

**Suggested Text for Protocol on Liability and Redress
for Damage Resulting from Transboundary Movements
of Living Modified Organisms
to the Convention on Biological Diversity**

Version 5 July 2007

Commentary

This text is provided by way of suggestion and is subject to correction and clarification as necessary.

Amendments made following 2nd and 3rd meetings of Ad Hoc Working Group February 2006 and 2007 and following submissions of additional text made on July 5.

The Parties to this Protocol,

Being Parties to the Convention on Biological Diversity, hereinafter referred to as “the Convention”,

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

Mindful of their obligations under the Convention and the Cartagena Protocol,

Recalling Article 27 of the Cartagena Protocol, which required the Conference of the Parties serving as the meeting of the Parties to the Protocol to, 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, analyzing and taking due account of the ongoing processes in international law on these matters, and to endeavour to complete this process within four years,

Recalling also article 14 of the Convention, which required the Conference of the Parties to examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter,

Aware of the rapid expansion of modern biotechnology and the growing public concern over liability for any adverse effects on biological diversity, taking also into account

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liability for adverse effects on human health,

Recognizing also the potential adverse effects which may be caused by modern biotechnology to centres of origin and centres of genetic diversity,

Taking into account the vulnerability of many countries, particularly developing countries, to risks associated with living modified organisms,

Desirous of ensuring adequate, equitable and prompt compensation for persons who suffer injury or damage and ensuring adequate and prompt reparation to the environment for damage caused by living modified organisms,

Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development and Principle 16 of the Rio Declaration that the polluter should, in principle, bear the cost of pollution,

Convinced of the need for unifying the rules applying in the various countries to the liability incurred for such damage, whilst leaving these countries free to take, on a national basis, any additional measures which they deem appropriate,

Have agreed as follows:

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| <p>PART I INTRODUCTION</p> <p>ARTICLE 1. OBJECTIVE</p> <p>The Objective of this Protocol is to provide for a comprehensive regime for liability and redress to ensure adequate, equitable and prompt compensation for damage and to ensure adequate and prompt reparation to the environment for damage consequent upon the transboundary movement of living modified organisms.</p> | |
| <p>ARTICLE 2. USE OF TERMS</p> <p style="padding-left: 40px;">For the purposes of this Protocol:</p> | |
| <ol style="list-style-type: none"> 1. Terms defined in the Cartagena Protocol shall have the meaning defined in that Protocol; 2. ‘Area under national jurisdiction’ shall mean the territory of a Contracting Party and any other areas over which the Contracting Party has sovereignty or jurisdiction according to international law.¹ | <p>It is important clearly to define the area of application of the Protocol. Under the Law of the Sea Convention 1982, the Coastal State has jurisdiction with regard to the protection and preservation of the marine environment</p> |

¹ ARTICLE 56 of the Law of the Sea Convention provides as follows:

"Rights, Jurisdiction and Duties of the Coastal State in the Exclusive Economic Zone

1. In the exclusive economic zone, the coastal State has:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

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| 3. “Biological diversity” means the variability among living organisms from all | (Art. 56(1)(iii)). |
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(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.”

² Definition adopted from International Treaty on Plant Genetic Resources for Food and Agriculture. <ftp://ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf>

³ Definition adopted from International Treaty on Plant Genetic Resources for Food and Agriculture. <ftp://ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf>

⁴ Similar to Vienna Convention as amended 1997 article 1(k)

⁵ Vienna Convention as amended 1997 article 1(k)

⁶ Wording from Lugano Convention

⁷ Definition from New Zealand Resource Management Act 1991.

⁸ See Lugano Convention

⁹ There is no definition of ‘farmer’ in e.g. International Treaty on Plant Genetic Resources for Food and Agriculture, at <ftp://ext-ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf>. The definition of farmer allows a farmer to sell 50% of the farmer’s product in any year.

¹⁰ Based on art 2 of the Basel Liability Protocol and Lugano Convention

¹¹ Based on art 2 of the Basel Liability Protocol

¹² Based on art 2 of the Basel Liability Protocol

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| <p>sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.</p> <p>4. A "center of origin" means a geographical area where a species first developed its distinctive properties.²</p> <p>5. A "centre of diversity" means a geographic area containing a high level of genetic diversity for species in <i>in situ</i> conditions.³</p> <p>6. 'Compensation' shall include compensation for damage, restoration and remediation and other amounts payable under this Protocol.</p> <p>7. 'Damage' includes</p> <ul style="list-style-type: none">(i) Damage to human health including:<ul style="list-style-type: none">(a) Loss of life or personal injury or disease together with medical costs including costs of diagnosis and treatment and associated costs ;(b) Impairment of health;(c) Loss of income;(d) Public health measures;(ii) damage to or impaired use of or loss of property;(iii) loss of income derived from an economic interest in any use of the environment, incurred as result of impairment of the environment;(iv) Loss of income, loss of or damage to cultural, social and spiritual values, loss of or reduction of food security, damage to agricultural biodiversity, loss of competitiveness or other economic loss or other loss or damage to indigenous or local communities.(v) damage to the environment, including<ul style="list-style-type: none">(a) the costs of reasonable measures of reinstatement or remediation of the | <p>It must be clear that compensation includes restoration and remediation.</p> <p>The definition of 'damage' must be broad enough to cover any kind of damage that can be caused by LMOs.</p> <p>For definition of damage, reference can be made to the Lugano Convention</p> <p>Consistently with the polluter pays principle, damage must include reinstatement, remediation, impairment, and preventive measure, as well as damage to private property, economic losses and injury or disease.</p> <p>It needs to be clear that socio-economic damage to local and indigenous communities is covered, following article 26 of the Protocol.</p> |
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impaired environment, where possible, measured by the costs of measures actually taken or to be undertaken, including introduction of original components;⁴

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

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

(d) the costs of preventive measures, including any loss or damage caused by such measures;⁵

(e) the costs of any interim measures; and

(f) any other damage to or impairment of the environment, taking into account any impact on the environment;

Provided that the damage was caused directly or indirectly by living modified organisms during or following a transboundary movement of the living modified organisms, or in the case of preventive measures, is threatened to be so caused.⁶

