

# Greenpeace International Explanatory Documents on the Biosafety Liability and Redress Negotiations

Preparation for the  
Fourth meeting of the *Ad Hoc* Open-ended Working Group of Legal and Technical  
Experts on Liability and Redress in the context of the Cartagena Protocol

## **Backgrounder on the Biosafety Liability and Redress Discussions**

### **Introduction**

This document<sup>1</sup> sets out some central strategic issues and provides some background on the liability negotiations, in the lead-up to the Fourth Meeting in October. It is intended to supplement the ‘Essential elements of a Biosafety Liability Regime’ that Greenpeace distributed in May 2005 and February 2006.

The document is intended as a simple backgrounder. It refers to heading numbers in the Third Meeting Report for ease of cross-reference. It is accompanied by two more detailed documents:

- a document answering Frequently Asked Questions (FAQ) which consecutively follows through the Annexes in the form of references, questions and answers, and
- an analysis and summary table which analyses the Blueprint, which is Annex I to the Third Meeting Report, and Annex II, the synthesis of proposed operational texts released in September.<sup>1</sup> The table sets out various issues and which suggests some answers, in an effort to clarify the document and the process, and to serve as a resource during the 4<sup>th</sup> Meeting in October.

### **Background to the Liability Negotiations**

In 1995, CBD Decision II/5 started a negotiation process to develop a protocol on biosafety to address the safe transfer, handling and use of living modified organisms (LMOs), specifically focusing on transboundary movement, and to address adverse effects on the conservation and sustainable use of biological diversity.<sup>2</sup> Socio-economic issues, liability and compensation were then listed as issues supported by many delegations.<sup>3</sup> What is now Article 27 of the Biosafety Protocol first emerged from the discussions of the Fifth Meeting of the Working Group on Biosafety in 1998,<sup>4</sup> and was finalised at the Sixth Meeting in 1999,<sup>5</sup> amid concerns expressed by a number of developing States that omitting substantive provisions on liability and redress resulted in a draft Protocol that was heavily slanted towards trade rather than protection of the environment.<sup>6</sup>

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<sup>1</sup> *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*, Annex II to UNEP/CBD/BS/WG-L&R/4/2, 13 September 2007.

## **Why is a Liability and Redress Regime Needed?**

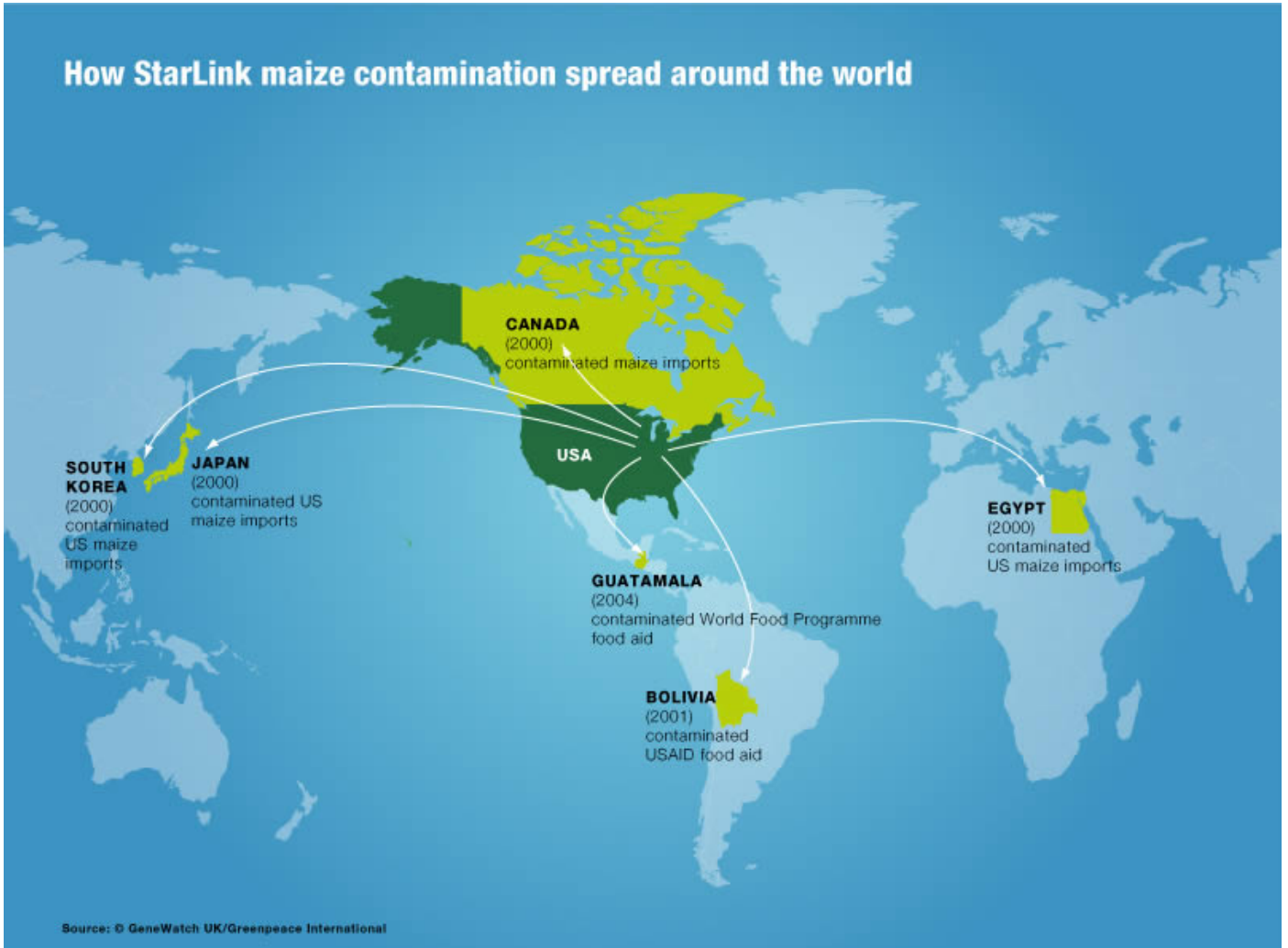
The concerns of the delegates are well founded. The transboundary nature of the production of and trade in LMOs requires a comprehensive and effective international regime which addresses risks inherent in the many potential damage scenarios, the difficulties inherent in obtaining compensation and redress for LMOs, current gaps in national laws and international law, and the mandate from the international community to develop such rules set out in the Biosafety Protocol.

