LIABILITY AND REDRESS

UNDER THE CARTAGENA PROTOCOL ON BIOSAFETY

CEBLAW was established by the Government of Malaysia and the University of Malaya to foster research, development and training in matters relating to biological diversity law and biosafety law. It is a national, regional and international resource centre for biodiversity law. It assists the Government in the negotiations on international treaties relating to access and benefit sharing of genetic resources (under the Convention on Biological Diversity) and liability and redress (under the Cartagena Protocol on Biosafety).

LIABILITY AND REDRESS

UNDER THE CARTAGENA PROTOCOL ON BIOSAFETY

A Record of the Negotiations for Developing International Rules

VOLUME 1

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LIABILITY AND REDRESS UNDER THE CARTAGENA PROTOCOL ON BIOSAFETY:
A Record of the Negotiations for Developing International Rules

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Dedicated to all those participants and the Co-Chairs of the
Working Group of Legal and Technical Experts
on Liability and Redress
(in the context of the Cartagena Protocol on Biosafety)
for their valiant effort these last few years over long negotiating periods
to craft international rules on liability and redress for
damage arising from the transboundary movements of
Living Modified Organisms (LMOs)

Foreword

by
Ahmed Djoghlaf
Executive Secretary
Convention on Biological Diversity

The Cartagena Protocol on Biosafety traces its roots back to the 1992 Convention on Biological Diversity. Paragraph 3 of Article 19 of the Convention provided the basis for the negotiations of the Biosafety Protocol – negotiations that were formally mandated in 1995 in Jakarta, Indonesia, began in 1996 and concluded in the early morning of 29 January 2000 with the adoption of the first legally binding international rules on the safe transfer, handling and use of living modified organisms. The final agreement on the Biosafety Protocol includes Article 27 which provides a further mandate to elaborate international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms.

States have long recognised the gaps and inadequacies which exist in the field of liability for environmental damage. In Principle 13 of the Rio Declaration on Environment and Development adopted at the 1992 Earth Summit, States expressed their support for the development of national law that provides for liability and compensation for the victims of pollution and other environmental damage. They also agreed to cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction. This principle is an important supplement to another principle included in Article 3 of the Convention on Biological Diversity i.e. the sovereign

right of States to exploit their own resources and their responsibility not to cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. The latter was first enshrined in Principle 21 of the 1972 Stockholm Conference on the Human Environment.

Article 27 of the Biosafety Protocol might be an outcome of the specific negotiations on the Protocol, but one should not also discount the incremental recognition by the international community of the need to develop common standards for environmental liability. Indeed, in the nearly 20 years since the Rio Declaration and the adoption of the Convention on Biological Diversity, the field of liability and redress in environmental law has witnessed notable developments at both the national and international level. The negotiations on liability and redress under the Biosafety Protocol are set to make a further addition to this field.

The formal negotiations under Article 27 of the Protocol have been ongoing since 2004 following the establishment 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. All efforts were made to complete the negotiations in 2008, within four years after the launching of the process as called for in the Protocol. However, given the complex and sensitive nature of the issues involved in negotiating a liability and redress regime, it is not surprising to see the negotiations taking longer time than earlier envisaged. A small group has been mandated by the Parties to the Protocol at their fourth meeting held in Bonn, Germany in May 2008 to further the negotiations and to report to the next meeting of the Parties in 2010.

The negotiations in Bonn achieved a major breakthrough when the legal nature of the rules and procedures on liability and redress was clarified. The Parties to the Protocol have agreed to work towards making a specific part of the rules and procedures legally binding while other parts could remain as guidelines and hence not intended to be legally binding. This determination to have rules and procedures of a mosaic nature is not only a rare experiment in international law-making, but it is also an important decision in facilitating the next phase of the negotiations.

This work is about the thread of one of the very difficult intergovernmental negotiations involving liability and redress for

damage that may result from the transfer of one of the rapidly growing technologies- biotechnology. In a way it is a record of history. However, like any other piece of history which always influences the present as well as the future, this record will greatly contribute in showing us all which components of the outcome of the negotiations will realistically work and which ones will remain unenforceable and why. In that regard, it goes beyond academic writing. For those who have been participating over the entire course of the negotiations, the many hours of debates, the multitude of documents, the amount of submissions of operational text and the various twists and turns have made it next to impossible to recall all the minutiae of how the process has arrived where it is today. For those who are new to the area, it is even more critical to be able to delve into the background of the negotiating text in order to understand the intent behind the words on the page.

Throughout the preparation, finalisation and now implementation of the Cartagena Protocol on Biosafety, Malaysia and its leading institutions have played a unique role. Indeed, Malaysia has chaired three out of four meetings of the Parties. I am very pleased, then, to welcome this volume of the record of the negotiations on international rules and procedures on liability and redress for damage from the transboundary movements of living modified organisms – a volume which has been meticulously compiled by members of the Centre of Excellence for Biodiversity Law. I commend the Centre for this initiative.

Montreal
Canada
August 2008

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ACRONYMS AND ABBREVIATIONS

BCH: Biosafety Clearing House

BSWG: Ad Hoc Open-Ended Working Group on Biosafety (1 - 6 meetings)

CBD: Convention on Biological Diversity or "the Convention"

COP: Conference of the Parties to the Convention on Biological Diversity (1 - 10 meetings)

COP-MOP: Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety (1- 5 meetings)

CPB: Cartagena Protocol on Biosafety, "Cartagena Protocol," "Biosafety Protocol" or "the Protocol"

EX COP: Extraordinary session of the Conference of the Parties to the Convention on Biological Diversity

FOC: Friends of the Chair group.

ICCP: Intergovernmental Committee for the Cartagena Protocol (1 – 3 meetings)

ICJ: International Court of Justice

IPRs: intellectual property rights

ITLOS: International Tribunal of the Law of the Sea

LMF: Like-Minded Friends

LMOs: living modified organisms (another name for genetically modified organisms, **GMOs**)

LMOs-FFP: living modified organisms for food, feed or processing

OT: operational text

PCA: Permanent Court of Arbitration

PIL: private international law

TEG L&R: Technical Group of Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety

WGLR: Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (1-5 meetings)

WS L&R: Workshop on Liability and Redress in the Context of the Cartagena Protocol on Biosafety

WTO: World Trade Organization

ABOUT THE AUTHORS

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He has been a key negotiator representing Malaysia since the process started in 2004 for the development of international rules and procedures on liability and redress.

Ms Sarah Lawson-Stopps was an intern with CEBLAW for a period in 2007 and 2008 and attended the 3rd and 4th Working Group Meeting of Legal and Technical Experts on Liability and Redress. She graduated from the College of the Atlantic Bar Harbor, Maine, USA with a degree in BA (Human Ecology) and is currently studying law in the US.

Ms Gan Pei Fern is an Assistant Consultant at CEBLAW. She attended the 5th Working Group Meeting of Legal and Technical Experts on Liability and Redress as a representative of the Centre. She has been a member of the Malaysian delegation at all the subsequent meetings of the Friends of the Chair, the Contact Group and COP-MOP4. She is a law graduate of the University of Malaya and an Advocate and Solicitor in Malaysia.

INTRODUCTION

The Cartagena Protocol on Biosafety ('the Protocol') was adopted on 29 January 2000. Because of the protracted nature of the negotiations that led to its adoption, it was not possible to agree on rules and procedures for liability and redress arising out of the transboundary movement of living modified organisms (LMOs). Article 27 provided for these rules to be elaborated and the process to be completed by 2008. The first meeting of the Parties (MOP) met in 2004 and initiated this process. Since then the process has started and negotiations are underway for the finalization of these international rules and procedures.

This publication records the process for the elaboration of these rules. It records the evolution of these rules through three different periods: from the inception and negotiation of the Cartagena Protocol on Biosafety (CPB), through its interpretation and implementation process to the current process of elaborating a set of rules and procedures. It also seeks to provide a snapshot of the current elements under negotiation, the options put forward under each element, and the positions taken by the delegates. Finally, it aims to contribute to the institutional memory and to the historical record of the development of this key element in the Protocol.

The publication is divided into 2 parts.

Part I outlines a brief history of the process, starting from the first expert group meeting to discuss the need for and modalities of a protocol on biosafety in 1995 up to the most recent 4th MOP meeting held in May, 2008 at Bonn, Germany. There are three distinct stages in this process: the negotiation of Article 27 on liability and redress within the Protocol, the interpretation of Article 27 during the Intergovernmental Committee on the Cartagena Protocol (ICCP) process, and the present ongoing elaboration of international rules and procedures on liability and redress under the Protocol. The history of the negotiations will show how the process developed, and, how, why and when the issues and elements that are currently being negotiated were

introduced. Finally, the history will also hopefully show how the final outcome and content of a liability and redress regime came into being.

Part II sets out the main body of this publication. This section is devoted to the issues and elements under negotiation. Each main element now under consideration for inclusion in the rules and procedures makes up a chapter. The chapters are organized based on the order of the topics as agreed to by Parties and as presented by the Co-Chairs of the Working Group. Each chapter is broken down into three sections. First: a short description of the concept embodied in each element. Secondly, a brief statement of the main options or combinations of options derived from the proposals made by delegates and other participants in the various Working Group meetings as well as those submitted in writing inter-sessionally. Finally, a summary of each delegate's and other participant's position. This provides a full understanding of the spectrum of views and proposals made. This, then, provides a comprehensive reference to the general concepts, the debate and the particular views of delegates in negotiations spanning the complete history of the negotiations to date. The proposals presented may sometimes appear inconsistent and even in conflict with an earlier position. This reflects the differing presentations made by the same delegates/participants at different meetings. The final texts agreed to at the final Friends of the Chair Group and Contact Group meetings, and approved by COP-MOP4, appear at the end of the respective sections, with or without brackets.

The sources for this compilation are: the Earth Negotiations Bulletin Reports which provides a daily report of the meetings held, submissions made to the Secretariat by Parties and others, and a record of the proposals and submissions made by delegates at the negotiations. This recording was accomplished by members of the Centre of Excellence for Biodiversity Law (CEBLAW).[1] Every attempt was made

[1] The 2 staff members were: Ms Sarah Lawson Stopps – who attended the 3rd and 4th Working Group meetings; and Ms Gan Pei Fern – who attended the 5th Working Group meeting, the subsequent Friends of the Chair and the Contact Group and COP-MOP4 meetings. CEBLAW is a centre set up by the joint initiative of the University of Malaya and the Malaysian Government. It is based in Kuala Lumpur, Malaysia.

to ensure the accuracy of the proposals and submissions, including where possible, by a cross-check with the official records.

This publication incorporates the negotiations and proposals made at all the 5 Working Group meetings held from February 2005 until March 2008; and the proceedings of the Friends of the Chair group[2] –- convened immediately preceding, as well as during (then renamed as the Contact Group), the COP-MOP4 held in Bonn, Germany in May 2008.

Despite these further meetings in the new format, the Parties were not able to complete the mandate under Article 27 to produce a final version of the rules and procedures. There still remain several bracketed texts – some in respect of critical areas. However, the areas of discord have been considerably narrowed. COP-MOP4 has re-established the Group of the Friends of the Co-Chairs. It is to continue with the negotiations in a meeting scheduled for early 2009; and if necessary, another one in early 2010. The outcome will be presented to the 5th Meeting of the Parties in Nagoya, Japan – scheduled for October 2010. The expectation is for this COP-MOP5 to adopt the instrument on liability and redress.

It is hoped that the information included in this work may serve as a ready reference guide to the process and assist in these final future negotiations.

Gurdial Singh Nijar
Director
Centre of Excellence for Biodiversity Law (CEBLAW)

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[2] Set up at the 5th Working Group meeting and through which the critical parts of the negotiations were held.

PART I

HISTORY OF THE PROCESS

1

HISTORY OF THE PROCESS FOR THE ELABORATION OF INTERNATIONAL RULES AND PROCEDURES ON LIABILITY AND REDRESS

a. Introduction: A Brief Overview

The issue of liability and redress for damage arising from the transboundary movement of living modified organisms (LMOs) was first raised when the Biosafety Protocol was being negotiated. It will be recalled that these negotiations for the development of the Protocol were undertaken pursuant to article 19(3) of the Convention on Biological Diversity (CBD) which reads as follows:

> *The Parties shall consider the need for and modalities of a protocol setting out appropriate procedures... in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biodiversity.*[1]

The First Conference of the Parties (COP1) in Bahamas set up an expert group to discuss the need for, and modalities of, a protocol. It met in Cairo and its report was considered by an Ad Hoc Group of Experts meeting in 1995 in Madrid. This meeting concluded that there was a

[1] Convention on Biological Diversity, Article 19.3, at http://www.cbd.int/doc/legal/cbd-un-en.pdf [the 'CBD'].

need for an international framework for safety in biotechnology. Although there was no consensus, many delegations identified the issue of liability and compensation (as 'redress' was initially described) for inclusion in the biosafety framework.[2] The second Conference of the Parties (COP2) in its Decision II/5, (the 'Jakarta Mandate') established an Ad Hoc Open-Ended Working Group on Biosafety to develop a draft Protocol. One of the elements to be considered for inclusion was liability and compensation.[3] For developing countries, this issue was of central importance. It was to become a 'highly contentious issue'[4] as several developed countries led by the Miami Group[5] resisted the inclusion of this provision altogether. By the time the Cartagena Protocol on Biosafety materialized - after six meetings of the Working Group on Biosafety, a failed, and a further final, extraordinary session of the COP - there was no time to include detailed provisions on liability and redress. Instead it was agreed to include an enabling clause that provided for a future process to develop international rules on liability and redress. This was Article 27 which reads:

> *The Conference of the Parties serving as the Meeting of the Parties, shall at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms... and shall endeavor to complete this process within four years.*[6]

The first COP-MOP in 2004 in Kuala Lumpur did indeed adopt the process by its Decision I/8. It mandated a meeting of a Technical Group

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[2] UNEP/CBD/COP/2/7, Annex I, para 18(b). See generally on the history leading to the final adoption of the Protocol: *The Cartagena Protocol on Biosafety: A Record of the Negotiations,* UNEP/CBD, (2003).
[3] COP Decision II/5, para 2(b).
[4]Biosafety Working Group 4: Daily Issues, 9 (77-84) Earth Negotiations Bulletin (5-13 February 1998), http://www.iisd.ca/vol09/ ; Biosafety Working Group 4: Summary, 9(85) Earth Negotiations Bulletin (16 February 1998), http://www.iisd.ca/download/pdf/enb0985e.pdf .
[5] Formed in Miami,comprising : Argentina, Australia, Canada, Chile, Uruguay and United States. It proved to be a formidable negotiating force.
[6] Cartagena Protocol on Biosafety, Article 27, (29 January 2000), at http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf [the ['CPB'].

of Experts and created an Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress. Five meetings of the Working Group were scheduled to enable the process to be completed by the fourth meeting of COP-MOP, scheduled in May 2008.

The process has been contentious right from the outset. Some have interpreted Article 27 as an opening to question the necessity and effectiveness of international rules and procedures on liability and redress, as well as the appropriateness of developing a comprehensive regime on such matters for biotechnology under the Protocol.[7] Others, mainly developing countries, say that this Article was carefully crafted in order to make explicitly clear the mandate of the COP-MOP to establish binding rules and procedures.

Nonetheless, the process started and the Working Group has held five meetings to date – the last of which concluded in March 2008 at the city from which the Protocol derived its name – Cartagena. This 5th Working Group Meeting was unable to complete its mandate to produce a final version of the rules and procedures. Despite two further meetings of the specially constituted Friends of the Chair Group preceding, and during, COP-MOP4, where significant progress was achieved, the operational text negotiated to-date remains heavily bracketed. Two more meetings have been scheduled before COP10 in Nagoya in Japan in 2010. The expectation is that this meeting will be presented with a final instrument on liability and redress for adoption.

The remainder of this section provides a more detailed history of this overview of the negotiations.

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[7] Liability and Redress: Compilation of submissions of further views with respect to approaches, options ; issues identified as regards matter covered by Article 27 ; proposals for texts, in preparation for the second meeting of the Ad Hoc Open-Ended Working Group on Liability and Redress under the Cartagena Protocol on Biosafety, UNEP/CBD/BS/WG-L&R/2/INF/1 (12 January 2006) http://www.cbd.int/doc/meetings/bs/bswglr-02/information/bswglr-02-inf-01-en.pdf ['Compilation of Views WGLR2'].

b. The Origins of Article 27 on Liability and Redress under the Cartagena Protocol

The issue of liability and redress for damage caused by LMOs transported across borders first appeared in the discussions during the meeting convened to prepare for the first meeting of the Conference of Parties to the Convention on Biological Diversity. It arose in the context of the discussions on implementing Article 19(3) of the CBD. Developed countries resisted any binding rules on biosafety, arguing instead for the use of guidelines. The compromise, reached at the first meeting of the Conference of the Parties (COP1) at Bahamas, was the establishment of a scientific committee to study the need for and modalities of a Protocol. This committee met in Cairo. It presented its report to the Ad Hoc Open-Ended Expert Group on Biosafety that had been set up and mandated by COP1 by its Decision I/9.[8] The Expert Group met in Madrid, Spain in July, 1995. The Group identified liability and compensation as a non-consensus issue 'supported by many delegations'[9] as an element that should be considered in an international framework on biosafety.[10] The second COP held in Jakarta, Indonesia, in November 1995, established an Open-Ended Biosafety Working Group to develop a biosafety protocol. COP Decision II/5, set out a 'negotiation process to develop, in the field of the safe transfer, handling and use of living modified organisms, a protocol on biosafety' to be completed within six meetings of the Working Group.[11] The COP reviewed the recommendations of the Expert Group and included liability and compensation in the terms of reference for the Working

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[8] First Conference of the Parties to the CBD, Decision I/9 (1994), Medium-term programme of work of the Conference of the Parties, at http://www.cbd.int/decisions/?m=COP-01&id=7069&lg=0 ['Decision I/9'].

[9] ENB BSWG-4.

[10] Report of the Open-Ended Ad Hoc Group of Experts on Biosafety, in preparation for the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity, UNEP/CBD/COP/2/7 Annex II (3 August 1995), at http://www.cbd.int/doc/meetings/cop/cop-02/official/cop-02-07-en.pdf ['EGB Report'].

[11] Jakarta Mandate, at para 1.

Group as a non-consensus issue suggested for inclusion in a protocol on biosafety.[12] With this decision, liability and redress for harm caused by modern biotechnology was effectively included as an element for consideration in the forthcoming negotiations for a binding agreement on biosafety.

The Working Group on Biosafety held six meetings between July 1996 and February 1999. Liability and compensation remained a 'highly contentious issue'[13] throughout the negotiations of the Working Group. The topic of liability was considered to be "the crux of the biosafety issue"[14] and an indicator of the overall success of negotiations, especially for developing countries.[15] There was a clear North-South divide on the need for an article on liability and compensation.[16] Northern, developed countries such as Canada, expressed opposition to an article on liability and compensation. The negotiations on liability and redress were described as being particularly chilly, evoking 'a stunned silence from the delegates of industrialized countries every time the issue was raised.'[17] Southern, developing countries, headed by an 'untidy alliance of delegates from India, Colombia ... [and Ethiopia] supported by countries such as Mexico and South Africa carried forward the crusade for substantive rules on liability and redress,'[18] although the exact positions of each of these countries differed substantially within the broad field of rules and procedures for liability and redress.[19] At the second meeting of the Working Group, Norway insightfully suggested that liability be addressed at a later date, possibly under the Protocol.[20]

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[12]Jakarta Mandate, at Annex II paragraph 1.

[13]ENB BSWG-4.

[14]Earth Negotiations Bulletin, Summary of the First Meeting of the Open-ended Ad Hoc Working Group on Biosafety (22 - 26 July 1996), at http://www.iisd.ca/download/pdf/enb0948e.pdf ['ENB BSWGLR1'].

[15]ENB BSWG-4.

[16]ENB BSWG-4.

[17] Worku Damena, 'Liability and Redress', in Christoph Bail, Robert Falkner; Helen Marquard Eds., *The Cartagena Protocol On Biosafety: Reconciling Trade In Biotechnology With Environment & Development,* UNEP/CBD (2002), 366, 368.

[18] *Id,* at 368.

[19] *Id,* at 368.

[20] Compilation of views of governments on the contents of the future protocol, for

Early discussions on liability and compensation under the Working Group on Biosafety addressed the need for liability and compensation for biotechnology based on: the adequacy (or inadequacy) of Article 14(2) of the CBD;[21] applicable national legislation; the relevance of existing international agreements; establishing criteria to assess liability and compensation provisions; and inclusion of criteria to assess liability and compensation in either the Protocol or an Annex.[22]

At BSWG-1, several delegations argued against any provision on liability and compensation arguing that the issue had been addressed by a number of international conventions; and that Article 14(2) of the CBD gave the COP a mandate to address this issue including compensation for damage to biodiversity.[23] They requested the Secretariat to prepare a working paper on the matter.

In their submissions to BSWG-2, developed countries reiterated their opposition to the need for provisions on liability. Developing countries insisted on the provision. Some, notably Africa, submitted elaborate text on liability and compensation, including on: compensation, reinstatement or restoration measures; identification of potentially liable parties; channeling liability to the operator; types of activities and movements covered; residual liability; exemptions; time limits; financial guarantees or compensation funds; and a list of topics to be addressed at COP-MOP 1. BSWG-2 decided that liability and compensation be discussed at the 3rd meeting on the basis of the government submissions of draft text.[24]

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review at the second meeting of the Ad Hoc Open-Ended Working Group on Biosafety, UNEP/CBD/BSWG/2/2, (18 March 1997), at http://www.biodiv.org/doc/meeting.aspx?mtg=BSWG-02 ['Compilation of Views BSWGLR2'].

[21] 'The Conference of the Parties shall examine … the issue of liability and redress including restoration and compensation for damage to biological diversity, except where such liability is a purely internal matter'.

[22] Earth Negotiations Bulletin, Report of the Third Meeting of the Open-Ended Ad Hoc Working Group on Biosafety, (13-17 October 1997) ['ENB BSWG-3'], http://www.iisd.ca/download/asc/enb0974e.txt.

[23] See further, *The Cartagena Protocol on Biosafety: A Record of the Negotiations,* UNEP/CBD, p. 82.

[24] UNEP/CBD/BSWG/2/6, para 177.

At the end of BSWG-3, the Consolidated Text of Draft Articles included under Article 27, seven options developed on the basis of submissions by governments. The options may be summarized as follows:

Option 1 - no provision;

Option 2 - to develop rules under Article 14(2) of the CBD;

Option 3 - oblige States of origin of harm to negotiate with the affected State on the legal consequences; and to bear the costs of restoration or compensation in cases of harm to human or animal health, biodiversity or socio-economic welfare of the State; and to make payments in case of personal or property damages.

Option 4 - Parties of export liable for any negative effects unforeseen on the basis of information provided for the first import, for breach of the protocol obligations, for illegal traffic and for unintentional transboundary movements.

Option 5 - exporter liable for any damage deriving from the transboundary movement of LMOs and for full compensation.

Option 6 - Parties to cooperate in adopting rules and procedures on liability and redress in accordance with Article 14(2) of the CBD.

Option 7 - Parties responsible to meet their international obligations on conservation and sustainable use of biodiversity, to ensure that recourse is available in their legal systems, and to provide compensation for damage from LMOs. Also, further cooperation between Parties for the further development of international law on liability, the settlement of related disputes, and the development of criteria and procedures for payment of compensation, compulsory insurance and compensation funds.

At BSWG-4, three options emerged: the ‘zero option’– no article; an ‘enabling clause’– an article to instruct the first meeting of the Parties

to consider the matter; and a substantive article or articles on liability and compensation within the Protocol.[25] The main new feature was the listing of possible different elements of the provision: civil liability; compensation; measures for reinstatement; prescription of liability; emergency funds and exceptions. Other proposals for substantive text included strict liability of the State of origin, liability for breach of due diligence, and the establishment of an emergency compensation fund.

At BSWG-5, the debate began to narrow to the question of whether to include a provision on liability and redress at all, as the time to finalize text on a protocol was drawing near. Some expressed concern about the lengthy process in developing liability regimes under other international agreements, such as the Basle Convention. Others suggested that the matter be addressed by national laws on product liability.[26] Several developing countries threatened to stop all negotiations if liability and compensation discussions did not move forward. Some delegates sported badges declaring 'no liability, no protocol!' This was meant as a threat against the viability of adopting a final protocol that provided no recourse for the consequences of harm caused by accidents, although 'some of those less well disposed toward the ultimate success of the protocol negotiations also muttered the phrase to themselves, in hope rather than defiance.'[27]

The outcome of BSWG-5 was a single bracketed text consolidating the three proposals of a zero option, an enabling clause, or a substantive provision. The text included seven paragraphs. This was the outcome of the work of a Contact Group which set up a small drafting group to clarify the positions and reach agreement on text. The text that emerged was entirely bracketed in an effort to combine all the variations into a single option.[28] The first paragraph most resembled the enabling clause in Article 27 of the final Protocol, but with heavy brackets: '[examine

[25] Kate Cook, 'Liability: No Liability, No Protocol', in Christoph Bail, Robert Falkner; Helen Marquard Eds., *The Cartagena Protocol On Biosafety: Reconciling Trade In Biotechnology With Environment & Development*, UNEP/CBD (2002), 371 at, 377-378.
[26] ENB, vol. 9, no. 108, p. 9.
[27] Cook, fn 25 at 372.
[28] UNEP/CBD/BSWG/5/3, paras 40.

[whether and] how]' to '[adopt appropriate measures],' '[establish procedures for developing appropriate rules and procedures]' or '[establish and develop rules and procedures].' These bracketed segments demonstrated the debate on whether or not such rules and procedures on liability and redress should be created and how. A stronger determination, but still an enabling clause, was also reflected in a paragraph that mandated the adoption of rules on liability and, although bracketed, redress and a compensation fund based on a process initiated at the first COP-MOP. Taken together, these two paragraphs reflected the vast majority of the final wording in Article 27.

The other paragraphs of the bracketed text of BSWG-5 related to primary and residual liability, the duty to reinstate the conditions that existed prior to occurrence of harm, financial security, jurisdiction for civil actions, the duty of due diligence concerning transboundary harm, and the availability of the right of recourse in legal systems.[29] It was ultimately the disparate and complex nature of these substantive provisions included in the final text that undermined the inclusion of a substantive provision on liability and redress in the Biosafety Protocol.

At BSWG-6, the Chair of the Sub-Working Drafting Group sought to reconcile these widely polarized positions. The delegates finally recognized that this complex issue could not be resolved at the meeting and agreed to the Chair's non-paper proposing an enabling clause to provide for a further process on liability and redress and a COP decision on the subject[30]. Countries resigned themselves to this option in the light of both the overwhelming support for this option and other issues under negotiation which took on a much higher priority, such as the inclusion of LMOs for food, feed or processing within the scope of the Protocol.[31]

The debate then shifted to the degree of commitment to this future process and establishing time frames for completion. There were

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[29] Report of the Fifth Meeting of the Open-Ended Ad Hoc Working Group on Biosafety, in preparation for the sixth meeting of the Open-Ended Ad Hoc Working Group on Biosafety, UNEP/CBD/BSWG/5/3 (17-28 August 1998), at http://www.cbd.int/doc/meetings/bs/bswg-05/official/bswg-05-03-en.pdf ['Report BSWG 5'].

[30] Cook, fn 25 at 380.

[31] Damena, fn 17 at 369.

varying concerns that an enabling clause would present either too rigid or too weak a framework for further work on liability after the adoption of the protocol. Discussions centered on the content of that framework: the time-frame for both starting and ending the negotiations; the extent to which account would be taken of other precedents and processes; and whether any specific elements should be included in the final outcome.[32]

The final compromise expressed a 'firm commitment, but one accompanied by an obligation to take account of other processes.'[33] The resulting finely balanced text, with a few minor adjustments, became the final provision, now known as Article 27 of the Cartagena Protocol on Biosafety. The changes removed language on studies to be carried out by the meeting of the Parties and changed the time frame from six years to 'endeavor to complete in four years' after the first meeting of the Parties.[34] It also called upon the first meeting of the COP-MOP to adopt a process for the elaboration of the international rules and procedures on liability.

The final text of the BSWG-6 was a Chair's text on the whole protocol submitted for consideration by the Extraordinary Session of the Conference of the Parties (EXCOP) to the Convention on Biological Diversity begun in Cartagena, Colombia, the week following BSWG-6. Although there was a breakdown of the Cartagena negotiations that week, the text of the draft article on liability and redress finalized at BSWG-6 was reproduced as Article 27 in the final Protocol.[35]

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[32] Cook, fn 25 at 382.

[33] *Id.*

[34] Report of the Sixth Meeting of the Working Group on Biosafety, in preparation for the first Extraordinary Session of the Conference of the Parties to the Convention on Biological Diversity UNEP/CBD/ExCOP/1/2 Appendix I: Draft Protocol (15 February 1999), at http://www.cbd.int/doc/meetings/cop/excop-01/official/excop-01-02-en.pdf ['Report BSWG 6']; Earth Negotiations Bulletin, Report Of The Sixth Meeting of the Open-Ended Ad Hoc Group On Biosafety (15-19 February, 1999), at http://www.iisd.ca/biodiv/bswg6 ['ENB BSWG-6'].

[35] Earth Negotiations Bulletin, Second Meeting of the Intergovernmental Committee for the Cartagena Protocol, (1-5 October 2001), http://www.iisd.ca/download/pdf/enb09198e.pdf. ['ENB ICCP 2'].

c. Interpretation and Implementation of Article 27

The Cartagena Protocol on Biosafety was adopted on January 29, 2000. The task of implementing Article 27 was left to the Intergovernmental Committee for the Cartagena Protocol (ICCP) - mandated to facilitate the implementation of the Protocol and prepare for the first Conference of the Parties to the Convention on Biological Diversity serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety (COP-MOP).

The ICCP held three meetings between 2000 and 2002. It recommended the separation of the liability and redress under Article 27 from both the work on liability under Article 14(2) of the Convention and the compliance mechanism and procedures under the Protocol. The ICCP produced a voluntary questionnaire for Parties, governments and other organizations. It also discussed the existing and potential options and elements for international rules and procedures on liability and redress and terms of reference for a potential Technical Expert Group and a potential Working Group to be created by the COP-MOP and recommended the convening of a workshop before the meeting of the COP-MOP to continue this discussion. [36]

The Workshop on Liability and Redress, held in 2002, brainstormed options for terms of reference for both a Technical Expert Group and a Working Group. The Workshop discussed options and elements for international rules and procedures on liability and redress, taking into consideration existing rules and procedures. Finally, the Workshop developed a set of potential damage scenarios outlined in a

[36]Report of the Second Meeting of the Intergovernmental Committee for the Cartagena Protocol, for consideration by the third meeting of the Intergovernmental Committee for the Cartagena Protocol, UNEP/CBD/ICCP/2/15, (10 October 2001), at http://www.cbd.int/doc/meetings/bs/iccp-02/official/iccp-02-15-en.pdf ['Report ICCP 2']; Report of the Third Meeting of the Intergovernmental Committee for the Cartagena Protocol, for the first Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety, UNEP/CBD/ICCP/3/10 (27 May 2002), at http://www.cbd.int/doc/meetings/bs/iccp-03/official/iccp-03-10-en.pdf ['Report ICCP 3'].

non-exhaustive indicative list including: GMO crops, laboratory test of virus, LMOs-FFP that enter the food chain, and shipment.[37]

At the first COP-MOP to the Protocol held in Kuala Lumpur, Malaysia, in 2004, the Parties adopted Decision-BS I/8 which outlined the process for the elaboration of international rules and procedures. The Decision declared the elaboration of rules and procedures on liability and redress as crucial to the implementation of the Protocol; and that the process on liability and redress under the Protocol was distinct from both the process on Article 14(2) under the CBD and the compliance mechanisms and procedures under the Protocol.[38]

The Decision established the Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress. It mandated at least one meeting to be held before the second COP-MOP and set a tentative timeline for five meetings of the Working Group by the fourth COP-MOP.[39]

The terms of reference for the Working Group, in an Annex to the Decision, included: the composition of the Working Group; election of chairperson and other officers; an examination of past information/documents from previous meetings addressing liability and redress under the Protocol and the CBD, as well as the ongoing processes in international law; request for any information that may be required to assist the work; and an analysis of issues based on the existing as well as any further information so as to build understanding and consensus on the nature and contents of international rules and procedures . The terms of reference also required the Working Group to

[37]Report of the Workshop on Liability and Redress in the Context of the Cartagena Protocol on Biosafety, for consideration at the first Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety, UNEP/CBD/BS/WS-L&R/1/3 (14 December 2002), http://www.cbd.int/doc/meetings/bs/bswslr-01/official/bswslr-01-03-en.pdf ['Report WS L&R'].

[38] First Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety, Decision BS-I/8 Establishment of an Open-Ended Ad Hoc Working Group of Legal ; Technical Experts on Liability and Redress in the Context of the Protocol (23-27 February 2004), at http://www.cbd.int/biosafety/cop-mop/result.aspx?id=8290 ['Decision BS-I/8'].

[39]Decision BS-I/8.

analyze general issues relating to: potential scenarios of damage, and the application of the rules to be developed to these scenarios; as well as to elaborate options for elements of the protocol set out in an indicative list, to include: definition and nature of damage, standard of liability, valuation, causation, channeling of liability, roles of Parties of import/export, standing/right to bring claims, and mechanisms of financial security.[40]

d. The Elaboration of Rules and Procedures in the field of Liability and Redress

As noted, the mandate for the elaboration of international rules and procedures on liability and redress provided for a process including one Technical Expert Group meeting and five meetings of the Working Group before the fourth COP-MOP. The fifth meeting of the Working Group was required to forward its report to the fourth COP-MOP in May 2008 for adoption or such other appropriate course as the COP-MOP may determine. What follows is a brief account of each of these meetings.

The Group of Legal and Technical Experts on Liability and Redress ('The Expert Group')

The Expert Group played an important role in performing preparatory work for the first meeting of the Working Group of Legal and Technical Experts, laying out potential considerations relevant to a comprehensive set of rules and procedures on liability and redress. The group elected two Co-Chairs, Rene Lefeber of The Netherlands and Jimena Nieto Carrasco of Colombia, and a rapporteur, Elan Petkova of Bulgaria. The Expert Group identified topics on which more information was needed and identified a list of options and issues for elements of international rules and procedures. These elements included: damage (definition, threshold, nature, scope, and valuation of), causation, standard of liability, channeling, financial security, State responsibility, settling claims, limitations (time and amount), non-Parties, standing and choice

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[40]*Id.*

of instrument. This list was fleshed out to form an outline attached to the report of the meeting. This outline became the reference and organizational guide for further work at the meetings of the Working Group. [41]

The First Meeting of the Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress (WG-L&R 1) ('The Working Group'): May 2005

The first meeting of the Ad Hoc Open-Ended Working Group on Liability and Redress (WG) was held in May 2005. It elected the Co-Chairs of the Technical Expert Group as the permanent Co-Chairs of the Working Group and elected Maria Mbengashe of South Africa as the rapporteur. The Working Group discussed the further elaboration of options included in the Annex to the recommendation of the Technical Expert Group and was able to create lists of concrete options on many issues such as: scope of damage, definition of damage, standard of liability, financial security, limitations (time and monetary), settlement of claims, scenarios of damage, and the nature of the instrument. Some issues were marked for further consideration before options could be listed. These issues included: valuation of damage, channeling, the role of parties of import and export, exemptions, civil liability, State liability, administrative approaches, standing, non-parties (including special rules and procedures), and use of terms. The WG identified an extensive list of further information to gather for consideration at the next Working Group meeting. The Co-Chairs were also asked by the WG meeting to compile and synthesize proposed text into one working draft for the next meeting. [42]

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[41] Report of the Technical Group of Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety, for consideration by the first meeting of the Ad Hoc Open-Ended Working Group on Liability and Redress in the Context of the Cartagena Protocol on Biosafety, UNEP/CBD/BS/TEG-L&R/1/3 (9 November 2004), at http://www.cbd.int/doc/meetings/bs/bstelr-01/official/bstelr-01-03-en.pdf ['Report TEG 1'].

[42] Earth Negotiations Bulletin, Report of the First Meeting of the Ad Hoc Open-Ended Working Group of Legal ; Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety Montreal, Canada 25-27 May 2005.

The Second Conference of the Parties to the Convention on Biological Diversity serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety (COP-MOP2): June 2005

The second COP-MOP was held at Montreal, Canada, in June 2005. The second meeting of the Parties heard a report on the progress of the intersessional work on liability and redress of the meeting of the Technical Expert Group and the first meeting of the Working Group. The Parties reviewed the progress of the Working Group and agreed "that a second meeting of the Working Group should be convened before the third COP-MOP."[43]

The Second Meeting of the Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress under the Cartagena Protocol on Biosafety (WG-L&R 2): February 2006

The second meeting of the Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress convened at Montreal, Canada in February 2006. It focused on, and considered, a Co-Chairs' working draft synthesizing proposed texts and views submitted by governments and other stakeholders on approaches, options and issues on liability and redress.

New Zealand and the United States introduced an indicative list of criteria for assessing effectiveness (to determine the need for a liability regime) 'as a topic' that should be discussed first. They stated that the elaboration of such criteria should be of 'equal if not greater importance' than the elaboration of potential elements of a regime. The majority of participants did not share their view.[44] Many saw this as an attempt to deflect the work away from the development of a liability

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(UNEP/CBD/BS/COP-MOP/2/11), http://www.biodiv.org/doc/meetings/bs/mop-02/official/mop-02-11-en.pdf . ['ENB WGLR1']

[43] Second Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety, Decision BS-II/11 Liability and Redress (Article 27), (30 May - 3 June 2005), at http://www.cbd.int/biosafety/cop-mop/result.aspx?id=10789 ['Decision BS-II/11'].

[44] *Id*.

regime. This criteria was therefore left to be discussed in informal negotiations, then brought to the closing plenary as a non-negotiated and non-exhaustive list, and adopted as an annex to the report of the Working Group. [45]

Parties identified further options on some issues, greater clarification was made of other elements, and a few options and elements were removed such as: primary State liability and use of terms. Operational texts were also submitted by participants on scope of damage, definition of damage, valuation of damage, and causation. [46]

The meeting closed with a set of requests by some Parties for further information on a number of topics and further submission on options and elements, especially other than those relating to damage or causation, 'taking into account the effectiveness criteria in the annex to the report'. Finally, the Working Group requested that a synthesis of submissions of proposed texts be prepared for the next meeting of the WG. This synthesis was included in the meeting report.[47]

The Third Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety (COP-MOP3): March 2006

The third COP-MOP was convened at Curitiba, Brazil in March, 2006. The Parties heard a report on the progress of the Working Group. [48] The COP-MOP then decided to promote continued work on liability and redress by the WG with three intersessional meetings before the fourth

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[45] *Id.*

[46] Report of the Second Meeting of the Ad Hoc Open-Ended Working Group of Legal; Technical Experts on Liability and Redress under the Biosafety Protocol on the Work of its Second Meeting, for consideration at the third Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety, UNEP/CBD/BS/COP-MOP/3/10 (24 February 2006), at http://www.biodiv.org/doc/meetings/bs/mop-03/official/mop-03-10-en.pdf ['Report WGLR2'].

[47] Report WGLR2.

[48] Earth Negotiations Bulletin, COP-MOP 3 Highlights: March 14, 2006, (15 March 2006), http://www.iisd.ca/download/pdf/enb09348e.pdf ['ENB COP-MOP 3'].

Meeting of the Parties in 2008 (MOP4) – to allow the WG to complete its work in accordance with the original work plan decided at COP1, that is by 2007. [49]

The Third Meeting of the Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress under the Cartagena Protocol on Biosafety (WG-L&R 3): February 2007

The third meeting of the Working Group was held at Montreal, Canada, in February 2007. The Working Group continued to elaborate options for elements of rules and procedures, discussing potential options and approaches to those remaining sections of the Co-Chairs' synthesis produced at the first Working Group meeting that were not discussed at the second meeting. Informal negotiations took place among regional and interest groups to develop operational text on these issues.[50]

A synthesis document was prepared at the end of the meeting, incorporating all the operational texts submitted that week and the operational texts submitted at the previous WG meeting. All the texts in this document were unattributed. The document was included in the meeting report as Annex II. The operational texts were streamlined under the following general headings:

I. Possible approaches to Liability and Redress

II. Scope

III. Damage

IV. Primary Compensation Scheme

V. Supplementary Compensation Scheme

VI. Settlement of Claims

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[49]Third meeting of the Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety, Decision BS-III/12 Liability and Redress Under the Biosafety Protocol, (13-17 March 2006), at http://www.cbd.int/biosafety/cop-mop/result.aspx?id=11068 ['Decision BS-III/12'].

[50]Earth Negotiations Bulletin, Summary of the Open-Ended *Ad Hoc* Working Group on Liability and Redress in the Context of the Cartagena Protocol on Biosafety: 19-23 February 2007, (19-23 February 2007), at http://www.iisd.ca/download/pdf/enb09370e.pdf ['ENB WGLR3'].

VII. Complementary Capacity-Building Measures

VIII. Choice of Instrument. [51]

Annex I of the Report, prepared by the Co-Chairs, provided a 'Blueprint for a COP-MOP Decision on International Rules and Procedures in the Field of Liability and Redress for Damage Resulting from Transboundary Movement of Living Modified Organisms' with a matrix indicating the possible combinations of key elements of a liability and redress regime and the possible approaches to accommodate these elements. Finally, the Working Group invited further submissions of operational text over the intersessional period.[52]

The Fourth Meeting of the Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress under the Cartagena Protocol on Biosafety (WG-L&R 4): October 2007

The fourth meeting of the Working Group was held in October 2007 in Montreal, Canada. This meeting focused on further reducing the numerous options of operational texts in the synthesis document prepared by the Co-Chairs. As noted, the synthesis document was a compilation of unattributed texts based on all previous submissions to the Secretariat and the Working Groups. WG 4 focused primarily on streamlining options and approaches for operational texts related to: possible approaches to liability and redress, damage, administrative approach and civil liability (sections I, III and IV of the synthesis of proposed operational texts). Other operational texts related to scope and the supplementary compensation scheme, (sections II and V) were also considered and revised. The Working Group also considered the 'Blueprint' for a decision by the COP-MOP4. The Working Group succeeded in decreasing the options available under the general

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[51]Report of the Open-Ended Ad Hoc Working Group of Legal ; Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety on the Work of its Third Meeting, for consideration at the fourth meeting of the Working Group of Legal ; Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety, UNEP/CBD/BS/WG-L&R/3/3 (15 March 2007), http://www.biodiv.org/doc/meetings/bs/bswglr-03/official/bswglr-03-03-en.pdf ['Report WGLR3']

[52]*Id.*

headings of: State responsibility, damage, civil liability, and administrative approach, as well as specific aspects such as causation, financial security, and exemptions, among others. The resulting Annex to the report of the WG 4 meeting was a revised synthesis document, almost twenty pages shorter than the document on the table at the start of the meeting. The Co-Chairs were requested by the WG to streamline the proposed operational texts of the working document on: administrative approach (sections IV.4(a), settlement of claims (VI), and complementary capacity building (VII) during the intersessional period, by grouping and editing them without altering the substance; and to produce a revised working draft for consideration at its fifth meeting.

The Fifth Meeting of the Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress under the Cartagena Protocol on Biosafety (WG-L&R 5): March 2008

The fifth meeting of the Working Group met in Cartagena, Colombia in March 2008. It considered the revised working draft in three separate processes. First, it discussed at the plenary session, the matters that had not been previously addressed, namely, settlement of claims, capacity building and scope (sections II, VI, and VII). It then discussed - at two sub-Working Groups - the texts of the other sections. Finally, and in an effort to push the process forward, the Co-Chairs presented a Core Elements Paper (CEP). They proposed that a 'Friends of the Chair group (FOC)' be formed to negotiate the CEP.

The CEP was divided into 4 'pieces' – the administrative approach, civil liability, supplementary compensation scheme and capacity building. There were elements proposed for each of these. The initial proposal by the Co-chairs was for a binding administrative approach; a non-binding civil liability approach, and a voluntary fund agreed to by industry combined with a collective approach to be funded by Parties and others and administered by the Parties. This was presented as a package deal. Developing countries did not approve of the document being presented as a package. After significant discussion, delegates decided to proceed on the basis of the CEP rather than continue to discuss the revised working draft. It was pointed out by several delegates that no real progress on substance had been made in the working groups. Switzerland, supported by Norway and the EC,

proposed establishing a Friends of the Chair group and delegates agreed to mandate it to revise the CEP. The group was composed of: JUSCANZ (although not appointed as such): Japan, New Zealand; Asia-Pacific: Malaysia, China, India, the Philippines; EU: two representatives; African Group: four representatives; GRULAC : four representatives; Others: Switzerland and Norway. Representatives could be rotated and additional representatives could attend the negotiations, but only the authorized number of representatives could intervene. The FOC initially allowed others to attend as observers. Later the meeting was confined to these representatives only.

The FOC removed from consideration the more contentious elements in the CEP relating to the nature of the instrument (binding or not). This was left for COP-MOP to decide at its 4th meeting at Bonn in May 2008. The FOC yielded some modest results. Agreement was reached in respect of several specific components in each section of the CEP, as elaborated below. On this basis the operational texts were tidied up and huge sections deleted. This reduced the revised proposed operational texts document considerably, from 53 to 27 pages. But these texts – although placed under agreed elements - still consisted of several, often contradictory options, and remained to be negotiated.

Aside from the nature of the instrument, the outstanding key contentious issues were:

- definition of operator;
- definition of damage;
- strict or fault based standard for civil liability;

The core elements that were broadly agreed to in principle, included the following: for both the administrative approach and for civil liability: broad functional scope; and, narrow geographical scope.

For the administrative approach: duty by person to inform of damage or threat of damage, and to take response and restoration measures; and in default, for the authorities to take such measures and to claim the costs from the person; definition of 'damage' to include 'damage to human health' in addition to damage to the conservation and sustainable use of biodiversity'.

For civil liability, the definition was based on the wording of Article 27 of the Biosafety Protocol that refers to 'damage resulting from the transboundary movement of LMOs'.

On the supplementary compensation scheme, countries agreed broadly on the need for such a scheme. The CEP referred to two schemes. One was a voluntary industry-driven regime. It would be implemented by a contractual arrangement between members of the private sector. The other was a collective compensation scheme created by MOP with contributions from Parties. Support for the first kind of scheme was boosted by an announcement from an industry representative that six major agricultural biotechnology companies were prepared to enter into a 'compact' to provide compensation in the event of damage. There were several qualifiers to this proposal. Countries were cautious and wanted to examine the details of the proposal before making a firm commitment. This scheme appears to be intended for the administrative approach. Divergent views remain on whether the proposed collective scheme should be binding or voluntary and the details of any supplementary compensation arrangement remain to be negotiated.

As time ran out, the 5th WG agreed to an informal and enlarged meeting of the Friends of the Chair (FOC) immediately preceding the COP-MOP4 meeting in Bonn, Germany, in May 2008. The composition was agreed as follows: six representatives of the Asia-Pacific region: Bangladesh, China, India, Malaysia, Palau and the Philippines; EU: 2 representatives; Central and Eastern Europe: 2 representatives; African Group: 6 representatives; Latin American and Caribbean Group: 6 representatives; and New Zealand, Norway, Switzerland and Japan.

Meetings of the Friends of the Chair (FOC) group preceding COP-MOP4; and the Contact Group during COP-MOP4: Bonn, May 2008

The enlarged FOC convened accordingly before the COP-MOP4 at Bonn on 7 – 9 May 2008. When COP-MOP4 started the following week, from 12 – 16 May, it directed that the negotiations continue in the same format as the Friends of the Chair group – although renamed as the 'Contact Group'.

Both the meetings failed to conclude a final document of the rules and procedures within the time frame contemplated by Article 27 of the Protocol and Decision I/8 – that is by 2008. COP-MOP4 nonetheless decided to continue the process and established a Group of the Friends of the Co-Chairs. It is in the same format as the enlarged FOC before. The Decision scheduled a meeting of this group for early 2009; if necessary, provision was made for holding a second meeting before MOP5 which has been planned for October 2010 at Nagoya, Japan. The basis of the negotiations will be the Annex to the Decision. This Annex represents the results of the negotiations thus far on proposals for operational texts.

These 2 meetings convened in 2008 – the Friends of the Chair, and, the Contact Group – did nonetheless achieve considerable progress. Although texts still remain bracketed, as countries wish to preserve their position in the final negotiations, there has been broad agreement on several key matters. The most crucial achievement has been the commitment by countries to work on an integrated text on the following basis.

First, the Parties have agreed to work towards developing an instrument consisting of binding provisions on an administrative approach to liability and redress. There is agreement on the following obligations on operators: to inform the national authority of any damage or imminent threat of damage; to take appropriate response measures; to provide monetary compensation if no such measures can be implemented; where the authorities cary out the response measures upon the failure of the operator to do so, to reimburse the authority the costs and expenses for doing so.

Secondly, it has been agreed that the instrument to be developed include a legally binding provision on civil liability which requires Parties, when (and if) they establish, or extend, their national civil liability regimes to:

a. include the following key elements, identified as: damage, standard of liability, (including strict liability as an option), channeling of liability, financial security where feasible, access to justice, and, due process procedures;

b. recognize and enforce foreign judgments in accordance with any applicable rules and procedures of their domestic courts where existing;

c. endeavour to extend the ambit of their existing reciprocal enforcement of judgments laws to include Parties which are not presently covered.

Thirdly, the binding civil liability component will be complemented by non-legally binding guidelines.

Fourthly, the differences for several contentious matters have been considerably reduced, such as the definitions of 'damage' and 'operator'.

Fifthly, it has been agreed that the instrument will be reviewed no later than a period (to be determined by the Parties) after its coming into force in the light of experience gained – with two options: either with a view to elaborating a more comprehensive binding regime on civil liability; or making the non-legally binding guidelines binding, although only the latter option is explicit.

As noted, the most significant breakthrough of the meeting was the political commitment by Parties to work towards a legally binding instrument. Indeed without this, the extension of the mandate to finalise the regime, as well as the funding for the process, was in jeopardy. The negotiations were in danger of being derailed. Many view the compromise proposal on civil liability by the Like-Minded Friends[53], comprising more than 80 developing countries and others, as largely responsible for having saved the process from collapsing. To reiterate, the agreement is to work towards a binding regime consisting mainly of the administrative approach, but with the inclusion of a legally binding article on civil liability to be complemented by non-legally binding guidelines. This is of critical importance as it introduces the core elements of a civil liability approach into a legally binding instrument and thus "opens the door" towards providing international recognition for civil liability.

[53] For text, see later at p388-389.

e. Future Negotiations on Liability and Redress under the Cartagena Protocol on Biosafety

The final stage of the negotiations will take place in the format of the FOC. A meeting has been scheduled for early 2009. A further final meeting has been tentatively agreed to as well. These meetings must be held before October 2010 – when MOP5 is expected to meet. The aim is to present the outcome in the form of a final instrument on international rules on liability and redress to MOP5 for its adoption. For this to happen, the instrument must be communicated to Parties at least six months before the meeting, as provided by Article 28 of the CBD. This means that the instrument must be finalized by March 2010. A legal drafting group will also have to vet and render the text in treaty language. This exercise may be accomplished within the six months' period.

COP-MOP AND WORKING GROUP MEETINGS: A SUMMARY

MEETINGS	MATTERS DISCUSSED
COP-MOP 1 **Kuala Lumpur February 2004**	Started process to implement Article 27. Mandated a meeting of Technical Group of Experts and also created an Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress (WG). 5 WG meetings scheduled Decided that the process be completed by MOP4 in 2008.
WORKING GROUP 1 Montreal May 2005	Elected co-chairs. Discussed the further elaboration of options included in the Annex to the recommendation of the Technical Expert Group; created lists of concrete options on many issues; some issues were marked for further consideration before options could be listed; and identified an extensive list of further information for consideration at the next WG meeting.
COP-MOP 2 **Montreal** **June 2005**	Reviewed the progress of the WG; and agreed on a second meeting of the WG.
WORKING GROUP 2 Montreal February 2006	Discussed Co-Chairs' working draft synthesizing proposed texts and views submitted by governments and others; Parties identified further options on some issues, clarified other elements; few options and elements removed. Operational texts were also submitted on some elements.
COP-MOP 3 **Curitiba** **March 2006**	Decided to promote continued work on liability and redress by the WG. Agreed on three inter-sessional meetings before MOP4.

WORKING GROUP 3 Montreal February 2007	Continued to elaborate options for elements, discussed potential options and approaches to those remaining sections of the Co-Chairs' synthesis that were not discussed at WG2; a synthesis document was prepared at the end of the meeting; the operational texts were streamlined under general headings; Co-chairs provided a 'Blueprint for a COP-MOP Decision' with the possible combinations of key elements and possible approaches.
WORKING GROUP 4 Montreal October 2007	Focused on further reducing the numerous options of operational texts in the synthesis document by streamlining options and approaches; considered the 'Blueprint'; decreased the options available under some general headings as well as specific aspects; revised synthesis document- now almost 20 pages shorter. WG requested Co-Chairs to streamline the operational texts on: administrative approach, settlement of claims, and complementary capacity building without altering the substance; and to produce a revised working draft for WG5.
WORKING GROUP 5 Cartagena March 2008	Considered revised working draft in three separate processes: at the plenary session - settlement of claims, capacity building and scope; two sub-WGs - the texts of the other sections; and 'Friends of the Chair group (FOC)' - to negotiate the Core Elements Paper (made up of 4 pieces: administrative approach, civil liability, supplementary compensation scheme and capacity building). 'Nature of instrument' left for COP-MOP4 to decide. Agreement reached on several specific components in each piece. Operational texts considerably reduced, but still many contradictory options and contentious issues. Agreed to hold an enlarged meeting of FOC preceding MOP4.

FOC preceding COP-MOP4. Contact Group during COP-MOP4; **COP-MOP 4** **Bonn** **May 2008**	Enlarged FOC met before MOP4 – no significant outcome. COP-MOP4 directed negotiations continue under a 'Contact Group' – which was the original FOC. Achieved broad agreement on several key matters, namely: to work towards developing instrument consisting of binding provisions on an administrative approach; and a legally binding provision on civil liability; complemented by non-legally binding guidelines. Also the instrument will be reviewed within an agreed time period. Differences for several contentious matters considerably reduced. Agreed to hold another meeting in 2009, and possibly another one before MOP5 – in the FOC format.

PART II

ELEMENTS FOR INTERNATIONAL RULES AND PROCEDURE

2

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

State responsibility refers to the obligations of States for acts committed by their nationals that affect other States and that are considered wrongs according to established international law – customary or in violation of a treaty obligation (in this case, the Protocol). A provision on State responsibility would simply recognize the rights and obligations of States under existing international law.

Options for State Responsibility[54]

Option 1: Substantive provision.

Option 2: Preambular paragraph.

Option 3: No provision.

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[54] 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 Fourth Meeting UNEP/CBD/BS/WG-L&R/4/3 Annex 2 (13 November 2007) at http://www.cbd.int/doc/meetings/bs/bswglr-04/official/bswglr-04-03-en.pdf ['Meeting Report WGLR4'].

Delegates' and Others' Positions on State Responsibility

The African Group

Supports operative text preserving existing principles of international law on State responsibility for damage caused by wrongful acts.[55]

Specific Statements by members of the African Group in support of the African Group position

Statements of support by: Cameroon,[56] Egypt,[57] Ethiopia,[58] Ghana,[59] Liberia,[60] Mauritius,[61] Namibia,[62] Rwanda,[63] Senegal,[64] and South Africa[65].

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[55] Earth Negotiations Bulletin, Daily Report on the Fourth Meeting of the Open-Ended *Ad Hoc* Working Group on Liability and Redress under the Biosafety Protocol, (October 2007) at, http://www.iisd.ca/download/pdf/enb09400e.pdf ['ENB WGLR4'] Summary.

[56] Liability and Redress (Article 27), Compilation of views submitted in response to questionnaire on Liability and Redress for damage resulting from transboundary movement of LMOs, in preparation for the first meeting of the Technical Group Of Experts On Liability and Redress In The Context Of The Cartagena Protocol On Biosafety, UNEP/CBD/BS/TEG-L&R/1/INF/1 (20 September 2004), at http://www.cbd.int/doc/meetings/bs/bstelr-01/information/bstelr-01-inf-01-en.pdf ['Compilation of Views TEG 1'].

[57] Earth Negotiations Bulletin, Summary Report on the First Meeting of the Open-Ended Ad Hoc Working Group on Liability and Redress under the Biosafety Protocol (25-27 May 2005) at, http://www.iisd.ca/download/pdf/enb09320e.pdf ['ENB WGLR1 Summary'] *;* Notes WGLR4.

[58] Compilation of Views WGLR2.

[59] Daily Notes from the Fourth Meeting of the Ad Hoc Open-Ended Working Group on Liability and Redress (February 2007) ['Notes WGLR4'].

[60] Compilation of Views WGLR2.

[61] *Id.*

[62] Notes WGLR4.

[63] *Id.*

[64] Earth Negotiations Bulletin, Daily Report on the Second Meeting of the Open-Ended *Ad Hoc* Working Group on Liability and Redress under the Biosafety Protocol (June 2005) ['ENB WGLR2'].

[65] Notes WGLR4.

Egypt: in bilateral relations, developing countries are often left in an unfavorable position with regard to State responsibility. Useful to state responsibility of State.[66]

Ethiopia: while preserving the position, responsibility should be of the State of export.[67]

Liberia: this provision will impress upon States the seriousness of their obligation to regulate and reduce possible risks to biodiversity and human health.[68]

Namibia: need to distinguish between the responsibility of exporting and importing States.[69]

Rwanda: State liability and responsibility should be combined.[70]

Senegal: States are responsible for ensuring the safety of their citizens and following the AIA procedure, as well as authorizing imports. A State may be responsible if it fails to establish appropriate rules and controls.[71]

South Africa: a liability and redress regime should not affect State responsibility.[72]

Uganda: State responsibility should be stated in the operative and not in the preambular paragraph.[73]

Bangladesh

No need for any explicit rules on State responsibility.[74]

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[66] ENB WGLR4 .
[67] Daily Notes from the Third Meeting of the Ad Hoc Open-Ended Working Group on Liability and Redress (19-23 February 2007) ['Notes WGLR3'].
[68] Compilation of Views TEG 1.
[69] ENB WGLR2.
[70] Notes WGLR4.
[71] ENB WGLR2.
[72] Notes WGLR3; Notes WGLR4.
[73] ENB WGLR4 Summary.
[74] Notes WGLR3.

Barbados

Concerned that channeling liability to importing States reliant on information received from the developer of the GMO during the authorization process would be harsh.[75]

Belize

Supports the text on State responsibility under international law.

Text should remain in a substantive paragraph, not preambular paragraph. [76]

Cambodia

Supports text on State responsibility.[77]

Colombia

Supports the retention of specific text on State responsibility.

Suggests inclusion of the work of the ILC on State responsibility.[78]

Cuba

Supports the retention of text on State responsibility.[79]

Ecuador

Supports the inclusion of specific text on State responsibility in the operational text, but not in a preambular paragraph.[80]

European Union

Does not see a need to establish rules on State responsibility; however, willing to consider the inclusion of a preambular paragraph on this subject.[81]

India

Supports the inclusion of operational text on State responsibility.[82]

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[75] ENB WGLR2.
[76] Notes WGLR4; ENB WGLR4
[77] *Id.*
[78] Notes WGLR4.
[79] *Id.*
[80] Notes WGLR4; ENB WGLR4 .
[81] Notes WGLR4.
[82] Notes WGLR4.

