contracting Parties which are parties to a dispute concerning the interpretation or application of this Protocol have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
2. If the parties have also agreed on a time limit, paragraph 1 applies only upon the expiration of that time limit.

Article 37. Obligation to exchange views
1. When a dispute arises between Contracting Parties concerning the interpretation or application of this Protocol, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Article 38. Conciliation
1. A Contracting Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation under Annex II.
2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.
3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.
4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.
Compulsory Procedures Entailing Binding Decisions

Article 39. Application of procedures under this section
Subject to section 3 of this Part, any dispute concerning the interpretation or application of this Protocol shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Article 40. Choice of procedure
1. When signing, ratifying or acceding to this Protocol or at any time thereafter, a Contracting Party shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

(a) the International Tribunal for the Protection of Biodiversity established in accordance with Annex III.
(b) the International Court of Justice;
(c) an arbitral tribunal constituted in accordance with Annex IV;
(d) a special arbitral tribunal constituted in accordance with Annex IV for one or more of the categories of disputes specified therein.

2. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted the International Tribunal for the Protection of Diversity in accordance with Annex III.
3. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.
4. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to the International Tribunal for the Protection of Biodiversity in accordance with Annex III, unless the parties otherwise agree.
5. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.
6. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.
7. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

Article 41. Jurisdiction

1. A court or tribunal referred to in article 40 shall have jurisdiction over any dispute concerning the interpretation or application of this Protocol which is submitted to it in accordance with this Part.
2. A court or tribunal referred to in article 40 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.
3. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Article 42. Experts

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

Article 43. Provisional measures

1. If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to biodiversity, pending the final decision.
2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.
3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.
4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other Contracting Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.
5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Protection of Biodiversity may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the

situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.
6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

Article 44. Access
1. All the dispute settlement procedures specified in this Part shall be open to Contracting Parties.
2. The dispute settlement procedures specified in this Part shall be open to entities other than States Parties as specifically provided for in this Protocol or as provided in Rules passed by the Assembly under article 31.

Article 45. Applicable law
1. A court or tribunal having jurisdiction under this section shall apply this Protocol and other rules of international law not incompatible with this Protocol.
2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo* et *bono*, if the parties so agree.

Article 46. Preliminary proceedings
1. A court or tribunal provided for in article 40. to which an application is made in respect of a dispute referred to in article 39 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case.
2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time limit within which they may request it to make a determination in accordance with paragraph 1.
3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure.

Article 47. Exhaustion of local remedies
Any dispute between Contracting Parties concerning the interpretation or application of this Protocol may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.

Article 48. Finality and binding force of decisions
1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.
2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

International Federation of Organic Agriculture Movements (IFOAM):
Settlement of claims is to be done directly by the owner of the GMO and, where possible with the person, cooperative or company experiencing the damage directly.

Any indirect damage, or damage to nature and biological diversity is to be settled by the owner of the GMO and

a. Active nature conservation bodies in the area
b. Representatives of communities depending on the natural resources of the area
c. Representatives of GMO free zones
d. Local and regional governments
e. Representatives of local and indigenous communities
f. Etc.

Organic Agriculture Protection Fund (OAPF):
All the procedures referred to from (a) to (d).

South African Civil Society:
We are not opposed in principle to the establishment of a mechanism under the CBD aimed at resolving claims by way of conciliation and mediation. In this regard, the Space Objects Liability Convention may be a model to consider. Under this Convention, claims are presented through the diplomatic channels of a country that has diplomatic relations with the defendant country within a prescribed time period. If there is no settlement within a time limit, the Claims Commission is set up by the Parties to hear and determine the claim. We are particularly in favour of an approach that does not require the national on behalf of whom the claim is made, to exhaust all available domestic remedies first.

With regard to the question of adjudication of the claim, we are in favour of the approach taken in the Basel Liability Protocol, which provides for three options with regard to the fora (court) that may be have jurisdiction to hear claims, namely, where either:

- The damage was suffered; or
- The incident occurred; or
- The defendant has his habitual residence, or has his principal place of business.

However, these should not be the only fora that will have jurisdiction to hear the claims, but should include in particular, the courts of non-contracting parties.

We are not in principle opposed to the use of a special tribunal but oppose this if it will mean delays in the implementation of the liability and redress regime for GMOs.

Third World Network (TWN):
There should be strong mechanism(s) under the liability and redress protocol for dealing with non-compliance, dispute settlement and settlement of claims.

VIII. STANDING/RIGHT TO BRING CLAIMS

Issues for further consideration

(a) Level of regulation (international and/or domestic level);

(b) Distinction between inter-State procedures and civil procedures;

(c) Level of involvement in the transboundary movement of living modified organisms as a requirement of standing/right to bring claims;

(d) Type of damage:

(i) Traditional damage: affected person, dependents, or any other person acting on behalf or in the interest of that person;

(ii) Costs of response measures: person or entity incurring the costs;

(iii) Damage to environment/conservation and sustainable use of biodiversity:

- Affected State
- Groups acting in vindication of common interests;
- Person or entity incurring the costs of restoration measures;

(iv) Damage to human health:

- Affected State;
- Affected person or any other person entitled to act on behalf of that person;

(v) Socio-economic damage:

- Affected State;
- Groups acting in vindication of common interests or communities.

