

Greenpeace International Explanatory Documents on the Biosafety Liability and Redress Negotiations

Preparation for the
Fifth 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

Cartagena, March 12-19 2008

Putting it all together: The Preferred Operational Texts Combined

The following constitutes the texts Greenpeace has suggested in its summary and analysis table for the 5th meeting, combined so delegates can see what the whole document may look like at present.

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

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

A. Functional Scope

Operational Text 1:

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

B. Geographical scope

Operational Text 7:

1. 'Area under national jurisdiction' shall mean the territory of a Contracting Party and any other areas over which the Contracting Party has sovereignty or jurisdiction according to international law.
2. These rules and procedures shall apply to any damage described by [paragraph (a)] wherever suffered including in areas
 - (a) Within limits of national jurisdiction or control of Contracting Parties;
 - (b) Within the limits of national jurisdiction or control of non-Contracting Parties; or
 - (c) Beyond the limits of national jurisdiction or control of States.
3. Nothing in these rules and procedures 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.

C. Limitation in time

Operational Text 4:

Unless a different intention appears from these rules and procedures, or is otherwise established, the provisions of these rules and procedures 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 rules and procedures with respect to that Contracting Party.

D: Limitation to the authorization at the time of the import of the LMOs

Operational Text 4

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

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

Operational Text 1:

1. Whenever a transboundary movement is effected by transport:
 - (a) When the State of export is a Contracting Party to these rules and procedures, these rules and procedures shall apply with respect to damage arising from an occurrence which takes place from the point where the living modified organisms are loaded on the means of transport in an area under the national jurisdiction of the State of export.
 - (b) When the State of import, but not the State of export, is a Contracting Party to these rules and procedures, these rules and procedures shall apply with respect to damage arising from an occurrence which takes place after the time at which the importer has taken possession of the living modified organism.
2. In any other case, these rules and procedures shall apply when there is a movement of a Living Modified Organism from within an area under national jurisdiction of a Contracting Party to an area outside its national jurisdiction.

F. Non-parties

Operational Text 2:

National rules on liability and redress implementing these rules and procedures should also cover damage resulting from the transboundary movements of LMOs from non-Parties, in accordance with Article 24 of the Cartagena Protocol and COP/MOP decisions BS-I/11 and III/6

III. DAMAGE

A. Definition of damage

Operational Text 4:

1. "Damage" includes/means:
 - (a) Damage to human health including:
 - (i) Loss of life or personal injury or disease together with medical costs including costs of diagnosis and treatment and associated costs;

- (ii) Impairment of health;
- (iii) Loss of income;
- (iv) Public health measures;
- (b) Damage to or impaired use of or loss of property;
- (c) Loss of income /directly/derived from an economic interest in any use of the environment/ biological diversity, incurred as result of impairment of the environment/biological diversity/ taking into account savings and costs;
- (d) 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.
- (e) Damage to the environment, including:
 - (i) The costs of reasonable measures of reinstatement or remediation of the impaired environment/biological diversity, /where possible/, measured by the costs of measures actually taken or to be undertaken, including introduction of original components;
 - (ii) 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
 - (iii) The costs of response measures, including any loss or damage caused by such measures; and
 - (iv) The costs of preventive measures, including any loss or damage caused by such measures;
 - (v) The costs of any interim measures; and
 - (vi) Any other damage to or impairment of the environment, taking into account any impact on the environment;

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.

2. “Impaired” in relation to the environment shall include any adverse effects on the environment;

3. “Measures of reinstatement” means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment/biological diversity/ domestic law may indicate who will be entitled to take such measures;

3bis. “Preventive measures” means any reasonable measures taken by any person, in response to an incident, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up.

4. “Compensation” shall include compensation for damage, restoration and remediation and other amounts payable under this Protocol.

5. “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, and (vi) social, economic,

aesthetic, and cultural conditions which are affected by the matters stated in paragraphs (i) to (v) of this definition.

6. “Biological diversity” means the variability among living organisms from all 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.

7. “Ecosystem” means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

8. A “center of origin” means a geographical area where a species first developed its distinctive properties.

9. “Centre of diversity” means a geographic area containing a high level of genetic diversity for species in in situ conditions.