Such a regime is needed to:

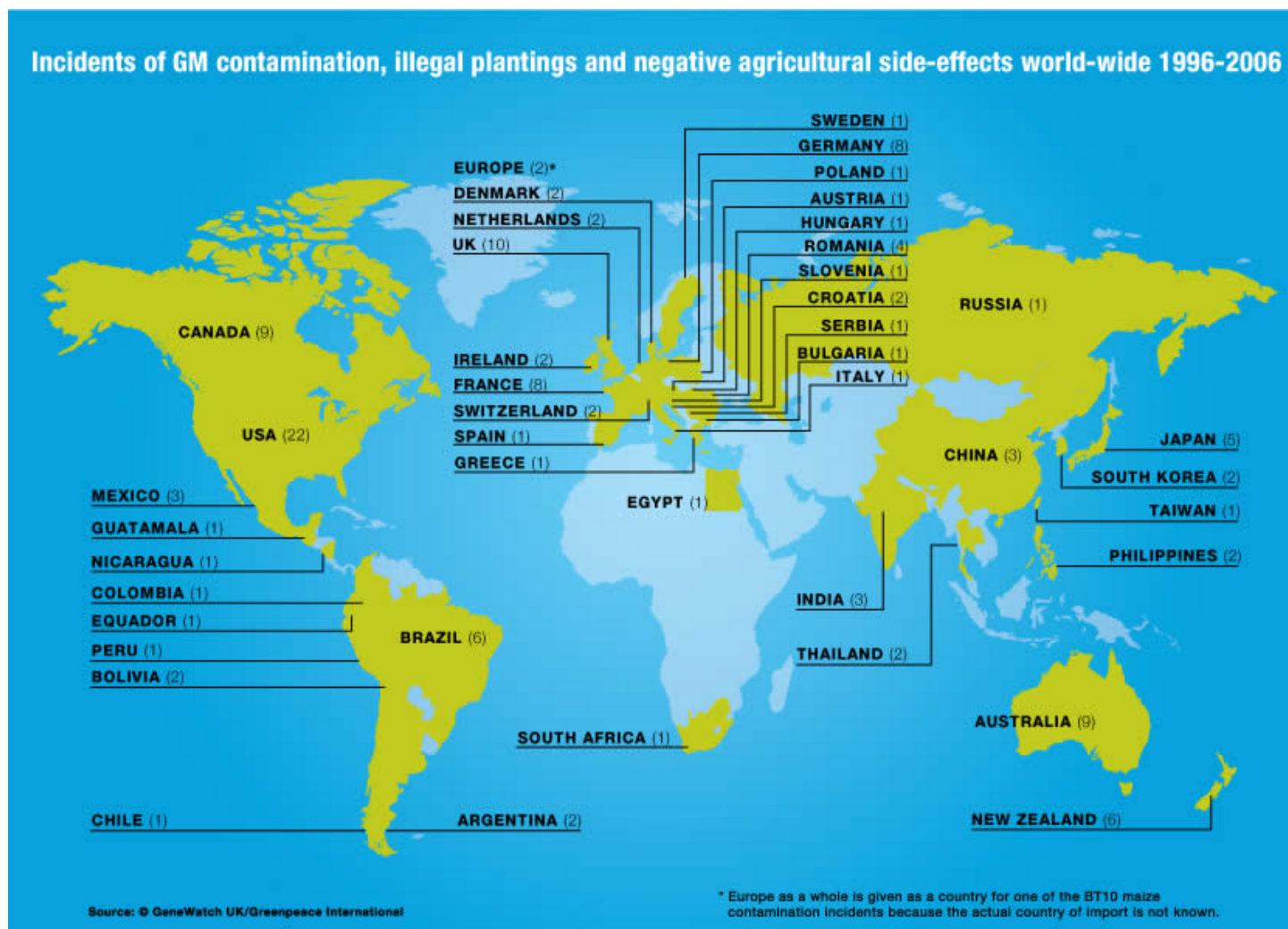
- put in place a scheme to ensure that victims can get compensation for damage suffered due to LMOs;
- put in place a system to achieve redress, which in general terms means fixing the damage, to ensure that preventative measures and response, remediation and restoration measures are taken for damage from LMOs
- ensure that risks to the environment, human health and the socio-economic effects of damage resulting from the transboundary movement of LMOs are covered;
- promote the prevention of damage to the environment by internalizing the cost to operators of LMOs and implementing the polluter-pays principle;
- create a consistent level of responsibility and predictability for LMO exporters; and
- provide assurance and confidence for developing countries when considering the import and use of biotechnology.