Argentina:

The right to bring claims, under both national and international law, is limited to those affected by the damage. This limitation ensures that whoever initiates the legal action has a direct and significant interest.

Furthermore, no international body has so far accepted the bringing of claims for environmental damages on the part of groups with a specific interest in the matter.

Ethiopia:

A RIGHT TO RECOURSE

1. The victim or the Contracting Party whose citizen is a victim of damage or any person or group of persons is entitled to bring a claim and seek redress in:
   a) that person's or group or class of persons' interest;
   b) the interest of a person who is unable to institute such a claim; or
   c) the interest of protecting the environment or biological diversity.
2. No cost shall be awarded against any of the persons who fail in any action taken under subarticle 1 of this Article.

3. The burden of proving that an action was not instituted under subarticle 1 of this Article rests on the person claiming that the case was instituted otherwise.

ACCESS TO JUSTICE

1. Each Contracting Party shall ensure that the victim or any person referred to under Article 13 of this Protocol is given access to effective administrative and judicial procedure.
2. Claims for compensation under this Protocol may be brought before the competent court where either the damage or the incident occurred or the victim has his principal residence or the defendant has his principal place of business.
3. Each Contracting Party shall ensure that its courts have the necessary capacity to deal with claims for compensation instituted under this Protocol.
4. Nothing in this Protocol shall affect the rights of persons who have suffered damage, or be considered as limiting the protection or restoration of the environment, which may be provided under domestic law.

EU:

The issue of standing is usually the preserve of national legal systems. However, it might be useful to share experience of the EC Environmental Liability Directive, which we have already referred to in Section IV.A paragraph 3 above, by way of an example of a different approach. This Directive relies largely on the competent public authorities to implement its liability scheme, and does not enable legal or natural persons affected by environmental damage to sue polluters directly. However, it provides natural and legal persons, in certain prescribed circumstances, with a right to require the competent authority to act according to the obligations set under the Directive and to challenge through a review procedure the competent authority's decisions, acts or failures to act.

Sri Lanka:

[(a)] to (d) all taken.

Global Industry Coalition (GIC):

In international and national law, legal standing to bring a claim is limited to those who suffer the actual damage. This limitation ensures that those who come to court have direct and important interests and avoids the courts being flooded with (and the public bearing the costs of) cases brought by those not directly impacted by the damage. Since protection of biodiversity is a public interest, the State, as a Party to the Protocol, has the responsibility to act and seek recovery if damage to the conservation and sustainable use of biodiversity occurs. Only States should be able to introduce a claim for damage under any liability rules to be developed under the Protocol. What States chose to do at the national level is up to them.

As discussed above, only damage to biodiversity can be addressed by any liability rules to be developed under the Protocol. Because that limited scope is determined by the Protocol itself, the various types of damage listed under item (d) are irrelevant to the Article 27 process, including the determination of standing to bring a legal claim. As noted above, states must be given the exclusive right to bring lawsuits to establish liability for any damage to biodiversity as a means of allowing them to carry out their responsibilities to protect biodiversity.

Greenpeace International:

Article 9. Court Powers and Procedures

1. The principle of wide access to justice 11/ shall be implemented. To this end, persons and groups with a concern for or interest in environmental, social or economic matters, persons and groups

11/ Cf Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998.

representing communities or business interests and local, regional and national governmental authorities, shall have standing to bring a claim under this Protocol.

2. Nothing in the Protocol shall be construed as limiting or derogating from any rights of persons who have suffered damage, or as limiting the protection or reinstatement of the environment which may be provided under domestic law.12/
3. Financial and other barriers to justice shall not impede access to justice under this article and Contracting Parties shall take appropriate steps to remove or reduce such barriers.13/

South African Civil Society:
We have addressed several of the issues raised here, in the course of our preceding comments. We raise here only new issues concerning who may prefer a claim. We support the approach taken under the Basel Liability Protocol where the person who may claim is not specified. By implication it is any person who suffers damage; this would cover individuals, entities, the State itself under the provisions of the Protocol itself as well as under general rules of international law on State responsibility.

We specifically support as a general rule, the standing of any person to bring a claim in the interests of the environment, human health of humanity, and the protection of society.

Third World Network (TWN):
The person who has suffered damage, the Party whose citizen has suffered damage, or any person or group of persons should be entitled to bring a claim in respect of

1. their own interest;
2. the interests of a person/s who is unable to bring a claim;
3. the interest of protecting the environment or biological diversity.

12/ From Basel Liability Protocol art 20.

13/ Cf Aarhus Convention article 9(5).

IX. NON- PARTIES

Issues for further consideration

Possible special rules and procedures in the field of liability and redress in relation to LMOs imported from non-Parties (e.g. bilateral agreements requiring minimum standards).