B. Valuation of damage to conservation of biological diversity/environment

Operational Text 1

1. In the valuation /on a case by case basis/ of the damage /harm to the environment/ conservation and sustainable use of biological diversity/or biological diversity/conservation of biological diversity the following, amongst other matters, shall be taken into account/ for compensation:

(a) Costs of reasonable measures of restoration/ reinstatement, remediation /rehabilitation or clean-up of the impaired environment/conservation and sustainable use of biological diversity /or biological diversity, where possible, measured by the costs of measures actually taken or to be undertaken, including introduction of original components;

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

(c) Costs of response measures eventually undertaken or to be undertaken, including any loss or damage caused by such measures. For the purpose of these rules and procedures, response measures are actions to minimize, contain or remedy damage, as appropriate.

(d) Costs of preventive measures/ where applicable, including any loss or damage caused by such measures;

(e) A monetary value for the loss during the period when the damage/harm occurs and the environment / conservation and sustainable use of biological diversity/ or biological diversity is restored as required in (a) and (b);

(f) A monetary value representing the difference in the value of the environment/ conservation and sustainable use of biological diversity/ or biological diversity as reinstated under (a) or (b), and the value of the environment/ conservation and sustainable use of biological diversity/ or biological diversity in its undamaged or impaired state; and

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

(i) Exchange value (relative price in the market);

(ii) Utility (the use value, which can be very different from the market price);

(iii) Importance (appreciation or emotional value attached);

(iv) The complexity of the biological system.

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

(b) Where baseline conditions cannot be restored, alternative mechanisms for evaluating further monetary conditions may be considered, including market valuation or value of replacement services.

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

Operational Text 1

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

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

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

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

D. Valuation of damage to sustainable use of biological diversity, human health, socio-economic damage and traditional damage

Operational Text 1

1. In the case of harm to human health, compensation shall include:

(a) All costs and expenses incurred in seeking and obtaining the necessary and appropriate medical treatment;

(b) Compensation for any disability suffered, for diminished quality of life, and for all costs and expenses incurred in reinstating, as far as possible, the quality of life enjoyed by the person before the harm was suffered;

(c) Compensation for loss of life and all costs and expenses incurred and other related expenses;

2. Liability shall also extend to harm or damage caused directly or indirectly by the LMO or its product to:

(a) The livelihood or indigenous knowledge systems of local communities,

(b) Technologies of a community or communities,

(c) Damage or destruction arising from incidence of public disorder triggered by the LMO or its product,

(d) Disruption or damage to production or agricultural systems,

(e) Reduction in yields,

(f) Soil contamination,

- (g) Damage to the biological diversity,
- (h) Damage to the economy of an area or community, and any other consequential economic, social or cultural damages.

E. Causation

Preferred option:

Operational Text 4

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

OR

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

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

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

4. There shall be presumption that:

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

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

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

IV. PRIMARY COMPENSATION SCHEME

A. Elements of Administrative Approach based on allocation of costs of response measures and restoration measures

Operational Text 1

In the event of damage or imminent threat of damage, an operator shall immediately inform the competent authority of the damage.

1. Standard of liability and channelling of liability

2. Obligation imposed by national law on the operator to take response and restoration measures to address such damage

There are a number of preferred options:

Operational Text 9:

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:

- (a) to ensure prompt and adequate compensation to victims of damage; and/or
- (b) to preserve and protect the environment.

and other elements include

Operational Text 5:

1. Response measures are actions to minimise, contain or remedy damage, as appropriate.
2. In the event of damage or imminent threat of damage, the liable person should be required by domestic law to take such response measures. This is without prejudice to a primary and general obligation for affected persons to minimise damage as far as possible and feasible.

And

Operational Text 6

1. The operator shall take reasonable measures of reinstatement in case damage resulting from transport, handling and/or use of living modified organisms occurs.
2. The Party in which damage resulting from an intentional or unintentional transboundary movement of living modified organisms occurs, may require the person responsible for the movement to take reasonable preventive measures and measures of reinstatement.