If any damage is caused or threatened to be caused to centres of origin or centres of genetic diversity, then:

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

(b) Any other monetary damage shall be payable representing the value of the centres; and/or

(c) Any other measures may be required to be taken

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8. "Ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.
9. 'Effect' includes (a) any direct or indirect effect, (b) any temporary or permanent effect, (c) any chronic or acute effect, (d) any past, present, or future effect; and (e) any cumulative effect which arises over time or in combination with other effects.⁷
10. 'Environment' includes all natural resources, including (i) air, water, soil, fauna and flora, and the interaction between the same factors, (ii) ecosystems and their constituent parts, (iii) biological diversity, (iv) amenity values, (v) indigenous or cultural heritage,⁸ and (vi) social, economic, aesthetic, and cultural conditions which are affected by the matters stated in paragraphs (i) to (v) of this definition.
11. 'Farmer' means⁹ mean a person growing a crop or other product for the individual's use or for purposes of sale of the crop or other product grown from the living modified organism. A person shall not be considered a farmer if that person produces and sells or otherwise transfers seeds of living modified organisms or plant parts containing heritable material including living modified organisms, if such products constitute over 50% of the total product of the living modified organism sold or transferred by that person in any 365 day period.
12. 'Impaired' in relation to the environment' shall include any adverse effects on the environment.the environment.
13. 'Measures of reinstatement' means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment.¹⁰
14. 'Notifier' means the person who notifies the competent national authority of the Party of import prior to the intentional transboundary movement of a living modified organism that falls within the scope of Article 7, paragraph 1 of the Cartagena Protocol.
15. 'Occurrence' means any occurrence or incident, or series of occurrences or incidents having the same origin, that causes damage or creates a serious threat of damage; and includes any act, omission, event or circumstance, foreseen or unforeseen,

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resulting from or following any transboundary movement of any living modified organism.¹¹

16. 'Person' includes natural and legal persons.

17. 'Preventive measures' means any reasonable measures taken by any person in response to an occurrence, to prevent, minimize, or mitigate loss or damage, or to address damage or threatened damage to biological diversity, or to effect environmental clean-up.¹²

18. 'Territory' means the territory of a Contracting Party, the internal and territorial waters and the airspace over the territory.

19. A 'Transboundary Movement' commences either (a) when a living modified organism is prepared for export within the territory of a State by the preparation, handling, or packaging of the living modified organism for export by transport; or (b) in any other case, when an LMO leaves the territory of the State.

20. An 'operator' includes any person in operational control of a living modified organism at the time of an occurrence.

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| <p>ARTICLE 3. SCOPE OF APPLICATION</p> <p>1. (a) This Protocol shall apply to damage resulting from the transport, transit, handling and/or use of living modified organisms resulting from transboundary movements of living modified organisms, including unintentional and illegal transboundary movements of living modified organisms,</p> <p>(b) This Protocol shall apply to any damage described by paragraph (a) wherever suffered including in areas</p> <p>(i) within limits of national jurisdiction or control of Contracting Parties;</p> <p>(ii) within the limits of national jurisdiction or control of non-Contracting Parties; or</p> <p>(iii) beyond the limits of national jurisdiction or control of States.¹³</p> <p>2. Whenever a transboundary movement is effected by transport:</p> <p>(a) When the State of export is a Contracting Party to this Protocol this Protocol shall apply with respect to damage arising from an occurrence which takes place from the point where the living modified organisms are loaded on the means of transport in an area under the national jurisdiction of the State of export.</p> <p>(b) When the State of import, but not the State of export, is a Contracting Party to this Protocol, this Protocol shall apply with respect to damage arising from an occurrence which takes place after the time at which the importer has taken ownership or possession of the living modified organism.</p> | <p>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. The Protocol must cover property damage, economic damage, damage to biodiversity, preventive measures, the cost of reinstatement and reinstatement or remediation of an impaired environment. The scope should also cover damage to areas beyond national jurisdiction such as the high seas.</p> <p>Art 3(1) Wording taken from Vienna Convention as modified in 1997, Article 1A.</p> <p>Art 3(3) wording to clarify applicability in case of no transport.</p> <p>Art 4(4) is from Basel Liability Protocol Art 3(4).</p> |
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¹³ Wherever suffered from Vienna Convention art. 1A

¹⁴ Article 28 Vienna Convention on the Law of Treaties

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| <ol style="list-style-type: none">3. In any other case, this Protocol shall apply when there is a movement of a Living Modified Organism from within an area under national jurisdiction of a Contracting Party.4. Nothing in the Protocol shall affect in any way the sovereignty of States over their territorial seas and their jurisdiction and the right in their respective exclusive economic zones and continental shelves in accordance with international law.5. Unless a different intention appears from this Protocol, or is otherwise established, the provisions of this Protocol do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that Contracting Party.¹⁴ | |
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PART II LIABILITY

ARTICLE 4.

ABSOLUTE LIABILITY

1. The exporter and notifier of any living modified organism shall be liable for all damage caused by the living modified organism from the time of export of the living modified organism.
2. Without prejudice to paragraph 1, the importer of the living modified organism shall be liable for all damage caused by the living modified organism from the time of import.
3. Without prejudice to paragraphs 1 and 2, should the living modified organism be re-exported from the state of import, the second and subsequent exporter and notifier of the living modified organism shall be liable for all damage caused by the living modified organism from the time of re-export of the living modified organism and the second and subsequent importer shall be liable for all damage caused by the living modified organism from the time of import.
4. Without prejudice to the preceding paragraphs, from the time of import of the living modified organism, any person intentionally having ownership or possession or otherwise exercising control over the imported living modified organism shall be liable for all damage caused by the living modified organism. Such persons shall include any distributor, carrier, and grower of the living modified organism and any person carrying out the production, culturing, handling, storage, use, destruction, disposal, or release of the living modified organism, with the exception of a farmer.
5. In the case of unintentional or illegal transboundary movement of a living modified organism, any person intentionally having ownership or possession or otherwise exercising control over the living modified organism immediately prior to or during the movement shall be liable for all damage caused by the living modified organism.
6. Any exporter, notifier and any person having ownership or possession or otherwise

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

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

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

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

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exercising control shall be liable for during the case of transit of living modified organisms through States other than the Party of export or Party of import.