## **Actual and Potential Damage from LMOs**

Liability for damage from LMOs requires special attention due to the nature of damage that LMOs may cause. LMOs may cause damage to the environment, including species and ecosystems, biodiversity, human health, the economic viability of farmers, including traditional and organic farmers, food security and traditional livelihoods. These effects may take years to manifest themselves. Wind, rain and floods, bees, birds and rodents may all play a role in the spread of LMOs. Damage may be widespread, ongoing and irreparable once it is finally determined, and contamination and damage may easily occur across boundaries. Many examples already exist of widespread global contamination due to the transboundary movement of contaminated seed and LMOs for food, feed or processing,<sup>7</sup> including widespread contamination of rice,<sup>8</sup> maize in the Starlink contamination episode, which spread through the world as shown in the following map.<sup>9</sup>



The GM contamination register at [www.gmcontaminationregister.org](http://www.gmcontaminationregister.org) at the time of writing showed 107 incidents of contamination. Problems with maize underline threats to maize diversity and to maize producers and consumers from the inability to keep maize transgenes under control. The following map shows incidents worldwide, and shows the transboundary nature of the problem.<sup>10</sup>



Apart from 107 incidents of contamination, the GM contamination register shows eight incidents of negative agricultural side effects, such as the emergence of herbicide resistant weeds, resistance to Bt toxin, growing problems with Roundup Ready soybeans and with GM cotton. The contamination register maintained by Greenpeace International and Genewatch at [www.gmcontaminationregister.org](http://www.gmcontaminationregister.org) clearly shows the transnational nature of the contamination incidents to date and the way that incidents such as the Starlink incident spread throughout the world.

### The Legal Environment

The 1972 Stockholm Declaration on Human Rights and Environment<sup>11</sup> and twenty years later the 1992 Rio Declaration<sup>12</sup> called for the development of national and international laws on liability. Only last year, the International Law Commission (ILC) developed important draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.<sup>13</sup>

The precautionary principle and the polluter-pays principle both underpin the need for the regime.

- The precautionary approach is adopted in the objective of the Biosafety Protocol,<sup>14</sup> as well as throughout the Protocol. The precautionary approach is relevant to liability, in the need to ensure that potential polluters have the incentive to take necessary steps to prevent damage, as well as to redress, in ensuring prompt and effective prevention and remedial measures.

- The polluter-pays principle which holds that polluters should, in principle, bear the cost of pollution, is central to the formulation of a liability and redress regime for LMOs.<sup>15</sup>

### **Problems with Existing National Laws**

While most common law countries in general provide for recovery of damages under nuisance, negligence, and trespass, and civil law countries provide for recovery under the law of obligations, from special rules on environmental liability or from neighbourhood law,<sup>16</sup> there are many difficulties in applying these to damage from LMOs. These include

- difficulties in proving causation, lack of foreseeability of damage, and possible multiple sources of damage, where damage is often contributed to by factors such as winds or flooding, or insects carrying pollen from one field to another;
- possible delays in finding damage, leading to claims possibly being barred by statutes of limitations;
- defenses such as act of God, *force majeure*, statutory authorisation, and intervention of third parties;
- restrictions on 'pure economic loss' for claims such as lost markets;
- restrictions on the availability of compensation or redress for environmental damage;
- wide variations in laws from country to country;
- difficulties in evidential proof where evidence may be in another country or in many countries.
- difficulties in enforcement of judgments obtained in one country in another.