3. Discretion of States to Take Response and Restoration Measures, including when The Operator has Failed to do so and to Recover the Costs

Operational Text 16:

Each State shall adopt the necessary measures to ensure that the necessary steps are taken to prevent, remedy, restore or reinstate the environment where an operator does not do so, and to recover the costs of doing so from an operator.

4. The Term Operator needs to be defined

Operational Text 18:

“Operator” means the developer, producer, notifier, exporter, importer, carrier, or supplier.

Operational Text 19 also has merit in explicitly including unintentional movements:

“Operator” means the person responsible for intentional or unintentional transboundary movements of living modified organisms. However IT 18 is preferred as it gives certainty in naming possible operators.

B. CIVIL LIABILITY (HARMONIZATION OF RULES AND PROCEDURES)

1. Standard of liability and Channelling of Liability

Option 1: Strict Liability

Operational Text 2

1. '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.

2. (a) 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.

(b) 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.

(c) 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.

(d) 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.

(e) 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.

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

(g) 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.

(h) 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.

(i) 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 these rules and procedures, or otherwise fails to meet such compensation, the liability shall be met by the State of which the person is a national.

3. Without prejudice to paragraph 2 above, any person shall be liable for damage caused or contributed to by that person's lack of compliance with the provisions implementing the Convention or the Protocol or by that person's wrongful intentional, reckless or negligent acts or omissions.

2. Interim Relief

Operational Text 2:

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

Abis and Bbis Additional Elements of an Administrative Approach and/or Civil Liability

1. Exemptions to or mitigation of strict liability

Option 2: Mitigation of strict liability

Operational Text 2

Liability may be limited in cases where the person referred to in [

Operational Text 5 of Section IV.2(b)] proves that the damage was:

- (a) The result of an act of armed conflict, hostilities, civil war or insurrection; or
- (b) The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character, provided that, (a) no mutation and no biological effect of any kind, including any change to an organism or an ecosystem whether due to evolution or otherwise and whether gradual or otherwise, shall be considered an Act of God or force majeure, and (b) no weather, meteorological disturbance or climatic occurrence or effect shall be considered Act of God or force majeure.

2. Recourse against third party by the person who is liable on the basis of strict liability

Operational Text 2

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

3. Joint and Several liability or Apportionment of liability

Option 1: Joint and several liability

Operational Text 2

1. 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.
2. 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.
3. Where there is liability under [exporting State] and [state of national], the liability shall be joint and several.

4. LIMITATION OF LIABILITY

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

1. Relative time limit

Operational Text 2 (from old OT 2):

A claim for damages under these rules and procedures should be exercised within [X] years from the date by which the claimant knew or ought reasonably to have known of the damage and the person liable.

and

2. Absolute time limit

Operational Text 7 (from old OT 2):

A claim for damages under these rules and procedures should in any event not be exercised later than [Y] years from the date of the transboundary movement of living modified organisms.

3. Additional provisions

Operational Text 11 (from old OTs 1 & 2):

Where the [incident][transboundary movement of living modified organisms] consists of a series of occurrences having the same origin, the time limits under this provision [shall][should] run from the date of the last of such occurrences. Where the incident consists of continuous occurrences, such time limits [shall][should] run from the end of that continuous occurrence.

And

Operational Text 12 (from old OT 1):

The right to bring a civil action in respect of harm caused by any living modified organism or its product shall commence from the date on which the affected person(s) or the community or communities learned of the harm, taking due account of:

(a) The time the harm may take to manifest itself; and,

(b) The time that it may reasonably take to correlate the harm with the living modified organism or its product, taking into consideration the situation or circumstance of the person(s) or community or communities affected.

(b) Limitation in amount

Option 1: Unlimited liability

either

Operational Text 1

The amount of compensation for damage caused by the transboundary movements of living modified organisms shall be determined by the extent of damage caused as assessed by a competent court, based on the facts of the particular case, and fully compensated. or

Operational Text 2

There shall be no financial limit on liability for any damage recoverable under these rules and procedures.