Opposed to placing text on State responsibility in a preamble.[83] This would have the effect of watering down text and 40 years of work by the International Law Commission on this subject.[84]

Indonesia

Opposed to State responsibility because it contradicts domestic law.[85]

Iran

No need for special rules on State responsibility.[86]

Japan

Proposes placing text on State responsibility in the preamble.[87]

Malaysia

1. Supports the inclusion of provision on State responsibility.[88] Rationale: State responsibility already exists for wrongful acts in international law. A provision is not needed; however, a provision would help to make this fact explicit and clear. Such a provision acknowledging State responsibility can be seen in many other conventions.[89]
2. A preambular paragraph on State responsibility could be a valid option.[90]

   Rationale: Notes the role of the preamble to provide background and aid in the interpretation of operational text. In some cases,

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[83] ENB WGLR4.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] Notes WGLR4; ENB WGLR4.
[88] Notes WGLR4; Notes WGLR3; Synthesis of Proposed Operational Texts on Approaches and Options Identified Pertaining to Liability and Redress in the Context of Article 27 of the Biosafety Protocol, Note by the Co-Chairs, in preparation for the fourth meeting of the Ad Hoc Open-Ended Working Group on Liability and Redress under the Cartagena Protocol on Biosafety, UNEP/CBD/BS/WG-L&R/4/2 Section VII OT 1 (13 September 2007), at http://www.cbd.int/doc/meetings/bs/bswglr-04/official/bswglr-04-02-en.pdf ['Synthesis of Texts WG 4'], at Section I A OT 2.
[89] Notes WGLR3.
[90] Notes WGLR4.

such as the *Pinochet* case, preambular paragraphs were relied upon to establish a right or imply a provision.[91]

Mexico

Rules on State responsibility already exist.[92]

New Zealand

Does not see a need for text on State responsibility.[93]

Norway

Supports the inclusion of operational text on State responsibility,[94] and opposes placing such text in a preamble.[95]

Palau

Supports the inclusion of text on State responsibility.[96]

Paraguay

Supports the inclusion of text on State responsibility.[97]

Peru

Supports the inclusion of text on State responsibility in a substantive, not in a preambular, paragraph.[98]

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[91] *Id.*
[92] Notes WGLR4.
[93] ENB WGLR4; Notes WGLR4.
[94] Compilation of Submissions of Further Views and Proposed Operational Texts with Respect to Approaches, Options and Issues Identified as Regards Matter Covered By Article 27 Of The Protocol and Proposed Texts, in preparation for the fourth meeting of the Ad Hoc Open-Ended Working Group on Liability and Redress under the Cartagena Protocol on Biosafety, UNEP/CBD/BS/WG-L&R/4/INF/1 (28 August 2007), at http://www.cbd.int/doc/meetings/bs/bswglr-04/information/bswglr-04-inf-01-en.pdf ['Compilation of Views WGLR4']; Notes WGLR4; Synthesis of Texts WGLR4, at Section IA OT 2.
[95] ENB WGLR4 .
[96] Notes WGLR4; Synthesis of Texts WGLR4, at Section IA OT 2.
[97] ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IA OT 5.
[98] Notes WGLR4.

Switzerland

Supports the inclusion of a provision stating that rules developed under Article 27 of the Protocol should not prejudice the general rules of international law for State responsibility.[99]

Notes that special rules are not necessary in this context, as State responsibility already exists.[100] States are responsible for damage caused by incidents occurring within their territory under existing international law.[101]

Thailand

Supports the inclusion of text on State responsibility.[102]

Trinidad and Tobago

Support the inclusion of text stating that the rules developed under Article 27 of the Protocol should not prejudice the general rules of international law for State responsibility.[103]

TEXT AGREED TO AT COP-MOP4

For both Administrative Approach and Civil Liability

Operational text

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

Preambular text

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

[99] ENB WGLR2; Notes WGLR4; Synthesis of Texts WGLR4, at Section I A OT 2.
[100] ENB WGLR2.
[101] Compilation of Views TEG 1.
[102] Notes WGLR4.
[103] ENB WGLR2.

Non-Parties

Argentina

Supports the retention of text on recognizing existing international law on State responsibility.[104]

Australia

State responsibility is inappropriate, as States are often not directly responsible for importing or exporting LMOs.[105]

Canada

Supports text on State responsibility stating that rules and procedures developed will not change existing norms of international law.[106]

United States of America

Supports text on State responsibility, stating that rules and procedures will not affect States' rights and obligations under existing principles of international law.[107]

Observers - Industry

Global Industry Coalition

States should be responsible for any breach of compliance with the Protocol, regardless of whether damage to biodiversity results from non-compliance.[108]

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[104] Notes WGLR4; ENB WGLR4; Synthesis of Texts WGLR4, at Section I A OT 5.
[105] *Id.*
[106] Notes WGLR4; Synthesis of Texts WGLR4, at Section IA OT 1.
[107] Notes WGLR4*;* Synthesis of Texts WGLR4, at Section IA OT 1 or 5.
[108] Liability And Redress under Cartagena Protocol on Biosafety, Compilation of Views Submitted on the Matter Covered by Article 27 of the Protocol pursuant to the Recommendation of the Meeting of the Technical Group of Experts on Liability and Redress, in preparation for the first meeting of the Ad Hoc Open-Ended Working Group on Liability and Redress under the Cartagena Protocol on Biosafety, UNEP/CBD/BS/WG-L&R/1/INF/1 (28 February 2005), at http://www.cbd.int/doc/meetings/bs/bswglr-01/information/bswglr-01-inf-01-en.pdf ['Compilation of Views WGLR 1'].

Existing methods of dispute resolution between States in these matters provide the most expedient and satisfactory solution to State responsibility.[109]

International Grain Trade Coalition

States should be responsible for non-compliance with the provisions of the Protocol.[110]

Observers - NGOs

Greenpeace International

Supports the inclusion of text on State responsibility under rules of general international law.[111]

South African Civil Society

State responsibility already exists in international law.[112]

Public Research and Regulation Initiative

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

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[109] *Id.*
[110] Compilation of Views WGLR1.
[111] Compilation of Views WGLR2.
[112] *Id.*

3

SCOPE

The scope establishes the general coverage of the instrument. It may be established by reference to the activities giving rise to the harm (the 'functional scope'); the area or jurisdiction where the harm occurred and for which the harm is recoverable (the 'geographical scope'); and, the subject matter that causes the damage.

A. Functional scope

The functional scope could be broad and cover all possible activities that find their origin in the transboundary movement of LMOs, such as transit, handling and use; as well as activities which are intentional, unintentional, legal, illegal and activities in contravention of the CPB. Alternatively the scope could be narrowly limited to damage that is caused while the LMOs are being transported across boundaries.

B. Geographical scope

The geographical scope deals with the territorial area in which the damage occurs. The question here is: should the instrument relate only to matters within the territory and control of a Party; or should it extend to areas beyond national jurisdiction, such as the high seas? Article 3(k) of the CPB defines the term 'transboundary movement' as: '*the*

movement from one Party to another Party…' This appears to exclude areas outside the jurisdiction of States. However, the narrow scope leaves unaddressed situations where an activity outside a country's jurisdiction causes damage within.

C. Subject matter

As to subject matter, the CPB applies to all LMOs so it is expected that the liability regime would have the same coverage. It is important to note that the definition of LMO in the CPB is confined to those that are the result of modern biotechnology. This is a much narrower category of organisms than that referred to in Articles 8(g) and 19 of the CBD, which use the term 'living modified organisms resulting from biotechnology'. The positions in the negotiations on 'subject matter' are set out and assimilated under the 'functional scope'.

D. Limitation in time

The coverage of a regime may also be limited by a time frame. One such situation is where the activity ceased before the entry into force of the instrument; or its incorporation into the domestic law of a country. That means that the instrument will not apply to retroactive acts. This reflects a well established rule of interpretation against the retroactive application of a treaty.

E. Limitation to the authorization at time of import

A variation is to limit the applicability of an instrument to the use of the LMO for which the authorization was given prior to the transboundary movement. Once the LMO is in the country of import any different, or subsequent authorized, use will not be covered by the scope of the regime.

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

As the scope of the instrument refers to transboundary movement, it is necessary to determine when this starts and ends. This movement will necessarily involve the import and export of LMOs. Hence the need to

define with certainty the physical activity that starts off an export (such as loading on a vessel) as well as an import (such as taking possession) of an LMO.

G. Non-parties

The CPB allows for the movement of LMOs between Parties and non-Parties. Generally, an instrument cannot create obligations for non-Parties. Hence the scope of an instrument cannot cover damage caused by the acts of non-parties. The Protocol addresses the issue of non-Parties in Article 24[113] and in COP-MOP decisions[114] implementing this Article. They provide guidance to Parties on activities involving non-Parties. A Party is obliged by Article 24 of the CPB to ensure that the movement of the LMOs is consistent with the Protocol's objectives – which is essentially to ensure an adequate level of safety in activities relating to LMOs that may adversely affect biodiversity and human health. Similarly a regime would not be able to impose its rules on non-Parties but oblige Parties to be responsible for any consequence arising from the activity or the LMO. Parties can enter into agreements or other arrangements with non-Parties, and even provide for a higher level of protection than that under the Protocol. The only prudent solution for a Party of import is to provide contractually for recourse to the non-Party if any liability results.

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[113] Article 24:

1. Transboundary movements of living modified organisms between Parties and non-Parties shall be consistent with the objective of this Protocol. The Parties may enter into bilateral, regional and multilateral agreements and arrangements with non-Parties regarding such transboundary movements.
2. The Parties shall encourage non-Parties to adhere to this Protocol and to contribute appropriate information to the Biosafety Clearing-House on living modified organisms released in, or moved into or out of, areas within their national jurisdiction.

[114] Decision BS-I/112; Third Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety, Decision BS-III/6 Cooperation (13-17 March 2006), at http://www.cbd.int/biosafety/cop-mop/result.aspx?id=11062 ['Decision BS-III/6'].

A. FUNCTIONAL SCOPE

Options for Functional Scope[115]

Option 1: Broad Scope

a. activities covered: transport, transit, handling, use, etc.

b. transboundary movements covered:

   i. legal,

   ii. illegal or in contravention of the Protocol,

   iii. intentional, and

   iv. unintentional;

c. damage threatened to occur due to transboundary movement.

Option 2: Narrow Scope

a. damage resulting from transboundary movement;

b. damage resulting from activities during transboundary movement;

c. damage resulting from transport during transboundary movement.

Delegates' and Others' Positions on Functional Scope

The African Group

1. Supports a broad functional scope.[116]
2. It should include:

   a. activities such as transport, transit, use and handling, including illegal traffic from the point where the LMO is loaded on the means of transport in an area under the national jurisdiction of a Party of export;

   b. damage resulting from the transboundary movement of LMOs and products thereof;

[115] Meeting Report WGLR4.

[116] ENB WGLR4 Summary.

c. intentional, unintentional, authorized or unauthorized transboundary movements; and
d. preventative measures for damage that is threatened.[117]

Specific Statements by members of the African Group in support of the African Group position

Statements of support by: Burkina Faso,[118] Cameroon,[119] Egypt, Guinea Bissau,[120] Kenya,[121] Liberia,[122] Mauritius,[123] Senegal,[124] South Africa,[125] Tanzania,[126] Uganda,[127] and Zambia[128] **.**

Cameroon: additional activities (and subject matter) to be included in the functional scope of rules and procedures, including:

a. contained use;
b. field trials;
c. LMOs-FFP;
d. handling of wastes from contained use facilities; and
e. accidental releases.[129]

Ethiopia: products of LMOs should be covered by scope because when we include 'labelling' in our Protocol we foresee that there will be products of LMOs that need to be labelled.[130]

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[117] Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT 2.
[118] ENB WGLR2.
[119] ENB WGLR1 Summary; Compilation of Views TEG 1.
[120] *Id.*
[121] ENB WGLR1 Summary.
[122] Compilation of Views TEG 1.
[123] *Id.*
[124] ENB WGLR2; Notes WGLR4.
[125] ENB WGLR1 Summary; ENB WGLR2.
[126] ENB WGLR1 Summary.
[127] Compilation of Views TEG 1.
[128] ENB WGLR2; Earth Negotiations Bulletin, Report on the Third Meeting of the Intergovernmental Committee of the Cartagena Protocol on Biosafety, Summary (22-26 May 2002) at, http://www.iisd.ca/download/pdf/enb09244e.pdf ['ENB ICCP3 Summary'].
[129] Compilation of Views TEG 1.

Guinea Bissau: rules should cover transboundary movement which are unknown to the importing country, example, food aid and other LMOs-FFP.[131]

Senegal: the instrument should adopt the scope in Article 4 of the Protocol.[132]

Uganda: should include specific activities such as:

a. accidents;
b. theft;
c. failure to comply with measures/procedures on labeling or packaging;
d. environmental releases;
e. experimental and contained use;
f. consumption and related activities;
g. direct consumption through feed or medicines; and
h. indirect consumption, example, physical contact.[133]

Bangledesh

1. Supports a broad functional scope including:
    a. damage resulting from the activities of transport, transit, handling and use of LMOs and products thereof;
    b. intentional, unintentional and illegal transboundary movements; and
    c. preventative measures for damage threatened by an activity or transboundary movement.[134]
2. The following be defined: biological diversity, transboundary movement, and "resulting from" as related to damage to biological diversity.[135]

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[130] Daily Notes from the Friends of the Chair group meeting just before the Fourth Meeting of the Parties to the Cartagena Protocol on Biosafety (May 2008) ['Notes, Friends of the Chair group preceding MOP4.'].

[131] *Id.*

[132] Notes WGLR4.

[133] Compilation of Views TEG 1.

[134] Notes WGLR4*;* Synthesis of Texts WGLR4. at Section II A OT 2 & 13.

[135] *Id.*

Belize

Favors a broad functional scope,[136] including damage resulting from:

a. activities such as transport, transit, handling and use of LMOs and products thereof;
b. intentional, unintentional and illegal transboundary movements; and
c. preventive measures to address the threat of damage.[137]

Bhutan

1. Favors a broad functional scope.[138]
2. The scope should include activities such as: transport, transit, handling and use of LMOs and products thereof.[139]
3. Damage and damage causing activities must result from the transboundary movement of LMOs and products thereof including intentional, unintentional and illegal transboundary movements.[140]
4. Preventative measures may be taken if there is a threat of damage due to such activities and movements.[141]

Brazil

1. Supports a broad functional scope including damage resulting from:
    a. transport, transit, handling, identification, packaging and/or use of LMOs originating in transboundary movements,
    b. unintentional transboundary movements of LMOs.[142]
2. Favours further discussion of Article 27 language on "damage resulting from transboundary movement of LMOs" in relation to scope and definition of damage.[143]

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[136] ENB WGLR4 Summary.
[137] Notes WGLR4*;* Synthesis of Texts WGLR4, at Section II A OT 2.
[138] ENB WGLR4 Summary.
[139] Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT 2.
[140] *Id.*
[141] *Id.*
[142] ENB WGLR2; Compilation of Views TEG 1.
[143] ENB ICCP2 Summary*;* ENB WGLR1 Summary.

3. Reserves its opinion on scope.[144]
4. Does not agree with using the word 'risk' as this will include compensation for risk and not for the damage[145].

Cambodia

1. Supports a broad scope encompassing the scope of the Protocol.[146]
2. Scope should include:
    a. activities such as: transport, transit, handling and use of LMOs and products thereof;
    b. damage and damage causing activities that result from the transboundary movement of LMOs and products thereof; and
    c. intentional, unintentional and illegal transboundary movements.
3. The threat of damage due to such activities and movements may also be addressed through preventative measures.[147]

China

1. Proposes limiting the scope to damage related to activities authorized according to the terms of the Protocol.[148]
2. Rules should apply to transboundary movements of LMOs as defined by Article 3k,[149] which defines transboundary movement.[150] Damage caused directly by shipment is very rare.[151]
3. Supports a broad functional scope.[152]
4. Does not support the inclusion of products because this is not stated in Article 4 of the Protocol.[153]

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[144] Notes WGLR4.
[145] Notes, Friends of the Chair group preceding MOP4.
[146] *Id*.
[147] Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT 2.
[148] Notes WGLR4; ENB WGLR4 Summary; Synthesis of Texts WGLR4, at Section II D OT.
[149] Synthesis of Texts WGLR4, at Section II F OT 4.
[150] Notes WGLR4.
[151] ENB WGLR1 Summary.
[152] Notes, Friends of the Chair group WGLR5.

Colombia

1. Supports a broad functional scope.[154]
2. Should include:
    a. activities such as transport, transit, handling and use of LMOs that find their origin in a transboundary movement;[155] and
    b. authorized and unauthorized activities and intentional and unintentional transboundary movements.[156]

Cuba

1. Favors a broad functional scope.[157]
2. Damage resulting from transboundary movement of LMOs including:
    a. activities such as transport, transit, handling and use of LMOs;[158]
    b. intentional, unintentional, authorized or illegal transboundary movements; and
    c. preventative measures.[159]

Ecuador

1. Supports a broad functional scope.
2. Should include:
    a. activities involving all LMOs covered by the Protocol that find their origin in transboundary movement, such as transport, transit, handling, and use;[160] and
    b. intentional, unintentional, authorized and unauthorized movements and activities.[161]

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[153] Notes, Friends of the Chair group preceding MOP4.
[154] Notes WGLR4.
[155] Notes WGLR3; Notes WGLR4.
[156] Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT 7.
[157] ENB WGLR4 Summary.
[158] ENB WGLR1 Summary.
[159] Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT 2.
[160] Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT 7.
[161] *Id.*

3. Prefers a final text that singles out damage resulting from a use different from that which is authorized.[162]

El Salvador

Suggests consideration of the inappropriate use and illegal introduction of LMOs for inclusion in the functional scope.[163]

European Union

1. Supports a broad functional scope,[164] encompassing:
    a. all activities covered under the Protocol;
    b. any activity that originates in a transboundary movement of LMOs,[165] namely, shipment, transit, handling and use of LMOs;
    c. intentional and unintentional transboundary movements (legal or illegal); for intentional transboundary movements, to apply to damage resulting from any authorized use of the LMO as in (d) below, as well as to any use in violation of such authorization or contravention of domestic measures (i.e. illegal uses). The point where these movements begin should be the same as for an intentional transboundary movement.
    d. LMOs intended for food, feed or processing, contained use, or intentional introduction into the environment; and
    e. authorized and unauthorized use of LMOs.[166]
2. Should not be limited to the first transboundary movement, but should be applied to all subsequent transboundary movements,[167] and the repatriation of LMOs.[168]

India

1. Favors a broad functional scope including:

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[162] ENB WGLR4 Summary.
[163] ENB WGLR1 Summary.
[164] ENB WGLR4 Summary.
[165] Notes WGLR4.
[166] Compilation of Views WGLR2; Compilation of Views WGLR4.
[167] ENB WGLR2.
[168] Compilation of Views WGLR2; Compilation of Views WGLR4.

a. all processes under Article 27[169] and damage resulting from transboundary movement of LMOs;
b. activities such as transport, transit, handling and use of LMOs;
c. transboundary movements may be intentional, unintentional, authorized or illegal; and
d. preventative measures.[170]

2. Damage should be limited to activities authorized under the Protocol.[171]

Indonesia

1. The functional scope should be in line with Indonesian national law, CBD and Protocol.
2. The scope should address:
    a. transboundary movements defined by Article 3k;
    b. unintentional movements under Article 17;
    c. illegal movements: Article 25; and
    d. LMOs in transit: Articles 4 and 6 of the Protocol.[172]

Iran

Favors a broad functional scope including damage resulting from:

a. activities such as transport, transit, handling and/or use of LMOs that find its origin in transboundary movements;[173] and
b. intentional and unintentional transboundary movements.[174]

Japan

1. The functional scope should reflect the scope of the Protocol.[175]
2. Should cover:

169 Compilation of Views TEG 1.
170 Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT 2.
171 Notes WGLR4; Synthesis of Texts WGLR4, at Section II D OT 3.
172 Compilation of Views WGLR2.
173 ENB WGLR2.
174 Compilation of Views TEG 1; ENB WGLR2.
175 Compilation of Views TEG 1.

a. damage resulting from the transboundary movement of LMOs;[176] and
b. response measures taken to avoid, minimise or contain the impact of such damage.[177]

Malaysia

1. Supports a broad functional scope,[178] applying to:
    a. activities such as transport, transit, handling and use;
    b. damage resulting from the transboundary movements of LMOs;
    c. LMOs for food, feed and processing, contained use or intentional introduction into the environment (including placing on the market[179]);
    d. intentional, unintentional, legal and illegal transboundary movements; and
    e. preventative measures for damage threatened to be caused.[180]
2. Scope should include products of LMOs.
   Rationale: 'products' are within the contemplation of the Protocol as set out in:
    a. Art 20(3)(c) – which refers to this concept.
    b. Annex III, Risk assessment – paragraph 5, refers to risks associated with products of LMOs.[181]

Mexico

1. Supports a broad functional scope,[182] covering damage resulting from:
    a. an intentional, unintentional or illegal transboundary movement;[183]
    b. the whole process of a transboundary movement;[184]

[176] Compilation of Views WGLR4.
[177] Notes WGLR4; Synthesis of Texts WGLR4, Section II B OT 7.
[178] ENB WGLR4 Summary, Notes Friends of the Chair group WGLR5.
[179] Notes, Friends of the Chair group preceding MOP4..
[180] ENB WGLR2; Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT2.
[181] Notes, Friends of the Chair group preceding MOP4.
[182] ENB WGLR4 Summary.
[183] Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT3.

c. activities such as transport, transit, handling and use of LMOs.[185]

2. Text should single out damage resulting from use of an LMO that is different from the authorized use.[186]

New Zealand

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 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 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.[187]

Norway

1. The scope should include:
    a. any activity that finds its origin in a transboundary movement,[188] such as transit, handling and use;[189]
    b. all LMOs covered by the Protocol;
    c. intentional, unintentional, authorized: includes contravention of domestic measures to implement the Protocol or illegal transboundary movements;[190]

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[184] Notes WGLR4.
[185] ENB WGLR2.
[186] ENB WGLR4 Summary.
[187] WGLR4.
[188] Notes WGLR4.
[189] Compilation of Views WGLR4; Compilation of Views WGLR2.
[190] Compilation of Views WGLR4.

d. for intentional transboundary movement, includes authorized as well as any use in violation of such authorization.[191]

2. The starting point for defining scope is Articles 1, 4 and 27 of the Protocol.[192]

Panama

1. Supports a broad functional scope that is closest to Articles 1 and 4 of the Protocol.[193]
2. Scope should include:
   a. activities such as transport, transit, handling and use of LMOs that find their origin in a transboundary movement; and
   b. intentional, unintentional, or authorized transboundary movements and activities; or
   c. activities or transboundary movements in violation of an authorization.[194]

Paraguay

Supports a narrow functional scope as broad scope is against Paraguay's national law.[195]

Peru

Prefers a broad functional scope covering damage resulting from transboundary movements of LMOs.[196]

Philippines

Products of LMOs should not be included in the scope.[197]

Saint Lucia

1. Supports a broad functional scope.[198]

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[191] *Id.*
[192] Notes WGLR4.
[193] ENB WGLR4 Summary; Notes WGLR4.
[194] Notes WGLR4; Synthesis of Texts WGLR4, Section II A OT 7.
[195] Notes, Friends of the Chair group WGLR5.
[196] Notes WGLR4; Synthesis of Texts WGLR4, Section II A OT 11.
[197] Notes, Friends of the Chair group preceding MOP4.
[198] ENB WGLR4 Summary.

2. Scope should include:
    a. LMOs and products thereof;
    b. damage resulting from transport, transit, handling and use of LMOs and products thereof;
    c. intentional, unintentional, authorized or illegal transboundary movement; and
    d. preventative measures, where applicable.[199]
3. The scope should be in line with the objectives and scope of the Protocol itself.[200]

Saudi Arabia

1. Supports a broad functional scope.[201]
2. The scope should include:
    a. damage resulting from transport, transit, handling and use of LMOs and products thereof;
    b. requirement that LMOs must have origin in an intentional, unintentional, authorized or illegal transboundary movement; and
    c. preventative measures, where applicable.[202]

Sri Lanka

Supports a broad scope covering:

a. damage resulting from transport, transit, handling, use, import or release of LMOs; and
b. LMOs that find their origin in intentional or unintentional transboundary movements.[203]

Switzerland

1. Supports a broad functional scope covering damage resulting from:
    a. activities such as transport, transit, handling and/or use of LMOs;

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[199] Notes WGLR4*;* Synthesis of Texts WGLR4, Section II A OT 2.
[200] Notes WGLR4.
[201] Notes WGLR4.
[202] Notes WGLR4; Compilation of Views TEG 1; Synthesis of Texts WGLR4, Section II A OT 2.
[203] Compilation of Views WGLR1; Compilation of Views WGLR2.

b. LMOs that find their origin in transboundary movements;
c. intentional and unintentional transboundary movements of LMOs.[204]

2. 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 of the LMOs.[205]

TEXT AGREED TO AT COP-MOP4

For both Administrative Approach and Civil Liability

Operational text

1. These rules and procedures apply to transport, transit, handling and use of living modified organisms [and products thereof], provided that these activities find their origin in a transboundary movement. The living modified organisms referred to are those:

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

(b) Destined for contained use;

(c) Intended for intentional introduction into the environment.

2. With respect to intentional transboundary movements, these rules and procedures apply to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1.

3. These rules and procedures also apply to unintentional transboundary movements as referred to in Article 17 of the Protocol as well as illegal transboundary movements as referred to in Article 25 of the Protocol.

[204] ENB WGLR1 Summary; ENB WGLR2.
[205] WGLR4.

Non-Parties

Argentina

1. Supports a functional scope consistent with Articles 3(k), 4, and 27 of the Protocol, defining a transboundary movement and limiting the scope to damage resulting from transboundary movement of LMOs.[206]
2. Scope should include:
   a. activities of transport and transit of LMOs;
   b. damage covered should be only damage during shipment of LMOs;[207] or
   c. damage resulting from the transboundary movement of LMOs.
   Rationale: Extending the scope of rules and procedures to other activities would be transcending the purview of Article 27.[208]
3. Scope should take into consideration the definition of biological diversity in Article 2 of the Convention.[209]
4. "Transboundary movements" should be defined as an intentional movement between the territories of Parties.[210]
5. "Resulting from" should be strictly defined according to a cause in fact (would not have occurred, but for) and proximate cause of damage to the transboundary movement of LMOs.[211]

Australia

1. Supports a narrow functional scope covering damage resulting from transboundary movement of LMOs.[212]
2. Activities covered should include transport of LMOs including transit.[213] Handling and use are outside the scope of Article 27 and should not be covered.[214]

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[206] Notes WGLR4; ENB WGLR2.
[207] ENB WGLR1 Summary.
[208] Notes WGLR4.
[209] *Id.*
[210] *Id.*
[211] Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT 13.
[212] *Id.*
[213] ENB WGLR2.

Canada

1. Prefers a narrow functional scope[215] consistent with Article 27 of the Protocol.[216]
2. The scope of rules and procedures should only cover:
    a. damage to biodiversity;
    b. damage resulting from a transboundary movement; and
    c. the transport of LMOs, including transit.[217]
3. The inclusion of damage caused by activities such as handling and use of LMOs would require examination of existing domestic legislation in the Party of import, and therefore has no role in international rules and procedures developed under Article 27.[218]

United States of America

1. The functional scope should be based on Articles 4 and 27 of the Protocol.[219]
2. The scope should cover :
    a. the damage resulting from the transboundary movement of LMOs;
    b. the shipment of LMOs;[220] and
    c. authorized use only.[221]

Observers - Education

Public Research and Regulation Initiative

1. The application of "transboundary movement" to the many movements involved in public research should be considered.[222]

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[214] ENB WGLR1 Summary.
[215] ENB WGLR4 Summary.
[216] ENB WGLR2.
[217] ENB WGLR2. Compilation of Views WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT 10.
[218] Compilation of Views WGLR4.
[219] Notes WGLR4.
[220] Compilation of Views WGLR1.
[221] ENB WGLR1 Summary.

2. This instrument shall apply to adverse effects of living modified organisms resulting from intentional or unintentional transboundary movement on the conservation and sustainable use of biodiversity.[223]

Universidad Nacional Agraria La Molina Of Peru

Supports broad functional scope including damage resulting from:

a. activities of transport, transit, handling and/or use, and placing on the market of LMOs;
b. LMOs that have their origin in transboundary movements; and
c. intentional (includes: authorized, unauthorized and non-authorised) and unintentional transboundary movements of LMOs.[224]
d. Illegal transboundary movements, that is, movements which contravene national legal provisions, as long as the affected State is a Party to the Protocol.
e. Applies equally to States regardless of whether they are importing or transit States.[225]

Observers - Industry

Global Industry Coalition

1. The functional scope should apply to traceable damage to biodiversity resulting from the intentional transboundary movement of LMOs between Parties.[226]
2. “Resulting from” means that the damage was:
   a. caused in fact by (would not have occurred but for) the transboundary movement of the LMO; and
   b. proximately caused by (there were no superseding or intervening causes) the transboundary movement of the LMO.[227]

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[222] Notes WGLR3.
[223] WGLR4.
[224] ENB WGLR2; and WGLR4.
[225] WGLR4.
[226] Compilation of Views WGLR4.

International Federation of Organic Agriculture Movements

Supports a broad functional scope, including damage to organic agriculture and products such as:

a. unwanted spread by uncontrollable means of transport;
b. decrease or change in soil activity;
c. decrease in ecological complexity of biodiversity following unwanted spread or out-crossing of LMOs;
d. disturbance of functional biodiversity;
e. decrease in varieties or variety choice in market for organic farmers;
f. presence of LMOs in organic products;
g. cost of testing or protective measures;
h. damage to the image of organic agriculture and products due to unwanted contamination;
i. loss of future possibilities to produce organic products; and
j. loss of organic market.[228]

International Grain Trade Coalition

1. The functional scope should not apply to the actual transboundary movement.
2. It should apply to damage that may occur subsequent to the transboundary movement.[229]

Organic Agriculture Protection Fund

Supports a broad functional scope including activities such as transport, transit, handling and/or use.[230]

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[227] WGLR4.
[228] Compilation of Views WGLR2.
[229] Compilation of Views WGLR4; Compilation of Views WGLR1.
[230] Compilation of Views WGLR2.

Observers - NGOs

ECOROPA

Acknowledges the existence of a list of scenarios and sub-scenarios where damage will be caused by LMOs and proposes that this list be widened.[231]

Edmonds Institute

Proposes that the scope should cover a scenario in which the origin of an LMO is unknown and presumed to be from a transboundary movement.[232]

Friends of the Earth International

The scope should cover the inclusion of transboundary contamination from genetically modified crops.[233]

Greenpeace International

Supports a broad functional scope including damage resulting from:

a. activities such as transport, transit, handling and/or use of LMOs;
b. LMOs that find their origin in transboundary movements; and
c. Intentional, unintentional and illegal transboundary movements of LMOs.[234]

South African Civil Society

1. Supports a broad functional scope including damage from:
    a. intentional or unintentional transboundary movement;
    b. activities such as transit, handling, and use (including consumption, production, culturing, storage, destruction, disposal or release - taking into account unknown risks) of LMOs; and

[231] ENB WGLR1 Summary.
[232] *Id.*
[233] Earth Negotiations Bulletin, Report on the First Conference of the Parties of the Convention on Biological Diversity serving as the meeting of the Parties of the Cartagena Protocol on Biosafety, Summary (23-28 February 2004) at, http://www.iisd.ca/download/pdf/enb09289e.pdf [‘ENB COP-MOP-1Summary’].
[234] Compilation of Views WGLR2; ENB WGLR2.

c. activities having an adverse effect on conservation or sustainable use of biodiversity, taking into account risk to human health. [235]

2. Patent liability should be addressed.[236]

Third World Network

Favors a broad functional scope including damage resulting from:

a. intentional, unintentional or illegal transboundary movement; and
b. activities such as handling, transit, use of LMOs and their products.[237]

Washington Biotechnology Action Council

Questions whether the wording "origin in transboundary movement" is intended to include handling before shipment.[238]

B. GEOGRAPHICAL SCOPE

Options for Geographical Scope[239]

Option 1: Damage in Parties, Non-Parties and Areas Beyond National Jurisdiction

a. Areas within the national jurisdiction or control of Parties to the Protocol;
b. Areas within the national jurisdiction or control of non-Parties to the Protocol; and
c. Areas beyond the national jurisdiction or control of States.

Option 2: Damage in Parties and Areas Beyond National Jurisdiction

[235] Compilation of Views WGLR2.
[236] *Id.*
[237] *Id.*
[238] ENB WGLR2.
[239] Meeting Report WGLR4.

a. Areas within the national jurisdiction or control of Parties to the Protocol; and
b. Areas beyond the national jurisdiction or control of States.

Option 3: Damage in Parties

Only areas within the national jurisdiction or control of Parties to the Protocol.

Delegates' and Others' Positions on Geographical Scope

The African Group

Recognizes the need for a wide ranging geographical scope.[240] Scope should cover damage:

a. within the limits of national jurisdiction and control of States;[241] and
b. beyond the jurisdiction and control of States;[242]
   Rationale: To ensure the inclusion of issues such as damage related to genetically engineered fish and micro-organisms;[243] and
c. in the territory of both Parties and non-Parties.[244]

Specific Statements by members of the African Group in support of the African Group position

Statements of support by: Ethiopia,[245] Senegal,[246] and Tanzania.[247]

[240] ENB WGLR4 Summary.
[241] Synthesis of Texts WGLR4, at Section II B OT 1.
[242] Synthesis of Texts WGLR4, at Section II B OT 1; ENB WGLR4 Summary.
[243] Notes WGLR4.
[244] ENB WGLR4 Summary; Synthesis of Texts WGLR4, at Section II B OT 1.
[245] Compilation of Views WGLR2.
[246] ENB WGLR2.
[247] ENB WGLR1 Summary3.

Senegal: further study of approaches to damage beyond national jurisdiction and control of States.[248]

South Africa: a geographical scope consistent with the scope of the Biosafety Protocol.[249]

Bahamas

Supports geographical scope for damage:

a. within the limits of national jurisdiction or control of Parties; and
b. on the high seas or in areas beyond national jurisdiction.[250]

Rationale:

1. Encourages regional and international agreements and organizations to address damage in areas outside national jurisdiction that these entities may presently strive to manage.
2. Encourages Parties to cooperate with regional and international agreements and organizations in an effort to address damage in areas outside of national jurisdiction.[251]

Belize

1. Supports a broad geographical scope for damage in:
   a. areas within national jurisdiction of Parties;
   b. areas within national jurisdiction of non-Parties; and
   c. areas beyond national jurisdiction of States.[252]
2. Text should define "area under national jurisdiction;" and note the sovereignty of States over their territorial seas and rights to exclusive economic zones and continental shelves.[253]

[248] ENB WGLR2.
[249] ENB WGLR4.
[250] ENB WGLR2.
[251] WGLR4.
[252] ENB WGLR4 Summary; Notes WGLR4; Synthesis of Texts WGLR4, at Section II B OT 2.
[253] Notes WGLR4; Synthesis of Texts WGLR4, at Section II B OT 2.

Brazil

1. Supports geographical scope for damage caused to areas under jurisdiction or control of Parties.[254]
2. Notes difficulties in operationalizing liability for "damage caused to area beyond national jurisdiction or control of States."[255]
3. The determination of the point of import and export of LMOs is, generally, irrelevant to the discussion of liability.
4. However Brazil is considering a limitation as to the point of import.[256]
5. Opposes the inclusion of ‘control’ of Parties and reference to ‘exclusive economic zone’ in the scope. This is a policy choice.[257]

China

1. Geographical scope should include only damage after the point of import.[258]
2. Text should clarify the commencement and the end of a transboundary movement as the point when an LMO leaves the jurisdiction of one State and the point when the LMO enters the jurisdiction of the other State.[259]

Colombia

Supports a geographical scope covering only areas within the jurisdiction or control of Parties,[260] but may consider text that includes all States[261].

Ecuador

The geographical scope should be as wide as possible, including areas within or beyond the national jurisdiction or control of States, regardless of whether States are Parties or non-Parties.[262]

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[254] Notes WGLR4; of Texts WGLR4, at Section II B OT 10 & 4.
[255] ENB WGLR2.
[256] Notes WGLR4.
[257] Notes, Friends of the Chair group preceding MOP4.
[258] Notes WGLR4; Synthesis of Texts WGLR4, at Section II D OT 3.
[259] Notes WGLR4; Synthesis of Texts WGLR4, at Section II E OT 5.
[260] Notes WGLR4; Synthesis of Texts WGLR4, at Section II B OT 4.
[261] ENB WGLR4 Summary.

European Union

Supports the application of rules and procedures to areas within the jurisdiction or control of Parties, noting potential difficulties for including areas beyond national jurisdiction or control.[263]

India

1. Supports a geographical scope covering:
    a. damage within the national jurisdiction or control of Parties only (not cover non-Parties and not extending to non-Parties); or
    b. beyond the national jurisdiction or control of any State,
2. Text should delineate responsibilities related to sea, land and air transport.[264]
3. Transit points should be included.[265]

Iran

Opposes the deletion of reference to areas in control of non-Parties and to areas beyond the national jurisdiction or control of States.[266]

Japan

Geographical scope should cover only damage within the jurisdiction or control of Parties and to response measures taken to avoid, minimize or contain impact of such damage.[267]

Malaysia

Supports a broad geographical scope covering damage occurring:
- a. within national jurisdiction or control of Parties;
- b. within national jurisdiction or control of non-Parties; and

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[262] Notes WGLR4; Synthesis of Texts WGLR4, at Section II B OT 1.
[263] ENB WGLR4 Summary.
[264] ENB WGLR4 Summary; Notes WGLR4; Synthesis of Texts WGLR4, at Section II E OT 4.
[265] ENB WGLR1 Summary.
[266] *Id*.
[267] ENB WGLR4 Summary; Compilation of Views WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section II B OT 7.

c. in areas beyond national jurisdiction or control, if damage occurs, or may be threatened, to the territory of the Party. [268]

Mexico

1. Geographical scope should cover damage in:
    a. areas under the jurisdiction and control of Parties; and
    b. areas beyond national jurisdiction or control.
2. The rules and procedures adopted under Article 27 apply to damage caused by a Party[269].
3. Proposes to exclude 'control' of Parties.[270]

New Zealand

1. Rules and procedures should apply to damage caused by a Party which occurs/manifests in areas within the limits of national jurisdiction of another Party or non-Party .[271]
2. Notes difficulties in operationalizing liability for damage caused to areas beyond national jurisdiction and control of States,[272] and the problem with attaching liability to the world at large.[273]

Norway

1. The geographical scope should apply to damage in areas:
    a. under the national jurisdiction and control of Parties regardless of whether the transboundary movement had its origin in a Party or non-Party; and
    b. damage caused by an operator of a State Party to this instrument beyond the jurisdiction and control of States, provided that it results from a transboundary movement of LMOs originating from an area covered by (a).[274]

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[268] Notes WGLR4; Synthesis of Texts WGLR4, at Section II D OT 1.
[269] WGLR4.
[270] Notes, Friends of the Chair group preceding MOP4.
[271] Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT 13.
[272] ENB WGLR2.
[273] ENB WGLR4 Summary; Notes WGLR4.
[274] ENB WGLR4 Summary; Compilation of Views WGLR2; Notes WGLR4; Synthesis of Texts WGLR4, at Section II B OT 9.

2. Notes that a broad definition of Article 3 k on transboundary movements would include activities at the national level post shipment.[275]
3. Foresees potential problems with liability beyond national jurisdiction and establishing who would be liable.[276]
4. Cautions against including areas under jurisdiction or control of non-Parties as this might discourage non-Parties from ratifying the Protocol.[277]
5. Supports text noting that rules and procedures will not affect the rights and obligations of Parties under rules of general international law with respect to jurisdiction.[278]
6. Supports a clear definition of land, sea, and air transboundary movements.[279]
7. The point of import or export should be defined as the point where an LMO leaves the exclusive economic zone or territorial sea of a State.[280] Norway notes that the origin of a transboundary movement is only relevant for damage suffered in areas beyond national jurisdiction and control.[281]
8. Underlines that the geographical scope must take into account damage resulting from transboundary movement of LMOs by non-Parties.[282]

Palau

1. The geographical scope should include damage within national jurisdiction and control of Parties and non-Parties.
   Rationale: Non-Parties must also handle shipments of LMOs with care.[283]

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[275] Compilation of Views WGLR2.
[276] Notes WGLR4.
[277] ENB WGLR2.
[278] Notes WGLR4; Synthesis of Texts WGLR4, at Section II B OT 9.
[279] Notes WGLR4; Synthesis of Texts WGLR4, at Section II E OT 4.
[280] Compilation of Views WGLR4.
[281] *Id.*
[282] *Id.*
[283] ENB WGLR2.

2. Prefers to retain 'control' of Parties and proposes to include economic exclusive zone. Rationale: a lot of small islands have genetic resources.[284]

Sri Lanka

The geographical scope should cover damage within the territory or control of both Parties and non-Parties.[285]

Switzerland

The geographical scope should include damage to areas beyond national jurisdiction or control, for example damage occurring on the high seas.[286]

TEXT AGREED TO AT COP-MOP4

For both Administrative Approach and Civil Liability

Operational text

These rules and procedures apply to areas within the limits of its national jurisdiction[, including the exclusive economic zone,] [or control] of the Parties to the Protocol.

284 Notes, Friends of the Chair group preceding MOP4.
285 Compilation of Views WGLR2.
286 ENB WGLR2.

Non-Parties

Argentina

1. The geographical scope should be limited to activities authorized under the Protocol.[287]
2. Reference to exclusive economic zones in the determination of the point of import and export should be deleted.[288]

Australia

1. The geographical scope should be in accordance with Articles 3k, 24, and 27,[289] covering damage within the national jurisdiction or control of Parties.[290]
2. Suggests the deletion of text extending the scope to areas under the national jurisdiction and control of non-Parties.[291]

Canada

1. The geographical scope should cover only damage suffered in an area under the national jurisdiction of a State arising from an incident resulting from a transboundary movement as referred to under the functional scope provision.[292] An incident in this case, refers to any unintended release into the environment.[293]
2. Has reservations about including non-Parties in the scope.[294]

United States of America

Does not support text on geographical scope.
Rationale: it is clear that rules and procedures will only affect Parties.[295]

[287] Notes WGLR4.
[288] ENB WGLR1 Summary.
[289] Notes WGLR4.
[290] ENB WGLR1 Summary.
[291] Notes WGLR4.
[292] Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT 10.
[293] Compilation of Views WGLR4.
[294] Compilation of Views WGLR2.
[295] ENB WGLR4 Summary; Notes WGLR4.

Observers - Education

Universidad Nacional Agraria La Molina Of Peru

Cover area within the limits of national jurisdiction: territory and exclusive economic zone within the limits of jurisdiction of a State Party and any other area over which the State Party has sovereignty or exclusive jurisdiction under international law.[296]

Observers - Industry

International Grain Trade Coalition

The geographical scope of damage should not include areas beyond national jurisdiction or control.[297]

Observers - NGOs

Greenpeace International

1. Supports a broad geographical scope covering damage to:
    a. areas within national jurisdiction and control of Parties and non-contracting Parties; and
    b. areas beyond national jurisdiction or control of contracting Parties, such as high seas.[298]

    'Area within/under national jurisdiction' means the territory of a Contracting Party and any other areas over which the Contracting Party has sovereignty or jurisdiction according to international law.
2. Rules and procedures should apply from the time an importer takes control of an LMO.[299]

Third World Network

The geographical scope should cover damage:

[296] WGLR4.
[297] Compilation of Views WGLR1.
[298] Compilation of Views WGLR2.
[299] Notes WGLR4.

a. within limits of national jurisdiction or control of contracting Parties; and
b. beyond limits of national jurisdiction.[300]

C. LIMITATION IN TIME

Options for Limitations in Time[301]

Retroactivity of rules and procedures:

Option 1: Text providing for no retroactivity.
Option 2: Text to provide for some retroactivity in specific situations.
Option 3: No text on retroactivity.

Delegates' and Others' Positions on Limitation in Time

The African Group

1. Damage may be on-going,[302] or manifest over an extended period of time[303]. Such damage should be covered even if it was caused prior to the adoption of rules and procedures.[304]
2. Acknowledges the principle of retroactivity in the application of time limits only to activities occurring after rules and procedures on liability enter into force. Courts should not investigate previous damage.[305]

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[300] Compilation of Views WGLR2.
[301] Meeting Report WGLR4.
[302] ENB WGLR4 Summary.
[303] Notes WGLR4.
[304] ENB WGLR4 Summary.
[305] Notes WGLR4.

Specific Statements by members of the African Group in support of the African Group position

Statements of support by**:** Cameroon,[306] Ethiopia,[307] and Liberia[308].

Bangladesh

1. Acknowledges the principle of retroactivity. Text should ensure that no provisions bind a Party to any act or fact which took place or any situation which ceased to exist prior to the entry into force of rules and procedures.[309]
2. Damage caused by LMOs can be ongoing. Believes that damage occurring after the adoption of rules and procedures must still be covered, even if it is caused prior to their adoption.[310]

Belize

Text should state that any action which took place or ceased to exist prior to the entry into force of rules and procedures would not be covered under such rules and procedures. Supports the adoption of the principle of retroactivity. [311]

Brazil

Supports a limitation against claims brought for damage resulting from transboundary movements commenced prior to the implementation of these rules and procedures into national law.[312] Supports adoption of the principle of retroactivity.[313]

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[306] Compilation of Views TEG 1; Notes WGLR3.
[307] Compilation of Views WGLR20.
[308] Notes WGLR4.
[309] Notes WGLR4; Synthesis of Texts WGLR4, at Section II C OT 1, ENB WGLR4 Summary.
[310] ENB WGLR4 Summary.
[311] Notes WGLR4; Synthesis of Texts WGLR4, at Section II C OT 1,
[312] Notes WGLR4; Synthesis of Texts WGLR4, at Section II C OT 3.
[313] Notes WGLR4. ENB WGLR 5#3

European Union

1. Text should confirm limitations in time based on the principle of retroactivity, as this is a general principle of international law.[314]
2. In particular, should only cover damage resulting from a transboundary movement of LMOs when that transboundary movement was commenced after their implementation by Parties into domestic law.[315]

Malaysia

Supports the inclusion of a clear provision that the rules should not be made retroactive; but notes that damage could be continuous or manifest at a later point after the entry into force of rules and procedures.[316] This should be recoverable.

New Zealand

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.[317]

Norway

Applies to damage caused by (later: resulting from) a transboundary movement of LMOs that started after the entry into force of the instrument.[318]

Peru

Supports the application of the principle of retroactivity, limiting claims to damage resulting after the entry into force of rules and

[314] Notes WGLR4; ENB WGLR4 Summary; Synthesis of Texts WGLR4, at Section II C OT 3.
[315] WGLR4.
[316] ENB WGLR4; Notes WGLR4.
[317] WGLR4.
[318] WGLR4.

procedures or damage resulting from transboundary movements occurring after the entry into force of rules and procedures.[319]

Trinidad and Tobago

Text should explicitly state that rules and procedures are not retroactive.[320]

TEXT AGREED TO AT COP-MOP4

For both Administrative Approach and Civil Liability

Operational text

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

Operational text - alternative

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

Non-Parties

Argentina

According to internationally accepted principles of international law, rules and procedures will not apply to activities or damage occurring before their entry into force, even if damage manifests

[319] Notes WGLR4; Synthesis of Texts WGLR4, at Section II C OT 1.
[320] ENB WGLR4 Summary; Notes WGLR4; Synthesis of Texts WGLR4, at Section II C OT 3.

after the entry into force.[321] This principle should be included in the final text.[322]

Australia

Rules should apply from the time the decision takes effect. (later: after the rules are implemented by Parties.)[323]

Canada

Rules should be prospective in nature and not retroactive.
Rationale: ensure that fair notice of behavioural expectations has been given.[324]

United States of America

Text should address the non-retroactivity of rules and procedures.[325]

Observers - Industry

Global Industry Coalition

Rules should apply only to damage resulting from transboundary movements that occur following entry into force of the rules.[326]

Observers – NGOs

Greenpeace International

Rules should not apply to any act or fact which took place or any situation which ceased to exist before the date of the entry into force

[321] Notes WGLR4; ENB WGLR4 Summary.
[322] Notes WGLR4; Synthesis of Texts WGLR4, at Section II C OT 5.
[323] WGLR4.
[324] WGLR4.
[325] ENB WGLR4 Summary; Notes WGLR4; Synthesis of Texts WGLR4, at Section II C OT 1, 2, or 5.
[326] WGLR4.

of the treaty - unless a different intention appears from the instrument or is otherwise established.[327]

D. LIMITATION TO THE AUTHORIZATION AT THE TIME OF THE IMPORT OF THE LMOs

Delegates' and Others' Positions on Limitation To The Authorization At The Time Of The Import Of The LMOs

African Group

Include damage resulting from transboundary movement of an LMO, without limitation to authorization at the time of import.[328]

European Union

Apply to intentional transboundary movement in relation to the use for which LMOs are destined and for which authorization has been granted prior to the transboundary movement.[329]

New Zealand

Limited to use specified at the time of the transboundary movement of the LMO.[330]

[327] WGLR4.
[328] ENB WGLR4 Summary; Synthesis of Texts WGLR4, at Section II D OT 5 & Section II E OT 3.
[329] WGLR4.
[330] WGLR4.

TEXT AGREED TO AT COP-MOP4

For both Administrative Approach and Civil Liability

Operational text

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

Non-Parties

Australia

Damage shall only relate to activities that have been authorized in accordance with the terms of the Biosafety Protocol.[331]

United States of America

Activities taken in accordance with the provisions of the Protocol or activities taken pursuant to a permit issued by an appropriate authorized official should be outside the scope of the rules and procedures. [332]

Observers – NGOs

Greenpeace International

Apply to all damage resulting from the transboundary movement of a living modified organism and any different or subsequent use of

[331] WGLR4.
[332] WGLR4.

the living modified organism or any characteristics and/or traits of, or derived from, the living modified organism.[333]

E. NON-PARTIES

Options for non-Parties[334]

Option 1: Parties only.

Option 2: Non-Parties in accordance with Article 24 (transboundary movements between Parties and non-Parties must be consistent with objectives of protocol) and COP-MOP decisions (namely, BS-I/11 and III/6).

Option 3: Parties and non-Parties involved in transboundary movements.

Delegates' and Others' Positions on non-Parties

The African Group

1. Specific text on non-Parties is not necessary.[335] Not apply when neither the State of export nor the State of import is a contracting Party.[336]
2. Supports text that includes all States and transboundary movements as identified in Article 3k of the Biosafety Protocol.[337]

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[333] WGLR4.
[334] Meeting Report WGLR4.
[335] Notes WGLR4.
[336] WGLR4.
[337] Notes WGLR4; Synthesis of Texts WGLR4, at Section II F OT 4. 'Transboundary movement' means the movement of a LMO from one Party to another Party, save that for the purposes of Articles 17 and 24 (it) extends to movement between Parties to non-Parties: article 3(k), Protocol.

Specific Statements by members of the African Group in support of the African Group position

Statements of support by: Ethiopia,[338] Liberia,[339] and Zimbabwe.[340]

Ethiopia: an international regime would set an international standard which any Party must follow, even when trading with non-Parties. Any bilateral or other agreements should follow these standards and Article 24 of the Biosafety Protocol. [341]

Zimbabwe: all provisions of the Biosafety Protocol should be applied when Parties enter into agreements with non-Parties.[342]

Brazil

1. Proposes that text should mandate national rules on liability and should also cover damage resulting from transboundary movements of LMOs from non-Parties, in accordance with Article 24 of the Biosafety Protocol and COP-MOP Decisions BS-I/11 and III/6.[343]

   Rationale: All decisions we are going to take must be practicable for Parties and non- Parties. We must allow trade of LMOs between Parties and non Parties. Opposes text that says explicitly that others who are non-Parties can do what they want and that the rules apply only to contracting Parties. Otherwise Parties engaged in trade in LMOs will be at a disadvantage.[344]

[338] Notes WGLR3.
[339] Notes WGLR4.
[340] ENB WGLR2.
[341] Notes WGLR3.
[342] ENB WGLR2.
[343] Notes WGLR4; Synthesis of Texts WGLR4, at Section II F OT2.
[344] Notes, Friends of the Chair group preceding MOP4.

China

1. Supports the recognition of non-Parties in rules and procedures,[345] only so far as they are recognized and provided for by the Protocol itself.[346]
2. Rules should apply to transboundary movements of LMOs as defined by Article 3k,[347] Article 14 and Article 24.[348]

Ecuador

1. Supports the inclusion of text on non-Parties.
2. Text should affirm the responsibility of Parties to include non-Parties in the scope of their national implementing legislation in accordance with Article 24 of the Protocol and COP-MOP Decisions I/11 and III/6.[349]

European Union

1. Apply to damage resulting from transboundary movements of LMOs from non-Parties.[350]
2. This in accord with Article 24 of the Protocol and COP-MOP decisions relating to non-Parties. National legislation or specific agreements should address the import of LMOs from non-Parties.[351]

India

Rules and procedures should not apply to non-Parties, if neither the importing nor exporting State is a Party. Rules and procedures should apply to transboundary movements as defined by Article 3k of the Biosafety Protocol.[352]

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[345] ENB WGLR1 Summary.
[346] Notes WGLR4.
[347] Synthesis of Texts WGLR4, at Section II F OT 4.
[348] Notes WGLR4.
[349] Notes WGLR4; Synthesis of Texts WGLR4, at Section II F OT 2; ENB WGLR4 Summary.
[350] ENB WGLR4 Summary; Compilation of Views WGLR4; Notes WGLR4
[351] *Id.*
[352] Notes WGLR4; Synthesis of Texts WGLR4, at Section II F OT 1.

Japan

In situations where either the party of import or the party of export is a not a Party to the Protocol, rules and procedures will only apply in the State that is a Party to the Protocol.[353]

Malaysia

1. Prefers text specifying that national rules implementing a regime for liability and redress should cover damage resulting from transboundary movements from non-Parties.[354]
2. Suggests that any bilateral agreements between Parties and non-Parties should reflect the minimum requirements for liability and redress established by international rules or be consistent with, and not undermine, these rules..[355]

Mexico

Text should spell out the special responsibilities of Parties and Non-Parties.[356]

New Zealand

Text on non-Parties should be deleted.[357]

Norway

1. Supports text stating that Parties should include non-Parties in the scope of their national implementing legislation in accordance with Article 24 of the Protocol and COP-MOP Decisions I/11 and III/6.[358]
   Rationale: Parties should encourage non-Parties to adhere to the Protocol, therefore rules and procedures on liability and redress should do the same.[359]

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[353] Notes WGLR4; Synthesis of Texts WGLR4, at Section II E OT 1.
[354] Notes WGLR4; Synthesis of Texts WGLR4, at Section II F OT 2.
[355] ENB WGLR1 Summary.
[356] ENB WGLR4 Summary; Notes WGLR4; Synthesis of Texts WGLR4, at Section II F OT 1
[357] *Id.*
[358] ENB WGLR4 Summary; Notes WGLR4; Synthesis of Texts WGLR4, at Section II F OT 2.
[359] Notes WGLR3.

2. Liability and redress should allow for access to claims against non-Parties, as victims' capability of gaining compensation is important.[360]

Thailand

Supports the possibility of creating minimum requirements for non-Parties to assure redress for Parties.[361]

TEXT AGREED TO AT COP-MOP4

For both Administrative Approach and Civil Liability

Operational text

1. National rules on liability and redress implementing these rules and procedures should also cover damage resulting from the transboundary movements of living modified organisms from non-Parties, in accordance with Article 24 of the Protocol.

2. These rules and procedures apply to "transboundary movements" of living modified organisms, as defined in Article 3(k) of the Protocol.

Non-Parties

Argentina

1. Text should State that rules and procedures will not apply when neither State is a contracting Party to the Protocol.[362]
2. Rules and procedures will only apply to situations where either the State of import or both States are Parties to the Protocol.[363]

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[360] *Id.*
[361] *Id.*
[362] ENB WGLR4 Summary.
[363] Notes WGLR4; Synthesis of Texts WGLR4, at Section II F OT 5.

Australia

Would be concerned with any steps to impose direct or indirect measures on non-Parties, in accordance with Articles 3k and 24 of the Protocol.[364]

Canada

Expresses reservations about including non-Parties in the scope.[365]

United States of America

1. Notes that according to treaty law, States cannot impose obligations on non-Parties.[366]
2. Apply to transboundary movements of LMOs as defined in Article 3(k) of the Protocol.[367]

Observers- NGOs

Greenpeace International

1. Any provision on non-Parties should be focused on non-Parties to the liability and redress regime, not the Biosafety Protocol.[368]
2. The requirement to establish a fund could apply to Parties and non-Parties.[369]
3. Whenever a transboundary movement is effected by transport: When the State of import, but not the State of export, is a Contracting Party to the liability instrument, this instrument shall apply to damage arising from an occurrence which takes place after the time at which the importer has taken ownership or possession of the living modified organism.[370]

[364] Compilation of Views WGLR4.
[365] Compilation of Views WGLR2.
[366] Compilation of Views WGLR1.
[367] WGLR4.
[368] Notes WGLR3.
[369] *Id.*
[370] WGLR4.

Third World Network

Parties importing and exporting to non-Parties should ensure that such transboundary movements do not result in a lower level of protection than provided under liability and redress under the Biosafety Protocol.[371]

Washington Biotechnology Action Council

1. The procedure for Parties and non-Parties should be consistent.[372]
2. When Parties trade with non-Parties they should ensure that the transboundary movement of LMOs are consistent with the Protocol. Notes that imports can be made conditional.[373]

[371] Compilation of Views WGLR2.
[372] ENB WGLR2.
[373] *Id.*

4

DAMAGE

A. Definition of damage

This refers to the kind of damage that may be claimed and recovered under the regime if liability is established. This may range from traditional loss – personal injury, loss of life, damage to property, economic loss - to damage to the environment and biodiversity. The damage may be extended to: damage to the conservation and sustainable use of biodiversity and its components, socio-economic loss, costs for response or preventative measures, costs of remediation and reinstatement of a damaged environment or eco-system. The definitions of damage currently under discussion reflect this wide and narrow range - from a very literal interpretation confined to the scope and objective of the Protocol, to a broad approach envisaging every potential harm caused by LMOs.

Damage to biodiversity is a complex concept. The COP, in its Decision VI/11, tasked a group of technical and legal experts to begin to consider developing a definition of, among others, the concept of damage to biological diversity. It may be difficult to measure the loss to conservation and sustainable use of biodiversity or whether it is 'adverse' or 'significant' – especially if there is no baseline from which to assess this loss. Generally, countries have not carried out any exercise in determinig their biodiversity

baselines. It will be an enormously complex and costly task to establish these. The problem is exacerbated for developing countries. A common sense approach may be necessary.

The definition of damage will clearly affect and shape the other provisions of the instrument. It will have implications for the pool of affected or interested persons that may bring claims, the type of claims that may be brought, and the general objectives of a regime. The definition of damage may promote the creation of a regime focused primarily on restoration of the environment and biodiversity, (this implies an administrative approach) or a regime focused on compensation of victims (a civil liability approach), or both.