These problems are seen in the response of Bayer CropScience, which created the GMO rice LL601, in responses to a recent lawsuit blamed contamination on “unavoidable circumstances which could not have been prevented by anyone”; “an act of God”; and farmers’ “own negligence, carelessness, and/or comparative fault.”<sup>17</sup>

### **Should a Regime be Legally Binding or Advisory?**

As noted above, Article 27 of the Protocol was negotiated amidst concerns expressed that omitting substantive provisions on liability and redress resulted in a draft Protocol that was heavily slanted towards trade rather than protection of the environment. Article 27 is very much an integral part of the Protocol, and it would amount to an exercise in bad faith to fail to implement it now. It is needed to balance the Protocol, which without it leaves compensation and liability for trade which would take place under the Protocol unaddressed.

Article 27 reads:

#### **LIABILITY AND REDRESS**

The Conference of the Parties serving as the meeting of the Parties to this Protocol 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*, analysing and taking due account of the ongoing

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for the 4<sup>th</sup> Biosafety Liability and Redress Meeting*

processes in international law on these matters, and shall endeavour to complete this process within four years.

There are two important points to draw from Article 27.

1. Clearly this calls for ‘international rules and procedures’. ‘Guidance’ in no way qualifies as ‘international rules and procedures’. Nor does a system which aims at harmonizing national laws. ‘International’ means just that: they must be international in nature, as are the other elements of the Protocol. The Protocol itself sets up the Biosafety Clearing House, which is itself an international institution. The Protocol does not aim simply at harmonizing national import and export procedures.
2. Article 27 speaks of ‘liability and redress’. These are separate issues. Liability answers the question of who should pay and how much. Redress addresses the question of how to fix the problem – i.e. prevention measures, response, remediation and restoration measures.

Anything falling short of these two requirements is simply not complying with Article 27.

A regime needs then to:

- address both liability and redress;
- ensure that the risks to the environment, human health and the socio-economic effects of damage resulting from the transboundary movement of LMOs are addressed;
- create a consistent level of responsibility and predictability for LMO exporters;
- provide assurance and confidence for developing countries when considering the import and use of biotechnology;
- ensure that victims have the right to recourse for damage suffered due to biotechnology;
- promote the prevention of damage to the environment by internalizing the cost to operators of LMOs and implementing the polluter-pays principle; and
- ensure that preventative measures and response, remediation and restoration measures are taken for damage to the environment or biodiversity.

These are needed in essence due to the transboundary nature of LMOs and the LMO trade.

A harmonization regime which aimed at harmonizing national laws would not satisfy the requirements of Article 27 or address the needs of LMO importers or the environment either.

- It would not establish any fund which would pay for cleanup.
- It would not provide for any financial security or insurance to ensure that money is available for compensation if e.g. exporters are undercapitalized.
- It would put the burden on importing countries to amend their legislation and put in place administrative remedies etc but without providing any funds for compensation, cleanup. In other words it would place the burden for compensation and redress entirely on the importing countries.
- It would likely leave claimants still to recover any damages through expensive and complicated mechanisms for foreign enforcement of judgments.

The ILC Draft Principles support a binding regime, with an accompanying fund. The ILC Draft Principles provide that:<sup>18</sup>

1. Where, in respect of particular categories of hazardous activities, specific global, regional or bilateral agreements would provide effective arrangements concerning compensation, response measures and international and domestic remedies, all efforts should be made to conclude such specific agreements.
2. Such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.

As noted in the Commentary to the articles, this is an implementation of the aspirations expressed by consensus in Principle 22 of the Stockholm Declaration<sup>19</sup> and Principle 13 of the Rio Declaration.<sup>20</sup> Such a regime is also an implementation of the polluter-pays principle: “internalizing the true economic costs of pollution control, clean-up, and protection measures within the costs of the operation of the activity itself.”<sup>21</sup>

### **The Scope of a Liability Regime (II.A/p. 5)**

The Protocol must cover all damage which resulted from transboundary movements of LMOs. In other words, damage which stems from such a movement. The scope should be broad, and apply to transport, transit, handling and/or use of LMOs resulting from transboundary movements of LMOs. It should include both unintentional and illegal transboundary movements of LMOs. All damage stemming from the transboundary movement should be covered, including damage to areas beyond national jurisdiction such as the high seas.