5. Coverage of liability

OT 1 except that the financial security should be able to be used for redress as well as compensation. To that end, OT 2 has useful elements.

Operational Text 1

1. Any person that will be strictly liable under these rules and procedures shall establish and maintain during the period of the time of liability, insurance, bonds or other financial guarantees covering their liability for amounts not less than the minimum limits specified herein.
2. Insurance, bonds or other financial guaranties provided under subarticle one of this Article shall only be drawn upon to provide compensation for damage.
3. Proof of coverage of the liability shall be delivered to the competent authorities of the state of import/transit, and the same shall be notified to parties through the Biosafety Clearing-House.
4. Any claim under these rules and procedures 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 these rules and procedures to be joined in the proceedings. Insurer and persons providing financial guarantees may invoke the defenses which the person liable under these rules and procedures would be entitled to invoke.

Operational Text 2:

1. These rules and procedures shall provide for mandatory or compulsory financial security for the damage caused by the operator, with residual liability being with the state.
2. These rules and procedures may also provide for voluntary financial security mechanisms to supplement the damage caused.]

V. SUPPLEMENTARY COMPENSATION SCHEME

A. Residual state liability

Operational Text 4:

1. 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.
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.:

B. Supplementary collective compensation arrangements

Operational Text 5:

Article 6 - Preventive, mitigating, restoring and reinstating measures required

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.

Article 19 - Fund established

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

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

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

Article 20 - Applicability of the Fund

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

Article 21 - Payment of Compensation and Remediation

1. The Fund shall pay compensation to any person suffering damage if such person has been unable to obtain full and adequate compensation for the damage under this Protocol, either

- (a) Because no liability for the damage arises under this Protocol;
- (b) Because the party liable for the damage under this Protocol is financially incapable of meeting his obligations in full and any financial security that may be provided under this Protocol does not cover or is insufficient to satisfy the claims for compensation for the damage; a person being treated as financially incapable of meeting that person’s obligations and a financial security being treated as insufficient if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under this Protocol after having taken all reasonable steps to pursue the legal remedies available to him;

2. The Fund shall pay the costs of prevention, remediation or reinstatement of the environment where payment for such remediation or reinstatement was not available under this Protocol.

3. The aggregate amount of compensation and prevention, remediation and reinstatement payable by the Fund under this article shall in respect of any one occurrence be limited, so that the total sum of that amount and the amount of compensation actually paid under this Protocol for an occurrence, shall not exceed the amount specified in Annex IV.

4. Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under this Protocol shall be the same for all claimants.

5. The Assembly of the Fund (hereinafter referred to as “the Assembly”) may, having regard to the experience of incidents which have occurred and in particular the amount of damage resulting therefrom and to changes in the monetary values, decide that the amount referred to in paragraph 2, shall be increased; provided, however, that this amount shall in no case be decreased.

The changed amount shall apply to incidents which occur after the date of the decision effecting the change.

6. The Fund shall, at the request of a Contracting Party, use its good offices as necessary to assist that State to secure promptly such personnel, material and services as are necessary to enable the State to take measures to prevent or damage arising from an occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol.

7. The Fund may on conditions to be laid down in Regulations provide credit facilities with a view to the taking of preventive measures against damage arising from a particular occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol.

Article 22 - Time limitations

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

Article 23 - Jurisdiction

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

2. Each Contracting Party shall ensure that its courts possess the necessary jurisdiction to entertain such actions against the Fund as are referred to in paragraph 1.

3. Where an action for compensation for damage has been brought before a court competent under article 8 of this Protocol, such court shall have exclusive jurisdictional competence over any action against the Fund for compensation under the provisions of article 21 of this Convention in respect of the same damage.

4. Each Contracting State shall ensure that the Fund shall have the right to intervene as a party to any legal proceedings before a competent court of that State against a person who may be liable under article 4 of this Protocol.

5. Except as otherwise provided in paragraph 6, the Fund shall not be bound by any judgment or decision in proceedings to which it has not been a party or by any settlement to which it is not a party.

6. Without prejudice to the provisions of paragraph 4, where an action under this Protocol for compensation for damage has been brought before a competent court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgment rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgment was given, become binding upon the Fund in the sense that the facts and findings in that judgment may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.