B. Valuation of damage

Valuation involves an assessment or calculation of the damage. This will depend upon the kind of damage being assessed. Valuation of damage to biological diversity and the environment, while problematic for much the same reason as discussed earlier, may be easier to establish when what is being assessed includes: costs for remediation, reinstatement or rehabilitation, response or preventative measures. Valuation of socio-economic damage may however be difficult. One suggested solution is to establish key indicators of what could constitute such damage. A valuation of economic and other traditional damage is much easier to establish as most mature legal systems have to deal with these in their national laws.

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

A centre of origin is the area where a particular organism was first domesticated and brought into use by humans. Such centres may still retain a very high diversity of the genetic resources base and wild relatives from which the organism concerned was

domesticated. A centre of domestic diversity is an area where there is a high diversity present amongst a particular group of related species – either a family, genus, or sub-species, varieties, cultivars, or other sub-categories within a species. The Biosafety Protocol affirms the crucial importance to humankind of such centres and signals the need for special care in conserving them – in particular the need to take into consideration potential effect of LMOs on such centres.[374] Hence the need for specific measures for damage to such centres – given the unique value of these centres to the long term preservation of biodiversity. Any damage to these centres could well be irreparable as there may be a need to go back to the place where the flora first developed its resilient characteristics.

Options for Definition of Damage[375]

Option 1: A broad and inclusive definition of damage, covering among others:

a. Conservation of biological diversity;
b. Sustainable use of biological diversity;
c. Human health;
d. Socio-economic considerations;
e. Traditional damage; and
f. Costs of preventative and response measures.

Option 2: Damage to the conservation and sustainable use of biological diversity and damage to human health.

Option3: Restricted or distinct measurable damage to biological diversity, such as damage to the conservation and sustainable use of biological diversity .

[374] Mackenzie, *et al*, *An Explanatory Guide to the Cartagena Protocol on Biosafety,* FIELD, IUCN (2003), p26.
[375] Meeting Report WGLR4.

Delegates' and Others' Positions on Definition of Damage

The African Group

1. Supports a broad definition of damage, including:
   a. inter-generational damage;[376]
   b. traditional damage;
   c. cost of response measures; and
   d. cost of preventative measures, among other aspects.[377]
2. Traditional damage should include:
   a. damage to property;
   b. impaired use of property;
   c. loss of property; or
   d. loss of income derived from an economic interest in any use of the environment.[378]
3. Adverse effects of biotechnology, including effects on human health should be covered.
   Rationale: These effects are provided for in Article 8(g) of the Convention. [379]
   Damage to human health should include:
   a. loss of life,;
   b. personal injury;
   c. impairment of health;
   d. loss of income; and
   e. public health measures.[380]
4. Socio-economic damage.
   Rationale: Socio-economic damage is provided for in Article 26 of the Biosafety Protocol.[381]
   Socio-economic damage should include:
   a. loss of income;

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[376] ENB ICCP3 Summary.
[377] ENB WGLR2.
[378] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 13.
[379] Notes WGLR4.
[380] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 13.
[381] Notes WGLR4.

b. loss or damage to cultural, social and spiritual values;
c. loss of, or reduction to, food security;
d. damage to agricultural biodiversity; and
e. loss of competitiveness or other economic loss or other loss or damage to indigenous or local communities.[382]

5. Damage to the environment which should include:
   a. cost of response, remediation, or reinstatement measures;
   b. cost of preventive measures;
   c. cost of interim measures; and
   d. any other damage to, or impairment of, the environment.[383]
6. Damage to the conservation and sustainable use, based on:
   a. any "significant" or measurable adverse effect on biological diversity,
   b. the ability of biodiversity to meet the needs of present and future generations. [384]
7. The following terms should be defined :
   a. impairment;
   b. measures for reinstatement;
   c. compensation;
   d. environment;
   e. biological diversity;
   f. ecosystem;
   g. centre of origin; and
   h. centre of diversity.[385]

Specific Statements by members of the African Group in support of the African Group position

Statements of support by: Cameroon,[386] Egypt,[387] Ethiopia,[388] Liberia,[389] Mali,[390] Senegal,[391] Uganda,[392] and Zimbabwe[393].

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[382] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 13.
[383] *Id.*
[384] Notes WG: Synthesis of Texts WGLR4, at Section III A *bis* OT 2.
[385] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 13.
[386] Compilation of Views TEG 1.

Algeria: proposes merging the two components of environmental damage and damage to sustainable development and conservation of biological diversity. [394]

Botswana: include loss of farmers' skills and independence in the definition of socio-economic damage.[395]

Burkina Faso: expresses concern that there is a wide area of rights not covered under domestic law and loss or damage to cultural, social and spiritual values is very important for countries like Africa.[396]

Cote d'Ivoire: human health may be covered under traditional damage.[397]

Guinea Bissau: the definition of damage should address the preservation of biological diversity and should be the same as under the CBD.[398]

Ethiopia: need a broader definition of damage containing a list of elements of damage and proposes replacing two operational texts on damage to conservation and sustainable use of biological diversity and human health with a formulation acknowledging that damage covers, but is not limited to, biological diversity, conservation and sustainable use of biological diversity, human health and socioeconomic

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[387] ENB WGLR1 Summary.
[388] Compilation of Views WGLR2.
[389] ENB WGLR2.
[390] ENB WGLR1 Summary.
[391] ENB WGLR1 Summary; ENB WGLR2; Notes WGLR4.
[392] ENB WGLR1 Summary.
[393] ENB WGLR1 Summary; ENB WGLR2.
[394] ENB WGLR1 Summary.
[395] *Id.*
[396] Notes, Friends of the Chair group preceding MOP4.
[397] *Id.*
[398] Compilation of Views TEG 1.

conditions during the development, handling, transport, use, transfer and release of LMOs.[399]

Liberia: Proposes to delete the section on damage to the conservation of biological diversity.
Rationale**:** it confuses the definition of damage and there is no basis to measure such damage.[400]

Senegal: an enlarged definition of damage will help with food security.[401]

South Africa: does not support the African Group on the definition of damage, except where this definition relates to damage to biological diversity.[402] The definition of damage should only include significant and measurable adverse impacts on the conservation and sustainable use, possibly taking into account the definitions of sustainable use and biological diversity under Article 2 of the Convention.[403]

Tunisia: include damage to organic agriculture in the definition of damage.[404]

Barbados

1. Suggests the addition of reinstatement costs to the definition of damage.[405]
2. Opposes retaining components of traditional damage in the definition of damage.[406]

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[399] Earth Negotiations Bulletin, Daily Report on the Fifth Meeting of the Open-Ended *Ad Hoc* Working Group on Liability and Redress under the Biosafety Protocol, (March 2008) ['ENB WGLR5'] #4.
[400] Notes, Friends of the Chair group preceding MOP4.
[401] Notes WGLR4.
[402] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A *bis* OT 2.
[403] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A *bis* OT 2; Section III A *bis* OT 6.
[404] ENB WGLR1 Summary.
[405] *Id*.
[406] *Id*.

Belize

1. Supports a broad definition of damage.[407]
2. Text should cover damage to:
   a. the conservation and sustainable use of biodiversity; and
   b. human health.
3. Should define conservation of biodiversity, and, sustainable use of biodiversity.
4. Damage should be defined as:
   a. loss of life;
   b. personal injury;
   c. property damage;
   d. loss of income;
   e. measures of reinstatement;
   f. measures of remediation; and
   g. preventative measures. [408]

Benin

Supports the inclusion of socio-economic aspects of damage.[409]

Brazil

1. Supports a broad definition of damage,[410] including damage to human health.[411]
2. The definition of damage cannot be the same as the CBD which only refers to damage to biodiversity.[412] Damage resulting from the transboundary movements of LMOs must be defined based upon the views and legal concepts of the Parties to the Protocol.[413]
3. Proposes an operational text focusing on adverse effects on biological diversity and merging the chapeau on damage to

[407] Notes WGLR4.
[408] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 7.
[409] ENB WGLR2.
[410] *Id.*
[411] Notes WGLR4.
[412] Compilation of Views TEG 1.
[413] *Id.*

conservation and sustainable use of biodiversity with a modified operational text on damage to the conservation of biological diversity as defined in CBD Article 2.[414]

4. Prefers a single definition of damage for both the administrative approach and civil liability.
5. Opposes the inclusion of ‘risks to human health’ because it is unquantifiable.
6. Prefers to retain the word ‘proven’ on the effect on human health because there is a need to qualify human health.
7. Loss of income is incompatible with art 26 of the Protocol. [415]

Cambodia

1. The definition of damage should cover damage to the conservation and sustainable use of biodiversity and damage to human health. The definition of damage should not be limited to the environment and human health.[416]
2. Supports text defining :
    a. conservation of biodiversity;
    b. sustainable use of biodiversity; and
    c. damage.
3. Damage means: loss of life, personal injury, property damage, loss of income, measures of reinstatement, measures of remediation, and preventative measures.[417]

China

1. Supports a single definition for both the administrative approach and for civil liability.[418]
2. On damage to the conservation of biological diversity, supports the deletion of reference to - an adverse or negative effect on biological diversity that is a result of human activities involving LMOs.[419]

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[414] ENB WGLR5 Summary; Sub-Working Group, ENB WGLR 5#4.
[415] Notes, Friends of the Chair group preceding MOP4.
[416] ENB WGLR4.
[417] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 7.
[418] Friends of the Chair Group, ENB WGLR5#7
[419] Notes, Friends of the Chair group preceding MOP4.

Colombia

1. Supports a broad definition of damage including:
   a. damage to sustainable use of biodiversity;
   b. damage to conservation of biodiversity;
   c. damage to human health (such as loss of life or personal injury);
   d. damage to property;
   e. loss of income;
   f. cost of reinstatement or remediation measures;
   g. cost of preventative measures; and
   h. moral and cultural damage.[420]
2. The definition of damage to the conservation and sustainable use should be broad, but include a threshold of significant adverse effect.
3. No specific mention or special treatment should be addressed to protected or endangered species.[421]
4. Definition of measures of reinstatement and preventative measures should be included in the definition of damage.[422]
5. Definition of 'damage' should be addressed specifically as well.[423]
6. Supports a narrower definition of damage. Should delete the reference to "cost of response measures" and "baseline established by a competent national authority" and add a paragraph stating that the mere presence of an LMO in the environment does not constitute damage. [424]

Cuba

1. Supports a broad definition of damage including:
   a. damage to sustainable use of biodiversity;
   b. damage to conservation of biodiversity;

[420] ENB WGLR1 Summary; Notes WGLR4; Synthesis of Texts WGLR4, at Section III A *bis* OT 2; Section III A OT 7.
[421] ENB WGLR4.
[422] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A *bis* OT 2; Section III A OT 7.
[423] *Id.*
[424] ENB WGLR 5 #3, Sub-Working Group, ENB WGLR5#4.

   c. damage to human health (such as loss of life or personal injury);
   d. damage to property;
   e. loss of income;
   f. cost of reinstatement or remediation measures; and
   g. cost of preventative measures.
2. The definition of damage to the conservation and sustainable use should be broad, but include a threshold of significant adverse effect.
3. Definition of measures for reinstatement and preventative measures should also be included in the definition of damage.
4. Definition of "damage" should be addressed specifically. [425]

Ecuador

1. Supports a broad definition of damage, including:
   a. damage to sustainable use of biodiversity;
   b. damage to conservation of biodiversity;
   c. damage to human health (such as loss of life or personal injury);
   d. damage to property;
   e. loss of income;
   f. cost of reinstatement or remediation measures;
   g. and cost of preventative measures.[426]
2. The definition of damage to the conservation and sustainable use should be broad.
3. Definition of measures of reinstatement and preventative measures should also be included in the definition of damage.
4. Definition of "damage" should be addressed specifically as well, taking into consideration Articles 1 and 4 of the Biosafety Protocol. Text should clearly require damage to be caused by GMOs.[427]

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[425] Notes WGLR4; Synthesis of Texts WGLR4, Section III A OT 7; Section III A *bis* OT 2.
[426] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 7.
[427] *Id.*

El Salvador

Suggests merging the concepts of damage to the environment and damage to conservation and sustainable use.[428]

European Union

1. The definition of damage should focus on damage to the conservation and sustainable use of biodiversity.[429]
2. Text should define:
    a. damage to the conservation of biodiversity;
    b. damage to the sustainable use of biodiversity; and
    c. "significant" adverse effect.[430]
3. Damage to conservation of biodiversity means an adverse effect on biodiversity that: results from human activities involving LMOs[431], relates to species and habitats protected by law, is measurable or observable, taking into account baseline conditions, and is significant.[432]
4. Agrees that damage to the conservation of biological diversity relates in particular to species and habitats protected under national, regional or international law and that should be discussed under 'scope' or 'nature' and not under 'damage'.
5. Damage to sustainable use means an adverse effect on biodiversity that: results from human activities involving LMOs, is related to sustainable use of biodiversity, results in loss of income, and is significant.[433] Do not agree that it should include loss of income as this should be dealt with under civil liability.[434]
6. Significant adverse effect is determined by these factors:

[428] *Id.*
[429] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A *bis* OT 2.
[430] *Id.*
[431] Agrees that this subsection be deleted – Notes, Friends of the Chair group preceding MOP4.
[432] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A *bis* OT 2; Compilation of Views WGLR4.
[433] *Id.*
[434] Notes, Friends of the Chair group preceding MOP4.

a. long term or permanent change not redressed through natural recovery over a reasonably short period of time;
b. qualitative or quantitative reduction of components of biodiversity and potential to provide goods and services;[435]
c. the extent of the quantitative or qualitative changes that adversely or negatively affect the components of biological diversity;
d. the reduction of the ability of components of biological diversity to provide goods and services;[436]
e. 'an effect of the damage to the conservation and sustainable use of biological diversity on human health.'[437]

Rationale:

a. Damage to conservation and sustainable use is already referred to in the Protocol.[438]
b. These concepts are very broad as biodiversity encompasses all life on Earth,[439] making it hard to imagine any damage to the environment that is not covered by damage to biodiversity.[440]
c. Damage to property may be covered under damage to sustainable use of biodiversity.[441]

7. Not prepared to discuss other forms of damage such as damage to property and damage to human health at this stage, but suggests further consideration of these forms of damage.[442]

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[435] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A *bis* OT 2; Compilation of Views WGLR4.
[436] Notes, Friends of the Chair group preceding MOP4.- it was agreed upon by all parties except Japan who voice out after agreement of all parties have been achieved.
[437] Notes, Friends of the Chair group preceding MOP4.
[438] Notes WGLR4.
[439] ENB WGLR4; Notes WGLR4.
[440] Notes WGLR4.
[441] ENB WGLR4; Notes WGLR4.
[442] ENB WGLR2; Notes WGLR4.

8. Regarding the chapeau, suggests using the wording of the Biosafety Protocol on taking into account "risks" to human health.[443]
9. Prefers different definitions of damage for administrative approach and for civil liability.[444]

Grenada

Opposed to retaining concepts of traditional damage in the definition of damage.[445]

India

1. Supports a broad definition of damage, including:
    a. damage to biodiversity;
    b. damage to human health; and
    c. traditional damage.[446]
2. Traditional damage should include:
    a. loss of life;
    b. personal injury; or
    c. loss of income

   as a direct result of impairment of biodiversity.[447]
3. Supports the merging of the component of environmental damage and damage to the conservation and sustainable use of biodiversity.[448]
4. Text should include definitions of damage to conservation of biodiversity and sustainable use of biodiversity.[449]
5. Proposes to maintain the wording taken from the Biosafety Protocol and supports that the same definition be used for both the administrative approach and for civil liability.[450]

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[443] ENB WGLR5, Summary; Notes, Friends of the Chair group preceding MOP4.
[444] Notes, Friends of the Chair group preceding MOP4.
[445] ENB WGLR1 Summary.
[446] ENB WGLR4 ; Notes WGLR4; Compilation of Views TEG 1; Synthesis of Texts WGLR4, at Section III A OT 7a-c.
[447] Notes WGLR4.
[448] ENB WGLR1 Summary.
[449] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 7a-c.
[450] ENB WGLR5 Summary. – discussion in Friends of the Chair group

6. Proposes to delete the whole paragraph on damage to the conservation of biological diversity.
7. 'Economic loss' is too wide. Suggests 'resulting from damage to the conservation or sustainable use of biological diversity'.[451]

Iran

1. Supports the inclusion of damage to non-GM crops and wild relatives or contamination of aquatic species in the definition of damage.[452]
2. Proposes retaining damage to the environment rather than damage to conservation and sustainable use of biodiversity or its components.[453]

Japan

1. The definition of damage should be in line with the scope of the Protocol,[454] covering only damage to human health and damage to the conservation and sustainable use of biodiversity.[455]
2. Damage must be measurable, adverse and significant.[456]
3. Damage should include the cost of response measures.[457]
4. Does not support a definition of damage that attempts to include a balance of all the value judgments of differing societies and communities. These concerns should be handled at the domestic level.[458]
5. Supports a narrower definition of damage noting that risk to human health can be dealt with under other conventions and it

[451] Notes, Friends of the Chair group preceding MOP4.
[452] Compilation of Views TEG 1.
[453] ENB WGLR2.
[454] Notes WGLR4.
[455] ENB WGLR4; Notes WGLR4; Compilation of Views WGLR4.
[456] ENB WGLR4; Notes WGLR4; Notes WGLR4; Compilation of Views WGLR4; Synthesis of Texts WGLR4, at Section III A OT 6.
[457] Notes WGLR4; Compilation of Views WGLR4; Synthesis of Texts WGLR4, at Section III A OT 6.
[458] Notes WGLR4.

is not related to the conservation and sustainable use of biological diversity.[459]

6. Regarding the chapeau, suggests using the wording of the Biosafety Protocol on taking into account “risks” to human health. In the administrative approach, objects to the inclusion of “risks to human health” in the definition[460] and its inclusion may “jeopardize the package.” Supports that the same definition should be used for civil liability [461]
7. Prefers a narrower definition of damage and opposes text referring to the extent of the qualitative or quantitative changes that adversely or negatively affect the components of biological diversity.
8. Prefers to retain ‘proven’ on the effect on human health to avoid confusion.[462]

Jordan

Supports retaining reference to damage to biodiversity only.[463]

Malaysia

1. Supports a broad definition of damage that includes:
    a. damage to conservation of biological diversity;
    b. damage to sustainable use of biological diversity;
    c. damage to human health;
    d. damage to ecosystems;
    e. damage to the environment;[464]
    f. traditional damage;
    g. socio-economic damage;[465]

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[459] ENB WGLR 5 #3; Notes, Friends of the Chair group preceding MOP4.
[460] ENB WGLR5 Summary. Japan is the only country objecting to the inclusion of this phrase in the Friends of the Chair group discussion
[461] Friends of the Chair Group, ENB WGLR5#7
[462] Notes, Friends of the Chair group preceding MOP4.
[463] ENB WGLR1 Summary.
[464] Added to the list of elements proposed by Ethiopia in Sub Working Group: ENB WGLR 5 Summary of the fifth meeting; Notes, Friends of the Chair group preceding MOP4. Rationale: damage to national park which involved an impact of national revenue.
[465] ENB WGLR4; Notes WGLR4.

h. cost of preventative measures; and
i. cost of response measures.[466]

Rationale: This is based on a broad interpretation of both the Convention and the Protocol.[467] A comprehensive liability and redress regime should not be limited to how the damage came about but should cover all damage caused.

2. Definition of damage for civil liability should, generally, be more extensive than in the administrative approach; it will cover such areas as 'traditional damage'.
3. On damage to the conservation of biological diversity, supports the deletion of references to an adverse or negative effect on biological diversity that is limited to being the result of human activities involving LMOs.
4. Damage should also include 'consequential loss'.
5. Notes that there seems to be no common understanding of what constitutes impairment of human health caused by an adverse effect of conservation and sustainable use of biological diversity.[468]

Mexico

1. Supports a definition of damage that includes damage to the conservation and sustainable use of biodiversity,[469] and damage to human health.[470]
2. Text on the definition of damage should define damage to:
   a. conservation of biological diversity;
   b. sustainable use of biodiversity; and
   c. human health.[471]
3. Damage should be measurable, significant and have an adverse affect on biodiversity. [472]
4. Text on "present and future generations" should be deleted from the definition of damage.[473]

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[466] ENB WGLR2.
[467] ENB WGLR2; ENB WGLR4; Notes WGLR4.
[468] Notes, Friends of the Chair group preceding MOP4.
[469] ENB WGLR2.
[470] ENB WGLR4.
[471] Notes WGLR4.
[472] Notes WGLR4; Synthesis of Texts WGLR4, at Section II A OT 7.

5. Supports the deletion of damage to the environment as there is overlap between the two types of damage.[474]
6. Prefers to retain the operational text on damage to conservation and sustainable use of biodiversity and human health.[475]
7. Prefer one definition of damage for both administrative approach and civil liability. Rationale: we are dealing with the same damage under civil liability and administrative approach which is caused by the one single LMO.
8. Proposes to delete the whole paragraph on damage to the conservation of biological diversity and the list of factors to be taken into account in deciding a "significant or serious" adverse or negative effect on the conservation and sustainable use of biological diversity as it is very subjective.[476]

New Zealand

1. The definition of damage should cover damage to biodiversity and human health,[477] taking into account Articles 1, 4, and 27 of the Protocol.[478]
2. Text should define damage to the conservation and sustainable use of biodiversity, taking into account the definitions set out in Article 2 of the Convention. The damage must be significant, adverse and measurable against a baseline.[479]
3. Traditional damage is beyond the scope of rules and procedures under Article 27.[480]

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[473] ENB WGLR4.
[474] ENB WGLR2.
[475] Sub-Working Group, ENB WGLR5#4
[476] Notes, Friends of the Chair group preceding MOP4.
[477] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 7.
[478] Notes WGLR4.
[479] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 7, 9, 10, 11; Section II A *bis* OT 6.
[480] Notes WGLR4.

4. Supports a narrower definition of damage[481] and adds that any future definition must make provision for diverse domestic approaches.[482]
5. Agrees that economic loss is important but not sure whether it should be included under 'sustainable use'.
6. Proposes 'The extent of any adverse or negative effects on human health'.
   [Note: This text was agreed to by all Parties except Japan.]
7. Prefers one definition of damage for both administrative approach and civil liability. Rationale: we are dealing with the legal consequences of damage.[483]

Norway

1. Damage to conservation and sustainable use of biological diversity; and
2. Human health which includes loss of life, personal injury, impairment of health, loss of income and public health measures.
3. Loss of income directly deriving from an economic interest in the use of biological diversity, incurred as a result of impairment of the biological diversity, taking into account savings and costs;
4. The cost:
   a. The costs of measures of reinstatement or remediation of the impaired biological diversity actually taken or to be undertaken;
   b. The costs of preventive measures, including any loss or damage caused by such measures.[484]
5. Same definition should be used for administrative approach and for civil liability.[485]
6. Prefers different definition of damage for administrative approach and for civil liability.
7. Supports 'damage' to human health as opposed to 'risk'.

[481] ENB WGLR5#3.
[482] Friends of the Chair Group, ENB WGLR5#7.
[483] Notes, Friends of the Chair group preceding MOP4.
[484] WGLR4.
[485] Friends of the Chair Group, ENB WGLR5#7.

8. Traditional damage must be covered in the definition of damage for civil liability.[486]

Palau

1. Supports a broad definition of damage based on a reading of the Protocol as a whole, not a narrow reading allowing for only damage to the conservation and sustainable use of biodiversity.[487]
2. The definition of damage should include damage to:
   a. the conservation of biological diversity;
   b. the sustainable use of biological diversity;
   c. human health;
   d. the environment;
   e. other forms of damage; and
   f. the cost of preventative, response, reinstatement or interim measures.[488]

   Each of these types of damage should be defined in detail.
3. The definition of damage to the conservation and sustainable use of biological diversity should be sufficiently broad, and could be subject to the test of significant adverse effect and the requirement that damage be measurable.[489]
4. Other forms of damage to be included could be:
   a. loss of life or personal injury;
   b. impairment of health;
   c. loss of income due to impairment of health, environment, use of biodiversity or cultural, social or spiritual values; and
   d. property damage.[490]

[486] Notes, Friends of the Chair group preceding MOP4.
[487] ENB WGLR4; Notes WGLR4.
[488] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 7.
[489] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 7.
[490] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 7.

Panama

1. The definition of damage should include damage to the conservation and sustainable use of biodiversity and damage to human health.[491]
2. Damage should be broadly defined, but measurable and significant.[492]

Paraguay

1. The definition of damage should include damage to the conservation and sustainable use of biological diversity that is adverse, significant, and measurable.[493]
2. Baselines, Article 2 of the Convention or cost or response measures may be used to determine damage.[494]
3. Reference to "the needs and aspirations of present and future generations" should be deleted from the optional text.[495]
4. Prefers the same definition of damage for both administrative approach and civil liability.[496]

Peru

1. On administrative approach, proposes to maintain the wording taken from the Biosafety Protocol.
2. On the definition of damage under civil liability, referring to damage resulting from transboundary movement of LMOs, suggests that injured parties first seek redress under the administrative approach, before turning to the civil liability regime.[497]
3. Supports that the same definition should be used for the part on civil liability.[498]

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[491] ENB WGLR4 ; Notes WGLR4. Sub-Working Group, ENB WGLR5#4
[492] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 7a-c.
[493] Notes WGLR4.
[494] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 6; Section III A *bis* OT 3.
[495] ENB WGLR4.
[496] Notes, Friends of the Chair group preceding MOP4.
[497] Friends of the Chair Group, ENB WGLR5 Summary.
[498] Friends of the Chair Group, ENB WGLR 5#7.

Philippines

1. Supports a definition of damage based on damage to biodiversity only.[499]
2. Damage should be defined in relation to the definition of biodiversity in Article 2 of the Convention.[500]
3. Damage should be measurable and result in an adverse effect. Damage to the sustainable use of biodiversity should also be included in the definition of damage.[501]
4. Sustainable use should include consideration of the potential use of components of biodiversity to meet the needs of present and future generations.[502]
5. Proposed 'qualitative or quantitative change of the components of biological diversity resulting in the reduction of their ability to provide goods and services.'[503]

Saint Lucia

1. Supports a broad definition of damage.
   Rationale: The definition of damage should be based on Articles 1, 4, and 27 of the Protocol.[504]
2. The definition of damage should include:
   a. damage to sustainable use of biodiversity;
   b. damage to conservation of biodiversity;
   c. damage to human health (such as loss of life or personal injury);
   d. damage to property;
   e. loss of income;
   f. cost of reinstatement or remediation measures; and
   g. cost of preventative measures.
3. Should require damage to be measurable and significant.

[499] ENB WGLR1 Summary.
[500] Notes WGLR4.
[501] *Id*.
[502] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A *bis* OT 3.
[503] Notes, Friends of the Chair group preceding MOP4.
[504] Notes WGLR4.

4. Definition of measures of reinstatement, preventative measures and significant adverse effect should also be included in the definition of damage.
5. Definition of "damage" should be addressed as well, taking into consideration Articles 1 and 4 of the Biosafety Protocol.
6. Text should be clear that damage is caused by GMOs.[505]

Sri Lanka

The definition of damage should includes damage to:

a. the environment;
b. human health;
c. socio-economic damage;
d. traditional damage; and
e. the cost of response measures.[506]

Switzerland

1. The definition of damage should include:
   a. loss of life;
   b. personal injury;
   c. loss of/damage to property;
   d. loss of income directly derived from economic interest in the sustainable use biological diversity, incurred as a result of impairment of the biological diversity, taking into account savings and costs;
   e. cost of reinstatement of the impaired biological diversity, limited to the cost of measures taken or to be taken;[507]
   f. 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.[508]

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[505] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 7; Section III A *bis* OT 2.
[506] Compilation of Views TEG 1; Compilation of Views WGLR2.
[507] Compilation of Views TEG 1: and WGLR4.
[508] WGLR4.

2. The definition of damage ought to be different from Article 14.2 of the Convention on Biological Diversity.[509]
3. Damage to the environment and biodiversity should be included in the definition of damage,[510] although there is an overlap between damage to the environment and damage to the conservation and sustainable use of biodiversity and its components.[511]
4. Damage to human health cannot be dealt with in administrative approach but only in civil liability. Damage to diversity is a subject collectively taken by the State whereas damage to human health is taken by an individual against another legal entity.
5. The list of factors must be only an indicative list for the judge to refer to and it must be short.
6. Traditional damage should be in the hands of the parties. It is only guidelines. It is subject to domestic law to have it in their laws. [512]

Syria

Supports retaining reference to damage to environment, including damage to soil and water.[513]

Thailand

Supports a broad definition of damage,[514] including traditional damage[515].

Trinidad and Tobago

Supports Africa in keeping the list of damage as exhaustive as possible and also to include damage to spiritual values in the list. [516]

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[509] *Id.*
[510] ENB WGLR1 Summary.
[511] ENB WGLR2.
[512] Notes, Friends of the Chair group preceding MOP4.
[513] ENB WGLR1 Summary.
[514] *Id.*
[515] Notes WGLR4.
[516] Notes,Friends of the Chair group preceding MOP4.

Turkey

Notes the need for a wide and comprehensive definition of damage.[517]

Venezuela

Proposes merging the concepts of damage to the environment and biodiversity.[518]

TEXT AGREED TO AT COP-MOP4

For Administrative Approach

Operational text

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

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

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

(b) Is significant as set out in paragraph 4 below.

3. [For the purposes of these rules and procedures, damage to the sustainable use, as defined in Article 2 of the Convention on Biological Diversity of biological diversity, means an adverse or negative effect on biological diversity that is significant as set out in paragraph 4 below and [may have resulted in loss of income] [has resulted in consequential loss to a state, including loss of income].].

[517] ENB ICCP3 Summary.

[518] ENB WGLR1 Summary

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

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

[(b) The extent of the qualitative or quantitative changes that adversely or negatively affect the components of biological diversity;

(c) The reduction of the ability of components of biological diversity to provide goods and services;]

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

[(d) The extent of any adverse or negative effects on human health;]

[(d alt) The extent of any adverse or negative effects of the conservation and sustainable use of biological diversity on human health;]

[5. Parties may take into account local and regional conditions in order to ensure the workability of domestic liability rules and procedures, provided that this is consistent with the objective and provisions of the Protocol.]

For Civil Liability

Operational text

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

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

(a) Damage to the conservation and sustainable use of biological diversity not redressed through the administrative approach {see administrative approach};

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

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

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

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

Non-Parties

Argentina

1. The definition of damage should be limited to damage to the conservation and sustainable use of biological diversity.[519]
2. Damage should not be extended to human health or traditional damage.[520]
3. Traditional damage has no legal basis in either the Convention or the Protocol and is covered by national legislation.[521]
4. Socio-economic damage is not within the scope of the Protocol.
5. Damage is to be determined by:
    a. a significant, serious and measurable change in biodiversity causing adverse effects;[522]
    b. comparison against a baseline established by the Competent National Authority, taking into account natural and human-induced variation in biodiversity;[523]
    c. proof that damage may not be repaired naturally; and
    d. its long-term or permanent nature.[524]

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[519] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A *bis* OT 4; Section III A OT 11.
[520] ENB WGLR4.
[521] ENB WGLR2.
[522] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A *bis* OT 4; Section III A OT 11.
[523] *Id.*

Australia

1. The definition of damage should be limited, in accordance with the definitions in Articles 1 and 4 of the Protocol, to damage to the conservation and sustainable use of biodiversity.[525]
   Rationale: Adopting language consistent with the Convention and Protocol will prevent ambiguity in application.[526]
2. There should be a threshold of 'significant or serious' attached to the determination of damage.[527]
3. The definition of damage should not extend to traditional damage.[528]

Canada

1. The definition of damage should be based on damage to biodiversity.[529]
2. Damage to human health may be considered, but must be in line with the provisions of the Protocol and limited to any problems resulting from damage to biodiversity.[530]
3. Damage must be compatible with the Convention, domestic legislation and international instruments addressing risk assessment.[531]
4. Damage should not include cases of personal injury, damage to private property, or economic loss.[532] Rules and procedures should not affect any right under existing national legal systems regarding these types of damage.[533]
5. Damage is to be determined by:

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[524] Notes WGLR4; ENB WGLR4.
[525] *Id.*
[526] *Id.*
[527] *Id.*
[528] *Id.*
[529] Notes WGLR4.
[530] ENB WGLR4.
[531] Compilation of Views WGLR2.
[532] *Id.*
[533] *Id.*

a. a significant, serious and measurable change in biodiversity causing adverse effects;[534] and
b. a comparison against a baseline ecological data or equivalent, previously established and published by the Competent National Authority, taking into account natural and human-induced variation in biodiversity and is not reversible through the normal capacity of the system .[535]

6. Notes that the narrower definition is best suited for an administrative approach.[536]

United States of America

1. The definition of damage should be focused on damage to biodiversity which is the focus of the Convention and the Protocol.[537]
2. Damage should be defined as a measurable loss with adverse and significant impact on the conservation or sustainable use of biodiversity, including response measures.[538]
3. Other types of damage discussed, such as socio-economic damage, should only be covered if they relate to damage to biodiversity.[539]

Observers-Education

Public Research and Regulation Initiative

1. Supports a limited definition of damage based on measurable and significant damage to the conservation and sustainable use of biological diversity in accordance with the definitions under

[534] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 6; Section III A *bis* OT 5.
[535] WGLR4.
[536] Sub-Working Group, ENB WGLR5#4
[537] ENB WGLR4; Compilation of Views WGLR2; Notes WGLR4.
[538] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 6.
[539] ENB WGLR1 Summary.

the Convention but does not include damage resulting from actions expressly authorised or required by a relevant national authority.[540]

2. Damage should not include personal injury, damage to property, or economic loss.[541]
3. Except where national law provides, should not cover damage to private property[542].

Conservation Biology Program at the University of Minnesota

Suggests that it would be impossible to limit the liability regime to damage to conservation and sustainable use of biological diversity or its components without including elements from damage to the environment.[543]

Observers-Industry

Global Industry Coalition

1. The definition of damage should only relate to damage to biodiversity.[544]
2. Damage to biodiversity must be actionable when there is "measurable", "significant" and "adverse" change in a protected species or protected area, or a measurable and significant impairment of a natural resource service provided by a protected species or area, resulting from the transboundary movement of an LMO.[545]
3. Specific provisions on a scientifically determined baseline should be included.[546]

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[540] Compilation of Views WGLR2. Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 6 & 9.
[541] Compilation of Views WGLR4.
[542] WGLR4.
[543] ENB WGLR2.
[544] Compilation of Views WGLR4.
[545] *Id.*
[546] *Id.*

4. The cost of reasonable response measures should also be included in the definition of damage.[547]
5. Socio-economic damage should not be included as it is subjective and unique to each Party and within each Party and should not be addressed at the international level.[548]
6. Traditional damage is outside the scope of rules and procedures under the Protocol and the establishment of such provisions would be fundamentally disruptive to Party's existing civil law systems.[549]
7. Damage to human health has never been documented, is unlikely to occur, and is already covered under national legislation.[550]

International Federation for Organic Agriculture Movements

Damage should include damage to organic agriculture and products such as:

a. unwanted spread by uncontrollable means of transport;
b. decrease or change in soil activity;
c. decrease in ecological complexity of biodiversity following unwanted spread or out-crossing of LMOs;
d. disturbance of functional biodiversity;
e. decrease in varieties or variety choice in market for organic farmers;
f. presence of LMOs in organic products;
g. cost of testing or protective measures;
h. damage to the image of organic agriculture and products due to unwanted contamination;
i. loss of future possibilities to produce organic products; and
j. loss of organic market.[551]

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547 Compilation of Views WGLR1; Compilation of Views WGLR4.
548 Compilation of Views WGLR1.
549 *Id.*
550 Compilation of Views WGLR2.
551 *Id.*

International Grain Trade Coalition

1. The definition of damage should only relate to damage to biodiversity, or a change in variability among species, where such change is also adverse and significant. Criteria that must be included in this definition are:
    a. objectively and scientifically measurable, i.e., measured against a scientifically established baseline;
    b. adverse;
    c. significant; and
    d. permanent, i.e., not self-correcting over a reasonable period of time. [552]
2. The cost of reasonable response measures should also be included in the definition of damage.[553]
3. Notes that socio-economic considerations, under Article 26, are limited to import decisions.[554]

Organic Agriculture Protection Fund

1. Supports a broad definition of damage, including all options and aspects of damage. Damage should include damage to:
    a. environment;
    b. public health;
    c. livelihood of an individual farmer with contaminated crops;
    d. organic industry as a whole for contamination and loss of credibility; and
    e. damage to the environment in perpetuity.[555]

2. Crop contamination should include contamination through or by:
    a. pollen;
    b. seed drift;
    c. wind;

[552] *Id.*
[553] Compilation of Views WGLR1; Compilation of Views WGLR4.
[554] ENB WGLR1 Summary.
[555] Compilation of Views WGLR2.

d. application process;
e. insect;
f. wildlife activity across field borders;
g. run-off and watershed action;
h. human carrier/vehicle/equipment;
i. transport; and
j. processing.[556]

Observers-NGOs

ECOROPA

Suggests merging the two concepts of damage to the environment and damage to the conservation and sustainable use of biological diversity.[557]

Greenpeace International

1. The definition of damage should be broad and inclusive and should not confine or restrict damage covered.[558] The definition of damage should include:
   a. economic damage;
   b. damage to/loss of property;
   c. damage to biodiversity;
   d. preventative measures;
   e. Cost of reinstatement/remediation;
   f. Costs of interim measures;
   g. damage to human health; and
   h. damage to marine environment.[559]
2. Supports the inclusion of human health and socio-economic components of damage.[560]

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[556] *Id.*
[557] ENB WGLR1 Summary.
[558] Notes WGLR4.
[559] Compilation of Views WGLR2; Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 13.
[560] Notes WGLR4.

Rationale: Vienna Convention on Law of Treaties indicates taking into account scope and objective of treaty and history of negotiation. The scope of the Protocol includes: health, socio-economic, components of biodiversity. The Convention further encompasses such concepts.[561]

3. Notes that damage to biodiversity under the Convention is not as broad as damage caused by LMOs.[562]
   Rationale: Damage to biodiversity under the Convention means damage to variability, whereas damage to individual species should also be included.[563]
4. Damage to the environment must be included in the definition of damage.
   Rationale: It would be impossible to limit the liability regime to damage to conservation and sustainable use of biological diversity or its components without including elements of damage to the environment. [564]
5. Opposed to a definition of damage that requires damage to be beyond the ability to naturally recover within a reasonable short period of time or restricts damage to damage resulting from human activities.[565]

South African Civil Society

1. Supports a broad definition of damage.
2. Text should indicate a general reference to damages under all subheadings through general chapeaus.
   Rationale: Specifics given in text may undermine scientific uncertainties inherent in this new technology.
3. Supports the use of "impairment" instead of "loss."
4. Proposes adding option of damage due to preventative measures/ cost of preventative measures. [566]

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[561] *Id.*
[562] ENB WGLR1 Summary.
[563] *Id.*
[564] ENB WGLR2.
[565] Notes WGLR4.
[566] Compilation of Views WGLR2.

Third World Network

1. Suggests a broad definition of damage including all options/aspects of damage put forward.[567]
2. Suggests the inclusion of costs of preventative measures.[568]

Washington Biotechnology Action Council

Suggests definitions pertaining to human health should be consistent with those of the WHO.[569]

World Wildlife Fund International

The definition of damage should include harm to:

a. environment;
b. biodiversity;
c. human or animal health; and
d. socio-economic welfare.[570]

Options for the Valuation of Damage[571]

Option 1: A broad and inclusive definition of damage and valuation, based on *inter alia*:

a. cost of response or reinstatement measures for damage to conservation and sustainable use of biological diversity;
b. compensation for damage to human health;
c. compensation for socio-economic damage; and
d. compensation for all measures taken to assess, reduce or repair damage to property or loss of income.

Option 2: Valuation of damage to the conservation and sustainable use of biological diversity based on cost of the reinstatement of the same or equivalent components, response measures and market valuation of damage that cannot be restored to baseline conditions.

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[567] *Id.*
[568] *Id.*
[569] *Id.*
[570] *Id.*
[571] Meeting Report WGLR4.

Option 3: Valuation of damage to the conservation and sustainable use of biological diversity based on the cost of response measures.

Delegates' and Others' Positions on Valuation of Damage

The African Group

1. Valuation of damage should be based on the cost of measures for reinstatement or remediation of the same or equivalent components for the same use, at the same location or at another location or for another use if reinstatement of the original is not possible.[572]
2. Valuation may also be based on the cost of:
    a. response measures;
    b. preventative measures;
    c. the monetary value of loss during the period between the time the damage occurred and restoration of the damage; and
    d. the monetary value of the environment prior to any damage or impairment.[573]
3. Suggests that monetary compensation for irreparable damage should be made to the community, if it cannot be made to the individual who was harmed.[574]
4. Willing to consider additional matters in the valuation of damage, as necessary.[575]
5. Does not support text on valuation that requires a science based process to identify significant change or assessment measured from a baseline.[576]

[572] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT1.
[573] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT1.
[574] ENB WGLR2.
[575] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT1.
[576] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 9.

Rationale: Little work has been undertaken in developing countries on baseline conditions, leading to difficulty in using baselines to measure biodiversity loss.[577]

Specific Statements by members of the African Group in support of the African Group position

Statements of support by: Gabon[578] and Liberia[579].

Burkina Faso: differentiate categories of damage and proposes using environmental accounting to assess damage for each category.[580]

Suggests inclusion of 'all costs and expenses arising from damage to cultural, social and spiritual values, including compensation for the impairment regarding damage to indigenous and/or local communities.' [581]

Cameroon: criteria to assess damage could include:

a. monitoring;
b. inspection;
c. collection of information on levels prior to damage from indigenous and local communities;
d. reports from experts and officials;
e. data collections;
f. questionnaires;
g. consultations;
h. interviews; and
i. public participation to measure and monitor damage.[582]

Djibouti: use baseline data, and exploring other options.[583]

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[577] Notes WGLR4; ENB WGLR2.
[578] ENB WGLR1 Summary.
[579] Notes WGLR4.
[580] ENB WGLR2.
[581] Notes, Friends of the Chair group preceding MOP4.
[582] Compilation of Views TEG 1.
[583] ENB WGLR2.

Ethiopia: adds 'to the lifestyles of indigenous' to Burkina Faso's proposal. [584]

Liberia: delete reference to monetary compensation as the purpose of valuation is restoration.[585]

Need to consider carefully the formulation of a qualitative threshold of damage based on:

a. genetic composition (especially in the case of small populations);
b. the nature of adverse effects; and
c. the occurrence of damage.[586]

Senegal: valuation must be done locally and that establishing thresholds is necessary.[587] Should take into account the Convention indicators for the 2010 biodiversity target when valuing different types of damage.[588]

South Africa: suggests a narrower method of valuation than the African Group proposal based on cost of measures for reinstatement or remediation.[589] Damage should be measurable and go beyond compensation and restoration to include redress.[590]

Uganda: concerns about uncertainty involved in establishing initial baseline levels of biodiversity.[591]

Bangladesh

Prefers the broader operational text listing various factors to be taken into account in valuing damage.[592]

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[584] Notes, Friends of the Chair group preceding MOP4.
[585] ENB WGLR2
[586] Compilation of Views TEG 1.
[587] ENB WGLR1 Summary.
[588] ENB WGLR2.
[589] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 5.
[590] Notes WGLR4.
[591] ENB WGLR1 Summary.
[592] ENB WGLR5 Summary.

Belize

1. Supports valuation based on the cost of response measure.[593]
2. Response measures are "actions to minimize, contain or remedy damage as appropriate"[594].
3. Threats to environment or human health could be valued based on risk assessments on a case-by-case basis according to specific activities involving: potential transfer of genetic material; use of material with phenotypic/genotypic instability; use of material with pathogenic, toxic or allergenic potential; incremental potential for survival, settlement and dissemination; adverse effects on organisms.[595]

Bolivia

Prefers the broader operational text listing various factors to be taken into account in valuing damage.[596]

Brazil

1. Suggests flexibility in choosing a method of valuation.[597]
2. Human health should be included in the valuation of damage.[598]
3. Valuation cannot be the same as valuation under the Convention which only refers to damages to biodiversity.[599]
4. Stresses the importance of human health and proposes other costs to be covered, including loss of income.[600]
5. Do not want section on valuation of damage under administrative approach. Prefers to have the text 'in accordance with domestic laws and provisions'.
6. For civil liability, proposes that for valuation of the damage, should take into account:
    a. costs of reasonable measures of restoration/reinstatement, or clean-up, actually taken

[593] Notes WGLR4.
[594] Notes WGLR4; Synthesis of Texts WGLR4, at Section III D OT 2.
[595] *Id.*
[596] ENB WGLR5 Summary.
[597] ENB WGLR4.
[598] Compilation of Views TEG 1; ENB COP-MOP-1 Summary.
[599] Compilation of Views TEG 1.
[600] ENB WGLR5 Summary.

or to be undertaken including introduction of original components.

b. Where reinstatement or remediation to the original state is not possible the costs of the impairment and introduction of the equivalent components at the same location for the same use or at another location for other types of use;
c. Costs of response measures eventually undertaken or to be undertaken, including any loss or damage caused by any such measures.
d. Loss of income related to the damage during reservation period or until the compensation is provided.
e. All costs or expenses arising from damage to human health including appropriate medical treatment and compensation for impairment, disability and loss of life.
f. In respect of damage in centres of origin and/or genetic diversity, the unique value of these should be considered, including the costs of investment.[601]

Cambodia

1. Valuation should be based on adverse effects and negative effects on conservation and sustainable use including damage to environment, human health, and socio- economic issues.[602]
2. Text should list factors to be taken into account when determining damage and compensation for socio-economic damage and damage to human health.[603]

Colombia

1. Opposed to baselines as a prerequisite for valuation.[604]

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[601] Notes, Friends of the Chair group preceding MOP4.
[602] Notes WGLR4.
[603] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 7. Section III D OT 1.
[604] ENB WGLR1 Summary.

2. Notes the relationship between valuation and channeling and suggests that valuation should be discussed under channeling instead of damage.[605]

Cuba

1. Supports the valuation of damage based on the cost of measures or reinstatement or remediation of the same or equivalent components for the same use, at the same location or at another location or for another use if reinstatement of the original is not possible.[606]
2. Valuation may also be based on the cost of: response measures; preventative measures; the monetary value of loss during the period between the time the damage occurred and restoration of the damage; and the monetary value of the environment prior to any damage or impairment.[607]

El Salvador

Proposes including natural productivity, structure, functioning and diversity of ecosystems as measure for the valuation of damage based on COP Decision V/6 on Ecosystem Approach.[608]

European Union

1. The valuation of damage based on the cost of response measure taken to minimise, contain or remedy damage.[609] Prefers the broader operational text listing various factors to be taken into account in valuing damage but opposes Brazil's proposal to cover other costs, including loss of income.[610]
2. Damage to conservation of biological diversity shall be valued on the cost of restoration/response measures only.[611]

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[605] Notes WGLR4; ENB WGLR4.
[606] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 1.
[607] *Id.*
[608] *Id.*
[609] ENB WGLR2; Notes WGLR4; ENB WGLR4; Synthesis of Texts WGLR4, at Section III B OT 2.
[610] ENB WGLR5 Summary.
[611] Notes, Friends of the Chair group preceding MOP4.

India

1. Valuation of damage should be based on the cost of response measures including actions to minimize, contain or remedy damage, as appropriate.[612] Valuation should also take into consideration compensation for damage based on the costs of assessment; measures to reduce/repair damage; loss of, or damage to, property and loss of income.[613]
2. Prefers the broader operational text listing various factors to be taken into account in valuing damage and proposes alternative wording focusing on costs of restoration, reinstatement, rehabilitation, clean-up and preventive measures.[614]
3. Suggests 'including incurred costs of investment' in the Brazilian proposal. [615]

Iran

1. Valuation should be based on the size and amount of damage and should be scientifically classified, taking into account the nature of damage and whether damage is reversible or irreversible.[616]
2. It is difficult to use baselines for measuring biodiversity loss,[617] as little work has been undertaken in developing countries regarding baseline conditions.[618]
3. In cases of genetic damage which cannot be reversed, compensation may have to be continuous.[619]

Japan

1. Valuation should be based on the cost of response measures only.[620]

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[612] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 2.
[613] Notes WGLR4; Synthesis of Texts WGLR4, at Section III D OT 4.
[614] Sub-Working Group, ENB WGLR5#5
[615] Notes, Friends of the Chair group preceding MOP4.
[616] ENB WGLR2.
[617] *Id*.
[618] Compilation of Views TEG 1.
[619] ENB WGLR2.
[620] ENB WGLR4; Notes WGLR4.

2. Does not support the inclusion of specific text on the valuation of damage to the sustainable use of biological diversity, human health, socio-economic damage and traditional damage.[621]
3. Prefers the narrow operational text that damage to conservation of biological diversity be valued only on the cost of restoration.[622]

Malaysia

1. Proposes that valuation of damage be based on a broad interpretation of the cost of response measures for damage to biodiversity and a range of criteria to be taken into account of other types of damage. [623]
2. Notes that the value of loss over the time of reparation, and, the value of the difference between the previous and repaired State of the environment could be compensated monetarily.[624]
3. Suggests adding a list setting out the elements that liability shall extend to from the remaining operational text.[625]
4. Proposes: replacing the text 'restore the condition that existed before the damage or the nearest equivalent' with the text 'the replacement of the loss by other components of the biological diversity at the same location or for the same use; or at another location for another type of use'.[626]

Mexico

1. Valuation of damage should be based on the costs of measures for:
    a. reinstatement;
    b. rehabilitation;
    c. clean-up;
    d. prevention;[627]

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[621] Notes WGLR4.
[622] ENB WGLR5 Summary; Notes, Friends of the Chair group preceding MOP4.
[623] Notes WGLR4; ENB WGLR1 Summary; ENB WGLR2; Synthesis of Texts WGLR4, at Section III B OT 1& Section III D OT 1.
[624] *Id.*
[625] ENB WGLR5 Summary.
[626] Notes, Friends of the Chair group preceding MOP4.
[627] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 3.

e. assessment, reduction of damage; or
f. repair of damage.[628]

2. Text should be limited to valuation of damage to biodiversity and damage to human health in line with the definition of damage.[629]
3. In valuation of damage to conservation of biodiversity, take into account: exchange value, utility (both on market value), importance (appreciation or emotional value attached).
4. On behalf of GRULAC, suggests combining the subsections on valuation of damage to conservation and on valuation of damage to sustainable use of biological diversity, and also make special mention of centres of origin.
5. Damage to conservation of biological diversity shall be valued case by case, taking into account the complexity of the biological systems.[630]

New Zealand

Valuation of damage to biodiversity should be based on the costs of reinstatement, rehabilitation or clean-up measures and preventative measures.[631]

Norway

1. In the valuation of the damage to conservation of biological diversity, the costs of measures of reinstatement or remediation of the impaired biological diversity actually taken or to be undertaken shall be taken into account, including introduction of original components or introduction of equivalent components on the same location, for the same use, or on another location for other types of use.[632]

[628] Notes WGLR4; Synthesis of Texts WGLR4, at Section III D OT 3.
[629] ENB WGLR4.
[630] WGLR4.
[631] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 3.
[632] WGLR4.

2. Opposes Brazil's proposal to cover other costs, including loss of income. [633]

Palau

1. Valuation should not be limited to financial loss, but should include use and enjoyment and should be based on cost of restoration measures, including replacement by equivalent components on a case by case basis.[634]
2. Prefers the broader operational text listing various factors to be taken into account in valuing damage.[635]

Panama

1. Valuation of damage should be based on cost of reinstatement, rehabilitation and clean up measures as well as the cost of preventative measures.[636]
2. Prefers the broader operational text listing various factors to be taken into account in valuing damage.[637]

Paraguay

The valuation of damage should be based on the cost of reinstatement, rehabilitation or clean-up measures and, where applicable, the costs of preventative measures.[638]

Peru

Opposes establishing baselines as a prerequisite for valuation and suggests other methods for assessing damage.[639]

Philippines

The valuation of damage should be based on the cost of response measures, including measures to minimize, contain, or remedy damage, as appropriate.[640]

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[633] ENB WGLR5 Summary.
[634] Compilation of Views TEG 1.
[635] ENB WGLR5 Summary.
[636] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 3.
[637] ENB WGLR5 Summary.
[638] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 3.
[639] ENB WGLR1 Summary.
[640] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 2.

Saint Lucia

The valuation of damage should be based on the costs of response measures.[641] Prefers the broader operational text listing various factors to be taken into account in valuing damage.[642]

Saint Vincent and the Grenadines

Prefers the broader operational text listing various factors to be taken into account in valuing damage.[643]

Sri Lanka

The valuation of damage should be based on the cost of response measures taken to restore damaged components and monetary compensation based on criteria to be developed.[644]

TEXT AGREED TO AT COP-MOP4

For Administrative Approach

Operational text

[1. Damage to conservation and sustainable use of biological diversity shall be valued on the basis of the costs of response measures [in accordance with domestic laws and provisions].

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

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

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

641 Notes WGLR4; Synthesis of Texts WG 60, at Section III B OT 2.
642 ENB WGLR5 Summary.
643 *Id.*
644 Compilation of Views WGLR2.

For Civil Liability

Operational text

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

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

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

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

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

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

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

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

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

Non-Parties

Argentina

1. The valuation of damage should be based on the cost of measures to restore damaged components of biodiversity.[645]
2. Restoration may include introduction of the same or equivalent components at the same location for the same or other types of use.[646] Restoration should aim to restore components to established baseline conditions.[647]
3. If baseline conditions cannot be met, additional monetary compensation may be provided based on market valuation or value of replacement services.[648]
4. Prefers the narrow operational text that damage to conservation of biological diversity be valued only on the cost of restoration.[649]

Australia

1. The valuation of damage should be based on the cost of restoration or rehabilitation to baseline conditions.[650]
2. Valuation may be based on measurement of negative impact if damage must be quantified and monetized.[651]
3. Measures must be practical and not impose costs disproportionate to the seriousness of the event, considering the fact that valuation can be complex and difficult.[652]

Canada

1. The valuation of damage to biodiversity should be based on the cost of reasonable restoration measures, taken or to be taken, including the introduction of the same or equivalent

[645] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 7.
[646] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 7.
[647] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 8.
[648] *Id.*
[649] ENB WGLR5 Summary.
[650] *Id.*
[651] *Id.*
[652] *Id.*

components for the same or other use at the same or another location.[653]

2. Prefers the narrow operational text that damage to conservation of biological diversity be valued only on the cost of restoration.[654]

United States of America

1. The formulation of a qualitative threshold for damage is standard practice, noting that the issue of threshold could be related to burden of proof and quantification of damage.[655]
2. 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.
3. 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.[656]

Observers-Education

Public Research and Regulation Initiative

Valuation must be based on a negative change in biodiversity[657] and should not relate to human health, socio-economic or other considerations.[658]

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[653] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 5.
[654] ENB WGLR5 Summary.
[655] ENB WGLR2.
[656] WGLR4.
[657] Compilation of Views WGLR2.
[658] Notes WGLR4.

Observers-Industry

Global Industry Coalition

Valuation of damage to biodiversity should be assessed using a science-based process to identify the nature and significance of change – including scientific baseline conditions.[659]

International Federation for Organic Agriculture Movements

1. Valuation is difficult to determine.[660]
   Rationale: Loss of natural biodiversity is incurable.[661]
2. Direct and indirect damage to property, income and production could be valued.[662]
3. A total ban on LMOs could be cheaper than any possible redress for damage.[663]

International Grain Trade Coalition

Damage should be valued against a baseline.[664]

Organic Agriculture Protection Fund

Valuation of damage should be related to the cost of response measures. All potential aspects of valuation should be included by reference to the Protocol.[665]

Observers-NGOs

ECOROPA

Valuation of damage needs to encompass the full time frame necessary for restoration of damage.[666]

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[659] Compilation of Views WGLR4.
[660] Compilation of Views WGLR2.
[661] *Id.*
[662] *Id.*
[663] *Id.*
[664] ENB WGLR1 Summary.
[665] Compilation of Views WGLR2.
[666] *Id.*

Edmonds Institute

Valuation of damage should take into account cultural variations in valuing damage.[667]

Greenpeace International

1. Valuation of damage should be based on the cost of response, reinstatement, rehabilitation and preventative measures.[668]
2. There is a need to discuss further the valuation of economic damage.[669]
3. Valuation should take into account that damage may be ongoing and become significant only over time.[670]
4. The approach to valuation should leave open the possibility of alternative valuation methods and include consequential damage.[671]
5. Baseline assessments could perhaps be tied to risk assessments under the Protocol.[672]

South African Civil Society

1. Valuation of damage could be based on measures for reinstatement and monetary costs.[673]
2. Opposes imposing thresholds of damage.[674]

Washington Biotechnology Action Council

1. Valuation of damage should include many factors such as:
    a. actual loss of biodiversity;[675]
    b. monetary value of loss;[676]
    c. cost of response measures;[677]

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[667] ENB WGLR1 Summary.
[668] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 2 & 3.
[669] Notes WGLR4.
[670] ENB WGLR1 Summary.
[671] ENB WGLR2.
[672] *Id.*
[673] Compilation of Views WGLR2.
[674] *Id.*
[675] ENB WGLR4. Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 1 (e).
[676] Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 1 (e).

d. cost of monitoring of restoration;[678] and
e. cost of preventative measures in cases of biodiversity loss.[679]

Options for Special Measures in case of Damage to Centres of Origin and Centres of Genetic Diversity[680]

Option 1: A provision should be included to ensure that the monetary value of the investment in centres of origin and centres of genetic diversity, the unique value of centres, and any other measures necessary are taken into account.

Option 2: Any competent court should pay particular regard to centres of origin and genetic diversity.

Option 3: No special measures.

Delegates' and Others' Positions on Special Measures for Centres of Origin and Centres of Genetic Diversity

The African Group

See position on definition of damage: item 7(g) and (h).

Bangladesh

Prefers text that sets out monetary measures for damage to centres of origin.[681]

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[677] ENB WGLR2; Notes WGLR4; Synthesis of Texts WGLR4, at Section III B OT 2.
[678] ENB WGLR2.
[679] *Id.*
[680] Meeting Report WGLR4.
[681] *Id.*

Bolivia

Prefers text that sets out monetary measures for damage to centres of origin.[682]

Colombia

1. No need for special rules on damage to centres of origin or genetic diversity.
2. Text should state that valuation of damage will relate to conservation and sustainable use of biodiversity, without special measures for centres of origin or genetic diversity.[683]

European Union

Specific text on centres of origin or genetic diversity is not necessary, as such damage would be covered under "significant" damage.[684]

India

Prefers text that sets out monetary measures for damage to centers of origin.[685]

Iran

1. Supports the inclusion of special measures for damage to centres of origin and centres of genetic diversity.
2. In addition to restoration and rehabilitation measures, centres suffering damage should receive monetary compensation.[686]

Japan

Does not support the inclusion of text on centres of origin or genetic diversity.[687]

Malaysia

1. A specific provision on damage to centres of origin or genetic diversity is necessary.[688]

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682 ENB WGLR5 Summary.
683 Notes WGLR4; ENB WGLR4; Synthesis of Texts WGLR4, at Section III C OT 2.
684 *Id.*
685 ENB WGLR5 Summary.
686 Compilation of Views TEG 1.
687 Notes WGLR4.