7. All liability under this article shall be joint and several. If two or more persons are liable according to this article, the claimant shall have the right to seek full compensation for the damage from any or all of the persons liable.
8. If an occurrence consists of a continuous occurrence, all persons successively exercising the control of the living modified organism immediately before or during that occurrence shall be jointly and severally liable.
9. In the case of a person liable under this article being financially unable fully to meet the compensation for damages, together with costs and interest, as provided in this Protocol, or otherwise fails to meet such compensation, the liability shall be met by the State of which the person is a national.

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| <p>ARTICLE 5. FAULT-BASED LIABILITY</p> <p>Without prejudice to article 4., any person shall be liable for damage caused or contributed to by that person's lack of compliance with the provisions implementing the Convention or the Protocol or by that person's wrongful intentional, reckless or negligent acts or omissions.</p> | <p>Breach of the Convention or Protocol or fault should give rise to liability.</p> |
| <p>ARTICLE 6. PREVENTIVE, MITIGATING, RESTORATING AND REINSTATING MEASURES REQUIRED</p> <p>1. Subject to any requirement of domestic law, any operator shall take all reasonable measures to mitigate, restore, or reinstate damage arising from the occurrence in order:</p> <p>(a) to ensure prompt and adequate compensation to victims of damage and/or</p> <p>(b) to preserve and protect the environment.</p> <p>2. Where the financial resources of an operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident, the Fund shall pay the costs of prevention, remediation, restoration or reinstatement of the environment where payment for such is not available under this Protocol.</p> <p>3. Each State shall adopt the necessary legislative, regulatory and administrative measures to ensure that the necessary steps are taken to prevent, remedy, restore or reinstate the environment where where an operator does not do so, and to recover the costs of doing so from an operator.</p> | <p>An overarching obligation to mitigate damage is essential.</p> <p>New wording from ILC draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. – Principle 3.</p> <p>Principle 7(2).and Principle 8(1).</p> |

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| <p>ARTICLE 7. RIGHT OF RECOURSE</p> <p>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:</p> <p style="padding-left: 40px;">(a) against any other person also liable under the Protocol; and</p> <p style="padding-left: 40px;">(b) as expressly provided for in contractual arrangements.</p> <p>2. Nothing in the Protocol shall prejudice any rights of recourse to which the person liable might be entitled pursuant to the law of the competent court.</p> | <p>This article allows cross-claims and claims for contributions where multiple persons may be liable.</p> |
| <p>ARTICLE 8. JURISDICTION AND APPLICABLE LAW</p> <p>1. Primary jurisdiction over actions under this Protocol shall lie with the courts of the Contracting Party where the damage occurs.</p> <p>2. If the damage occurs only beyond the limits of national jurisdiction, primary jurisdiction over actions under this Protocol shall lie with the courts of the State of import or the intended State of import, or, if the transboundary movement was unintended, with the courts of the State most closely connected with the damage.</p> <p>3. Jurisdiction over actions under this Protocol shall also lie with the courts of the Contracting Party where the occurrence took place, where the defendant has his habitual residence or has his principal place of business.¹⁵</p> <p>4. All matters of substance or procedure regarding claims before the competent court</p> | <p>This article allocates jurisdiction, firstly to where the damage occurred, and if the damage occurred e.g. in the high seas, to the State most closely connected with the damage.</p> <p>Jurisdiction where the defendant is resident may be necessary to ensure recovery of damages.</p> |

¹⁵ Basel Protocol art 17

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| <p>which are not specifically regulated in this Protocol shall be governed by procedural and substantive law of that court.¹⁶ The nature, form and extent of the compensation, as well as the equitable distribution thereof, shall be governed by that law, and shall be consistent with this Protocol.</p> <p>5. Each Contracting Party shall (a) ensure that its courts possess the necessary competence to entertain claims for compensation under this Protocol and (b) shall adopt the legislative measures necessary to ensure that the laws provide for compensation according to this Protocol and according to any harmonizing recommendations made by the Assembly under article 15.</p> | |
| <p>ARTICLE 9. COURT POWERS AND PROCEDURES</p> <p>1. Courts shall have the power to order remediation and restoration as well as compensation and may order costs and interest.</p> <p>2. The Court shall presume that (a) the living modified organism which was the subject of a transboundary movement caused the damage where there is a reasonable possibility that it could have done so and (b) that any damage caused by a living modified organism which was the subject of a transboundary movement is the result of its biotechnology-induced characteristics rather than any natural characteristics.¹⁷</p> | <p>Damage may be caused to the environment and society without necessarily damaging private property interests as such. Also damage may be caused to areas such as the high seas. So groups acting in the general interest, for groups such as farmer or consumer interests and for the environment, must have standing to sue. Also, other barriers to justice, such as, security for costs, liability for costs of the winning party and lack of legal aid must not prevent access to justice.</p> <p>A presumption is necessary since it may be difficult or impossible to prove that damage was caused by a</p> |

¹⁶ Basel Protocol art 19

¹⁷ Cf. Austrian law on genetic engineering. UNEP/CBD/ICCP/3/3, para. 27.

¹⁸ from Lugano Convention

¹⁹ Cf. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998.