### **The Definition of Damage (III.A/p. 14)**

The term ‘damage resulting from transboundary movements of living modified organisms’ is not further qualified in any way. So in simple terms, damage to be covered must be (a) damage that (b) resulted from transboundary movements of LMOs.

The general rule of interpretation of treaties is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>22</sup> We have already looked at the ordinary meaning of the words. So what is the object of the treaty? The objective of the Biosafety Protocol is stated in Article 1:

In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology *that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.*<sup>23</sup>

So damage the Protocol covered includes adverse effects on (i) the conservation and (ii) sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.<sup>24</sup>

The ‘sustainable use’ of biological diversity clearly refers to use of its components. In the Convention on Biological Diversity (CBD),<sup>25</sup> “‘Sustainable use’ means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity in a way, thereby maintaining its potential to meet the needs and aspirations of future generations.”<sup>26</sup>

Ecosystems are also covered by the CBD: the CBD’s preamble notes that the fundamental requirement for the conservation of biological diversity is the *in-situ* conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings. Clearly this includes components, ecosystems and habitats. Significantly, ‘ecosystems’ are defined to include not only living aspects, but also ‘their non-living environment’<sup>27</sup> which would include soil, water and air quality.

The broad types of damage to be covered are reinforced in the CBD itself. The CBD provides in Article 8(g) for the establishment of “means to regulate, manage or control risks associated with the use and release” of LMOs resulting from biotechnology “which are likely to have *adverse environmental impacts* that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health.” It is therefore clear that adverse environmental impacts is intended to be included, as well as ecosystems, their non-living environment, and damage to components of biodiversity, as ‘damage’ under Article 27 of the Biosafety Protocol, even if the impacts do not necessarily lead to the decline of biodiversity in the sense of variability. ‘Risks to human health’ must also be taken into account under Article 8(g) of the CBD. This provision is directly reflected in the objective and scope of the Protocol which also includes “taking also into account risks to human health.”<sup>28</sup> Risks to human health cannot be taken into account if they are not covered in a definition of damage.

Finally, with respect to socio-economic considerations, Article 26 of the Protocol allows Parties to take into account “socio-economic considerations arising from the impact of living modified organisms on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities,” in reaching a decision on import under the Protocol or under its domestic measures implementing the Protocol. The scope of the Protocol therefore encompasses socio-economic considerations.<sup>29</sup> Since Parties can take into account socio-economic considerations in making an import decision or under their domestic measures, any impact of those decisions or measures on socio-economic considerations must be included in a liability and redress regime.

In conclusion, a comprehensive regime on liability and redress for damage caused by LMOs should include in its definition of damage all types of damage that may be caused by LMOs. A suitable definition of damage will include adverse affects on the conservation and sustainable use of biodiversity, including its components, effects on the environment, including ecosystems and the non-living environment, impacts on human health, socio-economic damage, as well as more traditional damage, and costs of any prevention, response or restoration measures as well as activities involved in discovering and assessing damage. The inclusion of each of these categories of damage in a regime does not imply liability, but simply extends the right to bring a claim for any damage suffered by a person or the environment due to damage caused by LMOs.

### **Strict Liability or Fault-Based Liability? (IV.1/p. 29)**

It is fundamental to a regime such as this that liability stems from the damage caused by the LMO without any requirement to prove fault. The polluter-pays principle underpins such a principle, and this was reinforced by the International Law Commission last year. The ILC Draft Principles in Principle 4 say that” [l]iability should not require proof of fault. Any conditions, limitations or

exceptions to such liability shall be consistent with draft principle 3”.<sup>30</sup> It is clear that the Draft Principles apply to damage from LMOs. The ILC Draft Principles apply to ‘transboundary damage caused by hazardous activities not prohibited by international law.’ “Hazardous activity” means an activity which involves a risk of causing significant harm.”<sup>31</sup> There is no serious doubt that LMOs can cause significant damage. The GM contamination database shows 107 incidents of contamination.<sup>32</sup>

The polluter-pays principle<sup>33</sup> has formed the foundation for liability regimes on the basis of strict liability.<sup>34</sup> As international commentators have noted,<sup>35</sup>

If liability is based on negligence, not only does this have to be proved, but harm which is neither reasonably foreseeable nor reasonably avoidable will not be compensated and the victim or the taxpayer, not the polluter, will bear the loss. Strict liability is a better approximation of the ‘polluter-pays’ principle, but not if limited in amount, as in internationally agreed schemes involving oil tankers or nuclear installations.

### **Exemptions to Liability (IV.3/p. 40)**

Any exemption shifts the burden onto the victim. While many liability regimes do allow defences for events such as act of God, force majeure, armed conflict, they should not be automatically applied to LMOs.