2. The provision should include monetary compensation for investment in, and unique value of, centres of origin or centres of genetic diversity, and additional measures.[689]
3. Prefers text that sets out monetary measures for damage to centres of origin.[690]

Mexico

1. Supports the inclusion of special measures for the restoration and rehabilitation of centres of origin or genetic diversity, as well as monetary compensation, due to the special importance of these centres.[691]
2. Suggests deleting this subsection, instead including a reference that the unique value of these centres should be considered in the subsection on valuation of damage.[692]

New Zealand

Does not support the inclusion of special measures on centres of origin or genetic diversity.[693]

Paraguay

Text should allow courts to take special consideration of damage to centres of origin or genetic diversity.[694]

Philippines

Supports the inclusion of special measures for damage to centres of origin or genetic diversity with special emphasis on the unique value of centres of origin.[695]

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[688] ENB WGLR4.
[689] Notes WGLR4; ENB WGLR1 Summary; ENB WGLR2; Synthesis of Texts WGLR4, at Section III C OT 1.
[690] ENB WGLR5 Summary.
[691] Notes WGLR4; ENB WGLR1 Summary; ENB WGLR2; Synthesis of Texts WGLR4, at Section III C OT 1.
[692] ENB WGLR5 Summary.
[693] ENB WGLR4; Notes WGLR4.
[694] Notes WGLR4; Synthesis of Texts WGLR4, at Section III A OT 3.
[695] Notes WGLR4; Synthesis of Texts WGLR4, at Section III C OT 1.

Saint Lucia

Supports the inclusion of measures to protect centres of origin.[696]
Rationale: Saint Lucia is an island with a high degree of endemism.[697]

Non-Parties

Australia

There should be no special measures for damage to centres of origin or genetic diversity.[698]

Canada

Does not see a need for special measures or rules on damage to centres of origin or genetic diversity.[699]

Observers-Education

Universidad Nacional Agraria la Molina de Peru

Supports special consideration for centres of origin or centres of biodiversity.[700]

Observers-NGOs

Greenpeace International

Supports the inclusion of special provisions on centres of origin or genetic diversity, including monetary compensation for damage.[701]

South African Civil Society

Proposes adding special measures for centres of origin of biodiversity.[702]

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[696] Notes WGLR4.
[697] *Id.*
[698] *Id.*
[699] ENB WGLR4*;* Notes WGLR4.
[700] *Id.*
[701] Notes WGLR4; Synthesis of Texts WGLR4, at Section III C OT 1.
[702] Compilation of Views WGLR2.

Washington Biotechnology Action Council

When considering valuation of damage to centres of origin, geographic considerations should be taken into account. [703]

D. Causation

Causation relates to establishing a link in fact and in law between the damage and the LMO (including the related activity). Normally, the claimant has the task (burden) of establishing the link. He has to produce convincing evidence showing that the LMO or the activity caused the harm on a balance of probabilities. Causation can be difficult to establish if there are multiple causes at work; or if there is a highly technical and complex chain of events or processes. Sometimes a claim by the defendant of trade secrets in respect of the technology producing or utilizing the LMO may make it difficult for a claimant to establish causation. Some national jurisdictions try to overcome this difficulty by allowing for rebuttable presumptions. That is, if facts point to harm being caused by an operator of an LMO, he is presumed to be liable. It is then for him to adduce enough evidence to show that he is not to blame. In this way, the evidential burden of proof is reversed and shifts to the defendant. This may be in situations when the substance or activity has a high degree of risk and is inherently hazardous.[704] However it is not confined to such situations. Some national jurisdictions

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[703] *Id.*

[704] See index to activities of the International Law Commission in, *International Liability in Case of Loss from Transboundary Harm arising out of Hazardous Activities*, http://untreaty.un.org/ilc/guide/9_10.htm ; the ILC 2006 Report, Report on the work of its fifty-eighth session (1 May to 9 June ; 3 July to 11 August 2006), Supplement No. 10 (A/61/10), Chapter V, 'Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law', *International Liability in case of Loss from Transboundary Harm Arising out of Hazardous Activities*, http://untreaty.un.org/ilc/reports/2006/2006report.htm. *See also* 'Allocation of loss in the case of transboundary harm arising out of hazardous activities', G. A. Res 61 /36, U.N. Doc. A/61/10 (10 September 2006), http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/61/36&Lang=E.

establish a framework which enables a court to draw common sense conclusions based on the circumstances of the case without the need to show with scientific certainty that a substance caused or contributed to the harm.

Options for Causation[705]

Option 1: Burden of proof lies on the claimant.
Option 2: Burden of proof lies on the respondent.
Option 3: The issue is left to domestic law.

Delegates' and Others' Positions on Causation

The African Group

1. Supports the inclusion of a provision on causation.
2. Supports text on causation that:
    a. defines effect and occurrence broadly;
    b. places the presumption of causation on the LMO and the biotechnology-induced characteristics of the LMO; and
    c. places the burden of proof in establishing causation on the defendant.[706]

    Rationale: There is risk that a claim may fail due to the inability to establish a causal link due to the nature of the LMO involved.[707]
3. Proposes that in cases where multiple causes are possible, there should be a presumption that the damage was caused by the LMO.[708]

    Rationale: Establishing causation may be challenging.[709]

[705] Meeting Report WGLR4. The existing headings remain in the Revised Working Draft of WGLR5.
[706] Notes WGLR4; Synthesis of Texts WGLR4, at Section III E OT 11.
[707] Notes WGLR4.
[708] ENB WGLR4.

4. On causation under administrative approach, supports international approach; and a strong international regulation of causation under the civil liability regime.[710]

Specific Statements by members of the African Group in support of the African Group position

Statements of support: Ethiopia[711] and Liberia[712].

Egypt proposes that the burden of proof be on the potentially liable party for any exemptions sought.[713]

South Africa supports the establishment of a causal link under domestic rules. [714]

Bangladesh

The burden of proof lies on the respondent.[715]

Bolivia

The burden of proof lies on the respondent.[716]

Brazil

1. Support text requiring a causal link.
2. Casual link may be based on:
    a. the introduction of an LMO that finds its origin in a transboundary movement and shifts the burden of proof to the operator;[717] or

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709 *Id.*
710 Friends of the Chair Group, ENB WGLR5#7
711 Compilation of Views TEG 1. ENB WGLR5 Summary. Ethiopia speaking on behalf of African Group.
712 Notes WGLR4.
713 Compilation of Views TEG 1.
714 ENB WGLR4 ; Notes WGLR4.
715 ENB WGLR5 Summary.
716 ENB WGLR5 Summary.
717 Notes WGLR4; Synthesis of Texts WGLR4, at Section III E OT 2 paragraphs 2 & 3.

b. an activity/incident and other event or effects involved in the total damage.[718]

3. Channeling of liability should be based on the establishment of a causal link.[719]
4. Under the option on burden of proof being on the respondent, supports that the causal link be established in accordance with domestic rules.[720]

Cambodia

1. Supports the inclusion of text on a causal link, a presumption of liability and the reversal of the burden of proof.[721]
2. A causal link would be based on adverse effects resulting from the introduction of an LMO which finds it origin in a transboundary movement.
3. The presumption of liability and burden of proof should be placed on the operator.
4. Causation could be considered at either the national or international level.[722]

Colombia

Supports the inclusion of rules and procedures on causation, but leaves options open supporting a minimal causal link and reversal of the burden of proof.

a. A causal link should be established between the activity and the LMO based on the inherent risk of activities involving LMOs with the burden of proof upon the liable party; or

b. A direct proximate link between the transboundary movement and damage, placing the burden of proof on the claimant; leaving all options open.[723]

Cuba

The burden of proof lies on the respondent. [724]

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[718] Notes WGLR4; Synthesis of Texts WGLR4, at Section III E OT 8.
[719] Compilation of Views TEG 1; ENB WGLR2.
[720] Agreed by other delegates – ENB WGLR5 Summary.
[721] Notes WGLR4; Synthesis of Texts WGLR4, at Section III E OT 2.
[722] ENB WGLR5 Summary.
[723] Notes WGLR4; Synthesis of Texts WGLR4, at Section III E OT 1.

Ecuador

1. Text should be included on causation, based on:
    a. establishment of a causal link between activities involving LMOs and damage to biodiversity;
    b. a presumption of liability of the operator; and
    c. a reversal of the burden of proof upon the potentially liable party.[725]
2. Supports leaving the issue to domestic law.[726]

European Union

A causal link must be established between damage and the activity in question in accordance with domestic procedural rules.[727]

India

1. Supports text on causation requiring a simple causal link and a presumption of liability with the reversal of the burden of proof. The establishment of a causal link will be based on the fact of any adverse effect resulting from an LMO that finds it origin in a transboundary movement. [728]
2. Causation could be addressed at the national or international level.[729]
3. Supports leaving the issue to domestic law.[730]

Japan

1. Each State should apply its own definition of causation consistent with best international practices.[731]
2. Supports leaving the issue to domestic law.[732]

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[724] ENB WGLR5 Summary.
[725] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 2.
[726] ENB WGLR5 Summary.
[727] ENB WGLR4; Compilation of Views WGLR4. Friends of the Chair Group, ENB WGLR5#7
[728] Notes WGLR4; Synthesis of Texts WGLR4, at Section III E OT 2.
[729] *Id.*
[730] ENB WGLR5 Summary.
[731] Notes WGLR4; Compilation of Views WGLR4.
[732] Friends of the Chair Group, ENB WGLR5#7

Malaysia

1. A provision on causation is needed in an international regime. Rationale: Although some countries have clear provisions on causation, it cannot be assumed that this is the case in all countries.[733]
2. A causal link is essential to show that the damage was caused by the LMO.
3. There could in certain circumstances, to aid recovery for the damage, be a presumption of a link between the LMO and damage.[734]
4. Similarly there could be a reversal of the burden of proof. Rationale:
    a. Unfair, in certain situations, to place the burden on the claimant.
    b. Establishing causation can be problematic in some cases.[735]
    c. This will only shift the initial evidential burden of proof, not the legal burden.
5. Suggests a provision that would allow countries to opt-out of the provision in the international rules, if they had or wished to have, a different domestic law provision.[736]

Mexico

1. Supports the inclusion of text on causation requiring:
    a. The establishment of a direct and proximate causal link between the transboundary movement and the damage; and
    b. placing the burden of proof on the claimant.[737]
2. GRULAC opposes the domestic law approach, noting that they could accept a more flexible definition under the administrative approach.[738]

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[733] Notes WGLR4.
[734] Notes WGLR4; ENB WGLR4 .
[735] Notes WGLR4. ENB WGLR5 Summary.
[736] Friends of the Chair Group, ENB WGLR5#7
[737] ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section III E OT 7. On behalf of GRULAC, supports that burden of proof lies on the claimant. ENB WGLR5 Summary.

New Zealand

1. Supports text on causation, requiring:
    a. a causal link; and
    b. the burden of proof placed on the claimant.[739]
2. The causal link should be either provided for under domestic law based on its own definition consistent with best international practice, if rules are guidelines for development of national liability rules,[740]
3. If rules are to be applied as an international regime, whether through national courts or an international entity, then causation should be based on a direct and proximate link between damage and transboundary movement as well as damage and the act causing damage.[741]

Norway

Supports the domestic law approach in accordance with the principle that all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the instrument shall be governed by the law of that court, including for the administrative approach.[742]

Saint Lucia

Supports the option of leaving the burden of proof on the respondent. [743]

Saint Vincent and the Grenadines

Supports the option of leaving the burden of proof on the respondent.[744]

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[738] Friends of the Chair Group, ENB WGLR5#7
[739] Notes WGLR4; *Synthesis of Texts WGLR4, at* Section III E OT 7; ENB WGLR5 Summary.
[740] Notes WGLR4; Synthesis of Texts WGLR4, at Section III E OT 3; Friends of the Chair Group, ENB WGLR5#7
[741] Notes WGLR4; Synthesis of Texts WGLR4, at Section III E OT 7.
[742] WGLR4; Friends of the Chair Group, ENB WGLR5#7.
[743] ENB WGLR5 Summary.
[744] ENB WGLR5 Summary.

Palau

1. Supports the inclusion of a provision on causation.[745]
2. Supports using a "more probable than not" as the test or a rebuttable presumption standard.[746]
3. Suggests the reversal of the burden of proof due to the complexity of proving causation for damage caused by LMOs, as in the Austrian Law on Genetic Engineering.[747]

Philippines

On causation under administrative approach, supports the domestic law approach.[748]

Sri Lanka

Supports a provision on causation that:

a. establishes a causal link; and
b. either relaxes or reverses the burden of proof.[749]

Thailand

1. Supports the inclusion of a provision on causation.[750]
2. Clear and sufficient evidence of a causal link between the liable person and damage to biodiversity should be taken into consideration when determining liability. Notes the necessity of a causal link that can be easily identified.[751]

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745 Notes WGLR4.
746 *Id.*
747 Compilation of Views TEG 1; ENB WGLR5 Summary.
748 Friends of the Chair Group, ENB WGLR5#7
749 Compilation of Views WGLR2.
750 Compilation of Submissions of Further Views and Proposed Operational Texts With Respect to Approaches, Options and Issues Identified as Regards Matter Covered by Article 27 of the Protocol, in preparation for the third meeting of the Ad Hoc Open-Ended Working Group on Liability and Redress under the Cartagena Protocol on Biosafety, UNEP/CBD/BS/WG-L&R/3/INF/1 (7 December 2006), at http://www.cbd.int/doc/meetings/bs/bswglr-03/information/bswglr-03-inf-01-en.pdf ['Compilation of Views WGLR 3'].
751 *Id.*

TEXT AGREED TO AT COP-MOP4

For Administrative Approach

Operational text

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

For Civil Liability

Operational text

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

Non-Parties

Argentina

1. Causation should be based on a clear, direct causal link between an act or omission or breach of duty of care and damage. Rationale: Operators should operate based on a due diligence standard.
2. If damage is diffuse then liability should not be attributed to anyone.[752]
3. Supports the option of leaving the burden of proof on the claimant.[753]

Australia

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

[752] ENB WGLR4 ; Notes WGLR4.
[753] ENB WGLR5 Summary.

2. Essential that the entity alleging damage establish a causal link between the damage and the activity based on scientific evidence.[754]

Canada

1. Causation must be established between damage and the transboundary movement of LMOs in order to establish liability.[755]
2. Causation must be based on a direct and proximate link between these occurrences.[756] No liability can be established in the absence of this causal link.[757]
3. The burden of proof of a causal link should fall on those alleging damage,[758] or the government body responsible for permitting the import/use of the LMO.[759]
4. Supports leaving the issue subject to domestic law.[760]

United States of America

Supports the inclusion of text on causation requiring a direct causal link between damage and the LMO involved, [761] including establishing in particular:

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). [762]

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[754] WGLR4; ENB WGLR5 Summary.
[755] ENB WGLR4 ; Notes WGLR4.
[756] Compilation of Views WGLR4.
[757] Compilation of Views WGLR2.
[758] Compilation of Views WGLR4.
[759] Compilation of Views WGLR2.
[760] ENB WGLR5 Summary.
[761] Compilation of Views WGLR1; ENB WGLR4 ; Notes WGLR4; Synthesis of Texts WGLR4, at Section III E OT 3, 9.
[762] WGLR4.

Observers-Education

Public Research and Regulation Initiative

1. Supports a strong provision on causation, requiring:
    a. proximate causal link between damage and the transboundary movement;
    b. a causal link between damage and the act or omission of the liable party (person in operational control) if he fails to fulfill his obligation set by the applicable laws or approval procedures, unless he can prove otherwise; and
    c. violation of a fault-based standard of care.[763]
2. The burden of proof would be upon the defendant.[764]

Observers-Industry

Global Industry Coalition

1. A clear causal link is necessary.
   Rationale:
    a. This is necessary for insurance reasons.
    b. This will implement the polluter pays principle.
    c. This will ensure that an innocent person is not held liable.[765]
2. Special provisions on causation based on foreseeability and proximate or legal causation are not necessary.[766]
   Rationale: These aspects of causation are considered to be normal aspects of a claim. [767]
3. The burden of proof is traditionally placed on the claimant. Do not see a need to change this practice.[768]

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[763] Notes WGLR4; Synthesis of Texts WGLR4, at Section III E OT 9.
[764] *Id.*
[765] Compilation of Views WGLR1.
[766] *Id.*
[767] *Id.*
[768] Compilation of Views WGLR1; Compilation of Views WGLR2.

4. No liability should apply if damage is diffuse and no causal link can be proven.[769]

International Grain Trade Coalition

1. Causation must be established according to a clear link between conduct and the damage by proximate cause.[770]
2. The burden of proof should be placed on the claimant.[771]

Observers-NGOs

ECOROPA

Notes the need for research into causation of damage to the environment and sustainable use of biodiversity.[772]

Greenpeace International

1. Supports the inclusion of a provision on causation. The provision should include:
   a. a causal link based on a reasonable presumption of causation by the LMO;
      Rationale: This provision would:
      i. apply the precautionary approach; and
      ii. avoid difficulties in technically or scientifically proving causation in relation to LMOs. [773]
   b. consideration of the increased danger/hazardous nature of operational control of LMOs;[774] and
   c. A reversal of the burden of proof and the requirement of a certain standard to rebut this presumption. [775]
2. Burden of proof must be shifted to those introducing the LMOs/specific gene by its development or release - directly or indirectly (exporter, importer and distributor). [776]

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[769] Compilation of Views WGLR2.
[770] *Id.*
[771] *Id.*
[772] *Id.*
[773] Notes WGLR4.
[774] Compilation of views WGLR3.
[775] Compilation of views WGLR3.

Rationale: Proof of damage may put unfair/insurmountable burden on victim.[777]

South African Civil Society

Supports the reversal of the burden of proof, placing the burden on the defendant.[778]

Third World Network

Causation should require/take into consideration:

a. reversal of the burden of proof beyond a "basic causal link";
b. cumulative effects; and
c. long time scales.[779]

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[776] Compilation of Views WGLR2.
[777] *Id.*
[778] *Id.*
[779] *Id.*.

5

PRIMARY COMPENSATION SCHEME

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

An administrative approach is contrasted with a civil liability approach. An administrative approach does not involve adjudication by the courts. All matters are dealt with administratively – usually by a designated national competent authority. The object is to ensure speedy and adequate preventative, response and remedial measures where there is harm caused by LMOs, and is especially useful where the harm is in respect of a diffuse right such as to the environment and in this context, to biodiversity or its components. Usually, under this approach, a person/entity with the closest connection is identified, such as an operator, to assume certain responsibilities with regard to the damage. Usually he will be required to notify the national competent authority whenever the harm occurs or is imminent. The operator will then be required to undertake the necessary measures and respond to the damage caused or imminently threatened – to remedy, reduce, mitigate or prevent. He has to bear all costs. If the operator fails to take any of these measures then the national competent authority may undertake the measures and recover the costs from the operator. The standard of

liability is strict and the obligation, as noted, is channeled to a single person – usually the operator/person in operational control. The operator may also be given the right to show why he should not be held responsible.

In some situations where remediation and repair of the damage is not possible or would cost more than the value of the damage, the person responsible may be required to make monetary compensation for the value of the damage.

Abis. Additional elements of an Administrative Approach

1. Exemptions to, or mitigation of, strict liability

There are usually various defences available especially where liability is strict. These include:

- *Force majeure*;
- Intentional intervention by a third party;
- Act of God – the result of natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character.
- War and hostilities;

These defences exempt liability as the damage is due to the happening of events outside the control of the defendant.

The more contentious ones are the defence of ‘development risks’, ‘state of the art’, and, compliance with legal requirements.

The ‘development risk’ defence describes situations in which the product is defective when put into circulation but the producer can seek to avoid liability by proving that the defect was not reasonably discoverable, given the then existing knowledge. ‘State of the art’ connotes that the product was safe when judged against the prevailing safety standard at the time it was put into circulation. In the latter case, it

matters not that there may well be other more efficacious means of avoiding the damage.

The defence of 'compliance with legal requirements' allows a defendant to plead that the defect is due to compliance with mandatory regulations issued by the authorities and that the defect is the inevitable result of the compliance.

A proposed limitation on exemptions for act of God or *force majeure*, recognizes the potential for evolutionary damage due to the nature of the technology involved with the creation of LMOs and the potential for damage caused by climatic occurrences due to increased levels of greenhouse gas emissions. Some consider that there should be no exemption for such circumstances as they are caused by human activities, not simply uncontrollable natural occurrences.

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

3. Joint and several liability and apportionment of liability

Sometimes the injury is indivisible and there may be more than one person who may be sued for the damage. The claimant can then sue and obtain judgment against any one or more of such persons. Under a rule of the common law, any tortfeasor whose act has been a proximate cause of the damage must compensate for the whole of it. This means that not all the tortfeasors need to be sued and the claimant may proceed to recover the whole amount from any one of the defendants. The party who pays out will have a right of recourse in respect of the amount he has paid out, or seek contribution from, other joint tortfeasors, that is, the other party whose judgment amount he has satisfied.

For apportionment of liability, where more than one person is liable for the damage, the amount payable is apportioned according to the degree of culpability of each defendant.

4. Limitation of liability

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

Relative time-limit

A claimant is given a time period within which to bring his claim. Time limits are fixed so that the defendant does not have a potential claim hanging over his head for a long time. Time limits also ensure that evidence is available.

Absolute time limits may also be fixed. No action can be presented after that period expires.

There also needs to be established when time begins to run. Generally time is fixed from the date when the damage occurred or is reasonably discoverable. Where the incident consists of continuous occurrences, the time usually runs from the date of the last occurrence or incident.

(b) Limitation in amount

This caps the amount recoverable in respect of a claim.

5. Coverage of liability

This refers to the requirement for the person potentially liable, if damage occurs, to take out insurance and furnish evidence of this fact. The person may also insure himself, that is, show his worth (and furnish evidence of the fact) that he can meet the claim for any damage.

Compulsory insurance or other financial guarantees

This makes it compulsory for operators to take out insurance coverage to pay for the damage. Sometimes, then, the insurance company can be sued directly. The defences that the insurers can raise are usually circumscribed. They have the right of subrogation or recourse if they

satisfy the claim on behalf of the insured. They can also often ask that the insured be joined as a co-defendant.

In place of insurance, the operator may be asked to provide some other form of financial guarantee. He could, for example, be asked to post a bond in a specified sum.

Options for an Administrative Approach[780]

Option 1: Binding national administrative approach.
Option 2: Voluntary national administrative approach.
Option 3: Administrative approach in combination with civil liability.

The administrative approach usually consists of the following aspects:

1. Obligation imposed by national law on the operator to inform competent authorities of the occurrence of damage.
2. Obligation imposed by national law on the operator to take response and restoration measures to address such damage.
3. Discretion of States to take response and restoration measures, including when the operator has failed to do so and to recover the costs.
4. Who is the 'operator' in a given context needs to be defined.

Delegates' and Others' Positions on an Administrative Approach

The African Group

1. In the event of damage, an operator to inform the Competent National Authority and to assess and evaluate the damage and:
    a. cease, modify or control any act, activity or process causing the damage;
    b. minimise, contain or prevent the movement of any living modified organisms causing the damage in

[780] Meeting Report WGLR4.

the event that an activity cannot reasonably be avoided or stopped;
c. eliminate any source of the damage; or
d. remedy the effects of the damage caused by the activity.

2. If an operator fails or inadequately implements the measures, the Competent National Authority may take any reasonable measures to remedy the situation and recover all costs incurred from the operator.
3. "Operator shall mean the developer, producer, notifier, exporter, importer, carrier, or supplier."[781]

Specific Statements by members of the African Group in support of the African Group position

Burkina Faso: for the definition of operator, adds 'person who placed the LMO on the market' and proposes to keep the list of potential operators as an option to continue negotiation.[782]

Egypt: on the discretion of States to take response and restoration measures, supports language that mandates the competent authority to recover costs from the operator. Also prefers a broader definition of the term 'operator'. [783]

Ethiopia: on behalf of African Group, on the obligation of the operator to inform competent authorities of occurrence of damage, prefers language requiring the operator to immediately inform the competent authority. [784]

Namibia: prefers the term 'operator' to be defined broadly.[785]

South Africa: on the obligation imposed by national law on the operator to take response and restoration measures to address such damage, supports language requiring the operator to assess

[781] WGLR4.
[782] Notes, Friends of the Chair group preceding MOP4.
[783] Sub-Working Group, ENB WGLR5#4.
[784] *Id.*
[785] *Id.*

and evaluate the damage and to implement measures to eliminate the source and remedy the effects.[786]

Brazil

1. Considering both a civil liability and an administrative approach.[787]
2. Text on an administrative approach could include a set of obligations by the operator with a secondary obligation on the Competent National Authority in relation to notification, prevention and clean up of damage.[788]
3. Reserves its views on the ability of the Competent National Authority to recover costs of its actions, and the definition of an operator.[789]
4. On the obligation of the operator to inform competent authorities of occurrence of damage, prefers language requiring the operator to immediately inform the competent authority.
5. On the obligation of the operator to take response measures, requests that "imminent threat of damage" on the chapeau to be bracketed and suggests a paragraph referring to "measures to avoid adverse impacts".
6. On the element of discretion of the State to take response and restoration measures, suggests the activities assigned to the national competent authority should instead be undertaken by the judiciary. [790] In Brazil, 'discretion' means duty and the use of 'option' does not help. Suggests 'the competent authority has the discretion to implement appropriate measures, in accordance with domestic law, including where the operator has failed to do so'.[791]

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[786] *Id.*
[787] Notes WGLR4.
[788] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 1 paragraphs 1-3
[789] *Id.*
[790] Sub-Working Group, ENB WGLR5#4.
[791] Notes, Friends of the Chair group preceding MOP4.

7. Opposes the inclusion of a list of potential operators.[792] Rationale: do not have definition of all the terms used in the list. Notifier can be interpreted as State with which unable to agree. Supports a broader definition of operator to give competent authority flexibility to identify the operator. [793]
8. Calls for the deletion of the obligation to inform and discretion of the State, favoring instead "neutral" language specifying "standard of liability and channeling of liability".[794]

China

1. Proposes alternative text on obligation imposed by national law on the operator to take response measures: if damage or imminent threat of damage is caused by an operator's/operators', activity originating in transboundary movements of LMOs, those persons shall, in consultation with the competent authority, and in accordance with domestic law, investigate, assess, and evaluate the damage, or imminent threat; and take response measures, to prevent, minimize, contain, or remedy it.[795]
2. The definition of 'operator' should include exporter. [796]

Colombia

1. Adopting an administrative approach at the international level is not necessary.[797]
2. States should take measures to adopt necessary rules for liability and redress, such as those outlined under an administrative approach.[798]
3. Text on an administrative approach could reflect the responsibility of the operator to take measures to avoid, minimize, contain, eliminate, prevent, and remedy damage.[799]

[792] Sub-Working Group, ENB WGLR5#5.
[793] Notes, Friends of the Chair group preceding MOP4.
[794] Friends of the Chair Group, ENB WGLR5#7
[795] Sub-Working Group, ENB WGLR 5#4
[796] Notes, Friends of the Chair group preceding MOP4.
[797] Notes WGLR4; ENB WGLR4.
[798] *Id.*
[799] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 1.

Provisions for assessment, and response, remediation or prevention measures by the Competent National Authority could be included, as well as, a provision allowing the Competent National Authority to recover costs for such measures from the operator.[800]

4. On the obligation of the operator to inform competent authorities of occurrence of damage, prefers language requiring the operator to immediately inform the competent authority.
5. Notes the need to define the term "operator" and look into the role of the Competent National Authority.[801] Supports "operator" to mean any person in operational control of the activity at the time of the incident and causing damage from transboundary movement of living modified organisms.
6. To include text to prevent a farmer being held liable.[802]

Ecuador

On the obligation of the operator to inform competent authorities of occurrence of damage, prefers language requiring the operator to immediately inform the competent authority.[803]

European Union

1. Supports a combination of civil and administrative procedures.[804]
2. Text should flesh out the important aspects of an administrative approach such as:
   a. the role of the Competent National Authority;
   b. the responsibilities of the operator;
   c. the identification of response measures; and
   d. the ability to recover costs from the operator for measures taken by the Competent National Authority.[805]

[800] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 1; Compilation of Views WGLR4.
[801] Notes WGLR4.
[802] Notes, Friends of the Chair group preceding MOP4.
[803] ENB WGLR5#3.
[804] ENB WGLR4.
[805] Notes WGLR4.

3. Text should not be overly prescriptive concerning the allocation of costs of preventative and response measures.[806]
4. The operator/importer should be required to take all necessary preventive and remedial measures and to bear their costs.[807]
5. Competent National Authority should establish which operator/importer has caused the damage, or the imminent threat of damage, and should assess the significance of the damage and determine which remedial measures should be taken.[808]
6. Competent Authority may take the necessary preventive or remedial measures and then recover the costs from the operator/importer.[809]
7. An administrative approach would empower competent authorities to prevent damage, as an alternative to the judicial process and without the intervention of a court.
8. Regarding the term 'operator', suggests using the International Law Commission's definition. Regarding the chapeau on the obligation imposed by national law on the operator to take response and restoration measures, prefers "imminent threat of damage".[810]
9. Suggests the inclusion of a list of potential operators. [811]
10. Supports "operator" to mean any person in operational control of the activity at the time of the incident and causing damage from the transboundary movement of living modified organisms.[812]

India

1. Supports an administrative approach.[813]

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[806] ENB WGLR4.
[807] Notes WGLR4; Compilation of Views WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 1.
[808] *Id;* ENB WGLR 5#3
[809] *Id.*
[810] Sub-Working Group, ENB WGLR5#4.
[811] Sub-Working Group, ENB WGLR5#5
[812] Notes, Friends of the Chair group preceding MOP4.
[813] Notes WGLR4.

2. Text should be included highlighting the role of the State or the Competent National Authority as the party responsible for:
   a. monitoring and overseeing measures taken to prevent or respond to damage; and
   b. ensuring the operator undertakes all necessary measures; or
   c. taking such measures itself.
3. A general provision allowing the State or Competent Authority to recover costs from the operator for measures taken should be included.[814]
4. On the discretion of States to take response and restoration measures, supports language that mandates the competent authority to recover costs from the operator.
5. On the obligation of the operator to inform competent authorities of occurrence of damage, prefers language requiring the operator to immediately inform the competent authority.
6. On the obligation imposed by national law on the operator to take response and restoration measures, supports language requiring the operator to assess and evaluate the damage and to implement measures to eliminate the source and remedy the effects; and prefers "imminent threat of damage" in the chapeau.
7. On the discretion of States, the activities of the competent authority should not be prescribed.
8. Suggests use of the term "transboundary damage" in the definition for 'operator'[815] and the inclusion of a list of potential operators.[816]

Japan

1. Supports text on an administrative approach.[817]
2. Suggests that Parties endeavor to require legal or natural persons who caused significant damage to undertake reasonable

[814] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT1 through 4.
[815] Sub-Working Group, ENB WGLR5#4
[816] Sub-Working Group, ENB WGLR5#5
[817] Notes WGLR4.

response measures and avoid, minimize or contain the impact of the damage.[818]

3. Emphasizes the importance of a national approach where concrete measures are embedded in national legal systems.[819] The harmonization of domestic legal systems could occur through an administrative approach which would still accommodate the differences in national legal systems.[820]
4. On the obligation of the operator to inform competent authorities of occurrence of damage, prefers a formulation that parties “endeavor to require” the operator to do so.
5. On the discretion of States to take response and restoration measures, supports a formulation allowing the competent authority more discretion. [821]
6. For the definition of operator, opposes the inclusion of ‘person who placed the LMO on the market’.[822]

Malaysia

1. Considering the application of an administrative approach to scenarios of damage to biodiversity, ecosystems and habitats.[823] An administrative approach should include three components:
    a. primary obligation of the operator to inform the competent national authority and to take measures;
    b. the right of the State to take the measures if the operator fails to act; and
    c. to then recover the costs from the operator.[824]

   Rationale: An administrative approach simplifies the procedure in cases where there is serious and large scale damage to the environment or biodiversity, by allowing States to require the

[818] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2a OT 6.
[819] Notes WGLR4.
[820] Notes WGLR4; ENB WGLR4.
[821] Sub-Working Group, ENB WGLR5#4
[822] Notes, Friends of the Chair group preceding MOP4.
[823] Notes WGLR4.
[824] Notes WGLR4; ENB WGLR4.

operator to take action through administrative rather than court process.[825]

2. The obligation of the operator should be to immediately inform the competent authority.
3. On the obligation imposed by national law on the operator to take response and restoration measures, supports language requiring the operator to assess and evaluate the damage and to implement measures to eliminate the source and remedy the effects; and prefers the inclusion of 'imminent threat of damage' in the chapeau.[826]
4. On the discretion of States to take response and restoration measures, supports language that the competent authorities should establish which operator caused the damage and who should undertake remedial measures; and in the event the operator fails to do so, the competent authority may do so and recover the costs from the operator.[827]
5. Opposes text requiring the competent authority to assess the significance of the damage and determine which response measures should be taken by the operator because it seems to impose unnecessary and onerous obligations on the competent authority.[828]
6. Prefers a broad definition for 'operators' and a list of possible examples.[829] The definition must address as well the situation where the damage is caused by the inherent quality of the LMOs itself. Those who benefit from the approval for the LMO should be held responsible. To include also 'including where appropriate…the commercialiser of the LMO'. To include 'the condition' to prevent farmers from being held liable. Agrees that domestic law can determine the definition of 'operator' if the rest of the text that defines the 'operator' (example: person

[825] Notes WGLR4.
[826] Sub-Working Group, ENB WGLR5#4
[827] Notes WGLR5.
[828] Notes, Friends of the Chair group preceding MOP4.
[829] Sub-Working Group, ENB WGLR5#4

in operational control, including the permit holder etc) is retained.[830]

Mexico

1. Supports an administrative approach.[831]
2. An administrative approach should ensure that operators take necessary measures to prevent, minimise, mitigate, or repair damage. Measures should include:
    a. assessment;
    b. reinstatement; and
    c. restoration of original or equivalent components in the same or other locations for the same or other use.[832]
3. On the obligation of the operator to inform competent authorities of occurrence of damage, prefers language requiring the operator to immediately inform the competent authority.
4. On the obligation imposed by national law on the operator to take response and restoration measures, supports language requiring the operator to assess and evaluate the damage and to implement measures to eliminate the source and remedy the effects. Referring to the list of measures, suggests qualifying the requirement to remedy the effects of the damage and that the list should not be presented as alternatives.[833] Proposes that in cases where none of the response measures can be implemented the operator shall provide monetary compensation for the damage caused.[834]
5. The State where damage occurs may take measures, at the cost of the operator, if the operator fails to do so.[835]
6. Opposes the inclusion of a list of potential operators. Having a list would require a very precise definition of the terms in the list. Owner of the technology and the one with the right for research and development (normally a company) should be the

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[830] Notes, Friends of the Chair group preceding MOP4.
[831] Notes WGLR4.
[832] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 10.
[833] Sub-Working Group, ENB WGLR5#4
[834] Notes, Friends of the Chair group preceding MOP4.
[835] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 10.

one that is responsible. Proposes 'any person or persons in direct or indirect control of the LMOs' to cover illegal transfer of LMOs.[836]

New Zealand

1. Supports an administrative approach based on:
    a. initial liability of the operator, with
    b. secondary responsibility of the State to act, if necessary.[837]
2. Supports text that delineates the basic duties of an operator in the case of damage and the role of the State in performing actions not undertaken by the operator at the operator's expense.[838]
3. Concerned about the prescriptive nature of some text on an administrative approach.[839]
4. Administrative liability is already in place in New Zealand for damage to the environment.[840]

Norway

1. Supports a mixed approach to civil and administrative liability, and emphasizes the need for language reflecting a binding regime.[841]
2. Supports an administrative approach that requires the:
    a. the operator to take preventative and response measures for damage; and
    b. the competent authority to take measures to address damage at the cost of the operator if the operator is not able to take such measures;[842]
    c. on the obligation of the operator to inform competent authorities of occurrence of damage, prefers language

[836] Notes, Friends of the Chair group preceding MOP4.
[837] Notes WGLR4.
[838] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 3.
[839] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 8.
[840] Notes WGLR4.
[841] ENB WGLR4; Notes WGLR4.
[842] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 3; ENB WGLR 5 #3

requiring the operator to immediately inform the competent authority.

3. In the case of a mixed civil and administrative approach, the competent authority shall also assess damage and determine which liable party is responsible for which response measure.[843]
4. Does not believe that text on standard of liability should be included within provisions on an administrative approach.[844]
5. On the obligation imposed by national law on the operator to take response and restoration measures, supports "imminent threat of damage" in the chapeau and on referring to the list of measures, suggests qualifying the requirement to remedy the effects of the damage.[845]
6. The definition of operator, should include the situation of 'imminent threat of damage'.[846]

Palau

1. Supports text on an administrative approach adopted by States in national law.
2. Such law would ensure that:
    a. operators are held responsible for all reasonable measures to mitigate, restore or reinstate damage in order to ensure prompt and adequate compensation and preserve and protect the environment;
    b. States ensure that these measures are taken either by the operator or by the State; and
    c. if the State takes measures the cost of these measures will be recovered from the operator.
3. On the obligation of the operator, to inform competent authorities of occurrence of damage, prefers language requiring the operator to immediately inform the competent authority.
4. A robust definition of "operator" should be included in this approach.[847]

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[843] ENB WGLR4.
[844] Notes WGLR4 ; Synthesis of Texts WGLR4, at Section IV 2c OT 12.
[845] Sub-Working Group, ENB WGLR5#4
[846] Notes, Friends of the Chair group preceding MOP4.
[847] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 12.

Paraguay

Supports the application of administrative measures based on the allocation of costs of response and restoration measures in accordance with domestic law.[848]

Peru

On the obligation of the operator to inform competent authorities of occurrence of damage, prefers language requiring the operator to immediately inform the competent authority. [849]

South Korea

1. On the obligation of the operator to inform competent authorities of occurrence of damage, prefers language requiring the operator to immediately inform the competent authority.
2. On the obligation imposed by national law on the operator to take response and restoration measures to address such damage, supports language requiring the operator to assess and evaluate the damage and to implement measures to eliminate the source and remedy the effects.[850]

Switzerland

1. Suggests further consideration of the proposals on an administrative approach.[851]
2. On the discretion of the State to take response measures, proposes no text because competent authority will act in accordance with their domestic legislation if necessary
3. On the term 'operator', suggests 'or as otherwise provided by national law.' Also to include permit holder. [852]

Thailand

Supports a potential administrative approach based on allocation of costs of response measures and restoration measures.[853]

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848 Notes WGLR4; Synthesis of Texts WGLR4, at Section Id OT 1.
849 Sub-Working Group, ENB WGLR5#4.
850 *Id.*
851 ENB WGLR4 .
852 Notes, Friends of the Chair group preceding MOP4.
853 *Id.*

Trinidad and Tobago

1. Supports text on an administrative approach, requiring:
    a. the operator to take response measures in the case of damage;
    b. the Competent National Authority 'overseeing' (i.e. undertaking) any measures that are not taken by the operator; and
    c. the right of the Competent National Authority to recover the cost of response measures from the operator.[854]
2. Notes a high degree of over proceduralization of text on an administrative approach.[855]

TEXT AGREED TO AT COP-MOP4

For Administrative Approach

Operational text

Operational text 9

Parties [may][shall][, as appropriate,] [, consistent with international [law] obligations,] provide for or take response measures in accordance with domestic law or[, in the absence thereof,] the procedures specified below, [provided that the domestic law is consistent with the objective of these rules and procedures].

Operational text 10

In the event of damage or imminent threat of damage, an operator [shall][should] immediately inform the competent authority of the damage or imminent threat of damage.[856]

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[854] Notes WGLR4; Synthesis of Texts WGLR4, at Section Id OT 1; Section IV 2c OT 2; ENB WGLR4 .

[855] Notes WGLR4.

[856] All Parties agreed to this text, except Japan, which opted for *Operational text 10 (alt):* Notes, Friends of the Chair group preceding MOP4.

Operational text 10 alt

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

Operational text 11

In the event of damage [or imminent threat of damage], an operator shall, subject to the requirements of the competent authority, investigate, assess and evaluate the damage [or imminent threat of damage] and take appropriate response measures.

[In cases where no response measures can be implemented, the operator shall provide monetary compensation for the damage caused [where applicable under the domestic law].]

Operational text 11 alt

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

Operational text 12

[1. The competent authority:

a) [should][shall] identify, in accordance with domestic law, the operator which has caused the damage [or the imminent threat of damage];

b) [should][shall] assess the significance of the damage and determine which response measures should be taken by the operator.]

2. The competent authority has the discretion to implement appropriate measures[, in accordance with domestic law, if any, including in particular] where the operator has failed to do so.

3. The competent authority has the right to recover the costs and expenses of, and incidental to, the implementation of any such appropriate measures, from the operator.

Operational text 13

"Operator" means any person in [operational control][[direct or indirect] command or control]:

(a) of the activity at the time of the incident [causing damage resulting from the transboundary movement of living modified organisms];

[(b) of the living modified organism [at the time that the condition that gave rise to the damage] [or imminent threat of damage] arose [including, where appropriate, the permit holder or the person who placed the living modified organism on the market];] [and/]or

(c) as provided by domestic law.

Operational text 13 alt

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

Operational text 13 alt bis

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

Operational text 14

Decisions of the competent authority imposing or intending to impose response measures should be reasoned and notified to the operator who should be informed of the procedures and legal remedies available to him, including the opportunity for the review of such decisions, inter alia, through access to an independent body, such as courts.

Non-Parties

Argentina

Supports the further consideration of proposals on an administrative approach.[857]

Australia

Any obligation to take response and restoration measures shall be limited to reasonable measures.[858]

Canada

1. Supports the adoption of an administrative approach by Parties domestically.[859]
2. An administrative approach would require:
    a. notification of the Competent National Authority of damage.
    b. the Competent National Authority to require the operator to take measures to mitigate damage or restore biodiversity.
    c. the Competent Authority will take such measures, in any case where the operator fails to take all required measures.
    d. the Competent Authority will reclaim any costs from the operator.
    e. any failure to comply with the notification of a government official, such as the Competent National Authority, will be prosecuted.[860]

Rationale:

a. An administrative approach would be a beneficial way of addressing damage caused by LMOs, as it would be part of an instrument with immediate application.
b. An administrative approach would be flexible, but also binding nationally.

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[857] ENB WGLR4 .
[858] WGLR4.
[859] Compilation of Views WGLR4; ENB WGLR4*;* Notes WGLR4.
[860] *Id.* ENB WGLR 5#3

c. The procedure of an administrative approach would be simpler and would more efficiently address harm to biodiversity than a legal claim for liability.[861]

3. The administrative approach is supposed to be a form of strict liability for the benefit of the State.[862]

United States of America

1. An administrative approach to liability should be explored, but is concerned about the initiation of new bureaucracies.[863]
2. Prefers the International Law Commission's definition for 'operator'.[864]

Observers- Education

Public Research and Regulation Initiative

1. Favors an administrative system for cases of damage to biodiversity, where the key is to clean up and repair damage. First the operator, then the State can take action and claim costs from the operator. This approach would be legally binding at the national level. [865]
   Rationale: An administrative approach will provide quick remedies without court action.[866]
2. Prefers the International Law Commission's definition for 'operator'.[867]

[861] Notes WGLR4.
[862] ENB WGLR 5#3
[863] ENB WGLR4 .
[864] Sub-Working Group, ENB WGLR5#4
[865] Notes WGLR4.
[866] ENB WGLR4; Notes WGLR3.
[867] Sub-Working Group, ENB WGLR5#4

Observers- NGOs

Greenpeace International

1. Supports an administrative approach based on:
    a. a precise definition of the “operator”;[868]
    b. a duty upon the operator to:
        i. take reasonable measures to prevent, mitigate, restore or reinstate damage;
        ii. compensate victims; and
        iii. preserve and protect the environment.
    c. a duty on the State to ensure damage is prevented or remedied and the environment is remediated or restored.[869]
2. State may take measures and recover the costs from the operator.[870]
3. Need to integrate a fund and consider situations where there is no operator as is the case in unintentional damage.[871]

[868] ENB WGLR4.
[869] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 12.
[870] ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 12.
[871] ENB WGLR4; Notes WGLR4.

B. Civil liability (harmonization of rules and procedures)

A person may bring a civil claim in a court against another person for damage he has suffered. This way he establishes civil (as opposed to criminal) liability against that person through the normal court process. There will be clear rules and procedures that he has to follow. Courts of different countries may have different rules. It may then be difficult for a person unfamiliar with those rules to make a claim in a court of another jurisdiction. This difficulty may be overcome if the fundamental rules and procedures are harmonized across jurisdictions through an international instrument.

Options for Civil Liability[872]

Option 1: Substantive rules and procedures.
Option 2: Guidance for national rules and procedures.
Option 3: A combination.
Option 4: No rules and procedures.

Delegates' and Others' Positions on Civil Liability

The African Group

1. A person or legal entity shall be liable for any damage caused by that person's or legal entity's intentional or negligent act or omission as a result of transboundary movement, transit, handling and use of LMOs.
2. Any person that commits fault either intentionally or by negligence during the transboundary movement, transit, handling and use of LMOs shall be liable for damage resulting from an incident other than those specified [under Article 4 of this Protocol]. This Article shall not affect the domestic law of

[872] Meeting Report WGLR4.

the Contracting Parties governing liability of servants and agents.

3. A person that takes or fails to take action required under this Protocol or other relevant international laws with full knowledge, or being aware that its act or omission may cause damage, shall be deemed to have committed an intentional fault if, with full knowledge of the consequences of the incident, it takes or fails to take action regardless that such damage may follow.
4. A person is proved negligent when, in the circumstances of the case, he fails to take such precautions as might reasonably be expected or acts without consideration or in disregard of the possible consequences of his act or omission during a transboundary movement, transit, handling and use of LMOs, including illegal traffic.[873]
5. Outlines proposal to merge the elements on civil liability with those relating to complementary capacity building measures.[874]

Brazil

National civil liability regimes should address measures in the field of liability and redress for damage resulting from the transboundary movement of LMOs in accordance with domestic law. The elements and procedures (later set out in the text, such as: standard of liability etc) could be considered for inclusion in such a law.[875]

Cambodia

Supports civil liability and text reflecting this approach.[876]

China

1. Supports an international civil liability regime.
2. A civil liability regime would address China's concern as, often, issues of liability and redress relate to multinational corporations. These multinational corporations are often

[873] WGLR4.
[874] Friends of the Chair Group, ENB WGLR5#7
[875] Notes, Friends of the Chair group preceding MOP4.
[876] Notes WGLR4.

controlled by larger multinational corporations that governments may not be able to hold liable otherwise.[877]

European Union

The operator/importer of a transboundary movement of LMOs should be liable for the damage resulting from such a transboundary movement.[878]

Norway

The person responsible for intentional or unintentional transboundary movements of living modified organisms shall be liable for damages resulting from transport, transit, handling and/or use of living modified organisms that finds its origin in such movements, regardless of any fault on his part.[879]

Malaysia

Proposes that the international instrument sets out the common minimum content – of both elements and procedures – for countries to include in their domestic law for civil liability.[880]

Paraguay

Supports the application of civil liability to traditional damage, i.e. damage to persons, goods or economic interests.[881]

Switzerland

Proposes:

1. The exporter who ensures notification under the Cartagena Protocol shall be (strictly) liable for damage. If the Party of export is the notifier, the exporter shall be liable.
2. The operator or the user of living modified organisms in the Party of export shall be (strictly) liable if the LMOs have been released unintentionally before crossing the border.

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[877] *Id.*
[878] WGLR4.
[879] *Id.*
[880] Notes, Friends of the Chair group preceding MOP4.
[881] Notes WGLR4; Synthesis of Texts WGLR4, at Section I C OT 2.

3. Without affecting the above, and in accordance with domestic law including laws on the liability of servants and agents, any person shall be liable for damage caused or contributed to by his or her wrongful intentional, reckless or negligent acts or omissions.[882]

TEXT AGREED TO AT COP-MOP4

Operational text

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

Note: These minimum elements, elaborated later, include the following: standard and channelling of liability, provision of interim relief, exemptions or mitigation, recourse against third party by the person who is liable on the basis of strict liability, joint and several liability or apportionment of liability, limitation of liability, and coverage.

Non-Parties

Argentina

1. Liability regime shall cover damage caused only by an intentional or negligent act or omission on the part of the liable person.
2. Liability shall be attributed as a consequence of the failure to comply with the duty of care or with obligations under the Protocol.

[882] WGLR4.

3. Liability shall be attributed to the person who is in operational control of the LMO or in the best position to prevent/control damage.
4. No strict liability.[883]

Australia

Civil liability is appropriate for damage to the conservation and sustainable use of biodiversity.[884]

Observers- Industry

Global Industry Coalition

1. In a civil liability system, liability is established where the operator:
   a. has operational control of the relevant activity;
   b. has breached a legal duty of care through intentional, reckless or negligent conduct, including acts or omissions;
   c. such breach has resulted in actual damage to biodiversity; and
   d. causation is established in accordance with section [x] of these rules.
2. "Operator" is the person, entity or Party which has the operational control of the activity which causes the damage to biodiversity.[885]

Observers- Education

Public Research and Regulation Initiative

Civil liability is only appropriate for traditional damage to goods or property.[886]

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[883] WGLR4.
[884] *Id.*
[885] WGLR4.
[886] Notes WGLR4.

Observers- NGOs

Greenpeace International

1. The exporter and notifier of any living modified organism shall be liable for all damage caused by the LMO from the time of export of the LMO.
2. Importer of the LMO shall be liable for all damage caused by the living modified organism from the time of import (without prejudice to 1).
3. Second and subsequent exporter and notifier of the LMO shall be liable for all damage caused by the living modified organism from the time of re-export of the LMO and the second and subsequent importer shall be liable for all damage caused by the living modified organism from the time of import (without prejudice to above).
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 LMO shall be liable for all damage caused by the LMO. Such persons shall include any distributor, carrier, and grower of the LMO and any person carrying out the production, culturing, handling, storage, use, destruction, disposal, or release of the LMO, with the exception of a farmer.
5. In the case of unintentional or illegal transboundary movement of a LMO, any person intentionally having ownership or possession or otherwise exercising control over the LMO immediately prior to or during the movement shall be liable for all damage caused by the LMO.
6. Without prejudice to paragraph above, any person shall be liable for damage caused or contributed to by that person's lack of compliance with the provisions implementing the Convention or the Protocol or by that person's wrongful, intentional, reckless or negligent acts or omissions.[887]

[887] WGLR4.

i. Standard of liability

Liability for damage caused by an LMO can be established on a fault basis or on the basis of strict liability. Fault is established by showing that the person owed a duty of care to the victim, that the standard of duty owed was breached and that damage ensued. The conduct of the alleged wrongdoer is the crucial consideration. There are problems in establishing fault especially in relation to damage by LMOs. Because of a wide variety of factors in determining fault, there could well be situations where damage results but no liability attaches. First the wrongdoer must be identified. A large number of factors will determine this. These include:

- The foreseeability of harm;
- The proximity of the relationship between the parties;
- Considerations of fairness and reasonableness; and
- Policy considerations that may deny or limit liability.

Similarly a large number of factors determine whether the defendant's conduct has fallen below a particular standard of care. These include: the probability of the risk, gravity of the danger, social utility of the activity, and the burden or difficulty in taking preventative measures. A balancing of all these factors may mean that no liability may be established for the proven harm – although it is shown that the damage was indeed caused by the LMO. In a fault based liability system, the burden is on the victim to prove each of the elements to establish liability. Given the complex and technical nature of the genetic engineering technology, it may not be easy to prove liability of the defendant.

Strict liability seeks to overcome some of these problems. All that has to be proved is that the damage was caused by the LMO. No fault needs to be established. The conduct of the wrongdoer is irrelevant.[888] Although generally speaking, strict liability is the usual standard for hazardous

[888] Nijar, (2006)*6,* at 7.

activity, it need not necessarily be so. It is all a matter of policy choice. For example in the US, and most common law jurisdictions, there is strict liability imposed on producers of manufactured defective products.

Mitigated strict liability refers to a mix of the standard of liability. In such a situation, the proponents suggest that fault-based liability be adopted unless the LMO is identified as posing an ultra-hazardous risk. Then, strict liability standard is applied.

Options for Standard of Liability[889]

Option 1: Strict liability.
Option 2: Mixed approach (both strict and fault-based liability).
Option 3: Fault-based liability.

Delegates' and Others' Positions on Standard of Liability

The African Group

1. Strict liability should be applied.
   Rationale: A strict standard of liability would prevent harm. This is necessary considering the cutting edge technology of the biotechnology industry and the need for precautionary measures.[890]
2. Text should state that any person should be liable for damage regardless of fault.[891]

[889] Meeting Report WGLR4.
[890] ENB WGLR2; Friends of the Chair Group, ENB WGLR5#7
[891] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 4.

Specific Statements by members of the African Group in support of the African Group position

Statements of support by: Cameroon,[892] Egypt,[893] Ethiopia,[894] Liberia,[895] South Africa,[896] and Uganda[897].

Burkina Faso: supports strict liability. [898]

Cameroon: supports applying strict liability to the developer and residual fault-based liability on third parties for gross negligence, acts or omissions.[899]

Egypt: supports the potential use of fault-based liability for further punitive action.[900]

Ethiopia: supports strict State liability for the purpose of ensuring that the victim does not go uncompensated.[901]

Guinea Bissau: supports fault-based liability not strict liability, depending upon the degree of damage and any agreement between countries involved.[902]

Senegal: supports mitigated strict liability[903]

South Africa: supports strict liability, but only where warranted by scientific proof showing certain risks.[904] Supports

[892] Compilation of Views TEG 1.
[893] *Id.*
[894] Notes WGLR3.
[895] Compilation of Views TEG 1; Notes WGLR4.
[896] ENB WGLR4 .
[897] Compilation of Views TEG 1.
[898] Notes, Friends of the Chair group preceding MOP4.
[899] Compilation of Views TEG 1.
[900] *Id.*
[901] Notes WGLR3.
[902] Compilation of Views TEG 1.
[903] ENB WGLR 5#3
[904] Notes WGLR4; ENB WGLR4.

as well fault based liability in general.[905] Supports mitigated strict liability[906]

Bangladesh

1. Not in favor of strict liability.[907]
2. Supports strict liability.[908]

Brazil

1. The standard of liability should be strict.[909]
2. Determination of the standard applied should take into account the definition of damage,[910] noting that national law includes both strict and fault based rules according to consideration of the definition of damage and causal link.[911]
3. Wants to see all options: fault-based, strict and mitigated strict liability reflected in the paper.[912]
4. Supports strict liability and suggests inclusion of text specifying that where damage has not been satisfied, the plaintiff can claim against another contributing party.[913]

China

1. Supports a strict liability standard and suggests making it the default standard if necessary with an exception for fault-based liability.[914]
2. Strict liability is a common standard in environmental law. Also reflects the precautionary approach in the Protocol.[915]

[905] Notes WGLR4.
[906] ENB WGLR 5#3
[907] Notes WGLR4.
[908] ENB WGLR 5#3
[909] ENB WGLR2. ENB WGLR 5#3
[910] Compilation of Views TEG 1.
[911] Notes WGLR3.
[912] Friends of the Chair Group, ENB WGLR5#7
[913] Sub-Working Group, ENB WGLR5#5; Notes, Friends of the Chair group preceding MOP4.
[914] Friends of the Chair Group, ENB WGLR5#7
[915] Notes , Friends of the Chair Group, WGLR5.

Cuba

Supports strict liability standard.[916]

Ecuador

1. Supports strict liability upon the operator.
2. Fault based liability for any person whose intentional or negligent conduct results in damage.[917]
3. Supports strict liability only.[918]

European Union

1. Supports the application of both strict and fault-based liability.
2. Text on strict liability should state that the person responsible shall be liable regardless of any fault on his part.[919]
3. Text on fault-based liability or negligence should state that liability is established where the operator has breached a legal duty of care through intentional, reckless or negligent conduct, including acts or omissions.[920]
4. Supports strict liability only.[921]

India

1. Supports a combination of strict and fault-based liability.[922]
2. Strict or absolute liability should be applied to:
   a. operators;[923]
   b. States for acts done knowingly or wrongfully. This has already been established in national case law;[924] and
   c. activities that are inherently harmful and consequences are irreversible.[925]

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[916] Notes WGLR4. ENB WGLR 5#3
[917] *Id.*
[918] ENB WGLR 5#3
[919] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2a OT 4.
[920] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2a OT 8 1b.
[921] ENB WGLR 5#3
[922] Notes WGLR4; ENB WGLR4 .
[923] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 4.
[924] Compilation of Views TEG 1.
[925] *Id.*

3. Notes that it may be helpful to decide whether to qualify LMOs as hazardous before determining which standard of liability should be used as a model. [926]
4. Supports strict liability [927]

Indonesia

1. The standard of liability should be fault-based. [928]
2. Supports mitigated strict liability.[929]

Iran

The standard of liability should be strict,[930] especially in the case of damage to centres of origin. [931]

Japan

1. Favors fault-based liability, holding persons liable for intentional or negligent acts or omissions causing damage.[932] Rationale: Fault-based liability is the only standard of liability appropriate in the case of activities involving LMOs, which are not inherently dangerous.[933] Strict liability applies to ultra-hazardous activities and does not apply for this purpose.[934]
2. Ready to support the option set out by the Co-Chairs with fault-based liability as the default standard unless approval of import has been made subject to strict liability. [935]
3. Add a chapeau clarifying that the subsection relates to a compensation scheme to deal with damage in accordance with domestic regulations.[936]

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[926] ENB WGLR1 Summary.
[927] Friends of the Chair Group, ENB WGLR5#7, Notes, Friends of the Chair group preceding MOP4.
[928] ENB WGLR1 Summary.
[929] ENB MOP4.
[930] ENB WGLR2.
[931] ENB WGLR1 Summary.
[932] Notes WGLR3; Compilation of Views WGLR4. ENB WGLR 5#3
[933] Compilation of Views WGLR4.
[934] Notes WGLR3; Compilation of Views WGLR4.
[935] Sub-Working Group, ENB WGLR5#5
[936] *Id.*

Malaysia

1. Supports strict liability.[937]
   Rationale:
   a. The standard of liability is a policy choice.[938] Whether liability is strict or not is a policy consideration.
   b. Rationale: Accepting that LMOs are not inherently dangerous, and the probability of incidence of occurrence of damage is low, if the magnitude of potential harm may be great, then the strict liability standard may be justifiably adopted.[939]
   c. Notes that strict liability is not only for hazardous activities. For example, strict liability is the standard applied to product liability in the United States and many other countries.[940]
   d. Notes further that the strict liability standard is applied to proof of environmental damage in several countries, such as: Sweden, Finland, Denmark, Spain; and in the EC White Paper and decisions.[941]

2. Fault based liability may not be appropriate for damage caused by LMOs.
   Rationale:
   a. Fault-based liability requires the claimant to establish the standard of care, and must take into consideration many subjective factors. This standard is not manageable under an international regime.[942] For example in a case of damage to farmer's fields and crops. Sometimes it may be difficult to establish scientifically that an LMO is the direct cause –

[937] ENB WGLR2; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2a OT 4; Notes, Friends of the Chair group preceding MOP4.
[938] Notes WGLR4.
[939] Notes WGLR3.
[940] ENB WGLR4; Notes WGLR4.
[941] Notes WGLR4.
[942] Notes WGLR3.

especially if it is one of a few causes. It may then be difficult to establish fault.[943]

b. People may then be uncompensated if these stringent subjective tests are applied. This will result in damage going unredressed.[944]

3. The Biosafety Protocol's precautionary approach recognises the need for safety precautions against the potential risks of LMOs.[945]
4. To be flexible, the norm could be strict liability but countries may opt for fault-based liability. [946]
5. Proposes that countries should provide for standard of liability – either a strict liability, fault based liability or a mix of the two – in their national law, if they choose to have a civil liability regime.[947]

Mexico

Supports strict liability .[948]

New Zealand

1. Supports a fault-based standard of liability,[949] based on breach of legal duty of care through intentional, reckless or negligent conduct, including acts or omissions.[950]
2. Does not support strict liability, except as necessary, on the operator in a supplementary role.[951]
3. Supports mitigated strict liability.[952]

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[943] Notes WGLR4.
[944] Notes WGLR3.
[945] Friends of the Chair Group, ENB WGLR5#7
[946] Notes, Friends of the Chair, WGLR5
[947] Notes, Contact Group MOP4. See further p. 388-389 and the text in Annex II, p.412-413.
[948] ENB WGLR2; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 4. ENB WGLR 5#3
[949] ENB WGLR4.
[950] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 7.
[951] Notes WGLR4.
[952] ENB WGLR 5#3

4. Proposes that the standard of liability, whether fault-based liability, strict liability or mitigated strict liability, needs to be established in accordance with domestic law.[953]

Norway

Supports a strict liability standard.[954]

Palau

1. Supports a strict standard of liability.[955]
2. Considers the possibility of a dual standard of either strict or fault-based liability if combined with a fund.[956]
3. Insists on strict liability.[957]

Paraguay

Supports fault-based liability.[958]

Philippines

Considering LMOs are not inherently dangerous, supports fault-based liability.[959]

Saint Lucia

All perceived possible ramifications of harm caused by LMOs should be taken into account when considering the standard of liability.[960]

Sri Lanka

1. Supports the consideration of both strict and fault-based liability.

[953] Notes, Friends of the Chair group preceding MOP4.
[954] Friends of the Chair Group, ENB WGLR5#7; Notes, Friends of the Chair group preceding MOP4.
[955] ENB WGLR2; Notes WGLR4.
[956] Notes WGLR4.
[957] ENB WGLR 5#3; Notes, Friends of the Chair group preceding MOP4.
[958] ENB WGLR 5#3
[959] Friends of the Chair Group, ENB WGLR5#7
[960] Notes WGLR4.