²⁰ from Basel Liability Protocol art 20

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| <p>To rebut the presumption a person must prove to the standard 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.</p> <ol style="list-style-type: none">3. 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.¹⁸4. 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.5. 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.6. The principle of wide access to justice¹⁹ shall be implemented. To this end, persons and groups with a concern for or interest in environmental, social or economic matters, persons and groups representing communities or business interests and local, regional and national governmental authorities, shall have standing to bring a claim under this Protocol.7. 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.²⁰8. Financial and other barriers to justice shall not impede access to justice under this article and Contracting Parties shall take appropriate steps to remove or reduce such | <p>particular LMO. The exporter, distributor etc is in a better position to discharge a burden of proof than the victim.</p> <p>The other procedural measures are aimed at upholding the principle of wide access to justice and wide powers of the Court to address damage.</p> <p>Standing should not be restricted to legal interest.</p> |
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²¹ Cf Aarhus Convention article 9(5)

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| <p>ARTICLE 10. LIS PENDENS</p> <ol style="list-style-type: none">1. Where proceedings involving the same or similar cause of action and between the same or substantially the same parties are brought in the courts of another Contracting Party or Parties, any court other than the court described in paragraphs 1 and 2 of article 8. shall of its own motion stay its proceedings unless and until the court described in paragraphs 1 and 2 article 8. rules that it does not have jurisdiction under this Protocol.2. Where the jurisdiction of the court described in paragraphs 1 and 2 is established by that court, any court other than that court shall decline jurisdiction in favour of that court.3. When there are two or more courts described in paragraphs 1 and 2 of article 8., then any court other than the court described in paragraphs 1 and 2 of article 8. and first seized of the case shall of its own motion stay its proceedings unless and until the court first seized of the case rules that it does not have jurisdiction under this Protocol. Where the jurisdiction of the court first seized of the case is established by that court, any court other than that court shall decline jurisdiction in favour of that court.²² | <p>These provisions are drawn mainly from the Lugano Convention, and are addressed at resolving scenarios where claims are brought in different countries about the same or similar matters.</p> |
| <p>ARTICLE 11. RELATED ACTIONS</p> <ol style="list-style-type: none">1. Where related actions are brought in the different courts described in article 8., any court other than the court described in paragraphs 1 and 2 of article 8. shall, while the actions are pending at first instance, stay its proceedings upon the motion of a | <p>These provisions are taken mainly from the Lugano Convention, and are addressed at closely connected cases that should be heard in the same proceedings.</p> |

²² This may arise for instance with damage caused in two states or principally beyond national jurisdiction

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party to any of the proceedings.

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

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| <p>ARTICLE 12. ENFORCEMENT</p> <ol style="list-style-type: none">1. Judgments entered by the competent court under article 8. after trial, or by default or by consent, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory of any of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgments.2. The foregoing provisions shall not apply if (a) a decision was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence, or (b) the judgment was obtained by fraud.²³3. If an action is brought against a Contracting Party under this Convention, such Contracting Party may not, except in respect of measures of execution, invoke any jurisdictional immunities before the court competent in accordance with this article. | <p>These provisions broadly follow the Basel Liability Protocol provisions on the enforcement of judgments. No public policy exception should be permitted, since such an exception may interfere with fair application of this protocol.</p> |
| <p>ARTICLE 13. IMPLEMENTATION</p> <ol style="list-style-type: none">1. Contracting Parties shall adopt the legislative, regulatory and administrative measures necessary to implement this Protocol.2. In order to promote transparency, Contracting Parties shall inform the Secretariat of measures to implement thus Protocol,3. The provisions of this Protocol shall be applied without discrimination based on | <p>This article aims to ensure broad implementation of the Protocol.</p> |

²³ Broadly following Basel Liability protocol art 21

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| nationality, domicile or residence. | |
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| <p>ARTICLE 14. TIME LIMITATION OF LIABILITY</p> <ol style="list-style-type: none">1. Claims for compensation under this Protocol shall not be admissible unless they are brought within ten years from (a) the date of the occurrence of the damage, or (b) from the date the damage becomes known or reasonably should have become known by the claimant and is known by the claimant to be attributable to the occurrence or should reasonably have been known to be so by the claimant, whichever occurs later.2. Where the occurrence consists of a series of occurrence having the same origin, the date of occurrence under this article shall be the date of the last of such occurrence. Where the occurrence consists of continuous occurrence, such time limit shall run from the end of that continuous occurrence. | <p>It may take time to discover damage. The limitation period should run from when the damage is found, not when it was caused, and should be sufficiently long to allow a reasonable time for a claim to be brought (see article 22.). The time must run from the date of the occurrence of the damage or the date of discovery of the occurrence of the damage, since the damage may take time to manifest itself.</p> |
| <p>PART III INSTITUTIONAL</p> <p>ARTICLE 15. CONFERENCE OF THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO THIS PROTOCOL</p> <ol style="list-style-type: none">1. The Conference of the Parties shall serve as the meeting of the Parties to this Protocol.2. The provisions of article 29 of the Cartagena Protocol shall apply, <u>mutatis mutandis</u>, to this Protocol.3. The Conference shall, <i>inter alia</i>,<ol style="list-style-type: none">(a) Consider and adopt, as required, amendments to this Protocol and its annexes, as well as any additional annexes to this Protocol, that are deemed necessary for the implementation of this Protocol; | <p>These articles establish institutional arrangements.</p> |

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| <p>(b) Pass and amend regulations with respect to this Protocol;</p> <p>(c) Make recommendations for Contracting Parties to achieve harmonization of national laws to facilitate the achievement of the objectives of this Protocol;</p> <p>(d) Exercise such other functions as may be required for the implementation of this Protocol.</p> <p>4. 5. The rules of procedure of the Conference of the Parties and financial rules of the Convention shall be applied, <u>mutatis mutandis</u>, under this Protocol, except as may be otherwise decided by consensus by the Conference of the Parties serving as the meeting of the Parties to this Protocol.</p> | |
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| <p>ARTICLE 16. SECRETARIAT</p> <ol style="list-style-type: none">1. The Secretariat established by article 24 of the Convention shall serve as the secretariat to this Protocol.2. Article 24, paragraph 1, of the Convention on the functions of the Secretariat shall apply, <u>mutatis mutandis</u>, to this Protocol.3. To the extent that they are distinct, the costs of the secretariat services for this Protocol shall be met by the Parties hereto. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, decide on the necessary budgetary arrangements to this end. | |
| <p>ARTICLE 17. BIOSAFETY LIABILITY AND COMPENSATION AUTHORITY</p> <ol style="list-style-type: none">1. A Biosafety Liability and Compensation Authority is hereby established. The Authority shall be open to participation by all Parties. It shall report regularly to the Conference of the Parties serving as the meeting of the Parties to this Protocol on all aspects of its work.2. Its functions shall be:<ol style="list-style-type: none">(a) To perform functions assigned to it by this Protocol(b) To perform such other functions as may be determined by the Conference of the Parties. | <p>This article establishes a Biosafety Liability and Compensation Authority, which may provide administrative, capacity-building and other functions assigned to it by the Conference of the Parties.</p> |
| <p>ARTICLE 18.</p> | |