Firstly, LMO producers have the choice of not placing the product on the market, or not releasing it to the environment. They should be liable for the results of their decision to do so, even if the direct cause is a third party cause such as the above defences. To allow the defences shifts liability from the producer to the damaged farmer and/or the environment or the public. In other words, if in case of a natural exceptional phenomenon, the producer would escape liability but the GE free farmer, or the public, would still suffer the damage, and receive no compensation. In addition, to allow the defences amounts to a *de facto* subsidy of the LMO industry.

Secondly, LMOs give rise to their own specific issues. For instance, where damage has recently been caused by extreme weather events, and where the IPCC has warned<sup>36</sup> that climate change can increase the intensity of storms, exclusions of grave natural disasters of an exceptional character will be of great concern since they may exempt weather: a specific scenario which is known to exacerbate the spread of GMOs. Similarly, LMOs are susceptible to modification by evolution, another situation which may give rise to an Act of God defence. Other defences are discussed in the Greenpeace FAQ.

### **Compulsory Insurance or other Instrument (IV.8/p. 49)**

Compulsory financial assurance benefits all stakeholders: it is one of the most effective ways of ensuring that compensation is actually paid, and it provides industry with a way of spreading risk and reducing uncertainty.<sup>37</sup> In practical terms, insurance ensures that compensation is available: without compulsory insurance or other financial guarantee, then the potentially liable party can simply avoid exposure through undercapitalization or shell companies. It is sometimes claimed that insurance is unavailable for LMOs. If true, then if the risk is uninsurable, there is no justification for the risk to be undertaken. Otherwise the risk is simply transferred to the victim, the public or the environment. However, the problem can also be addressed by financial guarantees provided by industry, in case third party insurance companies are not willing to underwrite risks.

### **Limited or Unlimited Liability (IV.7(b)/p. 48)**

There are no limit on damage that can be caused to States, the population, other industries such as non-LMO producers or the environment. LMO damage can, unlike damage caused by oil or hazardous waste, be multiplying and continuous. It is therefore logical that liability must be unlimited, and the polluter-pays principle would bear this out. Limited liability assists industry to obtain insurance cover, sets relatively low limits, making that insurance cover cheaper. Some in industry will argue that the insurance market is unable or unwilling to insure unlimited liability, but States and others may question why they or the environment at large should be subjected to risks which exceed the capacity of the insurance market. As with absolute liability defences, limitations on liability amount to a subsidy to the producer, as well as to involuntary assumption of risk by LMO-free farmers, individuals and others, or socialisation of risk, or both.

The pragmatic argument that limits allow producers to find insurance more easily does not bear scrutiny, as if producers will not accept the full consequences of their actions, then their actions should not be encouraged by a liability regime to take place. Secondly, a well structured regime may provide for set limits of insurance or other financial security which will enable insurance to be provided to that surety limit.

### **Channeling and Joint and Several liability (IV.1 and 2/p. 29)**

An advantage of a strict liability regime is that a claimant does not need to prove negligence and this makes it easier whom to sue.<sup>38</sup> Liability regimes often designate people who may be liable: this is often an operator, for instance. In the case of LMOs under the Biosafety Protocol, where liability stems from transboundary movement, it will be necessary to designate more than liable party.

It is essential that damage stemming from transboundary movements of LMOs is covered, whether it occurs at the transit, handling or use stage. All such damage stems from the transboundary movement. Liability should be channeled to exporters, importers, and distributors, which should all bear joint and several liability. Liability does not end with the import of the LMO: the damage results from the movement as it would not have taken place without the movement. The decision of the producer to ship the LMO results in the damage, even if it is only manifested once imported and planted, for instance. The Biosafety Protocol in Article 7 uses terms of ‘intentional introduction into the environment’, and ‘significant adverse effects on the conservation and sustainable use of biological diversity’ have direct reference to the end results of the movement, rather than the movement itself.

Where harm could not easily be traced to any one party, or cannot be separated with a sufficient degree of certainty, joint and several liability is commonly assigned, so that each liable party bears responsibility, and a Court can apportion responsibility. The polluter-pays principle means that all persons responsible for damage must pay (joint and several liability) so if one cannot or does not pay, the others responsible must pay, to ensure compensation is paid.

### **Importance of a Backup Fund (V.B/p. 53)**

A fund is essential, for two reasons:

1. to ensure that where a liable party is insolvent or for some other reason does not pay, that damage is not left uncompensated or unremedied. A fund would also cover major disasters or accidents or situations where no party is found liable for any reason.
2. to pay for prevention, response, and restoration measures for damage to the environment.