2. The standard of liability should be determined based on the: type of damage, place of damage, risk involved, adverse effects and operational control.
3. Vicarious liability should also be considered.[961]

Switzerland

1. Supports a strict standard of liability.[962]
2. Suggests the use of guidelines allowing parties to choose the appropriate liability standard.[963]
3. Proposes to look at fault-based liability first. [964]

Thailand

1. Suggests the inclusion of a number of possible factors in determining the standard of liability. These factors include:
    a. type of damage;
    b. degree/extent of damage;
    c. likelihood of unexpected adverse effects; and
    d. clear and sufficient evidence of a causal link. [965]
2. Supports the application of a conditional strict standard of liability.[966]
3. A combination of strict and fault-based liability could be considered.[967]

Turkey

Supports a standard of strict liability.[968]

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961 Compilation of Views WGLR2.
962 ENB WGLR2.
963 Friends of the Chair group, ENB WGLR5#7.
964 Notes, Friends of the Chair group preceding MOP4.
965 ENB WGLR2.
966 *Id.*
967 *Id.*
968 ENB ICCP3Summary.

TEXT AGREED TO AT COP-MOP4

For Civil Liability - Working towards non-legally binding provisions on civil liability

Operational text

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

Option 1: Strict liability

Operational text

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

{“Operator” see administrative approach}

Option 2: Mitigated strict liability

Operational text

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

[(a) a risk-assessment has identified a living modified organism as ultra-hazardous; and/or]

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

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

2.In cases where a fault-based standard of liability is applied, liability [shall][should] be channeled to the [entity having operational control][operator] of the activity that is proven to have caused the

damage, and to whom intentional, reckless, or negligent acts or omissions can be attributed.

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

Option 3: Fault-based liability

Operational text

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

(a) Has operational control of the relevant activity;

(b) Has breached a legal duty of care through intentional, reckless or negligent conduct, including acts or omissions;

[(c) Such breach has resulted in actual damage to biological diversity; and]

(d) Causation is established in accordance with section [] of these rules.]

Non-Parties

Argentina

1. Supports the application of fault-based liability.
   Rationale: This standard best fits the current state of knowledge of risks posed by LMOs.
2. Strict liability addressees hazardous substances, and therefore does not apply to LMOs.[969]

Australia

1. Fault-based liability with relevant exemptions is the appropriate standard.

[969] Synthesis of Views WGLR2, ENB WGLR 5#3

2. Cannot support an absolute or a strict liability regime, as these standards are generally reserved for situations where activity is ultra-hazardous according to the seriousness of the harm.[970]

Canada

1. Supports a fault-based standard of liability.[971]
2. Opposed to considering LMOs as hazardous, a key element in choosing to apply a standard of strict liability. [972]

United States of America

1. Notes that LMOs are not considered ultra hazardous in the US, and that a fault based standard would be applied within the US. A strict liability standard shall be used in cases where a risk-assessment has identified an LMO as ultrahazardous.[973]
2. For strict liability to apply the hazard would have to be ubiquitous, whereas with LMOs the potential hazard depends on the receiving environment.[974]

Observers- Education

Public Research and Regulation Initiative

1. Supports fault-based liability under a civil liability system.[975]
2. Does not support strict liability.[976]
   Rationale: There is no evidence that LMOs are intrinsically hazardous.[977] Biotechnology is neither hazardous nor unsafe, and depends on how one uses it.[978] Scientific evidence points in the opposite direction.[979] Cautions Parties against fundamental

[970] *Id.*
[971] ENB WGLR1 Summary; Notes WGLR4.
[972] ENB WGLR1 Summary.
[973] ENB WGLR4; Notes WGLR4.
[974] ENB WGLR2.
[975] Compilation of Views WGLR2; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 8.
[976] Notes WGLR3.
[977] *Id.*
[978] *Id.*
[979] Notes WGLR4.

flaws in the data in a report of the US National Academy of Science on hazards of Bt Corn on aquatic ecosystems.[980] This study on Bt corn has not been scientifically established or refuted yet.[981] Reminds all of the case of the monarch butterfly.[982]

Observers- Industry

Global Industry Coalition

1. Supports the adoption of a fault-based standard of liability.
   Rationale:
   a. Fault-based liability is the general rule for liability systems.
   b. There is no scientific, legal or fact-based justification for departing from the general rule.
   c. Fault-based systems promote care because they provide incentives to the operator and promote preventative action before commercialization and in the market place.
   d. A fault-based system, hinging on causation, is the essence of the polluter pays principle.
2. Opposed to the application of strict liability.[983]
   Rationale:
   a. Strict liability addresses acts that are inherently dangerous or ultra-hazardous. LMOs are not inherently dangerous. There are no cases of damage to-date. LMO activities have no hazard per se. LMOs have already gone through rigorous regulations and assessment.[984]
   b. Any such approach focusing all responsibility on pre-identified persons would penalize/tax/punish potentially innocent persons or a particular sector

[980] *Id.*
[981] *Id.*
[982] *Id.*
[983] Compilation of Views WGLR1
[984] Compilation of Views WGLR1; Notes WGLR3.

without delivering material benefit to biodiversity and would be inequitable.[985]

c. Further, strict liability systems, by their nature, inhibit innovation and development of technologies.[986]

International Federation of Organic Agriculture Movements

The owners of LMOs should be held liable and have a duty to provide instruction on use that will not cause damage.[987]

International Grain Trade Coalition

1. Supports a fault-based standard of liability for breach of any obligation, or negligence in any act or omission based on a standard of due diligence.[988]
2. Does not support strict or absolute liability.[989]
   Rationale:
   Such a regime would impose unmanageable and unknowable risks on all parties in a global, bulk commodity shipment environment. It is imperative that there be commercial predictability in order for the grain trade to continue to function in a way that ensures food and feed are available around the world. [990]

Observers- NGOs

ECOROPA

Notes that a fault-based standard of liability may give a comparative advantage to non-Parties' citizens (where strict liability applies).[991]

Friends of the Earth International

Supports strict liability regime.

[985] Compilation of Views WGLR1.
[986] *Id.*
[987] Compilation of Views WGLR2.
[988] *Id.*
[989] *Id.*
[990] *Id.*
[991] *Id.*

Rationale:

a. This type of regime will reflect the polluter pays principle.[992]
b. After ten years of experience with genetically modified crops there is still not sufficient evidence to prove these crops are not hazardous.[993]

Greenpeace International

1. Supports the application of a standard of absolute liability, that is, strict liability without any exemptions.
   Rationale for strict liability:
   a. LMOs can cause significant damage and it would be unjust and inappropriate to make the claimant shoulder the burden of proof of fault or negligence.[994]
   b. ILC draft articles principle 2(c) reads that "hazardous activity" means an activity which involves a risk of causing significant harm.[995] LMOs are hazardous by this criteria.[996]
   c. Focus should be on deterring damage that may occur - not on the fault or lack of fault that caused the damage.[997]
   d. Applies the polluter pays and precautionary principles.[998]
2. A fault-based liability standard will be applied for breach of obligations under the Biosafety Protocol.[999]

South African Civil Society

1. Strict liability or absolute liability should apply due to the ultra hazardous nature of this technology - low probability of

[992] ENB BSWG -3 Summary.
[993] ENB WGLR4; Notes WGLR4.
[994] ENB WGLR4.
[995] Notes WGLR3.
[996] Notes WGLR4.
[997] Notes WGLR3.
[998] ENB WGLR1 Summary.
[999] Compilation of Views WGLR2.

occurrence incident, high degree of damage and magnitude of incident.[1000]

2. Fault based liability imposes too high a burden of proof of fault which African countries are not able to afford.[1001]
3. Supports no exemptions, therefore, supports absolute liability.[1002]

Third World Network

Supports the application of a standard of strict liability.[1003]

Washington Biotechnology Action Council

The standard of liability should be strict.[1004]

Rationale:

a. Research on the nature of risk related to LMOs has been under-funded and is therefore not conclusive.[1005] The fact that there is no evidence of no risk, is different from the evidence of no risk. LMOs must be treated as hazardous.[1006]
b. Strict liability would apply the polluter pays and precautionary principles.[1007]
c. Strict liability is common for new technologies due to the information disparity between producers and possible victims of damage.[1008]

[1000] *Id.*
[1001] *Id.*
[1002] *Id.*
[1003] *Id.*
[1004] ENB WGLR2.
[1005] ENB WGLR4.
[1006] Notes WGLR4.
[1007] ENB WGLR1 Summary.
[1008] ENB WGLR2.

ii. Channeling of liability

Liability may be directed ('channeled') to a particular person or entity for the alleged damage. Under a fault based liability standard, the party shown to be at fault has to answer the claim. When a strict liability standard is adopted, a particular person may be identified and he has to answer the claim. There may be multiple potential defendants. The one chosen, and to whom liability is usually channeled, is the one with the clearest connection to the damage; and who is, from a practical point of view, able to answer the claim. Thus in a damage scenario involving LMOs, there may be numerous potential defendants such as the: developer of the LMO, patent holder, permit holder, exporter, notifier, transporter, importer, permitting authority, importing State, exporting State, and such like; or simply the person or entity in operational control of the LMO causing damage. Liability would then be chanelled to a particular person or entity, with his right of recourse (or contribution) against others who may also be responsible for the damage, especially where this damage is indivisible.[1009]

Options for Channeling of Liability[1010]

Option 1: Channeling according to strict liability and a chain of liability.
Channeling liability to:

a. operator;
b. notifier;
c. exporter;
d. importer;
e. any person having ownership or possession or otherwise exercising control including, *inter alia*:
    i. distributor;
    ii. carrier;

[1009] See earlier text under Civil Liability.
[1010] Meeting Report WGLR4.

            iii. grower;
      f. person involved in:
            i. production;
            ii. culturing;
            iii. handling;
            iv. storage;
            v. use;
            vi. destruction;
            vii. disposal; or
            viii. release of LMOs.

Option 2: Channeling based on a standard of mitigated strict liability. Channeling based on:

a. fault;
b. operational control of ultra-hazardous LMOs held to a strict liability standard.

Option 3: Channeling based on fault.

Delegates' and Others' Positions on Channeling of Liability

The African Group

1. Liability may be channeled to more than one party, for example the notifier may be liable for information provided during the process of authorization of import.[1011]
2. Supports primary liability of the:
    a. operator;[1012] or
    b. the person responsible for intentional or unintentional transboundary movements of LMOs for damage resulting from the transport, transit, handing and use of LMOs that finds their origin in such movements.[1013]

[1011] ENB WGLR2.
[1012] Notes WGLR4.
[1013] ENB WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 4.

Specific Statements by members of the African Group in support of the African Group position

Statements of support by: Cameroon,[1014] Egypt,[1015] Ethiopia,[1016] Liberia,[1017] Mauritius,[1018] Morocco,[1019] South Africa,[1020] and Uganda[1021].

Cameroon: liability channeled to the operator reflects the polluter-pays-principle of Agenda 21.[1022]

Egypt: supports channeling liability to the developer, producer or exporter instead of merely the operator because these parties have the most information on the LMO available to them and are the primary beneficiaries of the LMOs' release.[1023]

Mauritius: liability should rest with the LMO permit holder.[1024]

Uganda: liable parties include: exporter, importer, patent holder, owner, supplier or any person whose actions led to the damage. [1025]

Bangladesh

1. Supports channeling liability to:
    a. the exporter; and
    b. the importer.[1026]
2. Definitions of 'exporter' and 'importer' should be included in the definition of terms of rules and procedures in accordance with Article 3 of the Protocol.[1027]

[1014] Compilation of Views TEG 1.
[1015] ENB WGLR1 Summary.
[1016] Compilation of Views WGLR2.
[1017] Notes WGLR4.
[1018] Compilation of Views TEG 1.
[1019] ENB WGLR1 Summary.
[1020] Notes WGLR3.
[1021] Compilation of Views TEG 1.
[1022] *Id.*
[1023] *Id.*
[1024] *Id.*
[1025] *Id.*
[1026] *Id.*

Brazil

1. Liability may be channeled to:
    a. one or more persons including the exporter, where there is no negligence on the part of the importer;[1028]
    b. supports primary liability of the operator with residual State liability;[1029] does not support residual State liability;[1030]or
    c. the operator under an administrative approach.[1031]
2. Channeling of liability should be based on a nexus of causality, or causal link.[1032]

China

1. Liability should be channeled to the operator of the LMO at the different stages such as:
    a. the developer;
    b. exporter;
    c. importer;
    d. carrier; and
    e. transporter.[1033]
2. Expresses concern that many operators are multinational corporations and it is sometimes difficult to trace liability from subsidiaries to the parent corporation.[1034]
3. Supports to have one definition of 'operator' for both administrative approach and civil liability but under civil liability, operator not within jurisdiction must also be covered.[1035]

[1027] *Id.*
[1028] ENB BSWG -3 Summary.
[1029] Notes WGLR3.
[1030] ENB WGLR4.
[1031] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2c OT 1 paragraphs 1-3.
[1032] Compilation of Views TEG 1; ENB WGLR2.
[1033] ENB WGLR4 Summary; Notes WGLR3. ENB WGLR 5#3
[1034] ENB WGLR4.
[1035] Notes, Friends of the Chair group preceding MOP4.

Colombia

Primary liability of the operator, including possible liability upon the exporter or importer.[1036]

Cuba

The person responsible for the transboundary movement or activity resulting from the transboundary movement of LMOs causing damage should be liable.[1037]

Ecuador

1. Supports channeling liability to one of multiple persons.
2. Primary liability should fall on the operator with residual liability on the State.[1038]
3. Any person involved in the transport, transit, handling or use of LMOs may be held liable for that damage including the:
    a. developer;
    b. producer;
    c. notifier;
    d. exporter;
    e. importer;
    f. carrier;
    g. supplier; and
    h. permit holder.[1039]
4. Any person shown to be at fault may also be held liable.[1040]

European Union

1. Liability should be attributed to the person who is in operational control or in the best position to prevent/control damage.[1041]
2. Liability should be channeled to the operator or importer responsible for the portion of damage caused by the

[1036] Notes WGLR4; ENB WGLR1 Summary; ENB WGLR4 Summary; Synthesis of Texts WGLR4, at Section V A OT 2.
[1037] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 4.
[1038] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 2.
[1039] *Id.*
[1040] *Id.*
[1041] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 6.

transboundary movement of LMOs.[1042] At times the State may be the operator.[1043]

India

1. Liability should be channeled to the operator.
2. Operator may be any person responsible for intentional or unintentional transboundary movements of LMOs resulting in damage or any person responsible for the transport, transit, handling and/or use of LMOs originating in such a transboundary movement.[1044] The operator may be in control of production or export as well.[1045]

Indonesia

Proposes that liability should be of the person(s) responsible for carrying out an act related to the transboundary movement of LMOs as the direct or indirect origin of damage. Others may also be responsible depending upon the nature of the damage.[1046]

Iran

Supports channeling liability to the:

a. importer;
b. exporter;
c. public sector; or
d. private sector.[1047]

Japan

Suggests channeling liability for significant damage to any legal or natural person who has the operational control of LMOs subject to transboundary movement.[1048]

[1042] Notes WGLR4; Compilation of Views WGLR4.
[1043] ENB WGLR4.
[1044] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 4.
[1045] Compilation of Views TEG 1.
[1046] *Id.*
[1047] Compilation of Views TEG 1; ENB WGLR2.
[1048] Compilation of Views WGLR4.

Malaysia

Liability should be channeled to the person having ownership, possession or otherwise exercising operational control of the LMOs causing damage, and who is responsible for that part of the damage. This could be any one of the following:

a. developer;
b. notifier;
c. exporter;
d. importer;
e. subsequent exporters/importers;
f. distributor;
g. carrier;
h. grower;
i. any person carrying out production, culturing, handling, storage, use, destruction, disposal or release of LMOs; but not the farmer.[1049]

Rationale: The objective is to implement the polluter pays principle.[1050]

Mexico

Liability should be channeled to the person responsible for transboundary movements for any damage resulting from transport, transit, handing or use of LMOs.[1051]

New Zealand

1. Liability should be channeled to the operator.
2. The operator should be defined as the person, entity or Party in operational control of the activity which causes damage. [1052]
3. Disagrees with carriers or suppliers being held liable.[1053]

Norway

Liability should be channeled to the person responsible for intentional or unintentional transboundary movements of LMOs.

[1049] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2a OT 10.
[1050] ENB WGLR2; Notes WGLR4.
[1051] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 4.
[1052] Notes WGLR4; Synthesis of Texts WGLR4, at Section III E OT 7.
[1053] Notes WGLR4.

Such persons shall be liable for damage resulting from transport, transit, handling and use of these LMOs.[1054]

Palau

1. Liability should be channeled to the person in control of activities causing damage, as seen in Danish and Finnish Law.[1055]
2. Should hold any person responsible for transboundary movement of LMOs liable for damage resulting from transport, transit, handling and use of LMOs.[1056]
3. Liable persons may include the: producer,[1057] notifier, exporter, importer or any person having ownership or possession or otherwise exercising control over an LMO during transit or once it is imported.[1058]
4. Persons exercising control over an LMO could include any distributor, carrier, grower or person carrying out production, culturing, handling, storage, use, destruction, disposal or release of LMOs.[1059]
5. An exception from liability should be made for the farmer.[1060]

Saint Lucia

Liability should be channeled to the:

a. developer;
b. owner of the facility where the LMO originated;
c. seller;
d. buyer; or
e. the State of import (could also be partially liable).[1061]

[1054] Compilation of Views WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 4.
[1055] Compilation of Views TEG 1.
[1056] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2a OT 4.
[1057] Compilation of Views TEG 1.
[1058] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2a OT 10.
[1059] *Id.*
[1060] *Id.*
[1061] Compilation of Views TEG 1.

Sri Lanka

Liability should be channeled to the:

a. Party of import;
b. Party of export;
c. operator;
d. shipper; or
e. any other person in operational control of the LMO.[1062]

Switzerland

1. Supports channeling liability to the producer or exporter of the original LMOs.[1063]
2. The concept of an operator is still unclear.[1064]

Thailand

1. Liability should be channeled to one or more persons along a chain of liability with the burden being placed on the importer or supplier to the importing country.[1065]
2. The end user or consumer in the importing country must not be held liable.[1066]

[1062] Compilation of Views TEG 1.
[1063] *Id.*
[1064] ENB WGLR4 .
[1065] Compilation of Views WGLR3.
[1066] *Id.*

TEXT PROPOSED AT COP-MOP4

For Civil Liability - Working towards legally binding provisions

Operational text 1

[Parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with living modified organisms.]

Operational text 2

(a) [Subject to subsections (b), (c) and (d) below, nothing in these rules and procedures shall prejudice the right of Parties to have in place or to develop their domestic law or policy in the field of civil liability and redress resulting from the transboundary movement of LMOs consistent with the objective of the Cartagena Protocol on Biosafety and these rules and procedures/this instrument/this supplementary Protocol.] [Parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with living modified organisms.] [Parties should ensure that their national civil liability rules and procedures provide for redress to damage resulting from the transboundary movement of living modified organisms. In creating their national rules and procedures on civil liability, Parties may give special consideration to sub-sections (b), (c) and (d).]

(b) Any such law or policy , [shall] [include][address], inter alia, the following elements, taking into account[, as appropriate,] the Guidelines in Annex [x] [to this supplementary Protocol][decision BS-V/x]:

a. Damage;

b. Standard of liability: that may include strict, fault or mitigated liability;

c. Channelling of [strict] liability;

d. [Financial security, where feasible][compensation schemes];

e. [Access to justice][Right to bring claims];

f. [[Procedural rules that provide for] due process.]

(e) The Guidelines shall be reviewed no later than [3] years after the entry into force of this instrument with a view to consider [elaborating a more comprehensive binding regime on civil liability] [making them binding], in the light of experience gained.

Non-Parties

Argentina

1. Liability should be channeled to the person who failed to comply with the duty of care or obligations under the Protocol or caused damage by an intentional or negligent act or omission.[1067]
2. Liability should be channeled to the:
   a. person in best position to control risk and prevent damage;
   b. person in operational control; and
   c. person who intentionally, recklessly, or negligently caused damage by an act or omission.[1068]
3. No entity should be held responsible for putting in place implementing provisions of the Protocol.[1069]
4. The definition of the operator will require further consideration, if civil liability is to be considered.[1070]

Australia

In cases where civil liability is applied, liability should be assigned to the party which is best placed to prevent the circumstances giving rise to the damage.[1071]

[1067] *Id.*
[1068] *Id.*
[1069] *Id.*
[1070] Notes WGLR4.
[1071] *Id.*

Canada

Discussion of channeling of liability is premature as channeling assumes the adoption of a strict liability regime with joint and several liability. Discussion of channeling depends upon the decision on the nature of the instrument adopted, standard of liability and causation.[1072]

United States of America

1. Liability should be channeled based on a causal link.
   Rationale: Under a fault based system, liability would be channeled to the party responsible for harm.[1073]
2. There must be a balance struck between liability of the importer and exporter.[1074] State liability will not be appropriate unless the State itself is responsible for the activity.[1075]
3. In cases where a fault based standard of liability is applied, liability shall be channeled to the entity having operational control of the activity that is proven to have caused the damage, and to whom intentional, reckless, or negligent acts or omissions can be attributed. In cases where a strict liability standard has been determined to be applicable, liability shall be channeled to the entity that has operational control over the activity that is proven to have caused the damage. [1076]

Observers- Education

Public Research and Regulation Initiative

1. Supports channeling liability to the operator.[1077]
2. Stresses the importance of clearly defining the producer and polluter.[1078]

[1072] Compilation of Views TEG 1.
[1073] *Id.*
[1074] *Id.*
[1075] *Id.*
[1076] WGLR4.
[1077] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 2b OT 8.
[1078] ENB WGLR2.

3. Notes that while the licensor of a technology can be easily identified, the way a technology is used lies beyond its control.[1079]

Observers- Industry

Global Industry Coalition

1. Liability should be channeled on the basis of a nexus of causality and the duties under the Protocol.[1080]
2. Operators may be liable based on fault or negligence.[1081]
3. Developers may be liable based on failure in duties related to risk assessment.[1082]

International Federation of Organic Agriculture Movements

Liability should be channeled to the owners of LMOs - not the user.[1083]

Rationale: If instructions on use fail it is the fault of the owner, not the user.[1084]

Organic Agriculture Protection Fund

1. Supports primary State liability with primary liability of operator.[1085]
2. Operator could include:
    a. the owners;
    b. developer;
    c. producer;
    d. notifier;
    e. exporter;
    f. importer;
    g. carrier; or
    h. supplier of LMOs.[1086]

[1079] *Id.*
[1080] *Id.*
[1081] *Id.*
[1082] Compilation of Views WGLR2.
[1083] *Id.*
[1084] *Id.*
[1085] *Id.*

Observers- NGOs

Greenpeace International

1. Liability should be channeled to any person or entity having ownership, possession or otherwise exercising control over the LMOs causing damage, including:
    a. developer;[1087]
    b. producer;[1088]
    c. notifier;
    d. exporter;
    e. importer;
    f. distributor;
    g. carrier;
    h. grower; and
    i. any person carrying out the production, culturing, handling, storage, use, destruction, disposal, or release of LMOs.[1089]
2. Notes the need for additional tiers of liability.[1090]

South African Civil Society

1. Liability should be channeled to the persons responsible for harm or for operating the activity causing damage.[1091]
2. The operator may be the:
    a. developer;
    b. producer;
    c. supplier;
    d. holder of the patent; or
    e. holder of the permit for sale/import of product.[1092]
3. Liability should not be channeled to government if LMO is approved for sale on market.[1093]

[1086] *Id.*
[1087] *Id.*
[1088] *Id.*
[1089] Compilation of Views WGLR4.
[1090] ENB WGLR2.
[1091] Compilation of Views WGLR2.
[1092] *Id.*

Rationale: monitoring will be beyond any reasonable capacity.[1094]

4. Channeling should be determined on a case by case basis.[1095]

Third World Network

1. Liability should be channeled to the:
   a. exporter;
   b. Party of export;
   c. person holding approval in country of export;
   d. developer;
   e. producer;
   f. importer;
   g. carrier; and
   h. supplier

   for all types of use based on intentional, unintentional or illegal transboundary movement.[1096]
2. Provisions for "lifting the corporate veil" should also be included.[1097]

Washington Biotechnology Action Council

Concerns about definition of operator and cases where there is no operator, for example, where damage is caused by wind, pollen etc.[1098]

[1093] *Id.*
[1094] *Id.*
[1095] *Id.*
[1096] *Id.*
[1097] *Id.*
[1098] Notes WGLR4.

C. INTERIM RELIEF

After a claim is made but before it is adjudicated to conclusion, there may be a threat of imminent, significant or irreparable harm. In such a case interim relief, usually an interim injunction is sought, to stop the activity from continuing. If upon final adjudication, liability is not established against the defendant, the claimant will have to pay for any losses incurred by the grant of the interim relief.

Sometimes interim relief may be in the form of payment of money, representing the damage claimed, where it is clear that the claimant will succeed in court. This could be where, for example, there is an admission of liability by the defendant but a dispute on the quantum of damages claimed.

Options for Interim Relief[1099]

Option 1: Provision for granting interim relief and compensating defendant, if not found liable.
Option 2: Provision for granting interim relief.
Option 3: No provision.

Delegates' and Others' Positions on interim relief

The African Group

1. Supports the provision of interim relief and injunction by a competent court or tribunal where necessary.[1100]
2. Text on interim relief should be retained as it, at minimum, provides useful guidance for the development of domestic legislation.[1101]

[1099] Meeting Report WGLR4.
[1100] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 4 OT 2.
[1101] ENB WGLR4.

3. Prefers that interim relief be granted only in case of imminent, significant and likely irreversible damage.[1102]

Specific Statements by members of the African Group in support of the African Group position

Statements of support by: Kenya,[1103] Liberia,[1104] and Tanzania[1105].

Burkina Faso: interim compensation must be paid to communities while restoration is underway.[1106]

Cameroon: any competent court may issue an injunction or other interim measures with respect to damage or threatened damage.[1107]

Tanzania: text on interim relief should be retained as some developing country legal regimes are not fully developed yet.[1108]

South Africa: not entirely in support of African Group position; supports operational text stating that any competent court or tribunal may issue an injunction or declaration, or take such measure as appropriate in respect of damage.[1109]

Belize

Supports text on interim relief as useful guidance for developing domestic legislation.[1110]

Brazil

Suggests deleting reference to interim relief.[1111]

[1102] ENB WGLR5#3.
[1103] Notes WGLR4.
[1104] *Id.*
[1105] *Id.*
[1106] ENB WGLR2.
[1107] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 4 OT 2.
[1108] Notes WGLR4.
[1109] ENB WGLR5#3.
[1110] ENB WGLR4.

Colombia

Prefers that interim relief be granted by a competent court only in case of imminent, significant and likely irreversible damage.[1112]

Cuba

Supports a provision allowing any competent court or tribunal the right to grant interim relief or an injunction.[1113]

Ecuador

Interim relief should be developed under domestic legislation, but text should be retained as guidance.[1114]

European Union

No text on interim relief suggested, as it is often addressed in common and civil law and European Community law. However, not against some guidance to flag the needs of parties to a claim for interim relief.[1115]

India

1. Supports the inclusion of text on interim relief for long drawn-out issues of litigation.[1116]
2. A competent court should be permitted to grant interim relief only in case of imminent, significant and likely irreversible damage to biodiversity.[1117]
3. In the event that liability is not established, the claimant must pay the defendant for its losses attributed to the grant of the interim relief.[1118]

[1111] ENB WGLR 5#3; Notes WGLR5.
[1112] *Id.*
[1113] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 4 OT 2.
[1114] Notes WGLR4.
[1115] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 4 OT 2.
[1116] Notes WGLR3.
[1117] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV OT 1. ENB WGLR 5#3
[1118] *Id.*

Japan

Proposes the deletion of text on interim relief, as interim relief and injunctions are dealt with very differently under national laws.[1119]

Malaysia

Supports the retention of text on interim relief stating that any competent court or tribunal is empowered to grant an interlocutory injunction or any other form of interim relief.[1120]

Rationale:

a. It is useful guidance for developing domestic legislation.[1121] Similar text is found in many common law jurisdictions. [1122]
b. Interim relief is important, bearing in mind that if damage is not responded to in some cases, then irreparable damage to the environment, biodiversity or human health may occur.[1123]

Mexico

Supports the retention of text on interim relief in order to guide the development of national legislation, as well as to ensure consistency across legal regimes. [1124]

New Zealand

1. Prefers no text on interim relief.[1125]
2. Notes that such provisions are generally addressed under national law by domestic courts; and does not see how interim relief could be relevant to an international tribunal.[1126]

[1119] Notes WGLR4; ENB WGLR4 .

[1120] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 4 OT 2. ENB WGLR 5#3

[1121] ENB WGLR4.

[1122] Notes WGLR4.

[1123] *Id.*

[1124] ENB WGLR4; ENB WGLR4 .

[1125] Notes WGLR4. ENB WGLR 5#3

[1126] Notes WGLR4.

Norway

Supports the inclusion of text on interim relief or an injunction by any competent court or tribunal in respect of any damage or threatened damage.[1127]

Palau

1. Supports the retention of text on interim relief as useful guidance for developing national legislation.[1128]
2. Text should provide a competent court or tribunal with the right to issue an injunction or declaration or take other appropriate interim measures with respect to damage or the threat of damage.[1129]

Paraguay

Supports operational text stating that any competent court or tribunal may issue an injunction or declaration, or take such measure as appropriate in respect of damage.[1130]

Philippines

Supports operational text stating that any competent court or tribunal may issue an injunction or declaration, or take such measure as appropriate in respect of damage.[1131]

Sri Lanka

Supports the provision on interim measures. [1132]

[1127] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 4 OT 2.
[1128] ENB WGLR4.
[1129] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 4 OT 2.
[1130] ENB WGLR5#3, Notes WGLR5.
[1131] *Id.*
[1132] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 4 OT 2.

TEXT AGREED TO AT COP-MOP4

For Civil Liability

Operational text

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

Non-Parties

Argentina

1. Text on interim relief should be deleted, as interim relief is already covered under domestic law.
2. If text remains on interim relief, then text should:
    a. indicate that interim relief will only be applied to situations where imminent, significant and irreversible damage is likely; [1133] and
    b. ensure that the defendant is paid for the cost of measures taken if no liability is established.[1134]

Observers- Industry

Global Industry Coalition

1. Interim relief may be granted by a competent court only in the case of an imminent, significant and likely irreversible damage to biodiversity.

[1133] ENB WGLR5#3.

[1134] ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 4 OT 1.

2. The defendant's costs and losses shall be paid by the claimant in any case where interim relief is granted but liability is not established subsequently in the case.[1135]

Observers- NGOs

Greenpeace International

1. Supports the provision of interim relief in the form of injunction or declaration or other types of interim measures, as necessary or desirable and determined by any competent court or tribunal.[1136]
2. Proposes that the Court shall have the power to order interim or preliminary measures to order any person to take or abstain from any act where necessary or desirable to prevent significant damage, to mitigate or avoid further damage.[1137]

Washington Biotechnology Action Council

Supports retaining text on interim relief to inform audiences other than governments.[1138]

[1135] WGLR4.
[1136] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 4 OT 2; OT 11.
[1137] WGLR4.
[1138] ENB WGLR4.

D. Additional elements of an administrative approach and/or civil liability

i. Exemptions to or mitigation of strict liability

[For a description of this subject matter, please see: earlier text under 'ABis Additional Elements of an Administrative Approach' at p. 158]

Options for Exemptions and Mitigation[1139]

Option 1: Absolute liability - no exemptions or mitigations.
Option 2: Some exemptions, with a limitation recognizing the role of evolution in genetic engineering and the role of climate change in *force majeure* scenarios.
Option 3: Some exemptions.
Option 4: Some exemptions and mitigations.
Option 5: All exemptions and mitigations.

Delegates' and Others' Positions on Exemptions and Mitigation

The African Group

Proposes the following:

1. If without their being at fault the damage is:
    a. directly due to an act of armed conflict or a hostile activity except an armed conflict initiated by the Contracting Party that is responsible for the damage;
    b. directly due to a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or

[1139] Meeting Report WGLR4.

   c. caused wholly by an act of a third party; or wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage..[1140]

2. No biological or evolutionary event related to an LMO or climatic event should be considered as an exemption from liability on the basis of act of God or *force majeure* exemptions.[1141]
3. Compensation may be reduced or disallowed if the victim or a person for whom he is responsible under the domestic law, by his own fault, has caused or contributed to the damage having regard to all the circumstances.
4. The granting of an advance agreement by the Party of import does not exonerate the Party of export from being answerable for any damage resulting during transboundary movement, transit, handling and use of LMOs, including illegal traffic.
5. Does not support, or only cautiously supports with reservations, exemptions for:
   a. Act of God/*force majeure*;
      Rationale: has been used as an argument by *Bayer* in the case of LL601 rice contamination.
   b. Acts of war;
      Rationale: could be used as an exemption for the use of biological weapons.
   c. Interventions of third parties;
      Rationale: still refers to damage caused by LMOs, which should be covered.
   d. Compliance with compulsory measures;
   e. Permission by applicable law;
      Rationale: damage caused by an LMO and permitted by national law is unacceptable.
   f. State-of-the-art activities or technologies.[1142]

[1140] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 3.
[1141] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 8.
[1142] Notes WGLR4.

6. Exemptions can constitute a *de facto* subsidy for the LMO industry as the victims or national authorities will have to bear the burden of the damage.[1143]
7. Supports the option listing exemptions to strict liability.[1144]

Specific Statements by members of the African Group in support of the African Group position

Statements of support by: Egypt,[1145] Ethiopia,[1146] Kenya,[1147] Lesotho,[1148] Liberia,[1149] South Africa,[1150] Uganda,[1151] and Zambia[1152].

Burkina Faso: suggests that there be no option of exemptions from liability; there should only be mitigations for liability.[1153]

Cameroon: proposes that there be no exemptions from liability because all liability can be covered by insurance.[1154]

Ethiopia: emphasizes that compliance with AIA procedures will not exonerate liable parties.[1155]

Liberia: opposes any exemption.[1156] 'Intervention by a third party' can be interpreted widely and provide ways for an operator to escape liability. A lot of issues are unforeseeable when the permit is given.[1157]

[1143] ENB WGLR4 ; Notes WGLR4.
[1144] ENB WGLR5#3.
[1145] Compilation of Views TEG 1; ENB WGLR1 Summary; Notes WGLR3.
[1146] Compilation of Views WGLR2; Notes WGLR3.
[1147] Notes WGLR4.
[1148] ENB WGLR2.
[1149] Compilation of Views TEG 1; ENB WGLR1 Summary.
[1150] Notes WGLR4.
[1151] Compilation of Views WGLR2.
[1152] ENB WGLR2.
[1153] *Id.*
[1154] Compilation of Views TEG 1.
[1155] Compilation of Views WGLR2.
[1156] ENB WGLR 5 summary
[1157] Notes, Friends of the Chair group preceding MOP4.

Senegal: proposes no exemptions in order to eliminate excuses for being liable.[1158]

South Africa: proposes 'could not reasonably have foreseen the damage' as an exemption or mitigation under civil liability.[1159]

Belize

1. Supports two potential exemptions to liability for damage resulting from:
   a. acts of armed conflict, hostilities, civil war or insurrection; or
   b. a natural phenomenon of exceptional, inevitable, unforeseeable or irresistible character.[1160]
2. These exemptions could be couched in a potential provision ensuring that act of God or *force majeure* type exemptions would not cover evolutionary, biologically-based or meteorological disturbances and damage.[1161]

Brazil

1. Admissible exemptions include:
   a. *force majeure* and act of God;[1162]
   b. civil unrest;
   c. natural phenomenon;
   d. compliance with compulsory measures; and
   e. acts of third parties.[1163]
2. Expressed doubts about whether any options should be removed as any exemption may actually have less desirable implications – even act of God or *force majeure* and civil unrest.[1164]

[1158] ENB WGLR2

[1159] Notes, Friends of the Chair group preceding MOP4.

[1160] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 3 & 8.

[1161] *Id*.

[1162] Compilation of Views TEG 1.

[1163] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 4.

[1164] Notes WGLR3.

3. Reserves the right to further consider exemptions.[1165]
4. Supports the option on mitigation of strict liability.[1166]
5. Suggests that in respect of the proposed exhaustive list of exemptions, the defence should only apply for civil liability and not for the administrative approach. [1167]

China

Supports the option listing exemptions to strict liability.[1168]

Colombia

1. Colombia suggests distinction between mitigations and exemptions as two separate lists.[1169]
2. Does not support the inclusion of permitted activities as exemption or mitigation.[1170]

Ecuador

1. Supports exemptions for:
    a. act of God/*force majeure*;
    b. acts of war or civil unrest;
    c. intervention by a third party;
    d. compliance with compulsory measures; and
    e. damage caused by activities in accordance with permission of an authorized activity.[1171]
2. Supports the option on exemptions to, and mitigation of, strict liability.[1172]

European Union

1. Supports the inclusion of exemptions for:
    a. act of God/*force majeure*;
    b. act or war or civil unrest;
    c. intervention by a third party; or

[1165] Notes WGLR4.
[1166] ENB WGLR5#3.
[1167] Notes, Friends of the Chair group preceding MOP4.
[1168] *Id.*
[1169] ENB WGLR1 Summary.
[1170] Notes, Friends of the Chair group preceding MOP4.
[1171] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 6.
[1172] ENB WGLR 5#3

   d. compliance with compulsory measures imposed by a public national authority.[1173]
2. Where appropriate, the operator/importer may not have to bear the costs of remedial action when he proves that he was not at fault or negligent and the damage was caused:
   a. by an activity expressly authorised by and fully in conformity with an authorization given under national law; or
   b. by an activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out.[1174]
3. Notes that exemptions are typical for liability regimes, and the need to address damage that will not be compensated because of the exemptions.[1175]
4. Should have an exhaustive list from which States could choose the exemptions; but the list should be restrictive.[1176]
5. Supports the option on exemptions to, and mitigation of, strict liability.[1177]
6. Adds 'that caused damage despite the fact that appropriate safety measures were in place' after intervention by a third party.
7. Proposes 'national defence or international security' as exemption.[1178]

India

1. Supports exemptions from liability based on:
   a. act of God/*force majeure*;
   b. acts of war or civil unrest;
   c. intervention by a third party; and
   d. compliance with compulsory measures.[1179]

[1173] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 2.
[1174] *Id.*
[1175] Notes WGLR4.
[1176] Friends of the Chair Group, ENB WGLR5#7
[1177] ENB WGLR 5#3
[1178] Notes, Friends of the Chair group preceding MOP4.

2. Mitigation of liability may be available if:
    a. the party proves it was not at fault or negligent; and
    b. activity was authorized; or
    c. not considered likely to cause damage at the time based on the state of scientific and technical knowledge at the time.[1180]

   [Note: Did not support these mitigations to liability at the third meeting of the WG,[1181] but supported them at the fourth meeting.[1182]]
3. Supports a list which is agreed to internationally. Should not leave it to domestic law to decide what should be in exemption and what to be in mitigation list.
4. Does not support the inclusion of permitted activities as exemption or mitigation.[1183]

Indonesia

Supports exemptions for natural disasters, war, hostilities and lawful reasons.[1184]

Iran

Supports an exemption for situations of unintentional transboundary damage to non-GM plants.[1185]

Japan

Supports all options for exemptions. Exemptions should include:
a. act of God/*force majeure*;
b. act of war or civil unrest;
c. acts of third parties;
d. compliance with compulsory measures;
e. acts authorized under national law; and
f. State-of-the-art.[1186]

[1179] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 2.
[1180] *Id.*
[1181] Notes WGLR3.
[1182] Notes WGLR4.
[1183] Notes, Friends of the Chair group preceding MOP4..
[1184] Notes WGLR4.
[1185] Compilation of Views TEG 1.

Malaysia

1. Supports limited exemptions to liability in case of:
   a. an act of God/*force majeure*; or
   b. armed conflict.[1187]
2. Exemptions should be limited. No mutation or biological effect due to evolution nor any weather, meteorological event or climatic occurrence should be considered an act of God or *force majeure*.[1188]
   Rationale: Concerned that everything can be interpreted as an act of God.[1189]
3. Supports deleting the exemptions:
   a. based on permission of an activity by means of an applicable law or a specific authorization;[1190] and
   b. 'state of the art' and state of scientific and technical knowledge[1191].

   Rationale:
   i. May justify limited support for research on biotechnology risk assessment, encouraging developers to use the public as guinea pigs.[1192]
   ii. This exemption does not exist in contractual relationships, or under the common law.[1193]
   iii. This exemption places the burden of damage and redress on innocent parties involved who do not know of the risk. The person who profits from the act should bear the cost, because he will internalize the cost.[1194]

[1186] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 2; Notes, Friends of the Chair group preceding MOP4.
[1187] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 3
[1188] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 8; Notes, Friends of the Chair group preceding MOP4.
[1189] Notes WGLR4.
[1190] ENB WGLR1 Summary.
[1191] ENB WGLR2.
[1192] Notes WGLR3.
[1193] *Id.*
[1194] *Id.*

iv. Product liability in industrialized countries excludes this type of exemption and it has been proven that the lack of this exemption does not stifle innovation.[1195]

4. Opposes broad exemptions to liability,[1196] and suggests deleting reference to exemptions and retaining mitigation.[1197]
   Rationale:
   a. Should not allow exemptions that are so wide as to exonerate those in operational control of LMOs. This will ignore the polluter pays principle and the precautionary principle.[1198]
   b. Victim may be left uncompensated.[1199]
   c. Exemptions beyond act of God or cases of armed conflict may subsidize the development of technology and violate the precautionary principle.[1200]

5. The proposed exhaustive list of exemptions/mitigations included in the operational text must be agreed to internationally.[1201]
6. Proposes that the defence of 'intervention by third parties' should be qualified. The issue here is whether the intervention is foreseeable. Agrees with New Zealand's proposal to include 'circumstances that the liable person could not have reasonably known of or protected against'. Also it should be a defence for strict liability only, not for fault-based liability as well. Only the 1969 Brussels International Convention on Civil Liability for Oil Pollution Damage (CLC) has such a provision.[1202]

[1195] *Id.*
[1196] Notes WGLR4; Notes, Friends of the Chair group preceding MOP4.
[1197] ENB WGLR2.
[1198] Notes WGLR4.
[1199] *Id.*
[1200] ENB WGLR4 ; Notes WGLR4.
[1201] Friends of the Chair Group, ENB WGLR5#7
[1202] Notes, Friends of the Chair group preceding MOP4. See Article III.2(b) of the CLC: *No liability .. if the owner proves that the damage was wholly caused by an act or omission done with intent to cause damage by a third party.*

Mexico

1. Proposes that there be only two exemptions: act of God or act of war. Mitigation can be a list which is in accordance with national law. Intervention by third party should be under mitigating factor.
2. Do not support activities in compliance with compulsory measures as exemption or mitigation. If there is damage, there is a permit but it occurred because of a lack of knowledge. The defence should be lack of knowledge and not because there is a permit.
3. Do not support the inclusion of permitted activities.[1203]

New Zealand

1. Supports exemptions for:
    a. act of God/*force majeure*;
    b. act of war or civil unrest;
    c. intervention by a third party;
    d. activities in compliance with compulsory measures;
    e. permitted activities;
    f. state-of–the-art or state of scientific or technical knowledge;[1204]and
    g. not having reasonably known of the import of LMOs.[1205]
2. Exemptions are common and necessary in the case of strict liability.[1206]
3. In cases that may be excluded due to exemptions, damage ought to be addressed through response measures and municipal compensation.[1207]
4. Should consider the intent behind exemptions and whether a lack of exemptions is meant to shut down the trade in LMOs.[1208]

[1203] *Id*.
[1204] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 2.
[1205] Notes WGLR4.
[1206] ENB WGLR4; Notes WGLR4.
[1207] *Id.*
[1208] Notes WGLR4.

5. For intervention by a third party, proposes 'circumstances that the liable person could not have reasonably have known of or protected against'.[1209]

Norway

1. Supports only limited exemptions to strict liability.
   Rationale:
   a. Not all risks will be disclosed prior to the transboundary movement of LMOs.
   b. Exemptions placing such risks on the importer would be in contravention of the polluter pays principle.
   c. Potential misuse of the act of God exemption in relation to LMOs.
   d. Exemptions can also constitute a *de facto* subsidy for the LMO industry as the victims or national authorities will have to bear the burden of damage.[1210]
   e. The impacts of LMOs are not all known, therefore, the precautionary principle should be applied in relation to exemptions.[1211]
2. Supports only exemptions for:
   a. act of armed conflict, hostilities, civil war or insurrection; or
   b. a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character.[1212]
3. Supports the option on mitigation of strict liability.[1213]
4. Activities in compliance with compulsory measures should not be an exemption or mitigation because it puts an unnecessary burden on the authority and not the operator.
5. Opposes 'permitted activities' because the permission is given by an authority based on information from the operator. The risk of this information not being correct would then be passed

[1209] Notes, Friends of the Chair group preceding MOP4.
[1210] Notes WGLR4.
[1211] Notes WGLR3.
[1212] Compilation of Views WGLR4.
[1213] Friends of the Chair Group, ENB WGLR5#7

on to the authority if this be made an exemption or mitigation.[1214]

Palau

1. Supports two potential exemptions to liability for cases of damage due to:
    a. acts of armed conflict, hostilities, civil war or insurrection; or
    b. natural phenomenon of exceptional, inevitable, unforeseeable or irresistible character.
2. These exemptions could be couched in a potential provision ensuring that act of God or *force majeure* type exemptions would not cover evolutionary, biologically, based or meteorological disturbances and damage.[1215]
3. Activities in compliance with compulsory measures should not be an exemption or mitigation because it puts an unnecessary burden on the authority and not the operator.[1216]

Panama

1. Supports the inclusion of exemptions and possibly mitigations to liability.
2. Supports text including exemptions for:
    a. acts of armed conflict and natural phenomenon only, or
    b. all proposed exemptions.[1217]

Paraguay

1. Supports exemptions for:
    a. act of God/*force majeure*;
    b. act of war or civil unrest;
    c. intervention by a third party;
    d. activities in compliance with compulsory measures;
    e. permitted activities; and

1214 Notes, Friends of the Chair group preceding MOP4.
1215 Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 3.
1216 Notes, Friends of the Chair group preceding MOP4.
1217 Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 2 or 3.

f. state-of-the-art or state of scientific or technical knowledge.[1218]

2. Supports the option listing exemptions to strict liability.[1219]

Peru

Agrees with Co-Chairs that the respective operational text would include an exhaustive list from which States could choose, underscoring that it must be agreed to internationally.[1220]

Saint Lucia

Supports exemptions for damage caused by unforeseen natural disasters. States should be required to anticipate these disasters, however, and follow best practices for avoidance and prevention of damage.[1221]

Saudi Arabia

Supports exemptions in certain cases where damage is the result of:

a. an act of war or civil unrest; or
b. the result of natural phenomenon of exceptional, inevitable, unforeseeable or irresistible character.[1222]

Switzerland

1. Supports the inclusion of an exemption for wrongful intentional acts by a third party, including acts by the person who suffered harm.[1223]
2. Opposes the deletion of the option of exemptions in the case of permission by an applicable law or specific authorization, noting that these exemptions do not constitute the shifting of liability to the public sector.[1224]
3. No liability in accordance with this article shall attach to the liable person according to paragraph one and two, if he or she

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1218 Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 2.
1219 Friends of the Chair Group, ENB WGLR5#7
1220 *Id.*
1221 Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 2.
1222 Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 3.
1223 Compilation of Views TEG 1.
1224 ENB WGLR2.

proves that, despite there being in place appropriate safety measures, the damage was:

a. the result of an act of armed conflict, hostilities, civil war or insurrection;
b. the result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character;
c. wholly the result of compliance with a compulsory measure of a public authority of the Party where the damage has occurred or where the living modified organisms were unintentionally released across the border; or
d. wholly the result of the wrongful intentional conduct of a third party.

4. If the person who has suffered the damage or a person for whom he or she is responsible under domestic law has by his or her own fault caused the damage or contributed to it, the compensation may be reduced or disallowed having regard to all the circumstances.
5. If two or more exporters are liable according to this article, the claimant shall have the right to seek full compensation for the damage from any or all of the persons liable.
6. The liable person who proves that only part of the damage was caused by living modified organisms shall be liable for that part of the damage only.[1225]
7. Agrees with Co-Chairs that the respective operational text would include an exhaustive list from which States could choose, adding that the list should be restrictive.[1226]
8. For activities in compliance with compulsory measures, 'non-compliance' is not precise and is a paradise for lawyers to argue out of liability. Proposes 'a specific order imposed by a public authority on the operator and the implementation of such order caused the damage'.

[1225] WGLR4. This, and the preceding paragraph, relates to recourse against third parties and apportionment of damage.
[1226] Friends of the Chair Group, ENB WGLR5#7

9. Does not support the inclusion of permitted activities as exemption or mitigation.[1227]

Thailand

1. Supports the inclusion of exemptions for:
    a. act of God/*force majeure*; and
    b. acts of war or civil unrest.
2. All other options for exemptions should be deleted.[1228]

Trinidad and Tobago

1. Supports exemptions for damage as a result of:
    a. an act of armed conflict; or
    b. a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character.[1229]
2. Notes that the state-of-the-art defence and the exemption based on compliance with mandatory regulation could cause problems for developing countries that have to rely on information submitted by the operator.[1230]

TEXT AGREED TO AT COP-MOP4

For Administrative Approach

Operational text

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

(a) Act of God or force majeure;

(b) Act of war or civil unrest;

[1227] Notes, Friends of the Chair group preceding MOP4.
[1228] ENB WGLR2.
[1229] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV OT 3.
[1230] ENB WGLR4.

[(c) Intervention by a third party [that caused damage despite the fact that appropriate safety measures were in place];]

[(d) Compliance with compulsory measures imposed by a public authority;]

[(d alt) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;]

[(e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;]

[(f) An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out;]

[(g) National security exceptions [or international security]].

For Civil Liability

Operational text

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

(a) Act of God or force majeure;

(b) Act of war or civil unrest;

[(c) Intervention by a third party [that caused damage despite the fact that appropriate safety measures were in place];]

[(d) Compliance with compulsory measures imposed by a public authority;]

[(d alt) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;]

[(e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;]

[(f) An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out;]

[(g) National security exceptions [or international security];]

[(h) Where the operator could not have reasonably foreseen the damage.]

Non-Parties

Argentina

1. Supports the inclusion of exemptions to strict or fault-based liability.[1231]
2. Liability shall be excluded/mitigated when damage was caused by:
    a. act of God/*force majeure*;
    b. act of war/civil unrest;
    c. intervention of a third party;
    d. compliance with compulsory measures imposed by national authority; and
    e. the "state-of-the-art" defence.[1232]
3. Supports the option listing exemptions to strict liability.
4. Emphasizes the need for the state-of-the-art defence in order to ensure that liability will not inhibit the development of LMOs.[1233]

Canada

1. In the case where exemptions are necessary, supports exemptions for:
    a. act of God/*force majeure*;
    b. act of war or civil unrest;
    c. intervention by a third party;

[1231] Notes WGLR3.
[1232] Synthesis of Views WGLR2.
[1233] Notes WGLR3.

   d. activities in compliance with compulsory measures; and
   e. activities in accordance with permission under applicable law with specific authorization.[1234]
2. Notes that the need for exemptions is contingent on the type of regime to be developed. Under an administrative approach or a fault-based liability regime, exemptions would not be necessary.[1235]
3. Highlights that exemption from liability does not mean exemption from fault.[1236]

United States of America

Supports exemptions for damage caused by:
   a. act of God/*force majeure*;
   b. act of war or civil unrest;
   c. intervention by a third Party;
   d. compliance with compulsory measures issued by a competent national authority;
   e. permission for activity by applicable law or specific authorization issued to the operator.[1237]

Rationale: These exemptions reflect the requirements of advanced informed agreement.[1238]

Observers- Education

Public Research and Regulation Initiative

1. Supports the inclusion of exemptions to liability based on:
   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;

[1234] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 6.
[1235] Notes WGLR4.
[1236] ENB WGLR 5 Summary
[1237] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 6 or 5.
[1238] Notes WGLR4.

d. compliance with compulsory measures imposed by a competent national authority;
e. harm that could not have been foreseen given the scientific and technical knowledge at the time they were carried out as determined by the risk assessment undertaken in conjunction with approval or authorization of the activity by the competent authority; and
f. possible harm to biodiversity that was deemed acceptable by the competent authority in the approval process for the activity.[1239]

Rationale:

a. Exemptions or defences are standard in liability regimes.
b. A regime that fails to include these would significantly restrict public research in modern biotechnology, because of fear by public researchers of unknown/unlimited liability.[1240]

2. An operator shall not be required to bear the cost of preventative or remedial actions when not at fault nor negligent and the damage to biodiversity or imminent threat of such damage was caused by:
    - Act of God/*force majeure*;
    - Etc.[1241]

Observers- Industry

Global Industry Coalition

Supports exemptions from liability for:

a. act of God/*force majeure*;
b. act of war or civil unrest;
c. intervention by a third party;

[1239] Compilation of Views WGLR4.
[1240] Compilation of Views WGLR2.
[1241] WGLR4; this appears to apply to the administrative approach. The 'etc' is presumably to include all the other exemptions.

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; or
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.[1242]

International Grain Trade Coalition

1. Supports a broad range of exemptions and defences.
2. Defences should include:
   a. excercise of due care; and
   b. best practices.[1243]
3. Exemptions should include:
   a. war risks;
   b. *force majeure*;
   c. sabotage or terrorism;
   d. act or omission required by responsible government agency;
   e. damaged party willingly assumes risk of action;
   f. damage attributed to the suffering party;
   g. exporter/transporter complying with obligations and not having control over use or development of technology.[1244]

Organic Agriculture Protection Fund

Does not support exemptions to liability.[1245]

[1242] Compilation of Views WGLR4.
[1243] *Id*.
[1244] Compilation of Views WGLR1.
[1245] Compilation of Views WGLR2.

Observers- NGOs

ECOROPA

1. Expresses concern about exemptions for act of God.
   Rationale: Insurance contracts for GMOs exclude damage caused by GMOs due to intransient and unstable genomes, and many actions caused or duly caused by a wobbly genome would fall within the category of act of God.[1246]
2. Expresses concern about the application of state-of-the-art exemption.
   Rationale: An EU document titled "Late Lessons from Early Warnings" pertains to the risks related to learning within the field of science. The state of the art exemption would extend this grey area of knowledge and risk in science.[1247]
3. Supports exemptions for:
   a. the result of an act of armed conflict, hostilities, civil war or insurrection; or
   b. the result of natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character.[1248]

Friends of the Earth International

1. Expresses concern about the inclusion of an exemption on the basis of authorization in national law.[1249]
   Rationale:
   a. this exemption would lead to no compensation if damage occurs after the authorization.[1250]
   b. for example: Bt corn has been shown in recent studies to cause damage to invertebrates and other species in fresh water habitats. If a country has authorized Bt corn and damage to ecosystems and biodiversity occurs then this damage will not be compensated.[1251]

[1246] Notes WGLR4.
[1247] Notes WGLR3.
[1248] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT.
[1249] ENB WGLR4; Notes WGLR4.
[1250] ENB WGLR4; Notes WGLR4.
[1251] Notes WGLR4.

2. Opposes any exemption.[1252]

Greenpeace International

1. Does not support exemptions to liability.
   Rationale:
   a. if rules exempt the operator from liability for harm that is not reasonably foreseeable, then, if operator is not liable the cost will fall on the public, taxpayers, and victims. This proposition affirmed by academic international lawyers such as Birnie and Boyle.[1253]
   b. the focus of a regime must be on the consequences and the protection of both biodiversity and victims of activity in a transnational context. It is not a question of stigmatizing or penalizing. An *a priori* exemption may have unintended consequences. Focus should be on the damage that may occur - not on the fault or lack of fault that caused the damage.[1254]
   c. the aim is not to block the activities of the LMO industry, but to ensure compensation.[1255]
2. Proposes specific text opposing the consideration of :
   a. any mutation or biological effect of any kind, including any change to an organism or an ecosystem whether due to evolution or otherwise and,
   b. any weather, meteorological disturbance or climatic occurrence,
   as Act of God or *force majeure*.[1256]

   Rationale: Concerned about the application of any exemption addressing acts of God such as storms and floods that are caused by greenhouse gas emissions.[1257]

[1252] ENB WGLR 5 summary
[1253] Notes WGLR4.
[1254] Notes WGLR3.
[1255] Notes WGLR4.
[1256] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 8.
[1257] Notes WGLR4.

South African Civil Society

1. Opposes any exemption based on knowledge of risk/risk assessments; should follow the precautionary principle.[1258]
2. Supports no exemptions, therefore, supports absolute liability.[1259]

Third World Network

Mitigations, not exemptions, should be available for:

a. act of God (unforeseeable);
b. act of war/ civil unrest (unforeseeable and not initiated by Party);
c. wrongful act of third party (only if information presented to third party in an accurate and effective manner and efforts are taken to ensure understanding of information).[1260]

Washington Biotechnology Action Council

Opposes to the state-of-the-art exemption.