Article 24 - Enforcement

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

Article 25 - Subrogation

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

Article 26 - Assessment of Contributions

1. Contributions to the fund shall be made in respect of each Contracting Party by any person who, in the calendar year referred to in article 27, paragraph 1, as regards initial contributions and in article 28, paragraphs 2 (a) or (b), as regards annual contributions, has exported living modified organisms in total quantities exceeding the amount specified in Annex II.
2. For the purposes of paragraph 1, where the value of living modified organisms exported by any person in a calendar year when aggregated with the value of living modified organisms by any associated person or persons exceeds the amount specified in Annex II, such person shall pay contributions in respect of the actual quantity received by him notwithstanding that that value did not exceed the amount specified in Annex II.
3. "Associated person" means any subsidiary or commonly controlled entity. The question whether a person comes within this definition shall be determined by the national law of the Party concerned.

Article 27 - Quantum of Contributions

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

Article 28 - Budget

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

(i) Expenditure

(a) Costs and expenses of the administration of the Fund in the relevant year and any deficit from operations in preceding years;

(b) Payments to be made by the Fund in the relevant year for the satisfaction of claims against the Fund due under article 21, including repayment on loans previously taken by the Fund for the satisfaction of such claims, to the extent that the aggregate amount of such claims in respect of any one incident does not exceed the amount specified in Annex I;

(ii) Income

(a) Surplus funds from operations in preceding years, including any interest;

(b) Initial contributions to be paid in the course of the year;

(c) Annual contributions, if required to balance the budget;

(d) Any other income.

2. For each person referred to in article 26 the amount of his annual contribution shall be determined by the Assembly and shall be calculated in respect of each Contracting Party.

3. The sums referred to in paragraph 2 above shall be arrived at by dividing the relevant total amount of contributions required by the total amount of living modified organisms exported by all Contracting States in the relevant year.

4. The Assembly shall decide the portion of the annual contribution which shall be immediately paid in cash and decide on the date of payment. The remaining part of each annual contribution shall be paid upon notification by the Director.

5. The Director may, in cases and in accordance with conditions to be laid down in the Regulations of the Fund, require a contributor to provide financial security for the sums due from him.

6. Any demand for payments made under paragraph 4 shall be called rateably from all individual contributors.

Article 29 - Assessment of Contributions

1. The amount of any contribution due under article 28 and which is in arrear shall bear interest at a rate which shall be determined by the Assembly for each calendar year provided that different rates may be fixed for different circumstances.

2. Each Contracting Party shall ensure that any obligation to contribute to the Fund arising under this Protocol in respect of living modified organisms exported from the territory of that State is fulfilled and shall take any appropriate measures under its law, including the imposing of such sanctions as it may deem necessary, with a view to the effective execution of any such obligation; provided, however, that such measures shall only be directed against those persons who are under an obligation to contribute to the Fund.

3. Where a person who is liable in accordance with the provisions of articles 27 and 28 to make contributions to the Fund does not fulfil his obligations in respect of any such contribution or any part thereof and is in arrear for a period exceeding three months, the Director shall take all appropriate action against such person on behalf of the Fund with a view to the recovery of the amount due. However, where the defaulting contributor is manifestly insolvent or the circumstances otherwise so warrant, the Assembly may, upon recommendation of the Director, decide that no action shall be taken or continued against the contributor.

Article 30 - Fund Bodies

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

Article 31 - Assembly Functions

The functions of the Assembly shall be:

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

Article 32 - Sessions of Assembly

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

Article 33 - Quorum

A majority of the members of the Assembly shall constitute a quorum for its meetings.

[other mechanical provisions as necessary]

VI. SETTLEMENT OF CLAIMS

A. Inter State procedures (including settlement of disputes under Article 27 of the Convention on Biological Diversity).

Option 2: Special procedure

Operational Text 6:

Section 1: General provisions

Article 34 - Obligation to settle disputes by peaceful means

Parties shall settle any dispute between them concerning the interpretation or application of this Protocol by peaceful means in accordance with article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in article 33, paragraph 1, of the Charter

Article 35 - Settlement of disputes by any peaceful means chosen by the Parties

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

Article 36 - Procedure where no settlement has been reached by the Parties

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

Article 37 - Obligation to exchange views

1. When a dispute arises between Parties concerning the interpretation or application of this Protocol, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

2. The Parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Article 38 - Conciliation

1. A Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation under annex II.

2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.