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There are a number of reasons that compensation for damage from contamination or some other occurrence may not be forthcoming. If a liable party cannot or does not pay, or if the liability regime fails for some other reason, compensation must still be paid, and/or the reparation for damage to the environment made. Sometimes, for instance, even if a party is found liable, the company is insufficiently capitalized and cannot or will not pay. A multinational enterprise may set up a shell company so that the local company has limited liability with few resources, for instance. Secondly, a company may claim an applicable exemption, so escapes liability. However in such a case, the victim is still out of pocket. Thirdly, damage may be caused to the environment, but not necessarily to any private interest. In short, a properly structured and well capitalized fund can ensure compensation and remediation regardless of fault, exceptions or the capitalization of defendants.

The ILC Draft Principles state that international regimes should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.<sup>39</sup> Such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.

The polluter-pays principle should be implemented, so that producers of LMOs pay into the fund. A protocol could assess funds from States according to the amounts of LMOs exported. The Oil Pollution Fund is funded according to the amount of oil received by each State, for example.

### **Other Issues**

Other issues are described in the FAQ, including just time limit of liability, just standing and access to justice, just rules on burden of proof and causation, dispute resolution procedures, jurisdiction and applicable law.

### **Conclusion**

This background document has set out some central issues that are likely to be discussed at the 4<sup>th</sup> Meeting in Montreal in October. More detail is provided in the accompanying two other documents, the Analysis and Summary of Annexes I and II and the FAQ.

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<sup>1</sup> This backgrounder was written by Duncan E.J. Currie, LL.B. (Hons.) LL.M. Greenpeace International gratefully acknowledges the research and findings of Sarah Lawson-Stoppes of College of the Atlantic.

<sup>2</sup> CBD Decision II/5 (1995), at <http://www.biodiv.org/decisions/default.asp?lg=0&m=cop-02&d=05>, paragraph 1.

<sup>3</sup> Report of the Open-Ended Ad Hoc Group of Experts on Biosafety (UNEP/CBD/COP/2/7) 3 August 1995, (1995 Ad Hoc Experts Report) Annex I, Section III, paragraph 18 (b), at <http://www.biodiv.org/doc/meetings/cop/cop-02/official/cop-02-07-en.pdf>.

<sup>4</sup> See the Report of the Fifth meeting of the Open-Ended Ad Hoc Working Group on Biosafety, UNEP/CBD/BSWG/5/3, 3 September 1998, at <http://www.biodiv.org/doc/meetings/bs/bswg-05/official/bswg-05-03-en.pdf>. See para.40, Annex, and negotiating text on page 42-43.

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<sup>5</sup> Report of the Sixth Meeting of the Open-Ended Ad Hoc Working Group on Biosafety, UNEP/CBD/ExCOP/1/2, 15 February 1999, at <http://www.biodiv.org/doc/meetings/cop/excop-01/official/excop-01-02-en.pdf>.

<sup>6</sup> See for instance interventions by India, at para. 61 of the Sixth Meeting report, and similar comments by Panama, at para. 77.

<sup>7</sup> See the GM contamination register at <http://www.gmcontaminationregister.org>.

<sup>8</sup> See Greenpeace, [Rice in Crisis](#), 6th February 2007, at <http://www.greenpeace.org/international/press/reports/rice-industry-in-crisis>. Contamination has been found in Japan, the UK, France and Germany and in the US: on 5th of March 2007 the USDA issued the following statement:

"The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) is taking action to prevent the planting and distribution of a long-grain rice seed known as Clearfield CL131 because testing by a private company has revealed the possible presence of trace levels of genetic material not yet approved for commercialization.....This is not the first detection of genetically engineered material in Clearfield CL131 rice seed. Last week, APHIS announced that trace levels of a previously deregulated genetically engineered trait had been identified in Clearfield CL131."

See statement by Dr Ron DeHaven regarding Aphis hold on clearfield CL131 long-grain rice, at [http://www.aphis.usda.gov/newsroom/content/2007/03/ge\\_riceseed\\_statement.shtml](http://www.aphis.usda.gov/newsroom/content/2007/03/ge_riceseed_statement.shtml).

<sup>9</sup> Map at <http://www.gmcontaminationregister.org/img/starlinkmap.jpg>.

<sup>10</sup> Map at <http://www.gmcontaminationregister.org/img/worldincidents.jpg>.

<sup>11</sup> Stockholm Declaration on the Human Environment of the United Nations Conference on the Human Environment, 16 June 1972, 11 I.L.M. 1416 (1972), ("Stockholm Declaration"), at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>. Principle 2 provides that States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

<sup>12</sup> Report of the UN Conference on Environment and Development, Rio de Janeiro 3-14 June 1992 ("Rio Declaration"), UN Doc. A/CONF.151/26/Rev.1, at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>. Principle 13 provides that States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also 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.