Rationale:

a. An exemption based on activities not considered harmful at the time they were carried out rewards the lack of research on LMOs' risks.[1261]
b. There is limited support for research on biotechnology risk assessment.[1262]

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

[For a description of this subject matter, please see: earlier text under 'ABis Additional Elements of an Administrative Approach' at p. 159]

[1258] *Id.*
[1259] *Id.*
[1260] ENB WGLR 5 Summary.
[1261] ENB WGLR1 Summary.
[1262] ENB WGLR2.

Options on Recourse[1263]

Option 1: A provision allowing for right of recourse against third parties.
Option 2: No provision.

Delegates' and Others' Positions on Recourse

The African Group

Supports the retention of text on recourse against third parties in order to ensure consistency across legal regimes.
Each Contracting Party shall ensure that adversely affected persons due to damage resulted during transboundary movement, transit, handling and use of LMOs, including illegal traffic, have a right of recourse for the wrongful act of that person or entity associated with the Party of export. [1264]

Specific Statements by members of the African Group in support of the African Group position

Statement of support by: Cameroon[1265] and Liberia[1266].

Cameroon: specific text ensuring that rules and procedures do not restrict any right of recourse or indemnity that person may have against any other person.[1267]

Belize

1. Supports text ensuring that rules and procedures do not limit or restrict right of recourse or indemnity.[1268]
2. Supports retaining this section to ensure consistency across legal regimes.[1269]

[1263] Meeting Report WGLR4.
[1264] ENB WGLR4.
[1265] Notes WGLR4; ENB WGLR4 .
[1266] Notes WGLR4.
[1267] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 5 OT 3.
[1268] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 5 OT 3.

China

Supports operational text that does not limit any right of recourse.[1270]

Cuba

Supports the retention of this section to ensure consistency across legal regimes.[1271]

Ecuador

1. Text on recourse to third parties should be retained to ensure consistency across legal regimes.[1272]
2. Supports operational text that does not limit any right of recourse.[1273]

European Union

Nothing in these rules and procedures should prejudice any right of recourse of the operator/ importer against the exporter.[1274]

India

1. Text should state that nothing in this instrument would prejudice the right of recourse of the defendant against any third party.[1275]
2. This provision should be retained to ensure consistency across legal regimes.[1276]

Japan

Issues related to the right of recourse against third parties should be dealt with under national law and these concerns are already

[1269] ENB WGLR4.
[1270] Notes WGLR5.
[1271] Notes WGLR4.
[1272] ENB WGLR4.
[1273] Notes WGLR5.
[1274] Notes WGLR4*;* Synthesis of Texts WGLR4, at Section IV 5 OT 2. ENB WGLR5 Summary
[1275] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 5 OT 1 option 2.
[1276] ENB WGLR4.

covered by national legislation in many countries.[1277] Proposes deleting this section. [1278]

Malaysia

Supports the retention of text on recourse to third parties in order to allow a party who is held liable to recover from any other person for whose damage he has had to pay on the basis of joint and several liability; including this text will also ensure consistency across legal regimes.[1279]

Mexico

Supports operational text that does not limit any right of recourse.[1280]

New Zealand

Text should not limit or restrict the right of recourse or indemnity that a person may have against any other person.[1281]

Norway

1. Should not limit or restrict any right of recourse or indemnity that a person may have against any other person.[1282]
2. Supports retaining text on right to recourse against third parties in order to ensure consistency across legal regimes.[1283]

Palau

1. Text should ensure that nothing in rules and procedures will limit or restrict any right of recourse or indemnity that person may have against any other person.[1284]
2. Text should be retained in order to ensure consistency across legal regimes.[1285]

[1277] *Id.*
[1278] Notes WGLR5.
[1279] ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 5 OT 2.
[1280] Notes WGLR5.
[1281] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 5 OT 3.
[1282] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 5 OT 3.
[1283] Notes WGLR4.
[1284] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 5 OT 3.

Paraguay

Supports operational text that does not limit any right of recourse.[1286]

Switzerland

Supports the right of recourse against the user of LMOs for reasons of negligence or carelessness.[1287]

Thailand

Suggests further consideration of the right of recourse against third parties.[1288]

TEXT AGREED TO AT COP-MOP4

For both Administrative Approach and Civil Liability

Operational text

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

Non-Parties

Argentina

Supports the removal of text on right of recourse against third parties as it is already covered under domestic law.[1289]

ENB WGLR4; Notes WGLR44.
[1286] Notes WGLR5.
[1287] Compilation of Views TEG 1.
[1288] *Id*.
[1289] Notes WGLR4.

Canada

This section does not limit or restrict any right of recourse or indemnity that a person may have against any other person.[1290]

Observers- Education

Public Research and Regulation Initiative

Nothing in this decision shall prejudice any right of recourse of the operator/importer against the exporter.[1291]

Observers- NGOs

Greenpeace International

1. Any person liable under the Protocol shall be entitled to a right of recourse in accordance with the rules of procedure of the competent court:
   a. against any other person also liable under the Protocol; and
   b. as expressly provided for in contractual arrangements.
2. Nothing in the Protocol shall prejudice any right of recourse to which the person liable might be entitled pursuant to the law of the competent court.
3. Supports retaining text on right of recourse to ensure consistency across legal regimes.[1292]

iii. Joint and several liability or apportionment of liability

[For a description of this subject matter, please see: earlier text under 'ABis Additional Elements of an Administrative Approach' at p. 159]

[1290] *Id*.
[1291] *Id.*
[1292] ENB WGLR4 .

Options for Joint and Several Liability or Apportionment of Liability[1293]

Option 1: Joint and several liability.
Option 2: Apportionment of liability.
Option 3: Liability of only one liable party.

Delegates' and Others' Positions on Joint and Several Liability or Apportionment

The African Group

1. Favors joint and several liability.[1294]
2. Where damage is caused by LMOs subject to the advanced informed agreement (AIA) and LMOs identified as being not likely to have adverse effects pursuant to Article 7(4) of the Cartagena Protocol, a person otherwise liable shall only be liable in proportion to the contribution made by the LMOs covered under the AIA.
3. In respect of damage where it is not possible to distinguish between the contribution made by LMOs covered by and LMOs identified as being not likely to have adverse effects, all damage shall be covered under this Protocol.
4. If there is more than one person responsible for the damage, injury or loss, the claimant shall have the right to seek full compensation from any or all of the persons liable for the damage, injury or loss.[1295]

Specific Statements by members of the African Group in support of the African Group position

Statement of support by **Egypt**.[1296]

[1293] Meeting Report WGLR4.
[1294] ENB WGLR2. ENB WGLR 5#3; WGLR4.
[1295] WGLR4.
[1296] Compilation of Views TEG 1.

Cameroon, supported by **Senegal**:[1297] favors retaining text on joint and several liability.[1298] Supports specific text allowing claimants to bring claims against two or more liable parties.[1299] Text should also cover continuous occurrences and joint and several liability of States.[1300]

Namibia: add text on apportionment and vicarious liability early in the negotiations process.[1301]

Uganda: joint and several liability of all liable parties in order that all compensation is paid.[1302] Expresses reservations about text concerning liability of the State of the national under this item.[1303]

Belize

1. Favors retaining text on joint and several liability for future negotiations.[1304]
2. Supports joint and several liability.
3. Specific text should:
    a. cover the right of the claimant to seek full compensation for damage from any or all operators or importers jointly and severally; and
    b. allow liable parties to be liable for only the portion of damage caused by the LMO, if such parties can prove this fact.[1305]

Brazil

1. Supports the inclusion of text on joint and several liability, ensuring:

[1297] ENB WGLR2.
[1298] ENB WGLR4.
[1299] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 6 OT 8.
[1300] *Id.*
[1301] ENB WGLR1 Summary.
[1302] ENB WGLR1 Summary; Notes WGLR4.
[1303] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 6 OT 8.
[1304] ENB WGLR4.
[1305] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 6 OT 3.

   a. the ability of the person who suffered the damage to hold any and all persons liable and seek full compensation;
   b. a person to be held liable for only part of the damage if the person can prove that only part of the damage was caused by the LMO; and
   c. the person suffering damage is responsible under national law for any personal contribution to the damage. [1306]
2. Where the claim for damage has not been satisfied, the unsatisfied portion shall be fulfilled by any other person, identified by the operator, whose activity has contributed to the occurrence of the damage resulting from the transboundary movement.[1307]

China

Supports joint and several liability.[1308]

Colombia

Supports joint and several liability.[1309]

Cuba

Text on joint and several liability should include continuous occurrences or series of occurrences.[1310]

European Union

1. Supports the inclusion of joint and several liability. This provision should be based on:
   a. in situations where two or more operators/importers are liable, the claimant should have the right to seek full compensation for damage from any or all operators/importers.

[1306] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 4; ENB WGLR 5#3.
[1307] Notes, Friends of the Chair group preceding MOP4.
[1308] ENB WGLR 5#3.
[1309] *Id.*
[1310] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 6 OT 2.

b. the application of this provision should be without prejudice to domestic provisions on rights of contribution and recourse.

2. The operator/importer who proves that only part of the damage was caused by the transboundary movement of LMOs should only be liable for that part of the damage.[1311]
3. Proposes in respect of this text: 'In case two or more operators have caused the damage, joint and several liability or apportionment of liability may, as appropriate, apply in accordance with domestic law' to delete 'apportionment of liability'.[1312]

India

1. Supports the application of joint and several liability to any or all liable parties.[1313]
2. Text should also be included for situations where not all damage is caused by LMOs, in which case liable parties will only be liable for damage caused by the LMO.
3. In situations where it is not possible to know the contribution made by the LMO, then all damage will be covered.[1314]

Japan

Suggests deleting text on joint and several liability, as it is covered under national legislation.[1315]

Malaysia

1. Supports the inclusion of joint and several liability.[1316]
2. Joint and several liability should be made up of a combination of provisions on joint and several liability, and apportionment. This means that if two or more persons are liable, the claimant

[1311] Notes WGLR4; Compilation of Views WGLR4; Synthesis of Texts WGLR4, at Section IV 6 OT 3. ENB WGLR 5#3.
[1312] Notes, Friends of the Chair group preceding MOP4.
[1313] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 6 OT 1, ENB WGLR 5#3.
[1314] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 6 OT 1.
[1315] ENB WGLR4.
[1316] Notes WGLR4.

can proceed to bring a case against any one person for all damage. Damages may alternatively, be apportioned amongst the several defendants, that is, each of the defendant will be held liable only for that portion of the damage for which he is held responsible.[1317]
Rationale: This provision would ensure redress that is fair and ultimately paid by the person who is truly responsible for the damage.[1318]

3. Favors retaining text on joint and several liability to ensure consistency across legal regimes.[1319]

Mexico

Supports the liability of multiple persons.[1320]

New Zealand

1. Supports joint and several liability of any person responsible for the transboundary movements of LMOs and held liable.[1321]
2. If this provision is not supported, then New Zealand supports no provision on joint and several liability, as it is covered by national legislation.[1322]

Norway

Supports the provision on joint and several liability.[1323]

Palau

1. Text should be retained on joint and several liability.[1324]
2. Liability should be joint and several upon any and all of two or more liable parties, unless one of the parties is able to prove that only part of the damage was caused by the LMO, in which

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[1317] *Id;* Notes, Friends of the Chair group preceding MOP4.
[1318] ENB WGLR4; Notes WGLR4.
[1319] ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 6 OT 2.
[1320] ENB WGLR2.
[1321] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 6 OT 5.
[1322] ENB WGLR4; Notes WGLR4.
[1323] Compilation of Views WGLR4; Notes WGLR4.
[1324] ENB WGLR4 .

case the party will only be liable for the part of the damage caused by the LMO.[1325]

Paraguay

Supports apportionment of liability.[1326]

Switzerland

Does not support joint and several liability, as liability should be channeled to one person only with a right of recourse to other parties involved.[1327]

Thailand

Encourages further consideration of the application of joint and several liability to situations in which damage to biodiversity is extensive, in both space and time.[1328]

TEXT AGREED TO AT COP-MOP4

For Civil Liability

Operational text

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

Operational text alt

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

[1325] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 6 OT 3.
[1326] ENB WGLR5#3.
[1327] ENB WGLR2.
[1328] *Id*.

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

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

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

Non-Parties

Argentina

1. Text on joint and several liability is unnecessary as it is already covered under national law.
2. If text is retained, however, supports text apportioning liability on the basis of degree of fault.[1329]

Canada

The following persons - the operator or any other person who caused or contributed to the damage or increased the likelihood of its occurrence, to the extent that such person knowingly or negligently caused or contributed to such damage - are jointly and severally liable for such costs and expenses.[1330]

[1329] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 6 OT 9. ENB WGLR 5#3

[1330] WGLR4.

United States of America

Where more than one entity is determined to be liable, all such entities shall be held jointly and severally liable.[1331]

Observers- Education

Public Research and Regulation Initiative

In the case of liability with multiple causes, liability shall be apportioned on the basis of relative degrees of fault where possible.[1332]

Observers- Industry

Global Industry Coalition

1. In the case of liability of more than one person, liability shall be apportioned on the basis of relative degrees of fault.
2. A Party shall be liable for failure to exercise reasonable care in carrying out its responsibilities pursuant to the Biosafety Protocol and national implementing legislation where such failure results in damage to biodiversity. Where another operator also is at fault, liability shall be apportioned based on degree of fault.[1333]

International Grain Trade Coalition

Liability should be joint and apportioned based on the degree of fault.[1334]

[1331] WGLR4.
[1332] *Id*.
[1333] *Id*.
[1334] Compilation of Views WGLR1; Compilation of Views WGLR4.

Observers- NGOs

Greenpeace International

1. Liability should be joint and several so as to ensure effective and adequate compensation.[1335]
2. Joint and several including exporting party, exporter (in order to bypass "shell entities"), developer, and producer.[1336]
3. Necessary due to potential continuing occurrences. If the incident causing damage 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. [1337]
4. Favors retaining text.[1338]
5. Where there is liability of the exporting State and the State of the national, the liability shall be joint and several.
    a. any exporter, notifier and any person having ownership or possession or otherwise exercising control shall be liable for damage during the case of transit of LMO through States other than the Party of export or Party of import.
    b. 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.[1339]

Third World Network

Liability should be joint and several.

Washington Biotechnology Action Council

Notes the importance of joint and several liability.[1340]

[1335] ENB WGLR2, WGLR4.
[1336] Compilation of Views WGLR2.
[1337] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 3 OT 8.
[1338] ENB WGLR4.
[1339] WGLR4.
[1340] ENB WGLR2.

Rationale: Joint and several liability would give victims broad recourse, especially when those liable have gone bankrupt.[1341]

iv. Limitation of liability

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

[For a description of this subject matter, please see: earlier text under 'Abis. Additional Elements of an Administrative Approach' at p. 160]

Options for Limitations in Time[1342]

Limitation in time for bringing claims:

Option 1: Absolute limit.
Option 2: Absolute and relative limits.
Option 3: No limitations in time.

Limitation in the time for administering full compensation and mitigation or response measures.

Option 1: Relative limits and a limitation in the time for administering full compensation and mitigation or response measures.
Option 2: No text.

[1341] *Id.*
[1342] Meeting Report WGLR4.

Delegates' and Others' Positions on Limitation in Time

The African Group

1. Supports time limits for bringing a claim with a series of specifications.
    a. time limits should commence when the affected person, persons or the community/communities learns of the harm, taking into account:
        i. the time period it may take for harm to manifest; and
        ii. the time that it may reasonably take to correlate the harm with the LMO or its product, taking into consideration the situation or circumstance of the person(s) or community or communities affected .
    b. if the incident consists of a series of occurrences having the same origin, time limits for bringing a claim will begin at the last occurrence. Where the incidents consists of continuous occurrences, such time limits shall run from the end of that continuous occurrence.
    c. in general, a claim shall be brought within 10 years from the time the claimant knew of the damage and its origin.[1343]
2. Does not support an absolute time limit for determining liability[1344] but provisions on relative time limits.
3. Supports an obligation on liable parties to redress harm caused within 10 years of a claim and to fully compensate claimants within 5 years of a claim.[1345]

[1343] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7 OT 1.
[1344] *Id.*
[1345] *Id.*

Specific Statements by members of the African Group in support of the African Group position

Statements of support by**:** Cameroon,[1346] Ethiopia,[1347] and Liberia[1348].

Egypt: does not support limitations in time.[1349]

Ethiopia: The duration depends very much on the nature of the LMOs. Should not set limitation. It should depend on cycle of the microorganism rather than number of years.[1350]

Guinea Bissau: does not support a limitation in time if the damage cannot be measured in time or by size.[1351]

Liberia: supports a limitation in time of 15 years,[1352] or the current African Group position.[1353]

Mauritius: does not support a limitation in time, as effects on human health may only show after a lengthy period of time.[1354]

Senegal: supports the need for time limits that encompass the full time frame necessary for restoration.[1355]

Uganda: does not support a limitation in time, as long as a causal link exists.[1356]

Brazil

1. Supports relative time limits for bringing claims, special consideration for communities, consideration of the nature of

[1346] Compilation of Views TEG 1; Notes WGLR3.
[1347] Compilation of Views WGLR20.
[1348] Notes WGLR4.
[1349] Compilation of Views TEG 1.
[1350] Notes, Friends of the Chair group preceding MOP4.
[1351] *Id.*
[1352] *Id.*
[1353] Notes WGLR4.
[1354] Notes WGLR4.
[1355] ENB WGLR1 Summary.
[1356] Compilation of Views TEG 1.

damage, consideration of continuous and series of occurrences and time limits for honoring claims.[1357]

2. Relative limitations in time should run from the date the damage becomes known or reasonably should be known.[1358] Proposes a 10 year limit for the bringing of claims.[1359]
3. Limitations in time are linked to the definition of damage.[1360] Time limits for communities to bring claims should take into consideration the time it may take for harm to manifest or for a correlation between damage and the LMO to be drawn.[1361]
4. Time limits for any series of occurrences and continuous occurrences, should commence at the end of the last occurrence.[1362]
5. Require liable parties to take actions to redress damage within 10 years and compensate damage within 5 years of a claim.[1363]
6. Proposes to leave the time limit to the discretion of Parties.[1364]

China

Supports combining provisions on relative and absolute time limits.[1365]

Colombia

1. Supports relative time limits and potentially absolute time limits.[1366]
2. Specific text could cover:
   a. an absolute time limit of 5 years and a relative limit of 1 year; or

[1357] Notes WGLR4. ENB WGLR 5#3.
[1358] Compilation of Views TEG 1; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7a OT 1.
[1359] ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7a OT 1.
[1360] Compilation of Views TEG 1.
[1361] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7a OT 1.
[1362] *Id.*
[1363] *Id.*
[1364] Notes, Friends of the Chair group preceding MOP4.
[1365] ENB WGLR 5#3.
[1366] ENB WGLR4 Summary; Notes WGLR4.

b. text could cover only a relative time limit of 10 years with many conditions and a limit on the time between a claim and action to remediate damage or pay compensation.[1367]

3. Conditions on relative time limits could include:
   a. consideration of the time for harm to manifest and the capacity of a community to link harm to an LMO;
   b. continuous occurrences or a series of occurrences, in which a relative time limit would begin with the end of the occurrence or the end of the last occurrence of damage.[1368]
4. Supports provisions on relative time limits.[1369]

Ecuador

Supports both relative and absolute time limits and proposes differing years for each limit.[1370]

European Union

1. A claim for damages under these rules and procedures should be exercised within [x] years from the date by which the claimant knew or ought reasonably to have known of the damage and the person liable and in any event not later than [y] years from the date of the transboundary movement of LMOs.
2. Where the transboundary movement of LMOs consists of a series of occurrences having the same origin, the time limits under this rule should run from the date of the last such occurrence. Where the effect of the transboundary movement consists of a continuous occurrence, such time limits should run from the end of the continuous occurrence.
3. Time limits should be flexible, but must be both relative and absolute.[1371]

[1367] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7 OT 1.
[1368] *Id.*
[1369] ENB WGLR 5#3.
[1370] Notes WGLR4; Synthesis of Texts WGLR4/2, at Section IV 7a OT 5.
[1371] Notes WGLR4; ENB WGLR4; ENB WGLR 5#3; Notes, Friends of the Chair group preceding MOP4.

India

1. Supports flexible limitations in time, but promotes the inclusion of both relative and absolute limits and a provision on series and continuous occurrences.
2. Any claim for compensation/damage shall be subject to a limitation period of [x] years, from the date on which the damage has or ought to have come to the knowledge of the claimant. Such claims to damage shall be brought within a maximum limitation period of [y] years.[1372]
3. Need for caution in setting time limits due to the lack of knowledge of risk related to LMOs. [1373]

Iran

1. Time limits should be dependent upon the time in which damage may emerge.
2. Reccurring damage should be taken into consideration.[1374]

Japan

1. Claims for compensation are not admissible unless they are brought within 5 years from the date of the incident.
2. Claims are not admissible unless they are brought within 1 year from the date the claimant knew or ought reasonably to have known of the damage provided that the time limit above is not exceeded.
3. Supports absolute and relative limitations in time without specifying the amount of either limit at this stage.[1375]

Malaysia

1. Supports a relative time limit of 10 years,[1376] with considerations for:
    a. continuous or series of occurrences;
    b. the time harm may take to manifest; and

[1372] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7a OT 3. ENB WGLR 5#3
[1373] Notes WGLR3.
[1374] *Id.*
[1375] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7 OT 4.
[1376] ENB WGLR4 2.

c. the time it may take to correlate damage to specific LMOs.[1377]

2. Supports specifying maximum time limits for person liable to pay compensation or redress the damage.[1378]

Mexico

1. Supports both relative and absolute time limits.
2. Flexible concerning the exact number of years for each limit, but proposes a 3-year relative limit and a 20-year absolute limit for bringing a claim.[1379]

New Zealand

1. Supports a standard international rule on both relative and absolute time limits.[1380]
2. Flexible concerning the exact number of years for each limit, but proposes a 3-year relative limit and a 20-year absolute limit for bringing a claim.[1381]
3. The inclusion of a time period is desirable as it provides an incentive for legal action and takes into consideration the fact that evidence can be lost over time.[1382]
4. Proposes to delete text referring to a series of occurrences and continuous occurrences as it is too detailed. [1383]

Norway

1. Supports a relative time limit of 3 years and an absolute time limit of 20 years.[1384]
2. This text reflects the provisions of the Norwegian Gene Technology Act.[1385]

[1377] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 6 OT 1

[1378] *Id.*

[1379] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7 OT 4.

[1380] Notes WGLR4.

[1381] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7a OT 4.

[1382] Notes WGLR4.

[1383] Notes, Friends of the Chair group preceding MOP4.

[1384] Compilation of Views WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7a OT 6.

[1385] Compilation of Views WGLR4.

Palau

Supports both a relative and absolute time limit, with the exact amount of time currently undefined.[1386]

Panama

1. Supports flexible time limits, including relative time limits for bringing claims and maximum limits for redress to the claimant.[1387]
2. Time limits may take into account the:
    a. special nature of continuous and series of occurrences; and
    b. time it may take for damage to manifest or to link damage to LMOs.
3. Text should also include maximum limits in time for compensation and measures for redress to take place.[1388]

Saint Lucia

1. In the case of small island developing countries, time limits should not be applied.
   Rationale: Concern about the potential deleterious effects of this new technology that may not manifest for decades.[1389]
2. Suggests consideration of time limits based on the affected species' history.[1390]

Saudi Arabia

Supports a 10 year relative time limit.[1391]

Sri Lanka

Does not support limitations in time.[1392]

[1386] ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7a OT 3.
[1387] Notes WGLR4.
[1388] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7a OT 1.
[1389] *Id.*
[1390] *Id.*
[1391] ENB WGLR4.
[1392] *Id.*

Switzerland

1. Time limits should include a 30-year limit from date of the incident and a 3-year limit from the date claimant knew of the damage.[1393]
2. Claims shall be brought within [x] years from the date of the moment when the living modified organisms have crossed the border.
3. Claims shall not be admissible unless they are brought within three years from the date that the claimant knew or ought reasonably to have known of the damage and of the person liable, within the time limits established above.
4. Where the damage has been caused by a series of occurrences, time limits established shall run from the date of the last of such occurrences. Where the damage has been caused by a continuous occurrence, such time limits shall run from the end of that continuous occurrence.[1394]
5. Emphasises that time limitations form an intrinsic part of a liability and redress regime.[1395]

Thailand

Proposes the deletion of limitations in time.[1396]

TEXT AGREED TO AT COP-MOP4

For Administrative Approach

Operational text

Domestic law may provide for relative and/or absolute time limits for the recovery of costs and expenses[, provided that such limits shall not be less than [three] years for relative time limit and [twenty] years for absolute time limit].

[1393] Compilation of Views TEG 1.
[1394] WGLR4.
[1395] Friends of the Chair Group, ENB WGLR5#7.
[1396] Compilation of Views TEG 1.

For Civil Liability

Operational text

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

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

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

Non-Parties

Argentina

1. Time limits should be fixed under rules and procedures for liability and redress.[1397]
2. No liability shall be alleged after [10] years from the date of the incident.
3. Liability shall be admissible within [3] years from the date the claimant knew or ought reasonably to have known of the damage provided that within the time limit established pursuant to the previous paragraph.[1398]
4. Supports provisions on relative time limits.[1399]

Australia

A limitation in time will be important to ensure any rules and procedures are relevant and workable.[1400]

[1397] Synthesis of Views WGLR2
[1398] WGLR4.
[1399] ENB WGLR 5#3.
[1400] Notes WGLR4; Synthesis of Texts WGLR4, at Section II C OT 5.

Canada

Where the incident giving rise to a claim has occurred, no proceedings in respect of the claim may be instituted after 5 years from the date on which the events occurred, or became evident to the competent authority, whichever is later.[1401]

United States of America

Supports both absolute and relative time limits, with the exact amount of time for each in brackets.[1402]

Observers- Education

Public Research and Regulation Initiative

1. Limitations in time should be included.
   Rationale:
   a. time limits are standard in liability regimes.
   b. a regime that fails to include this element would significantly restrict public research in modern biotechnology, because of fear by public researchers of unknown/unlimited liability.
2. Claims in relation to damage to biodiversity shall be brought within 3 years from the date the damage is identified or reasonably could have been identified and within 20 years of the transboundary movement unless it can be shown that the damage could not have been identified within the 20-year period. [1403]

Observers- Industry

Global Industry Coalition

1. Maximum time limits must be developed. Supports an absolute limit of 10 to 30 years and a relative limit of 3 years.

[1401] WGLR4.
[1402] ENB WGLR4 Summary; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7A OT 3, 4.
[1403] *Id.*

Rationale: Maximum limits:

a. will strike a balance between holding persons responsible for harm and avoiding legal consequences that deter innovation and technological advancement;
b. are necessary for insurability;
c. promote vigilance and care by potential claimants;
d. ensure fewer evidentiary problems;
e. promote predictability for defendants; and
f. ensure an over-all well functioning system.[1404]

2. Any claim for damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of LMOs shall be brought within 3 years from the date the damage is known or reasonably could have been known but shall in no case be recognized if not brought within 20 years of the conduct alleged to have caused the damage occurred.[1405]

International Grain Trade Coalition

Time limits are necessary.

Rationale: Time limits are:

a. normal under domestic legislation;
b. typically for 3 years;
c. promote vigilance and care by potential claimants;
d. necessary for insurability;
e. ensure fewer evidentiary problems;
f. promote predictability for defendants; and
g. promote an overall well functioning system.[1406]

Observers- NGOs

Greenpeace International

1. Supports a relative limit of 10 years, from
    a. the date of the occurrence of the damage, or

[1404] Compilation of Views WGLR1.
[1405] WGLR4.
[1406] Compilation of Views WGLR1; Compilation of Views WGLR4.

   b. from the date the damage becomes known or reasonably should have known by the claimant, whichever occurs later.
2. Does not support absolute time limit.[1407]
3. Suggests provisions on continuous and series of occurrences.[1408]
4. Supports a maximum time limit upon the liable party to ensure full compensation and remediation.[1409]

South African Civil Society

1. Time limits under other liability regimes vary from 1 to 5 to 30 years.
2. Time limits should be flexible taking into consideration:
   a. the potentially long time period for manifestations of risks involved,
   b. infancy of technology, and
   c. knowledge gaps.
3. Supports no time limit.[1410]

Third World Network

1. Favors a relative time limit of 10 years.
2. No absolute limit. [1411]

Washington Biotechnology Action Council

Does not support limitations in time.

Rationale: Some forms of damage may only manifest in the long term.[1412]

[1407] Compilation of Views WGLR2; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7a OT 11.
[1408] Notes WGLR4; Synthesis of Texts WGLR40, at Section IV 7a OT 11.
[1409] Notes WGLR4.
[1410] *Id.*
[1411] ENB WGLR5#3.
[1412] Notes WGLR4.

(b) Limitation in amount

[For a description of this subject matter, please see: earlier text under 'ABis Additional Elements of an Administrative Approach' at p. 160]

Options for Financial Limitations[1413]

Option 1: Limited liability.
Option 2: Unlimited liability.

Delegates' and Others' Positions on Financial Limitations

The African Group

> Does not support financial limits, preferring language without specified limits. [1414]

Specific Statements by members of the African Group in support of the African Group position

> Statements by: Cameroon,[1415] Egypt,[1416] Guinea Bissau,[1417] Liberia,[1418] Mauritius,[1419] Senegal,[1420] Uganda,[1421] and Zambia[1422].
>
> **Burkina Faso**: supports differentiation in limitations based on categories of damage and environmental accounting.[1423]

[1413] Meeting Report WGLR4.
[1414] Notes WGLR4; ENB WGLR4; ENB WGLR 5#3.
[1415] Compilation of Views TEG II.
[1416] *Id.*
[1417] *Id.*
[1418] ENB WGLR2.
[1419] Compilation of Views TEG II.
[1420] ENB WGLR2.
[1421] Compilation of Views TEG II.
[1422] ENB WGLR2.

Cameroon: proposes that financial limits should be evaluated on a case by case basis due to the potential magnitude of damage.[1424]

Ethiopia: proposes that minimum limitations be set by the COP-MOP. [1425]

Guinea Bissau and **Mauritius**: suggests that there be a case by case determination of financial limits of liability.[1426]

Liberia, **Senegal** and **Zambia**: emphasizes that the focus of a regime should be on justice and equity, therefore no victim should go uncompensated or inadequately compensated. [1427]

Uganda: does not support limitations as it is difficult to estimate harm in advance.[1428]

Brazil

1. Supports either specified financial limits to be determined later in negotiations,[1429] or a case by case determination of limits.[1430]
2. Supports parameters for financial limits set on a case by case basis aimed primarily at redressing damage due to complexity of determining economic value of damage.[1431]
3. Supports limited liability.[1432]
4. Proposes to have cap in the amount but not a minimum amount.[1433]

[1423] ENB WGLR3.
[1424] Compilation of Views TEG 1.
[1425] Compilation of Views WGLR2.
[1426] Compilation of Views TEG 1.
[1427] ENB WGLR2.
[1428] Compilation of Views TEG 1.
[1429] ENB WGLR4 ; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7b OT 3 paragraph 3.
[1430] Compilation of Views TEG 1.
[1431] *Id.*
[1432] ENB WGLR 5#3
[1433] Notes, Friends of the Chair group preceding MOP4.

Cuba

Prefers text with some limits on liability.[1434]

Ecuador

Supports unlimited liability.[1435]

European Union

1. Financial limits must be carefully considered in order to ensure that they are effective and workable. [1436]
2. Notes that floors are often provided in order to harmonize national legislation; however, limitations that are too high may curb insurability.[1437]
3. Prefers limited liability.[1438]

India

1. Supports some financial limit to liability such as a cap, but unsure of the amount.[1439]
2. Notes that financial limits may not be prudent due to the inherently hazardous character and difficulty of assessment of risks involving LMOs.[1440]

Iran

There should be no upper limit on the amount of compensation.

Rationale: Supports the focus of a regime on justice and equity, ensuring that no victim goes uncompensated or inadequately compensated.[1441]

Japan

Proposes a limit: Each claim may result in a maximum of $500,000 total compensation.[1442]

[1434] ENB WGLR4 .
[1435] ENB WGLR 5#3
[1436] Notes WGLR3.
[1437] Compilation of Views WG2.
[1438] ENB WGLR 5#3
[1439] ENB WGLR4; Notes WGLR4.
[1440] Compilation of Views TEG 1.
[1441] ENB WGLR2.
[1442] WGLR4.

Malaysia

Does not prefer a cap on quantum of liability.[1443]

Rationale:

a. the focus should be on justice and equity so that no victim goes uncompensated or inadequately compensated.[1444]
b. a cap, if allowed, should prompt industry to consider other mechanisms such as financial security. It does not inspire much confidence in consumers or Parties of import when industry says that their technology will not cause damage, but requires a financial cap.[1445]

Mexico

Supports unlimited liability.[1446]

New Zealand

Supports text on a maximum financial limit, leaving the amount of the limit unspecified at this point.[1447]

Norway

Supports a limitation on the amount of liability, but not sure how much.[1448]

Palau

Supports some financial limits on liability, but no specified amount at this stage.[1449]

[1443] Note Malaysia's position if there is a cap on liability, then financial security must be available to cover the payment of the remainder of the damage: see later text on 'coverage of liability.'
[1444] Notes WGLR4.
[1445] *Id.*
[1446] ENB WGLR 5#3
[1447] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7b OT 4.
[1448] Notes WGLR4.
[1449] ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7b OT 3.

Panama

Financial limits should be determined by the competent court on a case by case basis.[1450]

Saint Lucia

Suggests a minimum and maximum range for financial limits which ought to be decided on a case by case basis.[1451]

Saudi Arabia

1. Supports text without the specification of exact financial limits.[1452]
2. Text should provide that the competent court determines compensation based on the facts of the particular case and extent of damage. Damage should be fully compensated.[1453]

Sri Lanka

Does not support financial limits.[1454]

Switzerland

1. Proposes that for strict liability there should be limits to the amounts recoverable and this amount should be specified in the instrument. Such limits shall not include any interests or costs awarded by the competent court.
2. The limits of liability specified shall be reviewed by the Meeting of the Parties on a regular basis taking into account the risks of living modified organisms.
3. There shall be no financial limit for fault-based liability.
4. Financial limits should be negotiated with the insurance sector.[1455]

Thailand

Proposes the deletion of reference to financial limits in rules and procedures. [1456]

[1450] ENB WGLR4; Notes WGLR4.
[1451] *Id.*
[1452] ENB WGLR4.
[1453] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7b OT 1.
[1454] *Id.*
[1455] *Id.*

TEXT AGREED TO AT COP-MOP4

For Administrative Approach

Operational text

Domestic law may provide for financial limits for the recovery of costs and expenses[, provided that such limits shall not be less than [z] special drawing rights].

For Civil Liability

Operational text

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

Non-Parties

Argentina

1. Financial limits should be fixed, including maximum financial limits or caps.[1457]
2. Supports text on financial limits, but does not yet support a specified limit. It shall be specified by agreement of Contracting Parties through the mechanism considered appropriate.[1458]

United States of America

1. Suggests the inclusion of text with some limits on liability.[1459]

[1456] *Id*.
[1457] Synthesis of Views WGLR2. ENB WGLR 5#3
[1458] ENB WGLR4.
[1459] ENB WGLR4 Summary.

2. A ceiling on the amount of liability could increase the availability of insurance.[1460]

Observers- Education

Public Research and Regulation Initiative

Financial limits should be included.

Rationale:

a. these are standard in liability regimes.

b. a regime that fails to include this element would significantly restrict public research in modern biotechnology, because of fear by public researchers of unknown/unlimited liability.[1461]

Observers- Industry

Global Industry Coalition

1. Financial caps on liability will render a system of insurance workable.[1462]
2. If national and international rules do not meet the criteria for insurability then insurance will not be available.[1463]
3. Total costs of compensation and redress measures shall be for remediation of actual damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of LMOs and shall not exceed [x] sum.[1464]

International Grain Trade Coalition

Supports a maximum claim that any person or entity could bring.[1465] This could be determined by the amount of cargo or some multiplier of that amount.[1466]

[1460] Compilation of Views WGLR1.
[1461] *Id.*
[1462] *Id.*
[1463] ENB WGLR2.
[1464] WGLR4.
[1465] Compilation of Views WGLR4.

Rationale:
Such a limitation on liability would strike a balance between holding persons responsible for the harm they may cause, and avoiding legal consequences that severely disrupt the trade, deter advances in technology, or otherwise undermine the ability to ship and receive food and grain worldwide.[1467]

Observers- NGOs

Greenpeace International

1. Does not support any financial limits.
   Rationale:
   a. insurability only relates to financial limits as a decision made by the insurance industry on provision of insurance or price.
   b. limitations amount to subsidies to industry for their choice of risky actions likely to cause damage and place burden upon society at large and the environment.
   c. polluter pays principle must be implemented. If companies cannot or will not guarantee payment of the damages that their products may cause, the liability scheme will not be effective or workable.
2. If there is no compulsory insurance coverage, arguments for unlimited liability will vanish.
   Rationale:
   One of the reasons for limited liability is that insurers will not underwrite unlimited liability.[1468]

South African Civil Society

Do not support any limitations.[1469]

[1466] Compilation of Views TEG 1
[1467] Compilation of Views TEG 1; Compilation of Views WGLR1.
[1468] Notes WGLR3.
[1469] *Id.*

Third World Network

Proposes that there be no upper financial limit.[1470]

Washington Biotechnology Action Council

The exporter might not be able to pay compensation in the case of an accident, which is why the question of caps (limitation in amount) is relevant.[1471]

v. Coverage of liability

[For a description of this subject matter, please see: earlier text under 'ABis Additional Elements of an Administrative Approach' at p. 160]

Options for Coverage of Liability[1472]

Option 1: Compulsory financial security.
Option 2: Voluntary financial security.
Option 3: Domestic law approach.

Delegates' and Others' Positions on Coverage of Liability

The African Group

1. Supports text requiring persons liable to maintain insurance or other financial guarantees for the period of the time limit of liability.[1473]
2. The Party of export may do so by notifying a declaration of self insurance through the Biosafety Clearing-House.

[1470] *Id.*
[1471] *Id.*
[1472] Meeting Report WGLR4.
[1473] ENB WGLR4; Notes, Friends of the Chair group preceding MOP4.

3. May also include: insurance, bonds or other financial guarantees.
4. Proof of coverage of the liability of the Party of export or any other person shall be delivered to the competent authorities of the State of import/transit; and this notified to parties through the Biosafety Clearing-House.
5. Any claim under this Protocol may be asserted directly against any person providing insurance, bonds or other financial guarantees. The insurer or the person providing the financial guarantee shall have the right to require the person liable to be joined in the proceedings. Insurer and persons providing financial guarantees may invoke the defences which the person liable would be entitled to invoke.[1474]
6. The amount of financial security should be based on the regulatory framework of the party of import and factors such as:
    a. seriousness;
    b. likelihood; and
    c. potential costs of damage.[1475]
7. Opposes the obligation to require evidence of financial security upon import of LMOs, arguing for national implementation.[1476]

Specific Statements by members of the African Group in support of the African Group position

Egypt: financial security is necessary to share costs of redress beyond the operator.[1477]

Liberia: countries should have the option to require financial security. Must not take away this right to provide for risks of products. [1478]

Brazil

1. Opposes the obligation to require evidence of financial security upon import of LMOs.

[1474] WGLR4.
[1475] ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 8 OT 5.
[1476] Friends of the Chair Group, ENB WGLR5#7.
[1477] Notes WGLR3.
[1478] Notes, Friends of the Chair group preceding MOP4.

Rationale: it could hinder South-South trade.[1479]

2. Strongly proposes to delete the section.
   Rationale:
   a. do not want text that will result in inequality in the market;
   b. should not create insurance for product which we do not know whether hazardous or not;
   c. creates discrimination between local products and imported products.
   d. product will be more expensive for the consumer;
   e. will limit science and technology research;
   f. will violate Parties' another international obligations.[1480]

Colombia

Supports the option on voluntary financial security.[1481]

European Union

1. Encourages the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic measures implementing this decision.
2. The need for financial security at the international level may be addressed by the COP-MOP after the proposed review period.[1482]
3. Supports the option on voluntary financial security.[1483]

India

1. Supports mandatory or compulsory financial security to be provided by the operator backed further by residual State liability.[1484]

[1479] Friends of the Chair Group, ENB WGLR5#7.
[1480] Notes, Friends of the Chair group preceding MOP4.
[1481] ENB WGLR 5#3.
[1482] Notes WGLR4.
[1483] ENB WGLR 5#3.

2. Prefers the arrangement of voluntary financial security mechanisms to supplement the damage caused, such as a fund.[1485]
3. Supports the option on voluntary financial security.[1486]

Indonesia

Insurance scheme is important, as many companies do not pay up when liability claims are made against them.[1487]

Iran

Supports the inclusion of compulsory financial security.[1488]

Japan

1. Parties should encourage legal or natural persons in operational control of LMOs to maintain adequate insurance or other financial security.[1489]
2. Supports the option on voluntary financial security.[1490]

Malaysia

1. Proposes that operators be required to provide insurance, bonds or other financial guarantees covering their liability.[1491]
2. If there is a cap on liability, then financial security must be available to cover the damage over and above the capped amount.[1492]
3. The provision could be applied in a non-discriminatory manner and will not violate any WTO obligation.[1493]

[1484] ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 8 OT 4.
[1485] ENB WGLR4 Summary.
[1486] ENB WGLR 5#3.
[1487] ENB BSWG -3 Summary.
[1488] *Id.*
[1489] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 8 OT 6.
[1490] ENB WGLR 5#3; Notes, Friends of the Chair group preceding MOP4.
[1491] ENB WGLR1 Summary; ENB WGLR4 ; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 8 OT 1.
[1492] ENB WGLR4; Notes WGLR4.

Mexico

1. Suggests the inclusion of other financial mechanisms and financial security, rather than insurance.[1494]
2. Prefers not to have any text in this section and it is unfair to impose obligations on a non-Party. [1495]

New Zealand

1. Willing to consider compulsory insurance, if available.[1496]
2. Does not require insurance in its national regime.[1497]
3. Opposes the obligation to require evidence of financial security upon import of LMOs, as it may be contrary to World Trade Organization obligations.[1498]

Norway

1. Supports the requirement of insurance cover, bonds or other financial guarantees during the period of the time limit of liability. [1499]
2. The requirement of insurance may take into consideration the:
    a. likelihood;
    b. seriousness;
    c. possible costs of damage or restoration; and
    d. the possibilities to offer financial security.[1500]
3. Supports the option on compulsory financial security.[1501]
4. Supports that this section on the provision of financial security to be kept. It is the sovereign right of Parties to do so and it was

[1493] Notes, Friends of the Chair, WGLR5; Notes, Friends of the Chair group preceding MOP4.
[1494] ENB COP-MOP-1 Summary.
[1495] Notes, Friends of the Chair group preceding MOP4.
[1496] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 8 OT 3.
[1497] ENB WGLR4; Notes WGLR4.
[1498] Friends of the Chair Group, ENB WGLR5#7.
[1499] Compilation of Views WGLR4; ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 8 OT 5; Notes, Friends of the Chair group preceding MOP4.
[1500] Compilation of Views WGLR2; Notes WGLR3; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 7a OT 6.
[1501] ENB WGLR 5#3.

agreed in Cartagena to have this provision included in the text.[1502]

Palau

1. Any person that could be held strictly liable should be required to establish and maintain insurance, bonds or other financial guarantees for an amount no less than a stated minimum during the period of time of liability.[1503]
2. The persons holding such financial guarantees must inform the Biosafety Clearing House and the Competent Authorities of any relevant State of import or transit.[1504]
3. Financial guarantees will only be used to provide compensation for damage.[1505]
4. Supports the section. Industry said there is a problem in getting insurance back in the years. It is because the risk is unquantified and risk is unknown. This helps the insurance as they now know the cap to the amount. [1506]

Paraguay

Says that this section will create imbalance in trade. [1507]

Peru

Suggests the inclusion of reference to other financial guarantees, beyond insurance.[1508]

Sri Lanka

Supports the further consideration of modes of financial security, including insurance.[1509]

[1502] Notes, Friends of the Chair group preceding MOP4.
[1503] ENB WGLR4; Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 8 OT 1.
[1504] *Id.*
[1505] *Id.*
[1506] Notes, Friends of the Chair group preceding MOP4.
[1507] *Id.*
[1508] ENB COP-MOP1 Summary.
[1509] *Id.*

Switzerland

1. Notes the current lack of availability of insurance and encourages the exploration of alternative insurance arrangements such as insurance pooling.[1510]
2. Proposes the following text:
    a. the exporter shall ensure that liability for amounts not less than a specified minimum limits for financial securities is and shall remain covered by financial security such as insurance, bonds or other financial guarantees including financial mechanisms providing compensation in the event of insolvency. For State-owned operators, Parties may opt to make a declaration of self-insurance.
    b. the specified minimum limits for financial securities shall be reviewed by the MOP on a regular basis taking into account the risks of living modified organisms.
    c. any claim may be made directly against any person providing financial cover; but a Party may exclude this right. This must be notified to the appropriate authority at a specified time.
    d. the insurer or the person providing the financial cover may
        i. join the person liable in the proceedings; and
        ii. invoke the defences that the person liable would be entitled to invoke.
    e. the insured may be required to pay the insurers, deductibles or co-payments; but this shall not be a defence against the person who has suffered the damage.[1511]

Thailand

Recommends voluntary financial security or compulsory financial security where required by the competent national authority on a case by case basis or on the basis of strict liability.[1512]

[1510] ENB WGLR2.
[1511] WGLR4.
[1512] *Id.*

TEXT AGREED TO AT COP-MOP4

For both Administrative Approach and Civil Liability

Operational text

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

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

Non-Parties

Argentina

1. Notes that financial security is generally a characteristic of strict liability regimes.[1513]
2. Expresses skepticism about the application of financial security because:
   a. insurance does not exist at the national level for environmental damage and is not very attractive to insurance companies.[1514]
   b. unsure of the capacity that national insurance companies may have to cover this damage.[1515]
   c. no insurance company in Argentina has any clause on damage to the environment, therefore only large

[1513] Synthesis of Views WGLR2.
[1514] *Id.*
[1515] *Id.*

multinational insurance companies would be able to provide coverage.[1516]

Australia

Cautions against the inclusion of any form of financial security that would restrict the movement of LMOs.[1517]

Canada

For purposes of the administrative procedures, competent authorities are encouraged to require operators to obtain financial security for the activities identified by the competent authority.[1518]

United States of America

Insurance must be available for practically functioning rules and procedures. This should be considered in defining scope of damage.[1519]

Observers- Education

Public Research and Regulation Initiative

1. Insurability is necessary if financial security is to be required.
2. Insurance companies do not insure LMO-related risks because they are unable to measure the risks and therefore cannot set premiums. Suggests identifying specific risk scenarios and developing insurance solutions that specifically address those risks. [1520]
3. National corporate and other applicable laws concerning financial security for the conduct of commercial, and research and development, activities in the Party where the damage exists shall apply.[1521]

[1516] *Id.*
[1517] ENB WGLR2.
[1518] WGLR4.
[1519] ENB WGLR2.
[1520] *Id.*
[1521] WGLR4.

Observers- Industry

Global Industry Coalition

1. Liability risk must be insurable. Financial responsibility of private parties is generally governed by national law.[1522]
2. If national and international rules do not meet the criteria for insurability then insurance will not be available.[1523]
3. National corporate and other applicable laws concerning financial security for the conduct of commercial, and research and development, activities in the Party where the damage exists shall apply.[1524]

International Grain Trade Coalition

1. Supports the inclusion of financial security that is affordable.
2. Notes that financial security will only be available if liability and redress is tailored narrowly to damage to biodiversity in an uncomplicated manner.[1525]

Organic Agriculture Protection Fund

Supports compulsory financial security.[1526]

Observers- NGOs

ECOROPA

Notes that insurance may not be available and that States should not embark on risks considered incalculable by insurance companies.[1527]

Greenpeace International

1. Financial security is essential to a liability regime.[1528]

[1522] Compilation of Views WGLR1.
[1523] ENB WGLR2.
[1524] WGLR4.
[1525] Compilation of Views WGLR4.
[1526] Compilation of Views WGLR2.
[1527] ENB WGLR1 Summary.
[1528] Notes WGLR4.

2. The Party of export and any other liable party should be required to maintain financial security during the period of the time limit of liability, in the form of insurance, bonds or other financial guarantees.
3. A document reflecting the coverage of the liability of the exporter and the notifier or of the importer shall accompany the notification referred to in article 8 or Annex II of the 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.
4. 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 to be joined in the proceedings.[1529]
5. Insurance limits may be provided for to a certain limit.[1530]
6. Insurance should be available for liability beyond any financial cap set.

   Rationale:

   The diffuse and uncontrolled nature of GMOs as a reason for such financial security to ensure compensation of damage beyond the cap on liability.[1531]

South African Civil Society

Understands that no insurance is currently available and would only be applicable to monetary compensation.[1532]

Third World Network

Suggests a minimum limit for financial security with proof shown in order to gain legal permission for activities.[1533]

[1529] Notes WGLR4; Synthesis of Texts WGLR4, at Section IV 8 OT 1

[1530] Compilation of Views WGLR2.

[1531] ENB WGLR4; Notes WGLR4.

[1532] *Id.*

[1533] *Id.*

6

SUPPLEMENTARY COMPENSATION SCHEME

A. Residual State liability

This is a form of a supplementary compensation scheme. The State is made liable to pay the damages in certain situations. One such situation is when the award of damages cannot be satisfied by the person held liable; or the person cannot be identified or the operator is unable to remedy the damage. The liability of the State will, usually, be in respect of claimants who are closely connected with it: nationals, or those who are domiciled or resident in that State. Note that delegates have already decided that there should be no primary State liability.[1534]

B. Supplementary collective compensation arrangements

This is a compensation arrangement that is organized either collectively or by the private sector. It could be compulsory or voluntary. It could be established by the private sector or by an interested body such as the COP-MOP. The former approach could consist of a voluntary compensation scheme organized by the private sector through contractual agreements between some key

[1534] There were 3 options presented as at the WGLR4, namely: primary State liability, residual State liability in combination with primary liability of the operator, and, no State liability.

biotechnology players.[1535] The arrangement could stipulate that the member contracting company responsible for the damage will compensate the person harmed based on the polluter pays principle after the damage is proven pursuant to criteria it establishes. It is not a fund but rather a form of self-insurance. The latter collective arrangement could be a mechanism under the COP-MOP based on contributions (voluntary or compulsory) from Parties to the protocol and others. The money collected could be disbursed to States where the damage occurred if that has not been otherwise redressed.

A separate fund could also be established. The money could come from either a combination of public and private funds or solely be privately funded by the biotechnology industry.[1536] Contributions could be voluntary or mandatory. The fund could be created under the instrument or in response to the occurrence of an incident. The fund could be used to provide aid for access to justice to victims of the damage, as well as to pay for response and clean-up measures especially for large scale cases of contamination or other damage under the administrative approach. A fund could also serve as a supplementary source of compensation once all other liable parties' ability to pay is exhausted. It is particularly useful where the operator is unable to make the payment of the compensation awarded under the civil liability approach; or the compensation is not payable in full. Fund mechanisms have been created under both the 1969 Brussels International Convention on Civil Liability for Oil Pollution Damage (CLC) and the Basel Convention on the Transboundary Movement of Hazardous Wastes.

[1535] Six major agricultural biotechnology companies have agreed to consider this arrangement to enter into contractual arrangements amongst themselves: BASF, Bayer CropScience, Dow AgroSciences, DuPont/Pioneer, Monsanto; Syngenta: Statement by Thomas Carrato of the Global Industry Coalition, Notes, WGLR5, 17 March 2008; CBD Report WGLR5, UNEP/CBD/BS/WG-L&R/5/L.1 (19 March 2008 Para 35 – 37, pp 6-7); see elaboration later under Global Industry Coalition statement in respect of 'Delegates and Others' Positions on Supplementary Collective Compensation'.

[1536] Meeting Report WG-3, at Annex II 61.

Options for Residual State Liability[1537]

Option 1: Residual State liability of:

a. any State,
b. State of export, or
c. State of residence or principal place of business of the liable person or entity.

Option 2: No State liability.

Delegates' and Others' Positions on Residual State Liability

The African Group

Supports placing primary liability on the operator, or the person responsible for intentional or unintentional transboundary movements of LMOs, with residual State liability for damage resulting from transboundary movement of LMOs on the unsatisfied portion of that claim. [1538]

Specific Statements by members of the African Group in support of the African Group position

Statements of support by: Cameroon,[1539] Egypt,[1540] Ethiopia,[1541] Liberia,[1542] Mauritius,[1543] Morocco,[1544] South Africa,[1545] and Uganda[1546].

[1537] Synthesis of Texts WGLR4, at Section IV 8.
[1538] ENB WGLR4; Synthesis of Texts WG4, at Section IV 2b OT4*;* Notes WGLR5.
[1539] Compilation of Views TEG 1.
[1540] ENB WGLR1 Summary.
[1541] Compilation of Views WGLR2.
[1542] Notes WGLR4.
[1543] Compilation of Views TEG 1.
[1544] ENB WGLR1 Summary.
[1545] Notes WGLR3.
[1546] Compilation of Views TEG 1.

Burkina Faso: primary liability shall be that of the operator with residual state liability - of the State of the operator.[1547]

Cameroon: channeling first to the operator reflects the polluter-pays-principle of Agenda 21.[1548]

Ethiopia: retention of the element on residual State liability.[1549]

Bangladesh

1. Does not support State liability.
   Rationale: Bangladesh has an open market economy with less control of its exports and imports, therefore trade in LMOs may not be in the control of the State.[1550]
2. Supports placing primary liability with the operator, with residual State liability for damage resulting from transboundary movement of LMOs.[1551]

Brazil

Does not support any form of State liability,[1552] either primary, or residual.[1553]

China

Proposes deletion of this section.[1554]

Colombia

1. In favor of residual State liability.[1555]

[1547] Daily Notes from the Contact Group established during Fourth Meeting Of The Parties To The Cartagena Protocol On Biosafety (May 2008) [‘Notes, Contact Group at MOP4’].
[1548] *Id.*
[1549] Friends of the Chair Group, ENB WGLR5#7.
[1550] Compilation of Views TEG 1.
[1551] ENB WGLR 5#3.
[1552] Notes WGLR4.
[1553] ENB WGLR4; Notes, Contact Group at MOP4.
[1554] ENB WGLR 5#3.
[1555] ENB WGLR4; Notes WGLR3; Notes WGLR4; ENB WGLR4 Summary; Synthesis of Texts WGLR4, at Section V A OT 2.

2. Supports making the State liable where the person is a national and unable to fully obtain compensation for damages.[1556]

Cuba

Supports placing primary liability with the operator, with residual State liability for damage resulting from transboundary movement of LMOs.

Ecuador

1. Supports residual State liability.[1557]
2. Proposes deletion of this section.[1558]

European Union

Does not support the inclusion of State liability, either primary or residual.[1559]

India

1. State liability should apply up to the due diligence standard.[1560]
2. A State should be primarily liable as it willingly permitted the use of LMOs in its country.[1561]
3. Supports residual State liability to ensure compensation to the victim.[1562]
4. Supports placing primary liability with the operator, with residual State liability for damage resulting from transboundary movement of LMOs.[1563]

Indonesia

Opposes State responsibility because it contradicts domestic law.[1564]

Japan

Does not support primary or residual State liability.[1565]

[1556] ENB WGLR 5#3.
[1557] Notes WGLR4; ENB WGLR4.
[1558] ENB WGLR 5#3.
[1559] Notes WGLR4. Friends of the Chair Group, ENB WGLR5#7.
[1560] Notes WGLR4.
[1561] Compilation of Views TEG 1.
[1562] Notes WGLR4; ENB WGLR4 Summary.
[1563] ENB WGLR 5#3; Notes, Contact Group at MOP4.
[1564] Notes WGLR4; ENB WGLR4 Summary.

Malaysia

1. Does not support primary State liability, unless the State is the operator.[1566]
2. Supports possible inclusion of some form of residual State liability, as a compensatory element when the claimant does not obtain his compensation fully from the person liable. The State liable should be the State of export or State of the national causing the damage;[1567] but only in limited situations.
   Rationale: Sympathetic to concerns expressed by several Parties that the party of export should not be exonerated and that there could be recourse to it in certain limited situations[1568]

Mexico

Does not support primary or residual State liability and proposes the deletion of this option.[1569]

New Zealand

1. Does not support State liability, particularly primary State liability.[1570]
2. New Zealand does not support residual State liability, as New Zealand supports the polluter pays principle.[1571]

Norway

1. Residual State liability should be addressed, but not until other issues of private liability are addressed.[1572]
   Rationale: State responsibility should not be the only recourse available.[1573]
2. Supports retention of the element on residual State liability.[1574]

[1565] Notes WGLR4. ENB WGLR 5#3.
[1566] ENB WGLR2; Notes WGLR4.
[1567] ENB WGLR4; Notes WGLR4.
[1568] Notes WGLR3.
[1569] ENB WGLR4; ENB WGLR2; ENB WGLR 5#3.
[1570] *Id.*
[1571] Notes WGLR4.
[1572] ENB WGLR3.
[1573] Notes WGLR3.
[1574] Friends of the Chair Group, ENB WGLR5#7.

Palau

Expresses reticence about the use of residual State liability.[1575]
Rationale:

a. would create further obstacles for claimants and ratification of any rules and procedures where States would be liable.[1576]
b. in Palau, for example, State liability would require approval of the national congress.[1577]
c. in a small country like Palau, it is possible the country could be bankrupt if it was required to pay for remediation on behalf of the operator.[1578]

Panama

Supports residual State liability upon the State of residence of the liable party, in order to ensure compensation to the victim.[1579]

Paraguay

Opposed to primary State liability.[1580]

Philippines

Supports retention of residual State liability.[1581]

Saint Lucia

Supports partial liability on the State of import, only if import was authorized.[1582]

South Korea

Supports making the State liable where the person is a national and unable to fully meet compensation for damages.[1583]

[1575] Notes WGLR4.
[1576] Notes WGLR4.
[1577] ENB WGLR4.
[1578] Notes WGLR4. ENB WGLR 5#3.
[1579] ENB WGLR4 Summary; Notes WGLR4.
[1580] ENB WGLR4.
[1581] Friends of the Chair Group, ENB WGLR5#7.
[1582] Compilation of Views TEG 1.
[1583] ENB WGLR 5#3.

Sri Lanka

Supports either primary or secondary State liability.[1584]

Switzerland

Does not support State liability,[1585] unless the State is the owner or operator of a relevant activity.[1586]

Thailand

State liability is not necessary,[1587] but supports the possible inclusion of some form of residual State liability.[1588]

Trinidad and Tobago

Notes that channeling liability to importing States that rely on information they receive during authorization process would be harsh.[1589]

[1584] *Id.*
[1585] Notes WGLR4.
[1586] Compilation of Views TEG 1.
[1587] Compilation of views WGLR3.
[1588] ENB WGLR4 ; Notes WGLR4.
[1589] ENB WGLR2.

TEXT AGREED TO AT COP-MOP4

Operational text

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

{alternative text}

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

Non-Parties

Argentina

1. Does not support primary State liability.[1590]
2. A State may be held liable only if the State has carried out the activities to the exclusion of individuals, as seen in the Space Objects Convention and/or has not taken appropriate precautions against accidents from activities with a high degree of risk.[1591]

Australia

State liability is inappropriate as States are often not directly responsible for importing or exporting LMOs.[1592]

[1590] ENB WGLR4.