EU:
Conscious of Article 24 CPB, which requires that transboundary movements of LMOs between Parties and non-Parties shall be consistent with the Protocol and that Parties are required to encourage non-Parties to adhere to the Protocol, the EU considers that any regime should not provide an incentive to non-Parties to fail to ratify or adhere to the Protocol.

Norway:
Article 24 requires that transboundary movements of LMOs between Parties and non-Parties shall be consistent with the Protocol and that Parties are required to encourage non-Parties to adhere to the Protocol. Consequently, a liability and redress regime should not provide an incentive for non-Parties not to ratify or adhere to the Protocol.

Sri Lanka:
All taken.

Global Industry Coalition (GIC):
As stated above, there is no legal jurisdiction for the establishment of any liability rules for non-Parties. Similarly there is no basis to create any special rules for bilateral and other arrangements established under Article 14 of the Protocol.

South African Civil Society:
We support this principle and note the provisions of Article 14 of the Biosafety Protocol in this regard.

Third World Network (TWN):
Parties importing from non-Parties and Parties exporting to non-Parties should ensure that, in respect of liability and redress, such transboundary movement does not result in a lower level of protection as provided for under the liability and redress protocol.

X COMPLEMENTARY CAPACITY BUILDING MEASURES

Possible approaches

(a) Use of measures adopted under Article 22 of the Protocol, including use of roster of experts and the Action Plan for Building Capacities for Effective Implementation of the Protocol, e.g. exchange of best practices in the design and implementation of national rules and procedures on liability and redress, cooperation at the regional level in the use of available expertise, and training in all relevant fields;

(b) Development of specific complementary capacity building measures, based on national needs and priorities, for the design and implementation of national rules and procedures on liability and redress, e.g. establishment of baseline conditions and monitoring of changes in the baseline conditions.

EU:
An important consideration is the relationship between the respective national regimes and international rules and procedures in the field of liability and redress. Such national regimes should provide the framework for the implementation of international rules and procedures. It is through capacity building that the respective national regimes could be initiated or further developed. Consideration should therefore be given to the development of international rules and procedures that contribute to that end. The EU is open to considering the range of measures identified in paragraphs (a) and (b) above, with a view to including the most suitable measures within the regime under Article 27.

Sri Lanka:
(a) and (b) both taken.

South African Civil Society:
We believe that more information is required regarding the efficacy of the current capacity building initiatives already underway in terms of Article 22 of the Protocol, before the discussion regarding the adoption of new measures is opened. In this regard, we believe that an independent assessment is required.

XI. 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.

Argentina:
It is considered that, until sufficient progress is made on the main content of the rules referred to in Article 27, conditions do not exist to assess the best type 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.

Greenpeace International:
A number of options have been proposed, including a liability Protocol to the Biosafety Protocol, amendment of the Biosafety Protocol, and annex to the Biosafety Protocol, and a liability Protocol to the Convention on Biological Diversity. Certainly it is important to choose an instrument that will achieve wide ratification and implementation. However it is also important to choose a strong and effective

instrument that will accomplish the required task. A liability protocol to the Biosafety Protocol seems on balance to be the most appropriate instrument, since it would specifically address liability under the Biosafety Protocol and since that would be consistent with the approach adopted with other areas such as the Basel liability protocol.

Organic Agriculture Protection Fund (OAPF):
Option 1

South African Civil Society:
We support a discreet Liability Protocol to the Biosafety Protocol. We vehemently oppose the use of non-binding instruments and reject with utter contempt, Option 6 proposed by New Zealand of 'no instrument.

Option 2 One or more legally binding instruments in combination with interim measures pending the development and entry into force of the instrument(s)

Norway:
Supports option 2. The interim instrument could be in the form of guidelines/Codes of conduct to countries in order to enable them to develop national legislation.

Third World Network (TWN):
The legally binding instrument should be a Liability and Redress Protocol to the Cartagena Protocol on Biosafety.

Interim measures should be put in place immediately, pending the development and entry into force of the liability and redress protocol. The measures, and the development of such measures must not prejudice or delay the development of the liability and redress protocol.

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)

EU:
The EU thinking on the preferred choice of instrument is driven by the aspiration to design a liability and redress regime that is promptly operational and which would apply to all Parties to the Protocol. These two objectives are best accommodated by taking a two-staged approach. That is to develop a regime by way of a COPMOP decision, which would take effect, for all Parties, immediately upon adoption. This first stage would subsequently be evaluated, on the basis of which the development of a legally binding instrument could then be considered. 7/ Therefore we support Option 4.

Sri Lanka:
Option 4 and 5 taken.

7/ See submission of the European Union of February 2005 and Council conclusions adopted on 10 March 2005.

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)

Sri Lanka:
Option 4 and 5 taken.

Option 6
No instrument

Public Research and Regulation Initiative (PRRI):
The PRRI believes no convincing arguments have been presented to support the development of a liability regime under the Protocol (Section XII, option 6). This does not mean, however, that public research institutes do not accept liability. In fact, we understand from our participation in the most recent CBD expert meeting on liability, that biotechnology could be addressed along with all other activities that may result in damage to biodiversity under liability rules that may be developed under Article 14 of the Convention.