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| <p>INSURANCE AND OTHER FINANCIAL GUARANTEES</p> <ol style="list-style-type: none">1. Exporters, notifiers, importers, distributors, growers, carriers, and other persons liable under article 4. shall establish and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability under article 4. of this Protocol for amounts not less than the minimum limits specified in paragraph [] of Annex I according to the terms and conditions established by the Regulations passed by the Conference of the Parties serving as the meeting of the Parties to this Protocol.2. A document reflecting the coverage of the liability of the exporter and the notifier under article 4. paragraph 1, of this Protocol or of the importer under article 4., paragraph 2, of this Protocol shall accompany the notification referred to in article 8 or Annex II of the Cartagena Protocol. Proof of coverage of the liability of the exporter and the notifier shall be delivered to the competent national authorities of the State of import.3. Any claim under this Protocol may be asserted directly against any person providing insurance, bonds or other financial guarantees. The insurer or the person providing the financial guarantee shall have the right to require the person liable under article 4. to be joined in the proceedings. | <p>This article ensures that persons who are liable for damage carry financial guarantees to ensure damages can be recovered from them.</p> |
| <p><u>Part IV</u> <u>The Fund</u></p> | <p>A fund is essential, to ensure that where a liable party is insolvent or for some other reason does not pay, that damage is not left uncompensated or unremedied. A fund would also cover major disasters or accidents or situations where no party is found liable for any reason.</p> |

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| <p>ARTICLE 19. FUND ESTABLISHED</p> <p>1. An International Fund for compensation for damage, to be named “The International Living Modified Organism Compensation Fund” and hereinafter referred to as “The Fund”, is hereby established with the following aims:</p> <p>(a) to provide compensation for and prevention, remediation or reinstatement of damage to the extent that the protection afforded by this Protocol is inadequate;</p> <p>(b) to provide legal aid to claimants;</p> <p>(b) to give effect to the related purposes set out in this Convention.</p> <p>2. The Fund shall in each Contracting Party be recognized as a legal person capable under the laws of that State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State. Each Contracting Party shall recognize the Director of the Fund (hereinafter referred to as “The Director”) as the legal representative of the Fund.</p> | <p>While capacity building is important, in the context of Article 27, so is access to justice, which in practical terms may mean developing States having the capacity to lodge and pursue claims in exporting States and otherwise providing legal aid to victims.</p> <p>Much language for the Fund is taken from the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.</p> |
| <p>ARTICLE 20. APPLICABILITY OF FUND</p> <p>This Part shall apply with regard to compensation according to article <u>21</u>. to damage caused in areas under the national jurisdiction of a Contracting Party or in areas beyond the limits of national jurisdiction, and to preventive measures taken to prevent or minimize such damage or for reinstatement or remediation of the environment following such damage.</p> | <p>This article ensures wide applicability of the Fund.</p> |
| <p>ARTICLE 21. PAYMENT OF COMPENSATION AND REMEDIATION</p> | |

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1. The Fund shall pay compensation to any person suffering damage if such person has been unable to obtain full and adequate compensation for the damage under this Protocol, either
 - (a) because no liability for the damage arises under this Protocol;
 - (b) because the party liable for the damage under this Protocol is financially incapable of meeting his obligations in full and any financial security that may be provided under this Protocol does not cover or is insufficient to satisfy the claims for compensation for the damage; a person being treated as financially incapable of meeting that person's obligations and a financial security being treated as insufficient if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under this Protocol after having taken all reasonable steps to pursue the legal remedies available to him; or
 - (c) because neither the exporter, notifier nor any other person who is or may be liable under this Protocol can be identified, located or otherwise be held liable.
2. The Fund shall pay the costs of prevention, remediation, restoration or reinstatement of the environment where payment for such remediation or reinstatement was not available under this Protocol.
3. The aggregate amount of compensation and prevention, remediation and reinstatement payable by the Fund under this article shall in respect of any one occurrence be limited, so that the total sum of that amount and the amount of compensation actually paid under this Protocol for an occurrence, shall not exceed the amount specified in Annex IV.
4. Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and

This article provides the mechanism for the payment of compensation and remediation.

A maximum is necessary since the Fund's resources will be limited, and since the Fund has no control over activities of exporters, importers and other parties.

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the amount of compensation actually recovered by the claimant under this Protocol shall be the same for all claimants.

5. The Assembly of the Fund (hereinafter referred to as “the Assembly”) may, having regard to the experience of incidents which have occurred and in particular the amount of damage resulting therefrom and to changes in the monetary values, decide that the amount referred to in paragraph 2, shall be increased; provided, however, that this amount shall in no case be decreased. The changed amount shall apply to incidents which occur after the date of the decision effecting the change.
6. The Fund shall, at the request of a Contracting Party, use its good offices as necessary to assist that State to secure promptly such personnel, material and services as are necessary to enable the State to take measures to prevent or damage arising from an occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol.
7. The Fund may on conditions to be laid down in Regulations provide credit facilities with a view to the taking of preventive measures against damage arising from a particular occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol.