[1591] Synthesis of Proposed Texts ; Views on Approaches, Options ; Issues Identified Pertaining to Liability and Redress in the Context of Article 27 of the Biosafety Protocol Note by the Co-Chairs, , in preparation for the second meeting of the Ad Hoc Open-Ended Working Group on Liability and Redress under the Cartagena Protocol on Biosafety, UNEP/CBD/BS/WG-L&R/2/2 (19 January 2006) at, http://www.cbd.int/doc/meetings/bs/bswglr-02/official/bswglr-02-02-en.pdf ['Synthesis of Views WGLR2'].

[1592] *Id.*

Canada

1. Does not support primary State liability.
2. State liability should not be included in rules and procedures.
   Rationale: the only precedent that exists for State liability in a civil regime is the Space Objects Convention.[1593]

United States of America

State liability is not appropriate unless the State itself is conducting the activity.[1594]

Observers- Education

Public Research and Regulation Initiative

1. If liability for damage to biodiversity cannot be established, the Party in which the damage exists shall be responsible for any necessary restoration or other remedial action in accordance with its obligations under the Convention on Biological Diversity.
2. National corporate and other applicable laws concerning financial insufficiencies in the Party where the damage exists shall apply.[1595]

Observers- Industry

Global Industry Coalition

1. States should be primarily liable, if at fault.[1596]
2. States should bear residual liability if a private operator is at fault.[1597]
3. If liability for damage to biodiversity cannot be established because:

[1593] Compilation of Views TEG 1; Notes WGLR4.
[1594] Compilation of Views WGLR1.
[1595] WGLR4.
[1596] Compilation of Views WGLR1; Compilation of Views WGLR2.
[1597] *Id.*

a. no person can be identified;
b. a complete defence applies; or
c. the claim is time-barred,

the Party in which the damage exists shall be responsible for any necessary restoration or other remedial action in accordance with its obligations under the Convention on Biological Diversity.

4. Where liability is assigned to a person but the financial limit provided for has been reached, the Party in which the damage exists shall be responsible for any additional remedial action that may be necessary in accordance with its obligations under the Convention on Biological Diversity.
5. National corporate and other applicable laws concerning financial insufficiencies in the Party where the damage exists shall apply.[1598]

Organic Agriculture Protection Fund

Supports primary State liability.[1599]

Observers- NGOs

Greenpeace International

1. Supports residual State liability of the State where the liable person or legal entity is domiciled or resident.
2. Proposes that where payments by a Fund (to be established) for damage, including compensation and the costs of prevention, remediation, restoration or reinstatement of the environment, are insufficient, the exporting Contracting Party shall be liable to pay the residual amount payable under this Protocol.
3. Further proposes that if a person liable is 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.[1600]

[1598] WGLR4.
[1599] Compilation of Views WGLR1; Compilation of Views WGLR2.
[1600] Notes WGLR4; Synthesis of Texts WGLR4, at Section V A OT 1.

4. Suggests liability could also be channeled to the exporting party, in order to bypass "shell entities." [1601]

South African Civil Society

1. Does not support State liability.
   Rationale:
   a. State liability places too much pressure on importing State, which is already pressured to import LMOs.
   b. Citizens already have right to hold their own government liable, therefore it is not necessary to establish this in an international regime.[1602]
2. Subsidiary State liability is an option.[1603]

Washington Biotechnology Action Council

If no operator exists residual State liability could apply.[1604]

Options for Supplementary Collective Compensation Arrangements[1605]

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: Combination of public and private funds.

[1601] Compilation of Views WGLR2.
[1602] *Id*.
[1603] *Id*.
[1604] Notes WGLR4.
[1605] Meeting Report WG-3, at Annex II 61.

Delegates' and Others' Positions on Supplementary Collective Compensation

The African Group

1. Supports the creation of a fund mechanism.
2. Any further liability that remains uncompensated should be paid by a fund.
3. A fund should ensure adequate and prompt compensation to cover the remaining uncompensated cost of damage.[1606]
4. A fund should be a well organized administrative mechanism created in advance on the basis of guarantees and contributions of biotechnology industry and other operators. The amount of such a guarantee and contribution can be determined on the basis of identified criteria.[1607]
5. Favors the operational text where compensation under the Protocol does not cover the costs of damage. Supports a supplementary compensation fund based on contributions from the biotechnology industry and other operators.[1608]

Specific Statements by members of the African Group in support of the African Group position

> Statements of support by: Burkina Faso,[1609] Cameroon,[1610] Egypt,[1611] Ethiopia,[1612] Kenya,[1613] Liberia,[1614] Senegal,[1615] and Zimbabwe[1616].

[1606] Notes WGLR4; Synthesis of Texts WGLR4, at Section V B OT 1; ENB WGLR 5#7; Notes WGLR5.
[1607] ENB WGLR2; Notes WGLR4; Synthesis of Texts WGLR4, at Section V B OT 1.
[1608] ENB WGLR 5#7.
[1609] Notes WGLR3.
[1610] ENB ICCP3 Summary.
[1611] Notes WGLR3.
[1612] Notes WGLR3; Compilation of Views WGLR2.
[1613] Notes WGLR3.
[1614] *Id.*
[1615] ENB WGLR2.
[1616] *Id.*

Burkina Faso, supported by **Liberia**: emphasizes that a supplementary compensation fund is necessary.
Rationale:

a. there must be a guarantee that damage will be redressed, especially in countries such as Burkina Faso which does not have the appropriate capacity to deal with damage on its own.
b. a fund could react quickly to damage.

A fund must be set up in advance, as it would be no use to set up a fund after damage occurs. Contributions must be made based on set criteria determined by the WG. A non-exhaustive list of criteria includes:

a. size of damage;
b. area of damage;
c. location of damage;
d. type of introduction of the LMO;
e. type of use (e.g. commercial or social use) of the LMO;
f. type of plant; and
g. type of gene (e.g. a toxin gene).[1617]

Senegal: stresses that most liability regimes have an international compensation fund in case an operator is insolvent.[1618]

South Africa: states that supplementary compensation should be supplementary to both forms of primary compensation.[1619]

Uganda, supported by **Zimbabwe**:[1620] need for the formulation of a list of situations a compensation fund would cover.[1621]

1617 Notes WGLR3.
1618 Notes WGLR4.
1619 Friends of the Chair Group, ENB WGLR5#7.
1620 ENB WGLR2.
1621 ENB WGLR1 Summary.

Bangladesh

Supports operational text for the creation of a fund to pay for costs of preventive, mitigating, restoring and reinstating measures where operator has insufficient funds or security.[1622]

Brazil

Agrees with GRULAC (see later, **Mexico**) and says that the proposed approach by Switzerland (see later) and in Piece C of Core Element Paper, is new and requires further examination.[1623]

China

1. Supports establishing a fund based on contributions by biotechnology industry and other operators.[1624]
2. Does not support text providing for payment by the exporting Party of any residual amount if the payment available through the fund are insufficient.[1625]

Colombia

1. Supports a supplementary compensation fund based on contributions from the biotechnology industry and other operators.[1626]
2. A fund would apply to situations where a company/operator is insolvent.[1627] In these cases a fund would be necessary for a fully functioning instrument on liability and redress.[1628]
3. Supports operational text for the creation of a fund to pay for costs of preventive, mitigating, restoring and reinstating measures where operator has insufficient funds or security.[1629]

[1622] Notes, Friends of the Chair Group, WGLR5.
[1623] Friends of the Chair Group, ENB WGLR5#7*;* Notes, Friends of the Chair Group, WGLR5.
[1624] ENB WGLR4 Summary. ENB WGLR 5#3.
[1625] Notes WGLR4; Synthesis of Texts WGLR4, at Section V A OT 5.
[1626] ENB WGLR1 Summary.
[1627] Notes WGLR4.
[1628] *Id.*
[1629] ENB WGLR 5#3.

Cuba

Supports operational text for the creation of a fund to pay for costs of preventive, mitigating, restoring and reinstating measures where operator has insufficient funds or security.[1630]

European Union

1. Supports the possible inclusion of a supplementary fund based on contributions from the private sector.[1631] This fund would be available for specific larger cases of damage and exceptional accidents or disasters.[1632]
2. Supports a 'no provision' option. Notes the readiness of industry to partake in the scheme and invites participants to respond positively to this and cautions that making this a binding fund supplementary to both forms of primary compensation scheme (administrative approach and civil liability) was not the most constructive approach to pursuing a relationship with industry.[1633]
3. Does not support a legally binding scheme and does not support a fund to be set up under COP MOP. [1634]

India

1. Supports operational text on additional/supplementary funding mechanisms to ensure appropriate payments for damage.[1635]
2. Where compensation under this Protocol does not cover the costs of damage, additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using the fund established hereunder.[1636]

[1630] Notes, Friends of the Chair Group, WGLR5.
[1631] Notes WGLR4; ENB WGLR4 Summary.
[1632] Notes WGLR4; Compilation of Views WGLR2.
[1633] Friends of the Chair Group, ENB WGLR5#7.
[1634] Notes, Contact Group at MOP4.
[1635] WGLR4; Friends of the Chair Group, ENB WGLR 5#7.
[1636] Notes, Contact Group at MOP4.

Indonesia

Supports operational text for the creation of a fund to pay for costs of preventive, mitigating, restoring and reinstating measures where operator has insufficient funds or security.[1637]

Japan

1. Does not support the creation of a fund mechanism for supplementary compensation.
2. Parties may discuss the modalities of a voluntary arrangement to supplement the compensation for cases where the damage exceeds the financial limit as set out in this document; or the Parties may consider the necessity of any supplementary financial arrangement in light of the experience gained through the implementation of the rules set out in this document.[1638]
3. Japan supports the deletion of text related, or referring, to a fund and prefers it to be supplementary to the administrative approach only.[1639]

Malaysia

1. Supports the development of a fund based on contributions from the biotech industry[1640] for situations where the provisions of the instrument do not adequately cover the costs of damage.[1641]

   Rationale:

   a. The creation of a fund with contributions by industry will inspire confidence and trust in the technology and a means of demonstrating responsible best practices.[1642]
   b. This will also ensure that no damage will go uncompensated.[1643]

[1637] Friends of the Chair Group, ENB WGLR 5#7.
[1638] Notes WGLR4; Synthesis of Texts WGLR4, at Section VB OT4.
[1639] Notes WGLR4. Friends of the Chair Group, ENB WGLR5#7; Notes, Contact Group at MOP4.
[1640] ENB WGLR1 Summary.
[1641] Notes WGLR4.
[1642] Notes WGLR4; Notes WGLR3.
[1643] Notes WGLR3; ENB WGLR4 Summary.

2. Supports operational text for the creation of a fund to pay for costs of preventive, mitigating, restoring and reinstating measures where operator has insufficient funds or security.[1644] Says that the industry should contribute to this fund and that supplementary compensation should be supplementary to both forms of primary compensation. [1645]

Mexico

On behalf of GRULAC, the supplementary compensation scheme proposed for the reimbursement of costs of response and restoration measures to redress damage, requires further discussion.[1646]

New Zealand

1. Expresses that there are many questions and concerns about the functionality of a fund mechanism due to:
    a. the large range of technologies;
    b. events and damage that could be addressed by another scheme;
    c. the potential effect of a fund on research; and
    d. the application of the polluter pays principle.[1647]
2. Would like further information about how a fund would operate.[1648]

Norway

1. Open to the consideration of supplementary collective compensation arrangements.[1649]
2. A potential fund should have legal personality and created by contributions by the operator.[1650] Contributions could be obligatory or optional.[1651] A fund mechanism would be used if it

[1644] ENB WGLR 5#3.
[1645] Friends of the Chair Group, ENB WGLR5#7.
[1646] Friends of the Chair Group, ENB WGLR5#7.
[1647] ENB WGLR4 Summary.
[1648] Notes WGLR4.
[1649] Compilation of Views WGLR4.
[1650] Notes WGLR4.
[1651] Notes WGLR4; ENB WGLR4 Summary.

were not possible to identify a responsible person, so the victim would not have to absorb the costs of restoration.[1652]

3. Supports, contingent on the scheme being in accordance with the polluter pays principle.[1653]

Palau

1. Supplementary collective compensation does not fully implement the principle of polluter pays, but may address concerns about the need for compensation if no one can be held responsible.[1654]
2. More information on experience using a fund would be helpful to further consideration of supplementary collective compensation.[1655]
3. Supports operational text for the creation of a fund to pay for costs of preventive, mitigating, restoring and reinstating measures where operator has insufficient funds or security.[1656]
4. Where compensation under this Protocol does not cover the costs of damage, additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using the fund established hereunder.[1657]

Panama

1. Supports the creation of a fund mechanism to ensure that the victim does not have to bear its own losses and be left destitute.[1658]
2. The Parties may consider the necessity of any supplementary financial arrangement in light of the experience gained through the implementation of the rules set out in this document.[1659]

[1652] ENB WGLR4 Summary.
[1653] Friends of the Chair Group, ENB WGLR5#7.
[1654] ENB WGLR4 Summary; Notes WGLR4.
[1655] Notes WGLR4.
[1656] ENB WGLR 5#3.
[1657] Notes, Contact Group at MOP4.
[1658] ENB WGLR4 Summary; Notes WGLR4.
[1659] Notes, Contact Group at MOP4.

South Korea

Supports operational text on additional/supplementary funding mechanisms to ensure appropriate payments for damage. [1660]

Sri Lanka

Supports the creation of a fund financed by contributions from the biotechnology industry to be made in advance on the basis of criteria to be determined, or a combination of public and private funds. [1661]

Switzerland

1. A fund is incompatible with the polluter pays principle.[1662]
2. Tables a proposal setting out that: an affected party may request the COP-MOP to allocate financial resources to redress damage that has not been redressed by the primary compensation scheme; and the COP-MOP may forward the request to the responsible committee and establish a voluntary trust fund to which States, private organizations and institutions are invited to contribute.[1663]

Thailand

Supports the establishment of a national biosafety fund for emergency response and remediation. A fund would be supported by required private contributions from the developer or producer of LMOs and permit fees.[1664]

[1660] Notes WGLR5.
[1661] ENB WGLR4 Summary; Notes WGLR4.
[1662] ENB WGLR1 Summary.
[1663] ENB WGLR 5#3.
[1664] ENB WGLR1 Summary.

TEXT AGREED TO AT COP-MOP4

Operational text

Where the costs of response measures to redress damage to the conservation and sustainable use of biological diversity have not been redressed by the primary compensation scheme (administrative approach), or by any other applicable supplementary compensation scheme, additional and supplementary measures aimed at ensuring under this Protocol does not cover the costs of damage, additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken.

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

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

{Operational text alt}

No provision

OR

The Parties may consider the necessity of any solidarity arrangements for cases of damage which are not redressed through the primary compensation scheme in light of the experience gained through the implementation of the rules set out in this document.

Non-Parties

Australia

It is premature to discuss supplementary compensation.[1665]

Observers- Education

Public Research and Regulation Initiative

Where compensation under this Protocol does not cover the costs of damage, additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using existing mechanisms.[1666]

Observers- Industry

Global Industry Coalition

1. Does not support a fund.
   Rationale: A fund will not promote prevention of damage, which should be the objective of any international rules.[1667]
2. Where no responsible operator can be identified, or the responsible operator cannot remediate the damage, then the Party shall remediate for the damage to biodiversity.[1668]
3. Speaking on behalf of six major agricultural biotechnology companies - BASF, Bayer CropScience, Dow AgroSciences, DuPont/Pioneer, Monsanto and Syngenta: Absolutely confident in safety and rigor of our risk assessment confirmed by approval by national risk assessments of our products for release into environment as well as LMOs FFPs. Producing over 15 years with 1 billion acres. No harm to human health or biodiversity to-date. Heard delegates several times say - if products are safe why not stand behind them. Now doing so and

[1665] Compilation of Views WGLR4.
[1666] WGLR4.
[1667] Compilation of Views WGLR1.
[1668] WGLR4.

committed to remediate damage if our products damage biodiversity. Have been considering compensation mechanism to demonstrate commitment. The concept most seriously being considered is a binding contractual obligation among the six companies, and any other companies that choose to sign it, to remediate actual damage to biodiversity caused by their products. This arrangement would be a 'compact' setting forth conditions for a Party to submit a claim and for the approval of the claim. It would also provide that only the responsible company would remediate or pay a claim after the actual damage to biodiversity had been proven pursuant to the claims procedures detailed in the compact. So the compact is not really a fund but rather a form of self insurance. Compact would be a binding contract among its members, with third party as beneficiaries. 'The concept of the compact was being seriously considered to contribute to negotiations that provided for a reasonable compensation mechanism and approach to liability for damage to biodiversity that was acceptable to all Parties and interested parties'. [1669]

4. Presents the content of the 'Compact'.[1670]

Organic Agriculture Protection Fund

Supports the establishment of a fund financed by contributions from biotech industry made in advance on basis of criteria to be determined.[1671]

Observers- NGOs

Greenpeace International

1. Fund is essential to pay for costs of prevention, remediation, restoration or reinstatement of the environment.[1672]

[1669] Notes WGLR5; CBD Report WGLR5, UNEP/CBD/BS/WG-L&R/5/L.1 (19 March 2008 Para 35 – 37, pp 6-7).

[1670] Notes, Contact Group at MOP4.

[1671] Compilation of Views WGLR2.

[1672] Compilation of Views WGLR2; Notes WGLR4.

2. A fund should apply in cases where:
    a. liable party is insufficiently capitalized, or, 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;;
    b. shell company is set up;
    c. exemptions apply;
    d. no direct actor liable

    in order that damage will still be compensated and remedied.[1673]
3. A fund can be established by a levy on exports of LMOs.[1674] Rationale: applies to 3 areas: small farmer, natural disasters, large contamination:
    a. small farmer: fund better than administrative approach or civil liability;
    b. environmental disaster: fund would provide for clean up better than administrative approach; civil liability would be expensive;
    c. large disaster: administrative approach would do very little; civil liability is unwieldy. Fund would address this situation adequately. [1675]
4. Proposes detailed provisions on: subrogation rights of the Fund, assessment of contribution and quantum of contribution to the Fund, and institutional arrangements for the Fund.[1676]

Institute for Trade and Agriculture Policy

Calls for the establishment of a compensation fund with contributions from the biotechnology industry.[1677]

[1673] Compilation of Views WGLR2; and WGLR4.

[1674] ENB WGLR4 Summary; Notes WGLR4; Synthesis of Texts WGLR4, at Section V B OT 5.

[1675] Notes WGLR4.

[1676] WGLR4.

[1677] ENB ICCP3 Summary.

South African Civil Society

Supports a fund based on contributions by the biotechnology industry, its beneficiaries and the exporting State.[1678]

Third World Network

A fund should be set up for cases where: liable party is bankrupt/ceases to exist, time limit expired, financial security not sufficient, primarily liable party escapes liability based on an exemption/mitigation.[1679]

Washington Biotechnology Action Council

A fund could address cases where no operator exists.[1680]

[1678] Compilation of Views WGLR2.
[1679] *Id.*
[1680] Notes WGLR4.

7

SETTLEMENT OF CLAIMS

A. INTER-STATE PROCEDURES

It is advisable to provide a mechanism for the settlement of disputes between Parties concerning the interpretation or application of the instrument. This can be done by making applicable the dispute settlement provisions of the 'parent' instrument. Thus the Cartagena Protocol on Biosafety by its Article 32 refers to, and adopts, the dispute settlement provisions of the Convention on Biological Diversity (CBD). Article 27 of the CBD provides for optional recourse to judicial settlement or arbitration, or a reconciliation procedure that is mandatory at the request of one of the Parties to a dispute. This is preceded by negotiation and mediation. The liability instrument could also refer to the CBD provisions in similar fashion.

B. CIVIL PROCEDURES

An instrument may also provide civil procedures for claims. The usual matters that will be provided for include:

a. designation of the court where the claim may be brought – the usual nexus is where the incident occurs, and/or where and the damage is suffered, the parties reside, or where the defendant has his place of business;
b. ensuring that such a court possesses the necessary competence to entertain the claim;

c. recognition and enforcement of the judgment of the court in other countries;
d. the applicable law;
e. applicability of civil law and/or private international law procedures, as appropriate;
f. the standing to bring claims.

The harmonization of procedural rules would facilitate the bringing of claims across different jurisdictions with different legal systems.

C. ADMINISTRATIVE PROCEDURES

Administrative procedures are established by domestic law when the administrative approach is applied in dealing with damage. Such procedures will provide for the obligations/duties of an operator where damage occurs or is imminent, and the rights of the State vis-a-vis the operator. Also the remedies available to the operator if he is aggrieved by any act or omission of the State. For example, an aggrieved party required to carry out any remedial measures should be allowed to request a review of the decisions of the competent national authority.

D. SPECIAL TRIBUNAL

This refers to the possibility of using an existing special tribunal, such as the Permanent Court of Arbitration, and its rules for arbitration of disputes relating to natural resources and/or the environment for the settlement of disputes.

Options for the Settlement of Claims[1681]

Type of procedure for the settlement of claims:

Inter-State procedures

Option 1: Existing procedure(s) with reference to Article 27 of the CBD
Option 2: Special procedure

Civil procedures

Option 1: Special provisions on private international law
Option 2: Enabling clause on private international law
Option 3: Binding arbitration

Administrative procedures.

Special tribunal.

Delegates' and Others' Positions on the Settlement of Claims

The African Group

1. Believes that all options for dispute settlement should be retained for consideration.[1682]
2. Supports existing procedure(s) with reference to Article 27 CBD for inter-State procedures for settlement of claims.
3. Supports special provisions on private international law for civil procedures. Recognizes that harmonization of international law is needed and suggests option for binding arbitration to be deleted while retaining Operational Text 1, 7 and 10. Operational Text 1 (claims in court where damage suffered,

[1681] Meeting Report WGLR4.
[1682] ENB WGLR2.

incident occurred, parties have residence, and ensuring courts have necessary competence to entertain the claims), operational text 7 (where matters regarding claims not specifically regulated by rules and procedures under international regime on liability and redress, to be governed by law of that court, including any rules on conflict of laws), operational text 10 (judgment of court having jurisdiction to be recognized and enforced in any Party provided formalities complied with, with certain exceptions)

4. On administrative procedures, supports operational text stating that parties provide administrative remedies as may be deemed necessary.[1683]

Specific Statements by members of the African Group in support of the African Group position

Burkina Faso: Emphasises that although States can regulate damage domestically, but if it is necessary to bring pressure at the international level, there must be recourse available at the international level.[1684]

Cameroon: Notes that arbitration is relevant when parties to conflict agree to submit to arbitration or when they are present in the place of arbitration. Arbitration should be the preferred option. [1685]

Egypt:

1. On administrative procedures, supports operational text stating that Parties provide administrative remedies as may be deemed necessary.

2. Also supports operational text stating that decisions of public authorities imposing preventive or remedial

[1683] ENB WGLR5#3*;* Notes WGLR5.
[1684] Notes WGLR3.
[1685] Compilation of Views TEG 1.

measures should be motivated and notified to the addressees. [1686]

3. Notes that the regime may allow for arbitration in settling disputes arising with respect to damage, with the consent of both Parties.[1687]

Mauritius: Proposes that arbitration be a means to settle claims, only if amicably decided by parties to the claim. Supports the creation of a legal entity/structure to arbitrate between parties. [1688]

Senegal: On administrative procedures, supports an alternative formulation with subparagraphs on: persons affected by damage taking actions; operators responding to requests; access to courts; and the right of review of decisions by operators.[1689]

South Africa: On administrative procedures, supports operational text stating that parties provide administrative remedies as may be deemed necessary.[1690]

Bangladesh

Supports special provisions on private international law for civil procedures and Operational Text 1 (claims in court where damage suffered, incident occurred, parties have residence, and ensuring courts have necessary competence to entertain the claims), 7 (where matters regarding claims not specifically regulated by rules and procedures under international regime on liability and redress, to be governed by law of that court, including any rules on conflict of laws), 10 (judgment of court having jurisdiction to be recognized and enforced in any Party provided formalities complied with, with certain exceptions) and 14 (rights of person who suffers damage as provided under domestic law to be preserved).[1691]

[1686] ENB WGLR5#3*;* Notes WGLR5.
[1687] Compilation of Views TEG 1.
[1688] *Id.*
[1689] ENB WGLR5#3*;* Notes WGLR5.
[1690] *Id.*
[1691] *Id.*

Brazil

Prefers enabling clause on private international law for civil procedures and in particular, the operational text setting out the general rules of private international law, adding that alternative grounds of jurisdiction may be provided for, 'according to national legislation'.[1692]

China

Regarding special tribunals, agrees to the retention of operational text on final and binding arbitration for integration in the other paragraphs.[1693]

Cuba

Prefers special provisions on private international law for civil procedures as supporting a binding instrument.

Opts for operational text 7 (where matters regarding claims not specifically regulated by rules and procedures under international regime on liability and redress, to be governed by law of that court, including any rules on conflict of laws), operational text 10 (judgment of court having jurisdiction to be recognized and enforced in any Party provided formalities complied with, with certain exceptions) and operational text 15 (rights of persons who suffer damage or entitled to relief or other measures preserved under domestic law).[1694]

Colombia

1. Prefers enabling clause on private international law for civil procedures.

   Prefers the operational text setting out the general rules of private international law, adding that alternative grounds of jurisdiction may be provided for, "according to national legislation".[1695]

[1692] Sub-Working Group, ENB WGLR5#4.

[1693] ENB WGLR5#3*;* Notes WGLR5.

[1694] *Id; see* VI. B, Option 1 (F), UNEP/CBD/BS/WG-L&R/5/2/Rev.1, 8 February 2008. This additional provision was deleted by WGLR5.

[1695] Sub-Working Group, ENB WGLR5#4.

2. On administrative procedures, supports operational text stating that decisions of public authorities imposing preventive or remedial measures should be motivated and notified to the addressees, with 'public authorities' to be replaced by 'international authorities'.
3. Regarding special tribunals, agrees retention of operational text on final and binding arbitration for integration in the other paragraphs.[1696]

Ecuador

1. Prefers special provisions on private international law for civil procedures. Opts for operational Text 1(claims in court where damage suffered, incident occurred, parties have residence, and ensuring courts have necessary competence to entertain the claims), operational text 5 (stay of proceedings where claim brought in courts of different Parties), operational text 8 (applicability of law of State where damage occurred and, where applicable, international law), operational text 10 (judgment of court having jurisdiction to be recognized and enforced in any Party provided formalities complied with, with certain exceptions) and operational text 15 (preserve domestic law rights of persons who suffer damage or entitled to relief or other measures). Suggests additional provisions under Section F to be deleted. Binding arbitration is acceptable provided with flexibility.
2. On administrative procedures, supports operational text stating that decisions of public authorities imposing preventive or remedial measures should be motivated and notified to the addressees. [1697]

European Union

1. Supports existing procedure(s) with reference to Article 27 CBD for inter-State procedures.[1698]
2. Supports where necessary, the use of civil law procedures at the domestic level and general rules of private international law.[1699]

[1696] ENB WGLR5#3*;* Notes WGLR5.
[1697] *Id.*
[1698] *Id.*

3. Supports enabling clause on private international law - operational Text 18 (availability of such procedures at domestic level; applicability of the appropriate private international law rules) for civil procedures. Special provisions on private international law are far too detailed although we might need to fill unforeseeable lacuna. [1700]
4. Under an administrative approach, proposes that decisions of public authorities imposing preventative or remedial action should be motivated and notified to the addressees who should be informed of legal remedies available to them and their time limits.[1701]
5. Suggests that resorting to special tribunals, such as the Permanent Court of Arbitration and its Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, may be considered in specific cases such as when a large number of victims are affected.[1702]

India

1. Supports inter-State procedures and civil procedures as found in many legal systems of the world.[1703]
2. Prefers enabling clause on private international law for civil procedures and the operational text setting out the general rules of private international law, adding that alternative grounds of jurisdiction may be provided for, "according to national legislation".[1704]
3. On administrative procedures, supports operational text stating that decisions of public authorities imposing preventive or remedial measures should be motivated and notified to the addressees.

[1699] Compilation of Views TEG 1.
[1700] ENB WGLR 5#3.
[1701] Compilation of Views TEG 1; ENB WGLR5#3*;* Notes WGLR5.
[1702] Compilation of Views TEG 1, WGLR4.
[1703] *Id.*.
[1704] Sub-Working Group, ENB WGLR5.

4. Prefers referring to civil/administrative procedures regarding special tribunal.[1705]
5. Arbitration is not a dependable mode of dispute-settlement as it is not permanent and because Parties have the freedom to choose their own judges.[1706]
6. Parties may also avail dispute settlement through civil/administrative procedures and special tribunals such as the Permanent Court of Arbitration's Optional Rules for the Arbitration of Disputes relating to Natural Resources and/or the Environment.[1707]

Indonesia

Proposes that settlement of claims should be in line with Article 27 of the Convention on Biological Diversity.[1708]

Iran

Suggests the adoption of an international scientific and legal body by the COP-MOP.[1709]

Japan

1. Any inter-State dispute arising under this instrument is to be handled through established inter-State procedures, including where appropriate the procedures established in Article 27 of the Convention on Biological Diversity.[1710]
2. Supports the deletion of the section on inter-State procedures.
   Rationale: at the meeting in 2001, it was agreed that Parties can only refer to dispute settlement provision under CBD and not others.
   Also opposes the establishment of any special procedures. [1711]
3. For civil procedures, supports operational text stating that all matters before the competent court, not regulated in the rules and procedures, shall be governed by the law of that court,

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[1705] ENB WGLR5#3*;* Notes WGLR5.
[1706] Compilation of Views TEG 1.
[1707] WGLR4.
[1708] Compilation of Views WGLR2.
[1709] Compilation of Views TEG 1.
[1710] WGLR4.
[1711] ENB WGLR5#3*;* Notes WGLR5.

including conflict of law rules. Also supports an enabling clause on private international law (non-legally binding) [1712]

Rationale: Sees the need for elaborate international law for certain countries but does not want international rules that impose upon Japan as it has effective private international law capable of coping, including in cases of damage by transboundary LMOs. There is equal access for locals as well as foreigners. Does not want any international law procedures that are incompatible with their national law. Prefers domestic law approach and cannot accept all the available options. [1713]

4. On administrative procedures, supports operational text stating that parties provide administrative remedies as may be deemed necessary. Supports flexible administrative approach at the national level.[1714]

Malaysia

1. Agrees with special procedures for inter-State disputes; also need a special provision to fill any lacuna whenever disputes arise between States.
2. For civil procedures, supports special provisions on private international law. Opts for Operational Text 1 (claims to be made in court of country where damage suffered, incident occurred, and parties reside; also ensure that courts have necessary competence to entertain the claims), operational text 5 (stay of proceedings where claim brought in courts of different Parties), operational text 7 (where matters regarding claims not specifically regulated by rules and procedures under international regime on liability and redress, to be governed by law of that court, including any rules on conflict of laws), operational text 10 (judgment of court having jurisdiction to be recognized by, and enforced in, the country of any Party, provided certain formalities complied with, except in certain situations (exceptions), operational text 15 (the rules should not

[1712] *Id.*
[1713] Notes WGLR5.
[1714] ENB WGLR5#3*;* Notes WGLR5.

prejudice rights given under domestic laws to persons who have suffered damage or the application of any measures for the protection or reinstatement of the environment). Also including these additional provisions: submission of claims after exhaustion of inter-State procedures or arbitration requirements, for submission of claims for damage to biodiversity to a court as determined by private international law, recognition and enforcement of judgments or awards in accordance with private international law, power of courts to order remediation, restoration, compensation, certain matters to be presumed, matters for courts to take into account when considering evidence of causal link between the occurrence and the damage, power of courts to order interim or preliminary measures where necessary.[1715]

3. Stresses the need to harmonize private international laws. For instance, the European Union has harmonized the private international laws of their member States.
4. On administrative procedures, supports operational text stating that decisions of public authorities imposing preventive or remedial measures should be motivated and notified to the addressees. Suggests also to include persons affected and operators to have access to a court or other independent public body to review the decisions of public authorities.
5. Regarding special tribunals, agree on retention of operational text on final and binding arbitration to be integrated in the other paragraphs.[1716]

Mexico

1. Suggests further consideration of inter-State dispute settlement procedures.[1717]
2. On behalf of GRULAC, supports existing procedure(s) with reference to Article 27 CBD for inter-State procedures.[1718]

[1715] *See* on the 'additional provisions': UNEP/CBD/BS/WG-L&R/5/2/Rev.1, 8 February 2008, VI. B, Option 1 (F). This additional provision was deleted by WGLR5.
[1716] Items 1 – 5: ENB WGLR5#3*;* Notes WGLR5.
[1717] ENB WGLR2.
[1718] ENB WGLR5#3*;* Notes WGLR5.

Norway

1. Supports existing procedure(s) with reference to Article 27 CBD for inter-State procedures.
2. For civil procedures, prefers special provisions on private international law. Supports Operational Text 1, 5, 7, 10 and 15 (see under **Malaysia**). Acknowledges that private international law is covered in other conventions, but that damage to biodiversity is a special case.
3. On administrative procedures, supports operational text stating that decisions of public authorities imposing preventive or remedial measures should be motivated and notified to the addressees. [1719]
4. Supports the option of arbitration for consideration in forming a binding regime.[1720]

Palau

Supports special provisions on private international law for civil procedures and prefers operational Text 1, 5, 7, 10 and 15 (see under **Malaysia**). [1721]

Switzerland

Supports the retention of arbitration as an option for dispute settlement, as it allows for the resolution of a case in the most cost-effective manner.[1722]

Thailand

1. Supports the settlement of claims through:
    a. inter-State procedures;
    b. civil procedures;
    c. administrative procedures; or
    d. special tribunal
    e. to be applied on a case by case basis.[1723]

[1719] *Id.*
[1720] Notes WGLR3 62.
[1721] ENB WGLR5#3*;* Notes WGLR5.
[1722] Compilation of Views TEG 1, WGLR4.
[1723] *Id*.

2. A combination of procedures to settle claims should be possible.[1724]

TEXT AGREED TO AT COP-MOP4

Operational text for Civil Procedure

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

Operational text alt

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

Operational text second alt

No provision

Operational text for Special Tribunal

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

[1724] *Id.*

Operational text alt

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

Operational text second alt

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

Operational text third alt

No provision.

Non-Parties

Argentina

1. Supports the settlement of claims through:
    a. inter-State procedures;
    b. civil procedures;
    c. administrative procedures; or
    d. special tribunal

    to be applied on a case by case basis.
2. A combination of procedures to settle claims should be possible.[1725]

[1725] Compilation of Views TEG1.

3. Prefers enabling clause on private international law - Operational Text 18 (see under **European Union**) for civil procedures. Laws, recognitions, arbitrations are all covered by other international instruments. Does not agree with the need for special reference to these. [1726]

Canada

1. For civil procedures, supports enabling clause on private international law operational Text 19 (for certain damages, Parties/governments encouraged to review their rules to grant foreign plaintiffs access to their courts, on a non-discriminatory basis, where supported by principle of justice) and operational text 18 (see under **European Union**) as well.
2. On administrative procedures, calls for a flexible administrative approach at the national level[1727]

United States of America

1. Supports special provisions on private international law - Operational Text 18 (see under **European Union**) for civil procedures. Supports non-binding instrument and of the opinion that this entire section is not necessary as can rely on existing national system.
2. Suggests arbitration could be available for private State disputes.
3. Suggests also retention of operational text on final and binding arbitration for integration in the other paragraphs.[1728]

Observers- Education

Public Research and Regulation Initiative

Resorting to special tribunals, such as the Permanent Court of Arbitration and its Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, may be

[1726] ENB WGLR5#3*;* Notes WGLR5.
[1727] *Id.*
[1728] *Id.*

considered in specific cases such as when a large number of victims are affected.[1729]

Observers- Industry

Global Industry Coalition

1. Suggests three types of international procedures:
    a. inter-State procedures, governed by Article 27 of the Convention, when claims cannot be addressed on a bilateral basis;
    b. arbitration under the Permanent Court of Arbitration (PCA) subject to the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment; and
    c. a transnational process of harmonized private international law.
2. Proposes that any claim for damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of LMOs shall be cognizable by a competent court only after applicable PCA procedures have been exhausted.[1730]

International Grain Trade Coalition

1. States that many existing mechanisms for dispute settlement could be used to settle claims between Parties, including the WTO dispute settlement body.[1731]
2. Proposes that claims between private parties or NGOs should be brought through existing legal systems within countries.[1732]

[1729] WGLR4.
[1730] Compilation of Views TEG 1; WGLR4.
[1731] *Id.*
[1732] Compilation of Views WGLR1; Compilation of Views WGLR4.

Observers- NGO

Greenpeace International

1. Suggests the creation of an International Tribunal for the Protection of Biodiversity similar to the International Tribunal of the Law of the Sea with possible joint accommodation with this Tribunal.[1733]
   Rationale: This tribunal may resolve issues related to competent court and jurisdiction, avoiding ruling on *forum non conveniens*.[1734]
2. Proposes conciliation for inter Parties' dispute, and where no settlement reached to refer to: International Tribunal for the Protection of Biodiversity, the International Court of Justice or an arbitral tribunal.[1735]

South African Civil Society

Does not oppose arbitration as a method to settle claims, as long as it does not delay implementation of an international regime on liability and redress for LMOs.[1736]

Third World Network

1. Supports strong mechanisms for non-compliance, dispute settlement, and settlement of claims.[1737]
2. Proposes that any case that may lead to liability should be reported to the Biosafety Clearing House.[1738]

Permanent Court of Arbitration

Noted that there might be a role for arbitration.[1739]

[1733] Compilation of Views WGLR2.
[1734] *Id.*
[1735] WGLR4.
[1736] *Id.*
[1737] *Id.*
[1738] *Id.*
[1739] ENB WGLR5#3; Notes WGLR5.

CIVIL PROCEDURES

A. Jurisdiction of Courts

'Jurisdiction' refers to the authority of a court to hear and decide a case as well as the appropriateness of a court exercising this authority.[1740] A court will often require a minimal relationship between the forum (territory and its court) to the facts in issue in order to decide whether it is the most appropriate forum for the case (*forum conveniens*).[1741] The connecting factors of the issues in the case to the forum, include: the habitual residence or corporate domicile of the defendant, the place of behavior causing the damage, the place of the effect of such behavior or place of damage, the site where the damage started, and the site where the damage was suffered.[1742] The "local action rule", requiring the damaged parties to exhaust their options locally before searching for a more appropriate forum,[1743] has become rather obsolete. Generally the claimant chooses the forum, but the defendant may challenge this choice.[1744] A court may deny or decline jurisdiction. Jurisdiction is usually only assumed if there is a sufficiently proximate international relationship because otherwise the issues of the case are truly matters of foreign affairs.[1745]

[1740] J.H.C. Morris, *The Conflicts Of Laws,* David McClean & Kish Beevers (eds), 6th ed., 2005, p.57.

[1741] C. von Bar. *Environmental Damage in Private International Law*. 268 Recueil Des Cours: Collected Courses of the Hague Academy of International Law (1997), pp.327-343.

[1742] *Id.*

[1743] Morris.

[1744] Transnational Procedures Including the Work of the Hague Conference on Private International Law in this Field, Including Case-Studies: Note by the Executive Secretary, for the second meeting Open-Ended Ad Hoc Working Group on Liability and Redress in the Context of the Cartagena Protocol on Biosafety, at 4, UNEP/CBD/BS/WG-L&R/2/INF/4 (2006) ['Transnational Procedures'].

[1745] Von Bar, at 1626.

Options for the Jurisdiction or Choice of Court[1746]

Option 1: habitual residence or corporate domicile of the defendant.
Option 2: place of behavior causing the damage.
Option 3: place of the effect of such behavior or place of damage.
Option 4: site where the damage started.
Option 5: site where the damage was suffered.
Option 6: local action rule.

Delegates' and Others' Positions on Jurisdiction or Choice of Court

The African Group

1. Claims for compensation under this Protocol may be brought in the courts where either the damage was suffered or the incident occurred or the plaintiff has his habitual residence or the defendant has his principal place of business.
2. Each contracting Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.
3. Subject to above, nothing in the Protocol shall affect any rights of persons who have suffered damage, or considered as limiting the protection or reinstatement of the environment which may be provided under domestic law.
4. No claims for compensation for damage based on the strict liability of the notifier or the exporter shall be made otherwise than in accordance with the Protocol. [1747]

Specific Statements by members of the African Group in support of the African Group Position

Egypt: suggests that jurisdiction rests with the courts of the territory in which the incident giving rise to liability has occurred.[1748]

[1746] Meeting Report WGLR4.
[1747] WGLR4.

Ethiopia: Proposes a choice of court based on:

a. where the damage/incident occurred;
b. where the victim has its place of residence; or
c. where defendant has its principle place of business.[1749]

Liberia: Proposes that claims be heard in an institution in the Party of import.[1750]

Bangladesh

Proposes a formulation: A claim for compensation of damage shall be brought in the court of the Party where damage is suffered, the incident occurred, the plaintiff has habitual residence, or the defendant has habitual residence or a principle place of business.[1751]

European Union

1. Civil law procedures should be available at the domestic level to settle claims between operators/importers and victims.
2. In cases of transboundary disputes, the general rules of private international law will apply as appropriate.
3. The competent jurisdiction is generally identified on the basis of the defendants' domicile.
4. Alternative grounds of jurisdiction may be provided for well-defined cases, e.g. in relation to the place where a harmful event occurred.
5. Special rules for jurisdiction may also be laid down for specific matters, e.g. relating to insurance contracts.[1752]

[1748] Compilation of Views TEG 1.
[1749] Compilation of Views WGLR2.
[1750] Compilation of Views TEG 1.
[1751] Sub-Working Group, ENB WGLR 5#4. This formulation was finally accepted by all the Parties.
[1752] Compilation of Views WGLR4.

Japan

1. Proposes that all disputes, other than inter-State disputes, should be handled through binding international arbitration, unless all parties to the dispute decide otherwise.
2. In that case, the applicable law shall be UNIDROIT rules on commercial contracts.[1753]

Norway

1. Supports a provision on the jurisdiction of courts to hear claims.
2. The courts of all Parties should be required to have the necessary competence to entertain claims.[1754]
3. Proposes that claims may be brought in courts of Parties where:
   a. damage suffered;
   b. incident occurred; or,
   c. defendant has habitual residence or principle place of business.[1755]
4. In the case of related actions, jurisdiction shall be of the court first seized; courts of other Parties shall decline jurisdiction or stay action.[1756]
5. Applicable law should be governed by the law of the court, if not specifically regulated under the instrument.[1757]

Switzerland

1. Claims for compensation under the subprotocol may be brought in the courts of a Party only where:
   a. the damage was suffered;
   b. the unintentional release across the border occurred; or
   c. the defendant has his or her habitual residence, or, if the defendant is a company or other legal person or an association of natural or legal persons, where it has its principal place of business, its statutory seat or central administration.

[1753] WGLR4.
[1754] Compilation of Views WGLR4.
[1755] *Id.*
[1756] *Id.*
[1757] *Id.*

2. Each Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.
3. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Parties, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.
4. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.
5. Where related actions are pending in the courts of different Parties, any court other than the court first seized may stay its proceedings.
6. Where these actions are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.
7. For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.
8. All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the subprotocol shall be governed by the law of that court, including any rules of such law relating to conflict of laws.
9. The subprotocol is without prejudice to any rights of persons who have suffered damage or to any measures for the protection or reinstatement of the environment that may be provided under applicable domestic law.[1758]

[1758] WGLR4.

Non-Parties

Canada

1. For other damage resulting from LMOs subject to transboundary movement, Parties and Governments are encouraged to review their national liability rules and related rules of court with a view to ensuring that foreign plaintiffs have access to their courts, where such access is supported by the principles of fundamental justice, on a non-discriminatory basis;
2. The Parties to the Protocol will review at MOP-6 the effectiveness of this decision in addressing cases of damage resulting from the transboundary movement of LMOs pursuant to Article 27, and whether further action should be considered, including work under the Hague Conference on Private International Law.[1759]

Observers - Industry

Global Industry Coalition

Proposes that:

1. Only the courts of the State where the damage occurred shall have jurisdiction except where:
   a. the parties have agreed specifically to bring such claims before the courts of another jurisdiction, or
   b. the court has no jurisdiction to order a form of redress with respect to damage to biodiversity, as defined in Article 2 of the Biodiversity Convention, in which case the court of the place where the defendant is domiciled may accept jurisdiction.
2. A court that does not have jurisdiction shall refuse to accept jurisdiction.
3. The doctrine of *forum non conveniens* shall not apply.
4. The applicable law shall be

[1759] *Id.*

   i. the laws of the State where the damage occurred and, insofar as applicable,
   ii. international law, including the Biodiversity Convention and the Biosafety Protocol.
5. If there is any conflict with international law, then international law shall govern.
6. The rules on admissibility of actions and standing of claimants of the state where the damage to biodiversity occurred, shall apply.[1760]

Observers- NGOs

Greenpeace International

1. Proposes that jurisdiction should be established where damage is suffered, or *lex loci delicti*, provided that there is jurisdiction over the defendant.[1761]
   Rationale: The Lugano Convention provides for jurisdiction where: damage suffered, activity was conducted, and the defendant has habitual residence.[1762]
2. Where related actions are brought in different courts, the subsequent court shall stay its proceedings upon application.
3. A subsequent court shall decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seized has jurisdiction over both or all actions.
4. When related actions are brought in the courts of different Parties the court first seized of the case may of its own motion stay its proceedings until it rules whether it has jurisdiction. If it rules it has jurisdiction any other court may decline jurisdiction in favour of that court.
5. Actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them

[1760] WGLR4.
[1761] Compilation of Views WGLR4.
[1762] *Id.*

together to avoid the risk of irreconcilable judgments resulting from separate proceedings.[1763]

South African Civil Society

1. Suggests that the choice of forum should be where:
   a. damage was suffered;
   b. incident occurred; or
   c. defendant has habitual residence/place of business.[1764]
2. Proposes that jurisdiction should include courts of non-contracting Parties.[1765]
3. Proposes that primary jurisdiction shall lie with the courts of the State
   a. of the Contracting Party where the damage occurs.
   b. of import or the intended State of import, if damage occurs beyond the limits of national jurisdiction, or
   c. most closely connected with the damage, if the transboundary movement was unintended,
4. Proposes that jurisdiction 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.
5. Proposes that the applicable law shall be the law of the court if not specifically otherwise regulated.
6. Parties to: (a) ensure that its courts possess the necessary competence to entertain claims and provide for compensation.
7. Courts to have power to order remediation and restoration as well as compensation and may order costs and interest.
8. Certain rebuttable presumptions to apply to facilitate claims. Example: that (a) the LMO caused the damage where there is a reasonable possibility that it could have done so and (b) that any damage caused by a LMO is the result of its biotechnology-induced characteristics rather than any natural characteristics. To rebut the presumption a person must prove to the standard

[1763] WGLR4.
[1764] Compilation of Views WG2.
[1765] *Id.*

required by the procedural law applied pursuant to article 8 that the damage is not due to the characteristics of the living modified organism resulting from the genetic modification, or in combination with other hazardous characteristics of the living modified organism.

9. When considering evidence of the causal link between the occurrence and the damage, the court shall take due account of the increased danger of causing such damage inherent in undertaking the transboundary movement of or exercising ownership, possession or control over the living modified organism.
10. Orders for compensation for damage shall fully compensate affected persons and shall pay the cost of preventive measures and costs of reinstatement or remediation of the environment.[1766]

B. Recognition and Enforcement of Foreign Judgments

The final judgment of a successful claim must be recognized and enforced by the court with the jurisdiction to ensure the plaintiff receives restitution, financial or otherwise. Provision for the recognition and enforcement of judgments by courts of other countries are not often seen in national procedural laws. Formal procedures for the recognition and enforcement of foreign judgments, however, are often embodied in multilateral agreements between States. They are also sometimes the subject of bilateral agreements. These provisions ensure that judgments are recognized and enforced and include standards for non-recognition.[1767] These standards are set out in the options below:

[1766] WGLR4.
[1767] Rene Lefeber, 'Transboundary Environmental Interference; The Origin Of State Liability', 24 *Developments in International Law* 266 (1996).

Options for Recognition and Enforcement of Foreign Judgments where such recognition/enforcement exists[1768]

Option 1: the court lacks jurisdiction.

Option 2: no fair trial, that is, the judgment was issued in default of the defendant's appearance and the defendant was not served with proper documentation initiating the proceedings.

Option 3: the judgment is contrary to public policy.

Option 4: irreconcilability with earlier judgments involving the same parties and the same facts made elsewhere.

Delegates' and Others' Positions on Recognition and Enforcement

The African Group

1. Any judgment of a court having jurisdiction in accordance with Article [x] herein, which is enforceable in the State of origin, shall be recognized in any Contracting Party, except where the judgment was obtained by fraud, the defendant was not given reasonable notice and a fair opportunity to present his case, the judgment is irreconcilable with an earlier judgment validly pronounced in another Contracting Party with regard to the same cause of action and same parties, or the judgment is contrary to the policy of the Contracting Party from which this recognition is sought.
2. A judgment recognized under this Article shall be enforceable in each Contracting Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merit of the case to be re-opened.
3. These shall not apply between Contracting Parties that are Parties to an agreement or arrangement in force on mutual

[1768] Meeting Report WGLR4.

recognition and enforcement of judgments under which the judgment would be recognizable and enforceable.[1769]

Specific Statements by members of the African Group in support of the African Group position

Cameroon: notes that judgments by PCA or ICJ may be recognized and enforced using Article 27 of CBD and Article 34 of Protocol. Judgments given in other countries/jurisdictions can be enforced using private international law rules.[1770]

Egypt: suggests that the recognition and enforcement should be determined by the competent courts of other territories or Parties. The issue of non-Parties must be resolved.[1771]

Ethiopia: proposes that a judgment shall be recognized and enforced by other Contracting Parties, except where irreconcilable with a previous judgment regarding the same incident[1772] and calls for strong provisions on the recognition and enforcement of judgments.[1773]

Mauritius: emphasizes that Parties should abide by international conventions and obligations on recognition and enforcement.[1774]

Uganda: notes the value of the New York Convention on Recognition and Enforcement of Foreign Judgments and the role of bilateral agreements.[1775]

[1769] WGLR4.
[1770] *Id.*
[1771] *Id.*
[1772] Compilation of Views WGLR2.
[1773] Friends of the Chair Group, ENB WGLR5#7.
[1774] Compilation of Views TEG 1.
[1775] Compilation of Views WGLR2.

China

1. Cautions against taking on additional obligations on private international law, other than under existing conventions.[1776]
2. Opposes making enforcement subject to assessing whether domestic law is compatible with international guidelines.[1777]

India

1. Proposes that the rules of private international law should apply.
2. Suggests that the Protocol could also prescribe an obligation on Parties.[1778]
3. Opposes making enforcement subject to assessing whether domestic law is compatible with international guidelines.[1779]

Japan

Proposes that the recognition and enforcements of judgments or arbitral awards shall be in accordance with international law, including the 1958 UN Convention on the Recognition and Enforcement of International Arbitral Awards and the 1975 Inter-American Convention on International Commercial Arbitration. [1780]

Malaysia

1. Calls for strong provisions on the recognition and enforcement of judgments.[1781]
2. On behalf of Like-Minded Friends,[1782] submits a compromise proposal that countries that wish to opt for domestic law or policy on liability and redress shall include also a provision on the recognition and enforcement of foreign judgments.[1783] It was made clear that this provision does not require any change in domestic law, and does not in itself constitute a treaty on

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[1776] Sub-Working Group, ENB WGLR 5#4.
[1777] Friends of the Chair Group, ENB WGLR5#7.
[1778] Compilation of Views WGLR2.
[1779] Friends of the Chair Group, ENB WGLR5#7.
[1780] WGLR4.
[1781] Friends of the Chair Group, ENB WGLR5#7.
[1782] Formed during the Contact Group Meeting at COP-MOP4. Consisted then of 82 countries.
[1783] Notes, Contact Group at MOP4; ENB MOP4.

reciprocal enforcement of foreign judgments. However, Parties should endeavor to extend their domestic law governing the reciprocal enforcement of foreign judgments to other Parties not presently covered by their domestic law.

Rationale: This reflects one of the core elements of a civil liability regime. The decisions of courts of Parties generally have no extra-territorial effect. Parties sometimes enter into bilateral arrangements for reciprocal enforcement of their judgements by other countries. Such a law or arrangement will provide for the subject matter to be covered as well as the procedure and criteria that will apply for the reciprocal recognition.

Now this proposal states that Parties who choose to develop a civil liability system or apply their existing one to liability and redress, shall recognize and enforce foreign judgments - in accordance with their domestic rules and procedures governing the enforcement of foreign judgments. It follows that if there is no treaty or arrangement at all with any Party – or with a particular Party - for its judgments to be recognized, then there is no obligation or compulsion to recognize that foreign judgment. Parties then are merely exhorted to 'endeavour' to extend their domestic law on recognition of foreign judgments, where it exists, to other Parties who are not covered by their present law.

Mexico

On behalf of GRULAC, opposes making enforcement subject to assessing whether domestic law is compatible with international guidelines.[1784]

Norway

1. Any judgment no longer subject to ordinary forms of review shall be recognized by any party with exceptions for judgments:
    a. obtained by fraud;

[1784] *Id.*

b. made without reasonable notice to a party to the claim; or
c. irreconcilable with earlier judgment; or
d. contrary to public policy.[1785]

2. Calls for strong provisions on the recognition and enforcement of judgments.[1786]

Switzerland

Proposes:

1. Any judgement of a court having jurisdiction or any arbitral award which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms of review shall be recognized in any Party as soon as the formalities required in that Party have been completed, except:
   a. where the judgement or arbitral award was obtained by fraud;
   b. where the defendant was not given reasonable notice and a fair opportunity to present his or her case;
   c. where the judgement or arbitral award is irreconcilable with an earlier judgement or arbitral award validly pronounced in another Party with regard to the same cause of action and the same parties; or
   d. where the judgement or arbitral award is contrary to the public policy of the Party in which its recognition is sought.

2. A judgement or arbitral award recognized above shall be enforceable in each Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be reopened.
3. The provisions above shall not apply between Parties to an agreement or arrangement in force on the mutual recognition and enforcement of judgements or arbitral awards under which

[1785] Compilation of Views WGLR4.
[1786] Friends of the Chair Group, ENB WGLR5#7.

the judgement or arbitral award would be recognizable and enforceable.[1787]

TEXT PROPOSED AT COP-MOP4

For Civil Liability - Working towards legally binding provisions

Operational text 1

[Parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with living modified organisms.]

Operational text 2

(a) [Subject to subsections (b), (c) and (d) below, nothing in these rules and procedures shall prejudice the right of Parties to have in place or to develop their domestic law or policy in the field of civil liability and redress resulting from the transboundary movement of LMOs consistent with the objective of the Cartagena Protocol on Biosafety and these rules and procedures/this instrument/this supplementary Protocol.] [Parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with living modified organisms.] [Parties should ensure that their national civil liability rules and procedures provide for redress to damage resulting from the transboundary movement of living modified organisms. In creating their national rules and procedures on civil liability, Parties may give special consideration to sub-sections (b), (c) and (d).]

(b) Any such law or policy , [shall] [include][address], inter alia, the following elements, taking into account[, as appropriate,] the Guidelines in Annex [x] [to this supplementary Protocol][decision BS-V/x]:

a. Damage;

b. Standard of liability: that may include strict, fault or mitigated liability;

[1787] Compilation of Views WGLR4.

c. Channelling of [strict] liability;

d. [Financial security, where feasible][compensation schemes];

e. [Access to justice][Right to bring claims];

f. [[Procedural rules that provide for] due process.]

[(c) Parties shall recognize and enforce foreign judgments in accordance with [the applicable rules of procedures of the domestic courts] [domestic law] [governing the enforcement of foreign judgments] in respect of matters within the scope of these rules and procedures/this instrument/ the Guidelines in Annex [x] to this [supplementary Protocol]. [Parties who do not have legislation concerning recognition of foreign judgments should endeavour to enact such laws.]]

[(d) While this provision does not require any change in domestic law, and does not in itself constitute a treaty on reciprocal enforcement of foreign judgments, Parties[, whose domestic law requires bilateral reciprocity agreements for recognition of foreign judgments] [shall endeavor to extend their domestic law governing the reciprocal enforcement of foreign judgments to other Parties not presently covered by their domestic law].]

(c) and (d) alternative

[Parties may, in accordance with domestic law, recognise and enforce foreign judgments arising from the implementation of the above guidelines.]

(e) The Guidelines shall be reviewed no later than [3] years after the entry into force of this instrument with a view to consider [elaborating a more comprehensive binding regime on civil liability] [making them binding], in the light of experience gained.

Non-Parties

United States of America

Suggests that foreign civil and commercial judgments be recognized and enforced in domestic courts. [1788]

[1788] *Id.*

Observers- Industry

Global Industry Coalition

Proposes the following:

1. A final court judgment shall be recognized and enforced by the courts of the defendant's domicile, except where:
    a. the court giving the judgment had no jurisdiction;
    b. the court applied other than the specified law;
    c. the court disregarded essential requirements of procedural justice;
    d. there was an earlier judgment in the same matter;
    e. the judgment conflicts with the public policy or public order of the defendant's domicile, or with applicable provisions of international law; or
    f. the judgment was given in default of the appearance of the defendant, unless the plaintiff shows that the defendant was properly served with the court documents; and given adequate notice and opportunity to appear and defend the claim.
2. The final decision of a competent authority with responsibility to administer and remediate claims of damage to biodiversity shall be as effective as a judgment of a national court. The same exceptions listed above shall apply,
3. Compliance with the Biosafety Protocol and applicable national laws and regulations shall create a rebuttable presumption that the defendant is not liable for damage to biodiversity.[1789]

Observers- NGO

Greenpeace International

1. Supports the inclusion of comprehensive rules on recognition and enforcement.[1790]

[1789] WGLR4.
[1790] Compilation of Views WG2.

2. Judgments of courts of a Party shall be enforceable in other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with.
3. This will not apply if (a) a decision was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence, or (b) the judgment was obtained by fraud.[1791]

C. Standing or the Right to Bring Claims

This addresses the question: who has the right to bring claims or institute legal action for any damage suffered? Standing can be narrow – confined to those persons directly affected; and/or who have suffered damage over and above the rest of members of society. Or, be wide – all those who have a direct or indirect interest in the matter; or including the right to institute action on behalf of communities who would otherwise be unable to do so. Standing may also be accorded to public interest groups to initiate action involving diffused interests – such as the right to a clean environment, biodiversity, water, and such like.

Options for Standing or the Right to Bring Claims[1792]

Option 1: States.

Option 2: damaged persons or entities.

Option 3: damaged persons or entities and States of damaged persons or entities.

Option 4: damaged persons or entities and States of damaged persons or entities and any other interest groups such as NGOs or dependents of victims.

[1791] WGLR4.
[1792] Meeting Report WGLR4.

Options for Special Provisions on Standing[1793]

Option 1: Special provisions (directly affected persons or entities and class actions)
Option 2: Special provisions (only directly affected persons or entities)
Option 3: Special provisions (diplomatic protection)
Option 4: Domestic law approach

Delegates' and Others' Positions on Standing or the Right to Bring Claims

The African Group

1. Any person who has suffered loss or harm during a transboundary movement, transit, handling and use of any LMOs, including illegal traffic, may institute a civil claim for damages in court, which may include a claim for:
   a. economic loss resulting from the release of LMOs and its products or from activities undertaken to prevent, mitigate, manage, clean up or remediate any harm from such incident;
   b. costs incurred in any inspection, audit or investigation undertaken to determine the nature of any release of LMO or to investigate risk management options.
2. Any person, group of persons, or any private or state organization is entitled to bring a claim and seek redress in respect of the breach or threatened breach of any provision of this Protocol, including any provision relating to damage to human health, biological diversity, the environment, or to socio-economic or cultural conditions of local communities or to the economy of the country:
   a. in that person's or group or class of persons' interest;

[1793] Revised Working Draft of WGLR5.