<sup>13</sup> See activities of the International Law Commission in International liability in case of loss from transboundary harm arising out of hazardous activities, at [http://untreaty.un.org/ilc/guide/9\\_10.htm](http://untreaty.un.org/ilc/guide/9_10.htm) and the ILC's 2006 Report, Report on the work of its fifty-eighth session (1 May to 9 June and 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), at <http://untreaty.un.org/ilc/reports/2006/2006report.htm> (hereafter "ILC Draft Principles").

This was recognised in General Assembly resolution 61/36 on allocation of loss in the case of transboundary harm arising out of hazardous activities. General Assembly resolution 61/36 on Allocation of loss in the case of transboundary harm arising out of hazardous activities. At <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/61/36&Lang=E>.

<sup>14</sup> See also Article 10.6 and Article 11.8 of the Biosafety Protocol.

<sup>15</sup> The principle is embodied in Principle 16 of the Rio Declaration on the Environment: National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment. The principle was also recognized more recently in the Johannesburg Program of Action. The World Summit on Sustainable Development, Johannesburg Plan of Implementation, A/Conf.199/20, (JPOI), paras. 15(b) and 19(b).

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<sup>16</sup> See discussion by Christophe Bernasconi, “Civil liability resulting from transfrontier environmental damage: a case for the Hague Conference,” (undated), page 16 ff, at [http://www.hcch.net/upload/wop/gen\\_pd8e.pdf](http://www.hcch.net/upload/wop/gen_pd8e.pdf).

<sup>17</sup> R. Weiss, Firm Blames Farmers, ‘Act of God’ for Rice Contamination, in Washington Post (22 November 2006), at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/21/AR2006112101265.html>.

<sup>18</sup> ILC Draft Principles, Principle 7.

<sup>19</sup> Principle 22 of the Stockholm Declaration reads that: States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

<sup>20</sup> Rio Declaration, Principle 13: States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also 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.

<sup>21</sup> ILC Commentary on the Purposes, para. 11 See Principle 16 of the Rio Declaration.

<sup>22</sup> Vienna Convention on the Law of Treaties, Vienna 23 May 1969, entered into force 27 January 1980, UN Doc A/Conf 39/28, UKTS 58 (1980), 8 ILM 679.

Article 31(1). Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31, or (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. Article 32.

<sup>23</sup> Emphasis added.

<sup>24</sup> The same formula is used in Articles 4, 7, 12, 16, 17, and 18.

<sup>25</sup> Convention on Biological Diversity, concluded at Rio de Janeiro on 5 June 1992, entered into force 29 December 1993, at 31 ILM 818, (“CBD”), text at <http://www.biodiv.org/convention/default.shtml>, Article 19.3. Web references are as at April 18, 2007.

<sup>26</sup> CBD article 2.

<sup>27</sup> CBD Article 2.

<sup>28</sup> Cartagena Protocol on Biosafety, Articles 1 and 4.

<sup>29</sup> See also Article 8(j) of the CBD.

<sup>30</sup> Those principles (a) to ensure prompt and adequate compensation to victims of transboundary damage; and (b) to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement.

<sup>31</sup> ILC Draft Principles Principle 2(c)

<sup>32</sup> See page 3 above.

<sup>33</sup> Principle 16 of the Rio Declaration and see ILC Commentary on the preamble, para. 13, page 145.

<sup>34</sup> ILC Commentary, on the preamble, para. 13, page 145, citing the Lugano Convention, 2003 Kiev Protocol, the 1992 Protection and Use of Watercourses Convention and Lakes, the 1992 Industrial Accidents Convention, the 1990 International Convention on Oil Pollution Preparedness and Response, the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, the 1992 Convention on the Protection of the Marine Environment of the Black Sea against Pollution, the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, the 1992 Convention on the Transboundary Effects of Industrial Accidents, and the EU Directive 2004/35/CE on environmental liability.

<sup>35</sup> Patricia Birnie and Alan Boyle, *International Law and the Environment* (Oxford: Oxford University Press, 2002) (2nd ed), p. 93-94. Cited in ILC Report, para. 14, page 146.

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for the 4<sup>th</sup> Biosafety Liability and Redress Meeting*

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<sup>36</sup> Climate Change 2007: Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Intergovernmental Panel on Climate Change, at <http://www.ipcc.ch/SPM13apr07.pdf>.

<sup>37</sup> ILC Commentary on Principle 4, paragraph 32, page 164, citing Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, Brussels, 23.1.2002, COM (2002) 17 final, pages. 7-9. At <http://www.entemp.ie/publications/environment/2002/environmentalliabilitydraft.pdf>.

<sup>38</sup> See ILC Commentary on Principle 4, para. 25, page 160.

<sup>39</sup> ILC Principle 7.2.

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**Backgrounder on the**  
**Biosafety Liability and Redress Discussions**

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