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| <p>ARTICLE 22. TIME LIMITATIONS</p> <p>Rights to compensation under article 21. shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 23., paragraph 6, within ten years from the date when the damage occurred or from when the damage is discovered.</p> | <p>It may take time to discover damage. The limitation period should run from when the damage is found, not when it was caused, and should be sufficiently long to allow a reasonable time for a claim to be brought (see article 14.)</p> |
| <p>ARTICLE 23. JURISDICTION</p> <ol style="list-style-type: none">1. Subject to the subsequent provisions of this article, any action against the Fund for compensation under article 21. of this Protocol shall be brought only before a court competent under article 8. of this Protocol in respect of actions against a person who is or who would be been liable for damage caused by the relevant occurrence.2. Each Contracting Party shall ensure that its courts possess the necessary jurisdiction to entertain such actions against the Fund as are referred to in paragraph 1.3. Where an action for compensation for damage has been brought before a court competent under article 8. of this Protocol, such court shall have exclusive jurisdictional competence over any action against the Fund for compensation under the provisions of article 21. of this Convention in respect of the same damage.4. Each Contracting State shall ensure that the Fund shall have the right to intervene as a party to any legal proceedings before a competent court of that State against a person who may be liable under article 4. of this Protocol.5. Except as otherwise provided in paragraph 6, the Fund shall not be bound by any judgment or decision in proceedings to which it has not been a party or by any settlement to which it is not a party.6. Without prejudice to the provisions of paragraph 4, where an action under this | <p>These provisions establish jurisdiction over actions for compensation against the Fund.</p> |

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| <p>Protocol for compensation for damage has been brought before a competent court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgment rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgment was given, become binding upon the Fund in the sense that the facts and findings in that judgment may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.</p> | |
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| <p>ARTICLE 24. ENFORCEMENT</p> <p>Subject to any decision concerning the distribution referred to in article 21., paragraph 4, any judgment given against the Fund by a court having jurisdiction in accordance with article 23., paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in article 12. of this Protocol.</p> | <p>This article provides for enforcement of judgments against the Fund.</p> |
| <p>ARTICLE 25. SUBROGATION</p> <ol style="list-style-type: none">1. The Fund shall, in respect of any amount of compensation for damage paid by the Fund in accordance with article 21., paragraph 1, of this Protocol, acquire by subrogation the rights that the person so compensated may enjoy under the Protocol against any person who may be liable under article 4. of this Protocol.2. Nothing in this Convention shall prejudice any right of recourse or subrogation of the Fund against persons other than those referred to in the preceding paragraph. In any event the right of the Fund to subrogation against such person shall not be less favourable than that of an insurer of the person to whom compensation or indemnification has been paid.3. Without prejudice to any other rights of subrogation or recourse against the Fund which may exist, a Contracting Party or agency thereof which has paid compensation for damage in accordance with provisions of national law shall acquire by subrogation the rights which the person so compensated would have enjoyed under this Protocol. | <p>This article ensures the Fund can recover damages against those responsible.</p> |

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| <p>ARTICLE 26. ASSESSMENT OF CONTRIBUTIONS</p> <ol style="list-style-type: none">1. Contributions to the fund shall be made in respect of each Contracting Party by any person who, in the calendar year referred to in article 27., paragraph 1, as regards initial contributions and in article 28., paragraphs 2 (a) or (b), as regards annual contributions, has exported living modified organisms in total quantities exceeding the amount specified in Annex II.2. For the purposes of paragraph 1, where the value of living modified organisms exported by any person in a calendar year when aggregated with the value of living modified organisms by any associated person or persons exceeds the amount specified in Annex II, such person shall pay contributions in respect of the actual quantity received by him notwithstanding that that value did not exceed the amount specified in Annex II.3. “Associated person” means any subsidiary or commonly controlled entity. The question whether a person comes within this definition shall be determined by the national law of the Party concerned. | <p>This article makes provision for contributions to the Fund.</p> |
| <p>ARTICLE 27. QUANTUM OF CONTRIBUTIONS</p> <ol style="list-style-type: none">1. In respect of each Contracting Party initial contributions shall be made of an amount which shall for each person referred to in article 26. be calculated on the basis of a fixed sum proportionate to the value of the living modified organisms exported during the calendar year preceding that in which this Convention entered into force for that State.2. The sum referred to in paragraph 1 shall be determined by the Assembly within three months after the entry into force of this Protocol. In performing this function | <p>This article sets contributions to the fund according to exports of LMOs.</p> |

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the Assembly shall, to the extent possible, fix the sum in such a way that the total amount of initial contributions would, if contributions were to be made in respect of 90 per cent of the quantities of living modified organisms exported throughout the world, equal ____ million SDR.

3. The initial contributions shall in respect of each Contracting Party be paid within three months following the date at which the Protocol entered into force for that Party.

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| <p>ARTICLE 28. BUDGET</p> <p>1. With a view to assessing for each person referred to in article 26. the amount of annual contributions due, if any, and taking account of the necessity to maintain sufficient liquid funds, the Assembly shall for each calendar year make an estimate in the form of a budget of:</p> <p>(i) Expenditure</p> <p>(a) costs and expenses of the administration of the Fund in the relevant year and any deficit from operations in preceding years;</p> <p>(b) payments to be made by the Fund in the relevant year for the satisfaction of claims against the Fund due under article <u>21</u>, including repayment on loans previously taken by the Fund for the satisfaction of such claims, to the extent that the aggregate amount of such claims in respect of any one incident does not exceed the amount specified in Annex I;</p> <p>(ii) Income</p> <p>(a) surplus funds from operations in preceding years, including any interest;</p> <p>(b) initial contributions to be paid in the course of the year;</p> <p>(c) annual contributions, if required to balance the budget;</p> <p>(d) any other income.</p> <p>2. For each person referred to in article 26. the amount of his annual contribution shall be determined by the Assembly and shall be calculated in respect of each Contracting Party.</p> <p>3. The sums referred to in paragraph 2 above shall be arrived at by dividing the relevant total amount of contributions required by the total amount of living</p> | <p>This article sets a Budget for Fund and sets allocations of contributions</p> |
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modified organisms exported by all Contracting States in the relevant year.

4. The Assembly shall decide the portion of the annual contribution which shall be immediately paid in cash and decide on the date of payment. The remaining part of each annual contribution shall be paid upon notification by the Director.
5. The Director may, in cases and in accordance with conditions to be laid down in the Regulations of the Fund, require a contributor to provide financial security for the sums due from him.
6. Any demand for payments made under paragraph 4 shall be called rateably from all individual contributors.