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

3. No costs shall be awarded against any of the above persons who fail in any action as aforesaid if the action was instituted reasonably out of concern for the public interest or in the interest of protecting human health, biological diversity or the environment.
4. The burden of proving that an action was not instituted out of public interest or in the interest of protecting human health, biological diversity or environment, rests on the person claiming that the case is otherwise.
5. Each Contracting Party shall ensure that any person in another Contracting Party who is adversely affected has the right of access to administrative and judicial procedures equal to that afforded to nationals of the Contracting Party of origin in case of domestic environmental harm.

Specific Statements by members of the African Group in support of the African Group Position

Cameroon: supports the rights of affected parties/States, affected individuals/communities, interested individuals, and potential victims (if preventative measures are needed) to bring claims.[1794]

Cote d'Ivoire: proposes to grant standing to persons or groups acting in the interest of affected persons.[1795]

Egypt: proposes the right of any qualified party to submit claims to competent authority of a Party and have access to the court.[1796]

[1794] Compilation of Views TEG 1.
[1795] ENB WGLR1 Summary.
[1796] Compilation of Views TEG 1.

Ethiopia: supports the effective participation and standing of all people,[1797] including any victim, contracting Party whose citizen is a victim, person, or group.[1798] Following a liberalized approach to standing will fill in the gaps in information and ensure equity.[1799] Supports a provision stating that any plaintiff shall have access to effective administrative and judicial procedure; and a provision stating that nothing in rules and procedures will affect the rights of persons who have suffered damage or limit restoration of environment under national legislation.[1800] Supports the option on special provisions (directly affected persons or entities and class actions), particularly the principle of wide access to justice.[1801]

Guinea Bissau: proposes that the right to bring claims should be determined by the Ministry of Foreign Affairs by propositions from the national environmental authority.[1802]

Liberia: proposes that affected persons, groups, communities, or States should have the right to bring claims.[1803]

Mauritius: suggests that anyone should have the right to bring claims, and should be assisted by their country.[1804]

Namibia: proposes to extend standing to dependents of damaged parties.[1805]

Senegal: preserve the option on a domestic law approach.[1806]

[1797] Notes WGLR3.
[1798] Compilation of Views WGLR2.
[1799] Notes WGLR3.
[1800] Compilation of Views WGLR2.
[1801] ENB WGLR5#3*;* Notes WGLR5.
[1802] Compilation of Views TEG 1.
[1803] *Id.*
[1804] *Id.*
[1805] ENB WGLR1 Summary.
[1806] ENB WGLR5#3.

Uganda: proposes standing for: States; States' organizations; individuals affected by or concerned about damage; persons or groups acting in the interest of affected persons.[1807]

Bangladesh

Supports the option on special provisions (directly affected persons or entities and class actions) and within the framework of its national legislation.[1808]

Bolivia

Supports the option on special provisions (directly affected persons or entities and class actions), particularly the principle of wide access of justice. [1809]

Brazil

Supports the option on a domestic law approach.[1810]

Colombia

1. Supports the option on special provisions (directly affected persons or entities and class actions).[1811]
2. Prefers to widen the scope of persons who could bring claims to also persons who are indirectly affected.[1812]

Cuba

Supports the option on special provisions (directly affected persons or entities and class actions), particularly the principle of wide access to justice.[1813]

European Union

1. Under an administrative approach, the decision of the Competent National Authority may be challenged through a review procedure.[1814]

[1807] Compilation of Views TEG 1; ENB WGLR1 Summary.
[1808] ENB WGLR5#3*;* Notes WGLR5.
[1809] *Id.*
[1810] *Id;* Notes, Contact Group at MOP4.
[1811] ENB WGLR5#3; Notes WGLR5.
[1812] Notes, Contact Group at MOP4.
[1813] ENB WGLR5#3*;* Notes WGLR5.
[1814] Compilation of Views TEG 1; ENB WGLR1 Summary.

2. Standing should be granted to:
    a. any affected natural or legal persons, as appropriate, under domestic law;[1815] and
    b. any other entity that may be bearing the costs of response and reinstatement measures.[1816]
3. Victims should have access in the State of export that is no less prompt, adequate and effective than those available to victims suffering in that State.
4. States should guarantee appropriate access to information relevant for the pursuance of remedies, including claims for compensation.
5. In case civil liability is complemented by an administrative approach, natural and legal persons, including NGOs promoting environmental protection and meeting relevant requirements under domestic law, should have a right to require the competent authority to act according to these rules and procedures and to challenge, through a review procedure, the competent authority's decisions, acts or omissions as appropriate under domestic law. [1817]
6. Supports the option on a domestic law approach.[1818]

India

1. Proposes that any victim should have the right to bring a claim for damage, including:
    a. States, being the actors in international law, on behalf victims; and
    b. NGOs or other representatives of civil society.[1819]
2. Notes that access to justice has been provided for NGOs and representatives of civil society under national law in India and could be considered under this instrument.[1820]

[1815] *Id;* WGLR4.
[1816] Compilation of Views WGLR2.
[1817] Compilation of Views WGLR4.
[1818] ENB WGLR5#3*;* Notes WGLR5.
[1819] Notes WGLR3.
[1820] *Id.*

3. Suggests that States shall be given the right to bring forth claims on behalf of their nationals for the damage caused and they shall adopt appropriate national legislation to this effect.[1821]
4. Supports the option on special provisions (diplomatic protection).[1822]
5. Agrees with domestic law approach and proposes to delete 'socio-economic' matters.[1823]

Indonesia

Supports the option on special provisions (directly affected persons or entities and class actions). [1824]

Iran

Supports the right of both States and the private sector to bring claims.[1825]

Japan

1. Proposes that claims may only be brought by persons or entities directly affected by the damage and not by third parties acting on behalf of such persons or entities.[1826]
2. Supports the option on a domestic law approach and prefers operational text stating that all matters of substance or procedure regarding claims before the competent court which are not regulated shall be governed by the law of that court.[1827]

   Rationale: we can't accept the section which imposes an obligation on the State to take action. It is the discretion of the country to take action and not an obligation.[1828]

[1821] WGLR4.
[1822] ENB WGLR5#3*;* Notes WGLR5.
[1823] Notes, Contact Group at MOP4.
[1824] ENB WGLR5#3; Notes WGLR5.
[1825] Notes WGLR3.
[1826] WGLR4.
[1827] ENB WGLR5#3*;* Notes WGLR5; Notes, Contact Group at MOP4.
[1828] Notes, Contact Group at MOP4.

Liberia

Supports the option on special provisions (directly affected persons or entities and class actions), particularly the principle of wide access of justice. [1829]

Malaysia

1. Any person affected, and others acting on their behalf where appropriate, should have the right to bring claims in the court of any State.

   Rationale:

   a. Rio Declaration Principle 13 states that redress and remedy shall be available.
   b. Aarhus Convention Article 9 provides for anyone with sufficient interest to have this right and wide access to justice.
   c. Under common law generally, for example UK and India, public interest groups have been given standing.[1830]
2. Supports the option on special provisions particularly the principle of wide access to justice. [1831]
3. Prefers to widen the scope of persons who could bring claims to also persons who are indirectly affected; and those protecting such diffuse interests as the environment, biodiversity, air, water, and such like.[1832]

New Zealand

Supports the provision of standing for the entity bearing the cost of response measures.[1833]

Norway

1. Supports all matters of substance or procedure regarding claims before the competent court which are not specifically

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[1829] ENB WGLR5#3; Notes WGLR5.
[1830] Notes WGLR3.
[1831] ENB WGLR5#3; Notes WGLR5.
[1832] Notes, Contact Group at MOP4.
[1833] ENB WGLR1 Summary.

regulated in the instrument to be governed by the law of that court, including any rules of such law relating to conflict of laws, in accordance with generally accepted principles of law.[1834]

2. Supports the option on a domestic law approach and prefers operational text stating that all matters of substance or procedure regarding claims before the competent court which are not regulated shall be governed by the law of that court.[1835]

Palau

Supports providing the right to bring claims to injured persons, legal and government entities, and private organizations.[1836]

Philippines

Supports the option on a domestic law approach.[1837]

Saint Lucia

Supports the right to bring claims by:

a. the State;
b. affected individuals;
c. agencies;
d. consumer rights associations;
e. affected communities.[1838]

South Korea

Supports the option on a domestic law approach.[1839]

Sri Lanka

Supports the right of any party or government to bring claims.[1840]

[1834] WGLR4.
[1835] ENB WGLR5#3; Notes WGLR5.
[1836] Compilation of Views TEG 1.
[1837] ENB WGLR5#3; Notes WGLR5.
[1838] Compilation of Views TEG 1.
[1839] ENB WGLR5#3; Notes WGLR5.
[1840] Compilation of Views TEG 1.

Switzerland

Supports the right of individuals who have suffered damage and those entitled to take response measures to bring claims.[1841]

TEXT AGREED TO AT COP-MOP4

For Administrative Approach

Operational text

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

For Civil Liability

Operational text

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

[1841] *Id.*

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

Operational text alt

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

Non-Parties

Argentina

The right to bring claims, both under domestic and international law, be limited to only directly affected parties.[1842]

Canada

1. Parties should provide for standing to bring claims by affected natural or legal persons as appropriate under domestic law.
2. In case civil liability is complemented by an administrative approach, natural and legal persons, including NGOs promoting environmental protection and meeting relevant requirements under domestic law, should have a right to require the competent authority to act according to this decision and to challenge, through a review procedure, the competent authority's decisions, acts or omissions as appropriate under domestic law.
3. Under an administrative approach, any person with concerns arising about an incident may report the incident to the Competent National Authority.[1843]

[1842] WGLR4; ENB WGLR5#3; Notes WGLR5.

[1843] Compilation of Views WGLR4.

Observers- Education

Public Research and Regulation Initiative

Any person affected by damage may bring a claim against the competent authority for action or inaction in a competent court.[1844]

Observers- Industry

Global Industry Coalition

Only those who suffer damage, including the State, may bring claims in national and international law. Only States should have the right to bring claims for damage to the conservation and sustainable use of biological diversity.[1845]

International Federation of Organic Agriculture Movements

The right to bring claims should be granted to:

a. nature conservation bodies;
b. representatives of communities depending on threatened or damaged natural resources;
c. representatives of GMO - free zones;
d. local and regional governments;
e. representatives of local and indigenous communities; and
f. other groups or representatives of groups.[1846]

International Grain Trade Coalition

Persons/entities with sufficient level of involvement in a dispute should have the right to bring claims. This often includes: those who suffered actual, direct, economic damage or political/ social interest groups.[1847]

1844 *Id.*
1845 *Id.*
1846 Compilation of Views WGLR2.
1847 Compilation of Views TEG 1.

Observers- NGOs

ECOROPA

Proposes the deletion of the requirement of 'direct involvement in the transboundary movement of LMOs' in order to bring claims.[1848]

Greenpeace International

1. Standing should be allowed for all general interests groups such as farmers, consumers or environmental groups.[1849]
2. The principle of wide access to justice shall be implemented. Persons and groups with a concern for or interest in environmental, social or economic matters, persons and groups representing communities or business interests and local, regional and national governmental authorities, shall have standing to bring a claim under this Protocol.
3. 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.[1850]
4. Financial and other barriers to access to justice should also be identified and removed or reduced by Contracting Parties such as legal costs, and lack of harmonization of laws and procedures.[1851]
5. The capacity and financial resources to bring claims must be considered.[1852]
6. Claimants should not be forced to participate in the legal systems of exporting States to have claims resolved.[1853]

South African Civil Society

Proposes that standing be given to any person representing the interests of the:

a. environment;

[1848] *Id.*
[1849] *Id.*
[1850] WGLR4.
[1851] Compilation of Views TEG 1 and WGLR4.
[1852] Compilation of Views TEG 1.
[1853] *Id.*

b. human health of humanity; and
c. protection of society, including individuals, entities, and the State.[1854]

Third World Network

The right to bring claims should be granted to the:

a. person who suffers damage;
b. Party whose citizen suffered damage;
c. any group on behalf of: own interest, interest of person unable to bring claim, protecting environment/ biodiversity.[1855]

[1854] Compilation of Views WG2.
[1855] *Id.*

8

COMPLEMENTARY CAPACITY-BUILDING MEASURES

Options for Complementary Capacity-Building Measures[1856]

Option 1: without an institutional arrangement
Option 2: with an institutional arrangement.

Delegates' and Others' Positions on complementary capacity-building measures

The African Group

1. Supports: the operational text referencing the up-dated Action Plan for Capacity Building for the effective implementation of the Protocol, take into account the present decision including capacity building measures such as assistance in the development of domestic 'liability rules' and considerations such as 'contributions in kind', 'model legislation', or 'packages of capacity building measures', including:

[1856] Meeting Report WGLR4.

a. the provision of assistance to develop national laws;
b. foster inter-sectoral coordination and partnership among regulatory organs at the national level;
c. ensure effective public participation in damage assessment and quantification; and
d. enhance the skills of the judiciary in handling issues pertaining to liability and redress.

2. Ready to discuss other options. African Group very interested in this area and welcomes them. [1857]

Specific Statements by members of the African Group in support of the African Group position

Ethiopia: emphasizes that development together with enforcement of regulatory structure necessary to give a complete picture.[1858]

Senegal: supports the development of institutional arrangements as the country does not have the technology to achieve this.[1859]

South Africa: emphasizes the need to focus on the technical aspects of risk assessment and limitation of risk.[1860]

Brazil

1. Supports the establishment of an institutional arrangement with its terms of reference in the main body or annex to a COP-MOP decision.
2. Cautions that the proposal in Core Element Paper was moving away from the purpose of capacity building measures and appeared more like a compliance mechanism. Notes that there

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[1857] WGLR4; Notes WGLR5: African Group was represented by Zambia in WGLR5.
[1858] ENB WGLR5#4; Notes WGLR5.
[1859] *Id.*
[1860] Friends of the Chair Group, ENB WGLR5#7.

is clear guidance from COP-MOP on separating liability and redress issues from compliance issues.

3. Prefers to draw on the existing roster of experts. [1861]
4. 'Proposes that the functions of the institutional arrangement to include, upon request,[based on the availability of funds] the provision of advice to:
    a. Parties on their domestic legislation in draft or existing form;
    b. [COP-MOP on access to [the voluntary] supplementary collective compensation mechanism of COP-MOP];
    c. Capacity building workshops on legal issues relating to liability and redress;
    d. Reports on best practices related to national legislation on liability and redress;
    e. [Support to national capacity's self-assessment activities];
    f. [Advice on providers of adequate technology and procedures to access it]'.[1862]

China

1. Emphasizes that capacity building is very important especially for developing countries.
2. Expresses no preference for the time being on a new institutional arrangement. This needs to be further considered.[1863]
3. Notes that the proposal in the Core Element Paper was moving away from the purpose of capacity building measures and appeared more like a compliance mechanism.[1864]

European Union

1. Prefers combining the operational text referencing the up-dated Action Plan for Capacity Building with the operational text which refers to a committee responsible for the facilitation of

[1861] *Id.*
[1862] Notes, Contact Group at MOP4. Brackets provided by Brazil, as it acknowledges the lack of consensus.
[1863] Notes WGLR5.
[1864] Friends of the Chair Group, ENB WGLR5#7.

the implementation of a future COP-MOP decision on this issue. Developing domestic legislation in this context is important.[1865]

2. Supports an institutional arrangement, adding that parties were at liberty to disregard advice, as it would not be binding.[1866]
3. Proposes the setting up of a Committee to
    a. provide advice, on request, on any draft domestic legislation on liability and redress;
    b. provide advice on implementation of this decision;
    c. report to each ordinary meeting of the COP-MOP on its activities; and
    d. report to COP-MOP7 on the implementation and effectiveness of this decision[1867]

India

Supports a committee responsible for the facilitation of the implementation of a future COP-MOP decision on this issue.[1868]

Japan

1. Recognizes the crucial importance of building capacities in biosafety, and encourages Parties to strengthen their efforts in implementing relevant COP-MOP decisions on capacity building under Article 22 of the Protocol.
2. Invites Parties to take into account the present decision in formulating bilateral, regional and multilateral assistance to developing country Parties that are in the process of developing their domestic legislation relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms.[1869]
3. Expresses reservations on establishing an institutional arrangement and on mandating a compliance committee to

[1865] Notes WGLR5.
[1866] Friends of the Chair Group, ENB WGLR5#7.
[1867] WGLR4.
[1868] Notes WGLR5.
[1869] WGLR4.

render judgment on whether or not domestic law is in conformity with a supplementary protocol and guidelines.

4. Notes that the proposal in Core Element Paper was moving away from the purpose of capacity building measures and appeared more like a compliance mechanism.[1870]
5. Opposes institutional arrangement, citing funding concerns.[1871]

Mexico

Supports a committee responsible for the facilitation of the implementation of a future COP-MOP decision on this issue.[1872]

New Zealand

Suggests adding reference to strengthening linkages between capacity building in liability and redress and capacity building in risk assessment and risk management.[1873]

Norway

1. Supports that the Parties to this instrument undertake to contribute to ensuring that the next review of the Up-dated Action Plan for Capacity Building for the Effective Implementation of the Cartagena Protocol on Biosafety, as contained in the annex to decision BS-III/3, reflects this instrument and include capacity building measures such as assistance in the implementation and application of this instrument, including:
    a. assistance to develop national implementing legislation;
    b. foster inter-sectoral coordination at national level;
    c. ensure appropriate public participation; and
    d. enhance the skills of the judiciary in handling liability cases.[1874]

[1870] Friends of the Chair Group, ENB WGLR5#7.
[1871] Notes, Contact Group at MOP4.
[1872] Notes WGLR5.
[1873] Friends of the Chair Group, ENB WGLR5#7.
[1874] WGLR4.

2. Recognizes the importance of this issue, is very flexible and can go along with all the text.[1875]

TEXT AGREED TO AT COP-MOP4

Operational text 1(to decision)

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

Operational text 2

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

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

[1875] Friends of the Chair Group, Notes WGLR5.

Operational text 3 (to decision)

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

a. Parties on their domestic legislation in draft or existing form;

b. Capacity building workshops on legal issues relating to liability and redress;

c. [Identification of best practices related to national legislation on liability and redress;]

d. [Support to national capacity's self-assessment activities;]

e. [Advice on providers of adequate technology and procedures to access it].

Non-Parties

Canada

Recommends clearer references to capacity building measures under the Biosafety Protocol.[1876]

Co-Chairs

Confirmed that the provisions on capacity building would form part of a COP-MOP decision on liability and redress. [1877]

[1876] ENB WGLR5#4*;* Notes WGLR5.
[1877] *Id.*

9

CHOICE OF INSTRUMENT

There are two questions in relation to the choice of instrument. First, what is the kind of mechanism or instrument that should operationalise the liability and redress regime? Secondly, whether it will be binding or not?

1. *The type of the instrument*

The first question addressees the form of the implementing mechanism. Article 27 of the CPB provides the basis for the development of the rules and procedures on liability and redress. It does not specify the form of the final product. This is left to be decided by the institutional mechanism of the CPB – the Conference of the Parties of the CBD serving as the Meeting of the Parties (COP-MOP) of the CPB.

There are several possibilities. The liability and redress regime could be a protocol to the CBD or to the CPB. It is unlikely to be the former as the regime is being discussed under a specific Article (27) of the CPB. Article 32 of the CPB states that the provisions of the CBD relating to its protocols will apply to the CPB. This refers to Article 28 of the CBD which provides for protocols to be formulated and adopted by Parties. This clearly authorizes the creation of a separate protocol on

liability and redress under the CPB. This would in effect be a supplementary protocol or a subprotocol.

The regime could also be introduced as an amendment to the CPB. This is provided for by the same enabling Article 32 of the CPB which relies upon article 29 of the CBD. Article 29 allows for any amendments to a protocol. An amendment represents any change and could include the addition of rules and procedures under Article 27. Any procedural, scientific, technical and administrative matters in the amended article could be set out in an annex. This is clearly envisaged by Article 30 of the CBD read together with Article 32 of the CPB. An annex is an integral part of a protocol.

What is a protocol, or as is likely in this case, a supplementary or subprotocol?[1878] A protocol is a binding international instrument. Although it is related to, and born out of, a 'parent' treaty, it is a separate instrument and is individually negotiated, signed and eventually ratified. It is only binding on States that become Parties to it. This separate treaty will consist of distinct rights and obligations.

It is however related to the parent treaty that 'enables' by its provisions for the creation of this supplementary or subprotocol – with substantive, procedural and institutional links to that treaty. For a start it must comply with the provisions of the parent treaty regulating and providing the process for the adoption of the subprotocol under its auspices. Further it cannot go beyond the scope of that parent treaty. Usually the main treaty will not allow Parties who are not Parties to the main treaty, to be Parties to the protocol. This is the case for the CPB as provided for by Article 32 of the CBD.

The protocol could be attached to the CBD or the CPB.

The CPB provides in its Article 32 that, unless otherwise stated, the provisions of the CBD relating to its protocols apply to the CPB. This means that any protocol adopted under the CBD or the CPB will

[1878] Under Article 29(4)(f) of the CPB, COP-MOP can exercise any other functions as may be required for the implementation of the CPB. Article 27 of the CPB requires Parties to develop rules and procedures on Liability and Redress. These rules would in effect be an implementation of an Article of the CPB. A supplementary protocol could be created under the CPB pursuant to Article 29.

have to include the provisions set out in the CBD. The fundamental ones which cannot be departed from are: Article 28(2) on adoption of protocols; Article 32(1) on Parties to the protocol; and Article 38 on withdrawal from the protocol. The other provisions that are optional are: Article 27: settlement of disputes; Article 29: amendment to protocols; Article 30: adoption and amendment of annexes; Article 31: right to vote; Article 34: ratification, acceptance or approval; Article 35: accession; Article 36: entry into force and Article 41: depositary.

2. *The status of the instrument: binding or non-binding*

The second question relates to the status of the implementing mechanism: whether it will be binding or not. Sometimes the kind of instrument will determine its nature – a protocol, for example, is binding. There is a range of possibilities for the nature of the instrument: from being mere guidelines to being binding; as well as an instrument that has binding as well as non-binding provisions. The non-binding instrument(s) proposed are guidelines, model law or specific model contract clauses. There are a whole range of possibilities as seen by the proposals presented by the parties in the negotiations

There are also proposals for having one or more instrument(s).

Options for Choice of Instrument[1879]

Option 1

One or more legally binding instrument(s).

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.

[1879] Meeting Report WGLR4.

Option 2

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

Option 3

One or more non-binding instrument(s):

(a) guidelines;

(b) model law or model contract clauses.

Option 4

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

Option 5

Mixed approach: combination of one or more legally binding instruments, example, on settlement of claims, and one or more non-binding instruments, example, on the establishment of liability.

Option 6

No instrument.

Delegates' and Others' Positions on the Choice of Instrument

The African Group

1. Supports a legally binding regime or a protocol.[1880]

[1880]ENB WGLR4; Synthesis of Texts WGLR4; Notes WGLR4.

2. Supports specific text on a COP-MOP decision adopting a protocol implemented by Parties through domestic legislative, regulatory and administrative measures.
3. Proposes a review period at a future COP-MOP.[1881]

Specific Statements by members of the African Group in support of the African Group position

Statements of support by: Egypt,[1882] Ethiopia,[1883] Liberia,[1884] Madagascar,[1885] Rwanda,[1886] and Senegal[1887].

Burkina Faso:

1. Proposes that both domestic and international measures be used depending upon the damage scenario.
2. Acknowledges the fact that States can regulate activities related to LMOs and create liability standards. However, the type of damage scenario is important. If it is simply a domestic scenario then the State can address the damage.[1888]

Bangladesh

Supports a legally binding instrument.[1889]

Brazil

1. Still considering various options such as a binding or a two-stage approach.
2. Notes with regard to a liability and redress regime:
    a. must ensure immediate application/implementation of the regime;[1890]

[1881] *Id.*
[1882]Notes WGLR3.
[1883] *Id.*
[1884] Notes WGLR4.
[1885] Compilation of Views WGLR2.
[1886] Notes WGLR4.
[1887] Notes WGLR4; ENB WGLR2.
[1888] Notes WGLR3.
[1889] *Id.*

b. it would have legal, technological and other implications;
c. must ensure that options for an instrument are not exclusive, bearing in mind the different internal rules of countries;[1891] and
d. should be in place and enforced; if not invoked or needed, will demonstrate the regimes' ineffectiveness.[1892]

3. Retains a cautious stance on the nature of an instrument from the ICCP and the early WG meetings to the present. Brazil is a mega-diverse country with a large population, and is a large exporter and importer of GMOs. It is not yet of one mind and has much work to do internally on this subject.[1893] Brazil suggests further information gathering or consideration of options.[1894]
4. Cautions that it is difficult to commit to working towards a legally binding approach given that the operative texts still contained many contentious elements.[1895]
5. Ready to engage to work towards an instrument with a legally binding administrative approach; and also including in such legally binding instrument, one article on civil liability as proposed by the Like Minded Friends.[1896]

Cambodia

1. Supports a legally binding regime.[1897]
2. Suggests that the regime should be a mix of civil and State (administrative) approaches.[1898]

[1890]ENB WGLR4; Notes WGLR4.
[1891] Notes WGLR3.
[1892] ENB WGLR2.
[1893] Notes WGLR3.
[1894]ENB WGLR1 Summary*;* ENB ICCP2 Summary.
[1895] Notes, Contact Group at MOP4.
[1896] Notes, Contact Group at MOP4. This legally binding instrument with an article on civil liability was the proposal of the Like Minded Friends.
[1897] Notes WGLR3; Notes WGLR4; ENB WGLR4.
[1898] Notes WGLR3.

3. Notes that countries have been waiting for such a regime for years.[1899]

Colombia

1. Supports a legally binding instrument.[1900]
   Rationale: a legally binding instrument would ensure the effective and rigorous management of the transboundary movement of LMOs.[1901]
2. Further consideration of the nature of the instrument should be considered based on the development of the rest of the instrument.[1902]

Cuba

Favours a legally binding instrument.[1903]

Ecuador

Supports a legally binding instrument.[1904]
Rationale: "Rules and procedures" referred to in Article 27 go beyond guidelines.[1905]

European Union

1. Supports the creation of an instrument on liability and redress with a flexible mandate. The instrument should be created through a two-step approach:
   a. Start with a COP-MOP decision with annexed rules and procedures on liability and redress. The COP-MOP decision would encourage Parties to develop a combination of administrative and civil liability in national law to address damage to conservation and sustainable use of biodiversity.
   b. After a given period of implementation a process could be undertaken to assess the effectiveness of national regimes

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[1899] *Id.*
[1900] Notes WGLR4.
[1901] *Id.*
[1902] *Id.*
[1903] Notes WGLR3; Notes WGLR4*;* ENB WGLR4.
[1904] Notes WGLR4.
[1905] Notes WGLR3.

and the need for further international rules. The review will be at COP-MOP 7. [1906]

Rationale:

i. it would allow parties to take on a binding approach that is compatible with their national legal systems.[1907]

ii. it would be faster to negotiate, would not require ratification, and would ensure immediate applicability.[1908]

2. Also proposes capacity-building in developing national legislation as an effective means of reaching the objectives of a regime.[1909]
3. Notes that during the negotiation of the Biosafety Protocol, the European Union cautioned against the inclusion of substantive provisions given the difficulty of attempting to harmonize national principles of liability and compensation on an international level.[1910] It supported the application of national legislation to liability and compensation issues regarding transboundary movements of LMOs.[1911]
4. Proposes the following text:

‘a. *Adopts* the Rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, as contained in the Annex to this decision, for the purpose set out in paragraph 2 below;

b. *Recommends* the implementation of these Rules and procedures by the Parties to the Protocol in their domestic law, while recognizing their respective varying needs and circumstances;

[1906] Notes WGLR3; Notes WGLR4; ENB WGLR1 Summary; ENB WGLR2; ENB WGLR4; Synthesis of Texts WGLR4, at Section VIII OT 1*;* Compilation of Views TEG 1.

[1907] *Id.*

[1908] *Id.*

[1909] *Id.* Compilation of Views WGLR1.

[1910] ENB BSWG3 Summary.

[1911] *Id.*

c. *Decides* to review the implementation and effectiveness of the present decision at its seventh meeting, taking into account experience at the domestic level to implement this decision with a view to considering the need to take further action in this field'.[1912]

5. Expresses no objection to work towards a legally binding instrument on an administrative approach, including in such legally binding instrument, one article on civil liability.[1913]

Fiji

Notes that further national legislation on liability may need to be enacted.[1914]

Haiti

Suggests the development of intermediary mechanisms for countries without liability regimes.[1915]

India

1. Supports a legally binding regime with text in the form of a protocol setting out rules and procedures for liability and redress.[1916]
2. Emphasises developing countries' need for the rules and procedures of a legally binding liability and redress regime.[1917]

[1912] WGLR4.

[1913] The Co-Chairs raised this question for the Parties: Is there an objection to work towards a legally binding instrument on an administrative approach? Is there an objection to work towards including in such legally binding instrument one article on civil liability. This was the EU's response.

[1914] Liability And Redress (Article 27) Compilation of information on national, regional and international measures and agreements in the field of liability and redress for damage resulting from the transboundary movements of living modified organisms, in preparation for the Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety UNEP/CBD/BS/COP-MOP/1/INF/5 (8 December 2003) at http://www.cbd.int/doc/meetings/bs/mop-01/information/mop-01-inf-05-en.pdf ['Compilation of Information COP-MOP 1'].

[1915] ENB ICCP3 Summary

[1916] Notes WGLR4; ENB WGLR4; Synthesis of Texts WGLR4, at Section VIII OT 5.

[1917] Notes WGLR3.

Japan

1. The final product of the WG must not be legally binding.[1918]
2. No need for a strong legally binding regime,[1919] because:
    a. many of these issues are adequately covered by the Convention on Biological Diversity,[1920]
    b. such a regime would not be very effective
    c. it would be difficult for many countries to follow.[1921]
3. Expresses view that would like to further understand the reasons for a liability and redress regime as Japan's view is that LMOs are useful to society, and humankind.[1922]
4. Notes that it could not agree to a provision on civil liability in a legally binding instrument.
   Rationale:
    a. drafting would have to be completed before they could decide whether they support the instrument.
    b. to accept binding civil liability is impossible.
5. Introduces a reference into the compromise proposal of the Like-Minded Friends, stating that Parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with LMOs. The proposal was to integrate this provision into part (a) of the compromise proposal.
6. Notes that divergence stems from divergent views regarding biotechnology;
7. Emphasises that it is committed to concluding negotiations during the meeting and working towards a legally binding instrument – for administrative approach with the article on civil liability as proposed by the Like Minded Friends, as amended in paragraph 5 above..[1923]

[1918]Compilation of Views WGLR4.
[1919] Notes WGLR4.
[1920] ENB BSWG3 Summary.
[1921] Notes WGLR4; ENB WGLR4; Notes WGLR3.
[1922] Notes WGLR4.
[1923] Notes, Contact Group at MOP4; ENB MOP4.

Malaysia

1. Supports the creation of an international regime of binding rules and procedures on liability and redress.[1924]
2. Does not support any proposal for no instrument,[1925] or a two-stage non-binding approach. [1926]
   Rationale: The mandate of Article 27 is for a process to create binding international rules and procedures on liability and redress.[1927]
3. Suggests to start the negotiations with the choice of instrument, noting that this is the most controversial issue that will also inform choices in other substantive sections.
4. Urges Parties to state categorically that they are willing to work towards a legally binding regime. Developing countries did not wish to continue with a long, arduous and costly process that will merely result in guidelines on liability and redress.
5. States the priority of reaching agreement on liability and redress,as otherwise we would fail the global community.
6. On behalf of Like-Minded Friends,[1928] supports a legally binding regime and proposes a compromise proposal on civil liability entailing three key points:
   a. a single legally binding Article on civil liability in a legally binding instrument. This Article states that where a Party chooses to enact, or develop their

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[1924] Notes WGLR4; Notes WGLR3; Synthesis of Texts WGLR4, at Section VII OT 2.
[1925] ENB WGLR1 Summary.
[1926] Notes WGLR4.
[1927] Notes WGLR3; Notes WGLR4; ENB WGLR4 .
[1928] Eighty two countries comprise the Like Minded Friends (LMF) - formed on the basis of support for a legally binding instrument during the Contact Group negotiations at MOP4. The countries are set out in Annex 1. The position of all these countries is expressed by Malaysia. Finally all Parties agreed to work towards a legally binding instrument on the administrative approach, and also including in such a legally binding instrument one article on civil liability as proposed by the LMF. Japan later substituted paragraph (a) of the LMF proposed article with their text. This was agreed to by the LMF. Both the LMF proposal and Japan's proposal has been retained as alternative texts – in respect of para (a) only. It is expected that these two articles on para (a) and the rest of the LMF proposed text on civil liability will be the basis for future negotiations on the nature of the instrument.

existing law or policy, on liability and redress, then this law must include these minimum core elements:
   i. damage;
   ii. standard of liability: that may include strict, fault or mitigated liability;
   iii. channeling of liability;
   iv. financial security, where feasible;
   v. access to justice;
   vi. procedural rules that provide for due process;

b. Parties are also to recognize and enforce foreign judgments on damage where their domestic courts recognize this; if their courts do not do so, then Parties are to endeavour to extend such recognition of foreign judgments; and

c. a review process, with the possibility of making the other remaining elements of civil liability, which are now included as guidelines, legally binding on the basis of experience gained.

7. Stresses that the provision on the recognition and enforcement of judgments, is a core element of the proposal.[1929]

LMF's Proposal:

(a) Subject to subsections (b), (c) and (d) below, nothing in these rules and procedures shall prejudice the right of Parties to have in place or to develop their domestic law or policy in the field of civil liability and redress resulting from the transboundary movement of LMOs consistent with the objective of the Cartagena Protocol on Biosafety and these rules and procedures/this instrument/this supplementary Protocol.

(b) Any such law or policy, shall include, *inter alia*, the following elements, taking into account the Guidelines in Annex [x] to this supplementary Protocol:

[1929] Notes, Contact Group at MOP4; ENB MOP4.

a. Damage;

b. Standard of liability: that may include strict, fault or mitigated liability;

c. Channelling of liability;

d. Financial security, where feasible;

e. Access to justice;

f. Procedural rules that provide for due process;

(c) Parties shall recognize and enforce foreign judgments in accordance with the applicable rules of procedures of the domestic courts governing the enforcement of foreign judgments in respect of matters within the scope of these rules and procedures/this instrument/ the Guidelines in Annex [x] to this supplementary Protocol.

(d) While this provision does not require any change in domestic law, and does not in itself constitute a treaty on reciprocal enforcement of foreign judgments, Parties shall endeavor to extend their domestic law governing the reciprocal enforcement of foreign judgments to other Parties not presently covered by their domestic law.

(e) The Guidelines shall be reviewed no later than 3 years after the entry into force of this instrument with a view to consider making them binding, in the light of experience gained.

Mexico

1. Still considering various options for an instrument on liability and redress.[1930]
2. Notes that Article 27 is very clear in its mandate on the need for rules and procedures on liability and redress. Article 27 is part of a binding Protocol. 'Rules' in this context must necessarily mean 'binding' rules.[1931]

New Zealand

1. Notes that it has no outcome in mind for negotiations on rules and procedures. Many formulations could be acceptable such as:

[1930] Notes WGLR4.
[1931] Notes WGLR3.

a. private law addressing issues between private parties, such as operators, importers, and exporters; or
b. a model law. [1932]

2. Still unsure of its role as either a net importer or a net exporter of LMOs. New Zealand along with the WG seems to be struggling with the degree of risk of LMOs and therefore the need for rules and procedures. [1933]
3. Expresses no objection to work towards a legally binding instrument on an administrative approach, including in such legally binding instrument, one article on civil liability.[1934]

Norway

1. Convinced that rules and procedures on liability and redress must be binding.[1935]
   Rationale:
   a. developing countries' need for a legally binding regime.[1936]
   b. will facilitate the development of equal rules in national law, even if it does not fully harmonize national rules.[1937]
   c. development of equal rules in national law would help industry. [1938]
   d. it is the best way to ensure effective operational implementation.[1939]
2. Not convinced that a non-binding or tiered approach, such as an approach including a COP-MOP decision, is the best way to

[1932] Notes WGLR4*;* ENB WGLR4.
[1933] *Id.*
[1934] The Co-Chairs raised this question for the Parties: Is there an objection to work towards a legally binding instrument on an administrative approach? Is there an objection to work towards including in such legally binding instrument one article on civil liability. This was New Zealand's response.
[1935] Notes WGLR4; ENB WGLR4*;* Compilation of Views WGLR4.
[1936] Notes WGLR3.
[1937] Compilation of Views WGLR2.
[1938] *Id.*
[1939] Notes WGLR4.

ensure effective operational implementation, or even an appropriate solution.[1940]

3. Acknowledges that such a COP-MOP decision could be more flexible, but it would not ensure implementation and appropriate standards.[1941]
4. Does not believe that the process should be postponed further out of fear that it will follow the same path as other treaties. Agrees that the negotiations process on liability and redress should continue until it comes to a final desired outcome.[1942]
5. Proposes that the liability and redress instrument be either:
    a. a protocol to the Biosafety Protocol; or
    b. be introduced as an amendment to the Biosafety Protocol; or
    c. be an annex to the Biosafety Protocol; or
    d. that it be a protocol to the Convention on Biological Diversity. [1943]

Palau

Supports binding rules and procedures.

Rationale:

a. article 27 suggests 'rules'. Rules are binding. Therefore, the binding nature of this instrument has already been decided and mandated.
b. does not believe that concern about the future entry into force of a regime should support the need for a non-binding approach as the same issue of adoption of rules and procedures would take place with no obligation for adoption under a non-binding approach.[1944]
c. suggests that participants should create provisions that they feel strongly enough about to adopt and follow.[1945]

[1940] Notes WGLR3*;* Notes WGLR4.
[1941] Notes WGLR4.
[1942] Notes WGLR3.
[1943] WGLR4.
[1944] *Id.*
[1945] Notes WGLR4.

Paraguay

1. Supports the formulation of an easily understandable and flexible text.[1946] The exact nature of the instrument on liability and redress should be contingent on the outcome of other options.[1947]
2. Objects to working towards a legally binding instrument on an administrative approach. Reason: our legal system and national law has contradiction with this.[1948]
3. Prepared to negotiate in good faith towards a legally binding instrument with an administrative approach, and also including one article on civil liability.[1949]

Peru

1. Supports a binding instrument.
   Rationale:
   a. Article 27 refers to some sort of obligatory regime, as the Article points to rules, not guidelines.
   b. The interpretation of Article 27 should take into consideration the Vienna Convention which instructs Parties to take note of the customary and historic interpretation. The history of Article 27 includes a consensus Article deciding on a 4-year period for development of rules and procedures. A customary interpretation is of rules that are binding. [1950]
2. Objects to work towards a legally binding instrument for the administrative approach.[1951]
3. Prepared to negotiate in good faith towards a legally binding instrument with an administrative approach, and also including one article on civil liability.[1952]

[1946] *Id.*
[1947] ENB WGLR4.
[1948] Notes, Contact Group at MOP4.
[1949] Notes, Contact Group at MOP4. This legally binding instrument with an article on civil liability was the proposal of the Like Minded Friends.
[1950] Notes WGLR3.
[1951] Notes, Contact Group at MOP4.
[1952] *Id.*

Philippines

Expresses willingness to work towards a legally binding instrument on an administrative approach with the reservation on financial security. Also no objection to engaging to negotiate to work towards a legally binding instrument with an article on civil liability as proposed by the Like Minded Friends.[1953]

Saudi Arabia

Supports a legally binding instrument.[1954]

Sri Lanka

Supports a two stage approach to the creation of an instrument on liability and redress, or a mix of both legally binding and non-binding instruments.[1955]

Switzerland

Supports a legally binding instrument, not a zero option or any measure that does not produce a result.[1956]

Thailand

1. Supports a two-stage approach to liability and redress with a clear time-frame for each stage of implementation and evaluation.[1957]
2. Suggests that each Party shall implement the chosen instrument in an effective manner for an appropriate interval. Although each Party may develop an instrument differently, harmonization and transparency of these instruments is essential.[1958]

Trinidad and Tobago

Records its opposition to the option of 'no instrument' on liability and redress.[1959]

[1953] *Id.*
[1954] Notes WGLR3.
[1955] Compilation of Views WGLR2.
[1956] Notes WGLR3; ENB WGLR4*;* Notes WGLR4.
[1957] Compilation of Views WGLR3.
[1958] *Id.* Thailand is a member of the Like-Minded Friends (LMF) and supports its position.
[1959] ENB WGLR1 Summary. It supports the LMF's position.

TEXT ON WORKING TOWARDS A LEGALLY BINDNG INSTRUMENT WITH A LEGALLY BINDING ADMINISTRATIVE APPROACH AND A BINDING ARTICLE ON CIVIL LIABILITY: ***SEE ANNEX II***

Non-Parties

Argentina

1. Suggests the development of model laws and contracts to facilitate the channeling of responsibilities.[1960]
2. Proposes that further discussion of either a legally binding or a non-binding instrument must be based on further discussion of other elements of liability and redress, such as standard of liability, damage and causal link.[1961]

Australia

1. Favors the COP elaborating guidelines to national legislation for non-binding fault-based civil liability.[1962]
2. Does not support a strict binding liability regime.[1963]
3. Questions the need for an international instrument on liability and redress,[1964] taking into account work under Article 14 (2) of the Convention[1965].
4. Notes that Article 27 does not require the establishment of a liability regime.[1966]

Canada

1. Supports a voluntary combination of civil and administrative approaches to liability and redress through rules and procedures within domestic law.[1967]

[1960] ENB COP-MOP-1 Summary.
[1961] ENB WGLR4*;* Notes WGLR4.
[1962] Compilation of Views WGLR4; Notes WGLR4.
[1963] *Id.*
[1964] ENB ICCP3 Summary.
[1965] Compilation of Views TEG 1.
[1966] Compilation of Views WGLR4.
[1967] Notes WGLR4*;* Compilation of Views WGLR4.

Rationale: A voluntary administrative approach would allow for rapid redress and efficient restoration of damages.[1968]

2. Supports text in the form of a COP-MOP decision encouraging countries to take measures to amend their liability laws and take an administrative approach and address the rules of court relating to foreign plaintiffs.[1969]
3. Proposes that a review of implementation should take place at MOP 6.[1970]

United States of America

1. Proposes that:
    a. this instrument enters into force upon the fulfillment of [x] ratifications, representing [x] per cent of trade in LMOs and representing a balance of importing and exporting parties;
    b. this instrument shall not be interpreted as implying any change in the rights and obligations of a Party under international law including any international agreements;
    c. whenever the provisions of this instrument and the provisions of a bilateral, multilateral or regional agreement apply to liability and compensation for damage caused by an incident arising during the same portion of a transboundary movement, this instrument shall not apply if the other agreement is in force for the Party or Parties concerned and had been opened for signature when the instrument was opened for signature, even if the agreement is amended afterwards.[1971]
2. Suggests focusing on existing liability regimes at the national level and further developing regimes at this level.[1972]
3. A two-tiered or two-stage process is not necessary and would duplicate the process currently underway.[1973]

[1968] Compilation of Views WGLR4.
[1969] *Id.*
[1970] *Id.*
[1971] WGLR4.
[1972] Compilation of Views WGLR1.

Rationale:

a. wishes to go through the process under Article 27 only once.[1974]

b. the COP-MOP may provide more time if necessary; however, notes that a timeline has already been given and suggests that the WG complete its work and do it once, correctly.[1975]

Observers- Education

Public Research and Regulation Initiative

1. Supports the adoption of a COP-MOP decision, including guidelines, for an administrative approach to be implemented at the national level.
2. Proposes: This instrument shall not affect the rights and obligations of the Contracting Parties under the Protocol. [1976]

Universidad Nacional Agraria La Molina Of Peru

Supports a binding liability regime.[1977]

Observers- Industry

International Grain Trade Coalition

1. Proposes a non-binding instrument, providing meaningful guidelines for best practices.[1978]
   Rationale: This system could be created without the pressure of commitment to a system that may not be equipped to address the real-life incidents of damage.[1979]

[1973] ENB WGLR4.
[1974] Notes WGLR4.
[1975] Notes WGLR3.
[1976] Compilation of Views WGLR4.
[1977] ENB WGLR2.
[1978] Compilation of Views WGLR1.
[1979] *Id*.

2. No new rules, or changes to national legislation, should result from rules developed under the Protocol.[1980]

Organic Agriculture Protection Fund

Supports the formation of one or more legally binding instrument(s) on liability and redress.[1981]

Rationale: The safety of biotechnology has not yet been proven. Therefore labeling, segregation, precautionary principle and patents are important along with the process underway on Article 27.[1982]

Observers- NGOs

ECOROPA

A liability regime is crucial as a citizens' issue.

Rationale: The precautionary approach is the obligation of those who transfer, handle and use LMOs.[1983]

Greenpeace International

1. Supports a legally binding liability and redress protocol to the Biosafety Protocol.[1984]

   Rationale: Damage may continue regardless of creation of any instrument. However, if an instrument is not created then compensation will not occur, and damage will not be mitigated or alleviated.[1985]
2. National legislation is not sufficient.

   Rationale: Notes that a legal paper focusing on liability for genetically modified organisms in New Zealand, concludes that there are significant difficulties in establishing liability for damage from GMOs. [1986]

[1980] *Id.*
[1981] Compilation of Views WGLR2.
[1982] *Id.*.
[1983] ENB BSWG3 Summary.
[1984] Compilation of Views WGLR2.
[1985] Notes WGLR3.
[1986] *Id.*

3. Proposes detailed provisions for entry into force of the instrument.[1987]

South African Civil Society

1. A liability regime should be a discrete liability protocol to the Biosafety Protocol.[1988]
2. Rejects, 'with utter contempt', the proposal of no instrument.[1989]

Third World Network

1. Supports a legally binding liability protocol to the Cartagena Protocol on Biosafety.[1990]
2. Supports the inclusion of interim measures, so long as they do not prejudice/ delay the development of a liability and redress regime under the Protocol.[1991]

World Wildlife Fund International

1. The development of rules and procedures for liability and redress are high priority under the Protocol.[1992]
2. The primary objective should be to:
    a. minimize any damage or the spread of damage detected; and
    b. provide efficient and timely compensation.[1993]

[1987] WGLR4.
[1988] Compilation of Views WGLR2.
[1989] *Id*.
[1990] *Id.*
[1991] *Id*.
[1992] Compilation of Information COP-MOP 1.
[1993] *Id*.

ANNEX I

LIKE-MINDED FRIENDS
(as at 15 May 2008, 10 pm)

Representing those countries whose position is that an international instrument on liability and redress should have binding elements on civil liability

	LIKE-MINDED FRIENDS
1 – 53.	Countries in African Group
54.	Antigua and Barbuda
55.	Bahamas
56.	Bangladesh
57.	Belize
58.	Bhutan
59.	Bolivia
60.	Cambodia
61.	Colombia
62.	Croatia
63.	Dominica
64.	Ecuador
65.	India
66.	Iran
67.	Jordan
68.	Malaysia
69.	Mexico
70.	Norway
71.	Palau
72.	Panama
73.	Qatar
74.	Saudi Arabia
75.	St. Lucia
76.	St. Vincent and The Grenadines
77.	Syrian Arab Republic
78.	Thailand
79.	Trinidad and Tobago
80.	Turkey
81.	Venezuela
82.	Yemen

ANNEX II

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

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1. *Working Towards Legally Binding Provisions*

1.A. ADMINISTRATIVE APPROACH

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

Operational text

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

Preambular text

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

II. SCOPE

A. Functional scope

Operational text 1

1. These rules and procedures apply to transport, transit, handling and use of living modified organisms [and products thereof], provided that these activities find their origin in a transboundary movement. The living modified organisms referred to are those:
2. With respect to intentional transboundary movements, these rules and procedures apply to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1.

a. Intended for direct use as food or feed, or for processing;

b. Destined for contained use;

c. Intended for intentional introduction into the environment.

3. These rules and procedures also apply to unintentional transboundary movements as referred to in Article 17 of the Protocol as well as illegal transboundary movements as referred to in Article 25 of the Protocol.

B. *Geographical scope*

Operational text 2

These rules and procedures apply to areas within the limits of its national jurisdiction[, including the exclusive economic zone,] [or control] of the Parties to the Protocol.

C. *Limitation in time*

Operational text 3

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

Operational text 3 alt

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

D. Limitation to the authorization at the time of the import of the living modified organisms

Operational text 4

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

E. Non-Parties

Operational text 5

1. National rules on liability and redress implementing these rules and procedures should also cover damage resulting from the transboundary movements of living modified organisms from non-Parties, in accordance with Article 24 of the Protocol.

2. These rules and procedures apply to "transboundary movements" of living modified organisms, as defined in Article 3(k) of the Protocol.

III. Damage

A. Definition of damage

Operational text 6

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

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

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

b. is significant as set out in paragraph 4 below.

3. [For the purposes of these rules and procedures, damage to the sustainable use, as defined in Article 2 of the Convention on Biological Diversity of biological diversity, means an adverse or negative effect on biological diversity that is significant as set out in paragraph 4 below and [may have resulted in loss of income] [has resulted in consequential loss to a state, including loss of income].].

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

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

[(b) The extent of the qualitative or quantitative changes that adversely or negatively affect the components of biological diversity;

(c) The reduction of the ability of components of biological diversity to provide goods and services;]

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

[(d) The extent of any adverse or negative effects on human health;]

[(d alt) The extent of any adverse or negative effects of the conservation and sustainable use of biological diversity on human health;]

[5. Parties may take into account local and regional conditions in order to ensure the workability of domestic liability rules and procedures, provided that this is consistent with the objective and provisions of the Protocol.]

B. Valuation of damage

Operational text 7

[1. Damage to conservation and sustainable use of biological diversity shall be valued on the basis of the costs of response measures [in accordance with domestic laws and provisions].

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

i. [prevent,] minimize or contain damage, as appropriate;

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

C. Causation

Operational text 8

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

IV. PRIMARY COMPENSATION SCHEME

A. Elements of administrative approach based on allocation of costs of response measures and restoration measures

Operational text 9

Parties [may][shall][, as appropriate,] [, consistent with international [law] obligations,] provide for or take response measures in accordance with domestic law or[, in the absence thereof,] the procedures specified below, [provided that the domestic law is consistent with the objective of these rules and procedures].

Operational text 10

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

Operational text 10 alt

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

Operational text 11

In the event of damage [or imminent threat of damage], an operator shall, subject to the requirements of the competent authority, investigate, assess and evaluate the damage [or imminent threat of damage] and take appropriate response measures.

[In cases where no response measures can be implemented, the operator shall provide monetary compensation for the damage caused [where applicable under the domestic law].]

Operational text 11 alt

The Parties should endeavor to require any legal or natural person who caused significant damage by that person’s intentional or negligent act

or omission regarding the transboundary movement to undertake reasonable response measures to avoid, minimize or contain the impact of the damage.

Operational text 12

[1. The competent authority:

a) [should][shall] identify, in accordance with domestic law, the operator which has caused the damage [or the imminent threat of damage];

b) [should][shall] assess the significance of the damage and determine which response measures should be taken by the operator.]

2. The competent authority has the discretion to implement appropriate measures[, in accordance with domestic law, if any, including in particular] where the operator has failed to do so.

3. The competent authority has the right to recover the costs and expenses of, and incidental to, the implementation of any such appropriate measures, from the operator.

Operational text 13

“Operator” means any person in [operational control][[direct or indirect] command or control]:

(a) of the activity at the time of the incident [causing damage resulting from the transboundary movement of living modified organisms];

[(b) of the living modified organism [at the time that the condition that gave rise to the damage] [or imminent threat of damage] arose [including, where appropriate, the permit holder or the person who placed the living modified organism on the market];] [and/]or

(c) as provided by domestic law.

Operational text 13 alt

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

Operational text 13 alt bis

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

Operational text 14

> Decisions of the competent authority imposing or intending to impose response measures should be reasoned and notified to the operator who should be informed of the procedures and legal remedies available to him, including the opportunity for the review of such decisions, inter alia, through access to an independent body, such as courts.

A bis. Additional elements of an administrative approach
1. Exemptions or mitigation

Operational text 15

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

(a) Act of God or *force majeure*;

(b) Act of war or civil unrest;

[(c) Intervention by a third party [that caused damage despite the fact that appropriate safety measures were in place];]

[(d) Compliance with compulsory measures imposed by a public authority;]

[(d alt) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;]

[(e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;]

[(f) An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out;]

[(g) National security exceptions [or international security]].

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

Operational text 16

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

3. Limitation of liability

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

Operational text 17

Domestic law may provide for relative and/or absolute time limits for the recovery of costs and expenses[, provided that such limits shall not be less than [three] years for relative time limit and [twenty] years for absolute time limit].

b. Limitation in amount

Operational text 18

Domestic law may provide for financial limits for the recovery of costs and expenses[, provided that such limits shall not be less than [z] special drawing rights].

4. Coverage

Operational text 19

1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of the

time limit of liability, financial security, including through self-insurance.]

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

1.B. CIVIL LIABILITY

Operational text 1

[Parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with living modified organisms.]

Operational text 2

(a) [Subject to subsections (b), (c) and (d) below, nothing in these rules and procedures shall prejudice the right of Parties to have in place or to develop their domestic law or policy in the field of civil liability and redress resulting from the transboundary movement of LMOs consistent with the objective of the Cartagena Protocol on Biosafety and these rules and procedures/this instrument/this supplementary Protocol.] [Parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with living modified organisms.] [Parties should ensure that their national civil liability rules and procedures provide for redress to damage resulting from the transboundary movement of living modified organisms. In creating their national rules and procedures on civil liability, Parties may give special consideration to sub-sections (b), (c) and (d).]

(b) Any such law or policy, [shall] [include][address], *inter alia*, the following elements, taking into account[, as appropriate,] the Guidelines in Annex [x] [to this supplementary Protocol][decision BS-V/x]:

a. Damage;

b. Standard of liability: that may include strict, fault or mitigated liability;

c. Channelling of [strict] liability;

d. [Financial security, where feasible] [compensation schemes];

e. [Access to justice][Right to bring claims];

f. [[Procedural rules that provide for] due process.]

[(c) Parties shall recognize and enforce foreign judgments in accordance with [the applicable rules of procedures of the domestic courts] [domestic law] [governing the enforcement of foreign judgments] in respect of matters within the scope of these rules and procedures/this instrument/ the Guidelines in Annex [x] to this [supplementary Protocol].[Parties who do not have legislation concerning recognition of foreign judgments should endeavour to enact such laws.]]

[(d) While this provision does not require any change in domestic law, and does not in itself constitute a treaty on reciprocal enforcement of foreign judgments, Parties[, whose domestic law requires bilateral reciprocity agreements for recognition of foreign judgments] [shall endeavor to extend their domestic law governing the reciprocal enforcement of foreign judgments to other Parties not presently covered by their domestic law].]

(c) & (d) alt

[Parties may, in accordance with domestic law, recognise and enforce foreign judgments arising from the implementation of the above guidelines.]

(e) The Guidelines shall be reviewed no later than [3] years after the entry into force of this instrument with a view to consider [elaborating a more comprehensive binding regime on civil liability] [making them binding], in the light of experience gained.

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

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

{For operational and preambular texts, see sub-section I of section 1.A, above}

II. SCOPE

{For operational texts, see sub-section II of section 1.A, above}

III. Damage

A. Definition of damage

Operational text 1

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

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

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

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

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

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

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

B. Valuation of damage

Operational text 2

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

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

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

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

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

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

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

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

[(ii) Restore to the condition that existed before the damage or the nearest equivalent, by the replacement of the loss by other

components of the biological diversity at the same location or for the same use or at another location or for another type of use.]]

C. Causation

Operational text 3

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

IV. PRIMARY COMPENSATION SCHEME

A. Civil liability (harmonization of rules and procedures)

Operational text 4

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

1. Standard of liability and channelling of liability

Operational text 5

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

Option 1: Strict liability

Operational text 6

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

{For operational texts on "operator", see sub-section IV.A of section 1.A, above}

Option 2: Mitigated strict liability

Operational text 7

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

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

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

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

Option 3: Fault-based liability

Operational text 8

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

(a) Has operational control of the relevant activity;

(b) Has breached a legal duty of care through intentional, reckless or negligent conduct, including acts or omissions;

[(c) Such breach has resulted in actual damage to biological diversity; and]

(d) Causation is established in accordance with section [] of these rules.]

2. The provision of interim relief

Operational text 9

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

A bis. Additional elements of civil liability

1. Exemptions or mitigation

Operational text 10

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

(a) Act of God or *force majeure*;

(b) Act of war or civil unrest;

[(c) Intervention by a third party [that caused damage despite the fact that appropriate safety measures were in place];]

[(d) Compliance with compulsory measures imposed by a public authority;]

[(d alt) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;]

[(e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;]

[(f) An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out;]

[(g) National security exceptions [or international security];]

[(h) Where the operator could not have reasonably foreseen the damage.]

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

Operational text 11

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

3. Joint and several liability or apportionment of liability

Operational text 12

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

Operational text 12 alt

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

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

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

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

4. Limitation of liability

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

Operational text 13

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

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

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

b. Limitation in amount

Operational text 14

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

5. Coverage

Operational text 15

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

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

3. Other Provisions
I. SUPPLEMENTARY COMPENSATION SCHEME
A. Residual State liability

Operational text 1

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

Operational text 1 alt

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

B. Supplementary collective compensation arrangements

Operational text 1

1. Where the costs of response measures to redress damage to the conservation and sustainable use of biological diversity have not been redressed by the primary compensation scheme *(administrative approach)* or by any other applicable supplementary compensation scheme, additional and supplementary compensation measures aimed at ensuring adequate and prompt compensation may be taken.

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

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

Operational text 1 alt

No provision

OR

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

II. SETTLEMENT OF CLAIMS

A. Civil procedures

Operational text 1

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

Operational text 1 alt

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

Operational text 1 second alt

No provision

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

Operational text 2

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

Operational text 2 alt

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

Operational text 2 second alt

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

Operational text 2 third alt

No provision.

C.Standing/Right to bring claims

Operational text 3 (civil liability)

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

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

Operational text 3 alt (civil liability)

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

Operational text 4 (administrative approach)

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

III. COMPLEMENTARY CAPACITY-BUILDING MEASURES

Operational text 1 (to decision)

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

Operational text 2

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

2. Parties are invited to take into account the present rules and procedures in formulating bilateral, regional and multilateral assistance to developing country Parties that are in the process of developing their domestic legislation relating to rules and procedures in the field of

liability and redress for damage resulting from transboundary movements of living modified organisms.

Operational text 3 (to decision)

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

(a) Parties on their domestic legislation in draft or existing form;

(b) Capacity building workshops on legal issues relating to liability and redress;

(c) [Identification of best practices related to national legislation on liability and redress;]

(d) [Support to national capacity's self-assessment activities;]

(e) [Advice on providers of adequate technology and procedures to access it].