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| <p>ARTICLE 29. ASSESSMENT OF CONTRIBUTIONS</p> <ol style="list-style-type: none">1. The amount of any contribution due under article 28. and which is in arrear shall bear interest at a rate which shall be determined by the Assembly for each calendar year provided that different rates may be fixed for different circumstances.2. Each Contracting Party shall ensure that any obligation to contribute to the Fund arising under this Protocol in respect of living modified organisms exported from the territory of that State is fulfilled and shall take any appropriate measures under its law, including the imposing of such sanctions as it may deem necessary, with a view to the effective execution of any such obligation; provided, however, that such measures shall only be directed against those persons who are under an obligation to contribute to the Fund.3. Where a person who is liable in accordance with the provisions of articles 27. and 28. to make contributions to the Fund does not fulfil his obligations in respect of any such contribution or any part thereof and is in arrear for a period exceeding three months, the Director shall take all appropriate action against such person on behalf of the Fund with a view to the recovery of the amount due. However, where the defaulting contributor is manifestly insolvent or the circumstances otherwise so warrant, the Assembly may, upon recommendation of the Director, decide that no action shall be taken or continued against the contributor. | <p>This article sets mechanisms for the collection of assessed contributions and enforcement action.</p> |
| <p>ARTICLE 30. FUND BODIES</p> <ol style="list-style-type: none">1. The Fund shall have an Assembly, a Secretariat headed by a Director and an Executive Committee.2. The Assembly shall consist of all Contracting States to this Protocol. | <p>This article establishes the institution of the Fund.</p> |

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| <p>ARTICLE 31. ASSEMBLY FUNCTIONS</p> <p>The functions of the Assembly shall be:</p> <ol style="list-style-type: none">1. to elect at each regular session its Chair and two Vice-Chairmen who shall hold office until the next regular session;2. to determine its own rules of procedure, subject to the provisions of this Protocol;3. to adopt Internal Regulations necessary for the proper functioning of the Fund;4. to appoint the Director and make provisions for the appointment of such other personnel as may be necessary and determine the terms and conditions of service of the Director and other personnel;5. to adopt the annual budget and fix the annual contributions;6. to appoint auditors and approve the accounts of the Fund;7. to approve settlements of claims against the Fund, to take decisions in respect of the distribution among claimants of the available amount of compensation in accordance with article 21., paragraph 3, and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of damage are compensated as promptly as possible;8. to elect the members of the Assembly to be represented on the Executive Committee.9. to establish any temporary or permanent subsidiary body it may consider to be necessary;10. to determine which non-Contracting States and which inter-governmental and international non-governmental organizations shall be admitted to take part, without voting rights, in meetings of the Assembly, the Executive Committee, and | <p>This article establishes the functions of the Assembly.</p> |
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| <p>subsidiary bodies;</p> <p>11. to give instructions concerning the administration of the Fund to the Director, the Executive Committee and subsidiary bodies;</p> <p>12. to review and approve the reports and activities of the Executive Committee;</p> <p>13. to supervise the proper execution of the Convention and of its own decisions;</p> <p>14. to perform such other functions as are allocated to it under the Convention or are otherwise necessary for the proper operation of the Fund.</p> | |
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| <p>ARTICLE 32. SESSIONS OF ASSEMBLY</p> <p>1. Regular sessions of the Assembly shall take place once every calendar year upon convocation by the Director; provided, however, that if the Assembly allocates to the Executive Committee the functions specified in article 31., paragraph 5, regular sessions of the Assembly shall be held once every two years.</p> <p>2. Extraordinary sessions of the Assembly shall be convened by the Director at the request of the Executive Committee or of at least one-third of the members of the Assembly and may be convened on the Director's own initiative after consultation with the Chairman of the Assembly. The Director shall give members at least thirty days' notice of such sessions.</p> | <p>This article establishes the Assembly sessions.</p> |
| <p>ARTICLE 33. QUORUM</p> <p>A majority of the members of the Assembly shall constitute a quorum for its meetings.</p> | |
| <p>[other mechanical provisions as necessary]</p> | |

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| <p>PART V SETTLEMENT OF DISPUTES</p> | <p>The following articles establish a disputes mechanism, modeled largely on the dispute settlement provisions of the Law of the Sea Convention, focused on an International Tribunal for the Protection of Biodiversity.</p> |
| <p>SECTION 1: GENERAL PROVISIONS</p> | |
| <p>ARTICLE 34. OBLIGATION TO SETTLE DISPUTES BY PEACEFUL MEANS</p> <p>Contracting Parties shall settle any dispute between them concerning the interpretation or application of this Protocol by peaceful means in accordance with article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in article 33, paragraph 1, of the Charter</p> | |
| <p>ARTICLE 35. SETTLEMENT OF DISPUTES BY ANY PEACEFUL MEANS CHOSEN BY THE PARTIES</p> <p>Nothing in this Part impairs the right of any Contracting Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Protocol by any peaceful means of their own choice.</p> | |
| <p>ARTICLE 36. PROCEDURE WHERE NO SETTLEMENT HAS BEEN REACHED BY THE PARTIES</p> <p>1. If the Contracting Parties which are parties to a dispute concerning the interpretation or application of this Protocol have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure .</p> | |

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| 2. If the parties have also agreed on a time limit, paragraph 1 applies only upon the expiration of that time-limit. | |
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| <p>ARTICLE 37. OBLIGATION TO EXCHANGE VIEWS</p> <p>1. When a dispute arises between Contracting Parties concerning the interpretation or application of this Protocol, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.</p> <p>2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.</p> | |
| <p>ARTICLE 38. CONCILIATION</p> <p>1. A Contracting Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation under Annex II.</p> <p>2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.</p> <p>3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.</p> <p>4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.</p> | |
| <p>SECTION 2. COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS</p> | |

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| <p>ARTICLE 39. APPLICATION OF PROCEDURES UNDER THIS SECTION</p> <p>Subject to section 3 of this Part, any dispute concerning the interpretation or application of this Protocol shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.</p> | |
| <p>ARTICLE 40. CHOICE OF PROCEDURE</p> <p>1. When signing, ratifying or acceding to this Protocol or at any time thereafter, a Contracting Party shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:</p> <ul style="list-style-type: none">(a) the International Tribunal for the Protection of Biodiversity established in accordance with Annex III.(b) the International Court of Justice;(c) an arbitral tribunal constituted in accordance with Annex IV;(d) a special arbitral tribunal constituted in accordance with Annex IV for one or more of the categories of disputes specified therein. <p>2. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted the International Tribunal for the Protection of Diversity in accordance with Annex III.</p> <p>3. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.</p> <p>4. If the parties to a dispute have not accepted the same procedure for the settlement of the</p> | |

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dispute, it may be submitted only to the International Tribunal for the Protection of Biodiversity in accordance with Annex III, unless the parties otherwise agree.

5. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.

6. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.

7. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

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| <p>ARTICLE 41. JURISDICTION</p> <p>1. A court or tribunal referred to in article 40. shall have jurisdiction over any dispute concerning the interpretation or application of this Protocol which is submitted to it in accordance with this Part.</p> <p>2. A court or tribunal referred to in article 40. shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.</p> <p>3. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.</p> | |
| <p>ARTICLE 42. EXPERTS</p> <p>In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or proprio motu, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex V, to sit with the court or tribunal but without the right to vote.</p> | |
| <p>ARTICLE 43. PROVISIONAL MEASURES</p> <p>1. If a dispute has been duly submitted to a court or tribunal which considers that <i>prima facie</i> it has jurisdiction under this Part, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the environment, pending</p> | |

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the final decision.

2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.

3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.

4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other Contracting Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.

5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Protection of Biodiversity may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

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| <p>ARTICLE 44. ACCESS</p> <p>1. All the dispute settlement procedures specified in this Part shall be open to Contracting Parties.</p> <p>2. The dispute settlement procedures specified in this Part shall be open to entities other than States Parties as specifically provided for in this Protocol or as provided in Rules passed by the Assembly under article 31.</p> | |
| <p>ARTICLE 45. APPLICABLE LAW</p> <p>1. A court or tribunal having jurisdiction under this section shall apply this Protocol and other rules of international law not incompatible with this Protocol.</p> <p>2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree.</p> | |
| <p>ARTICLE 46. PRELIMINARY PROCEEDINGS</p> <p>1. A court or tribunal provided for in article 40. to which an application is made in respect of a dispute referred to in article 39. shall determine at the request of a party, or may determine proprio motu, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case.</p> <p>2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time limit within which they</p> | |

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may request it to make a determination in accordance with paragraph 1.

3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure.

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| <p>ARTICLE 47. EXHAUSTION OF LOCAL REMEDIES</p> <p>Any dispute between Contracting Parties concerning the interpretation or application of this Protocol may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.</p> | |
| <p>ARTICLE 48. FINALITY AND BINDING FORCE OF DECISIONS</p> <p>1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.</p> <p>2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.</p> | |
| <p>SECTION 3. LIMITATIONS AND EXCEPTIONS TO APPLICABILITY OF SECTION 2</p> | |
| <p>ARTICLE 49. STATE RESPONSIBILITY AND RESIDUAL LIABILITY OF EXPORTING STATE PARTY</p> <p>1. The Protocol shall not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to State responsibility.</p> <p>2. Where payments by the Fund under Article 21 for damage, including compensation and the costs of prevention, remediation, restoration or reinstatement of the environment, are insufficient, the exporting Contracting Party shall be liable to pay the residual amount payable under this Protocol.</p> | |

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| 3. Where there is liability under Article 4(9) and Article 49(2), the liability shall be joint and several. | |
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| PART VI FINAL PROVISIONS | These articles establish final mechanical provisions. |
| ARTICLE 50. RELATIONSHIP WITH THE CONVENTION Except as otherwise provided in this Protocol, the provisions of the Convention relating to its protocols shall apply to this Protocol. | |
| ARTICLE 51. ASSESSMENT AND REVIEW The Conference of the Parties serving as the meeting of the Parties to this Protocol shall undertake, five years after the entry into force of this Protocol and at least every five years thereafter, an evaluation of the effectiveness of the Protocol, including an assessment of its procedures and annexes. | |
| ARTICLE 52. SIGNATURE This Protocol shall be open for signature at the United Nations Office at Nairobi by States and regional economic integration organizations from ___ to _____, and at United Nations Headquarters in New York from _____ to _____. | |
| ARTICLE 53. ENTRY INTO FORCE | |

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| <ol style="list-style-type: none">1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the [fiftieth] instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Convention.2. This Protocol shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves this Protocol or accedes thereto after its entry into force pursuant to paragraph 1 above, on the ninetieth day after the date on which that State or regional economic integration organization deposits its instrument of ratification, acceptance, approval or accession, or on the date on which the Convention enters into force for that State or regional economic integration organization, whichever shall be the later.3. For the purposes of paragraphs 1 and 2 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization. | |
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| <p>ARTICLE 54. RESERVATIONS</p> <p>No reservations may be made to this Protocol.</p> | |
| <p>ARTICLE 55. WITHDRAWAL</p> <ol style="list-style-type: none">1. At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from the Protocol by giving written notification to the Depositary.2. Any such withdrawal shall take place upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal. | |
| <p>ARTICLE 56. AUTHENTIC TEXTS</p> <p>The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.</p> | |

ANNEX I

1. Minimum limits of insurance, bonds or other financial guarantees covering their liability under article 4. (Reference article 18.)
2. Minimum amount of export of LMOs to qualify for contributions to the Fund. (Reference article 26.)
3. Initial contributions for each Contracting Party (Reference article 27.1.)
4. Total amount for aggregate claims against Fund (Reference article 28.1(b))
5. Total amount for aggregate claims against Fund (Reference article 28.1(c))
6. Annual contribution (Reference article 28.2)

Annex II

Conciliation Procedure [see Law of the Sea Convention Annex V] (reference article 38.)

Annex III

International Tribunal for the Protection of Biodiversity (reference article 40.)

Annex IV

Arbitral tribunal (reference art 40.)

Annex V

List of Experts (reference art 42)

Annex VI

Maximum amount payable under Fund under article 21.

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