3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.

4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.

Section 2: Compulsory procedures entailing binding decisions

Article 39 - Application of procedures under this Section

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

Article 40 - Choice of procedure

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

(a) The International Tribunal for the Protection of Biodiversity established in accordance with annex III.

(b) The International Court of Justice;

(c) An arbitral tribunal constituted in accordance with annex IV;

(d) A special arbitral tribunal constituted in accordance with annex IV for one or more of the categories of disputes specified therein.

2. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted the International Tribunal for the Protection of Diversity in accordance with annex III.

3. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

4. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to the International Tribunal for the Protection of Biodiversity in accordance with annex III, unless the parties otherwise agree.

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

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

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

Article 41 - Jurisdiction

1. A court or tribunal referred to in article 40 shall have jurisdiction over any dispute concerning the interpretation or application of this Protocol which is submitted to it in accordance with this Part.

2. A court or tribunal referred to in article 40 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

3. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Article 42 - Experts

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

Article 43 -Provisional measures

1. If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the environment, pending the final decision.

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

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

Article 44 - Access

1. All the dispute settlement procedures specified in this Part shall be open to Parties.

2. The dispute settlement procedures specified in this Part shall be open to entities other than States Parties as specifically provided for in this Protocol or as provided in Rules passed by the Assembly under article [x].

Article 45 - Applicable law

1. A court or tribunal having jurisdiction under this section shall apply this Protocol and other rules of international law not incompatible with this Protocol.

2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree.

Article 46 - Preliminary proceedings

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

Article 47 - Exhaustion of local remedies

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

Article 48 - Finality and binding force of decisions

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

B. CIVIL PROCEDURES

Option 1: Special provisions on private international law

A. Jurisdiction of courts

Operational Text 3 (from old OT 11)

1. Primary jurisdiction over actions under these rules and procedures shall lie with the courts of the Party where the damage occurs.
2. If the damage occurs only beyond the limits of national jurisdiction, primary jurisdiction over actions under these rules and procedures shall lie with the courts of the State of import or the intended State of import, or, if the transboundary movement was unintended, with the courts of the State most closely connected with the damage.
3. Jurisdiction over actions under these rules and procedures shall also lie with the courts of the Party where the occurrence took place, where the defendant has his habitual residence or has his principal place of business.
4. Each Party shall: (a) ensure that its courts possess the necessary competence to entertain claims for compensation under these rules and procedures; and (b) shall adopt the legislative measures necessary to ensure that the laws provide for compensation according to these rules and procedures and according to any harmonizing recommendations made by the Assembly under *Article [x]*.

B. Related Actions

Operational Text 6 (from old OT 11)

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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 Party or Parties, any court other than the court described in *paragraphs 1 and 2 of*

2. *Operational Text 3* shall of its own motion stay its proceedings unless and until the court described in *paragraphs 1 and 2 of*

3. *Operational Text 3* rules that it does not have jurisdiction under this rules and procedures.

4. Where the jurisdiction of the court described in *paragraphs 1 and 2 of*

5. *Operational Text 3* is established by that court, any court other than that court shall decline jurisdiction in favour of that court.

6. When there are two or more courts described in *paragraphs 1 and 2 of*

7. *Operational Text 3*, then any court other than the court described in *paragraphs 1 and 2 of*

8. *Operational Text 3* 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 rules and procedures. 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.

4. Where related actions are brought in the different courts described in

Operational Text 3, any court other than the court described in *paragraphs 1 and 2 of*

Operational Text 3 shall, while the actions are pending at first instance, stay its proceedings upon the motion of a party to any of the proceedings.

5. A court other than the court described in *paragraphs 1 and 2 of Operational Text 3* shall, on the application of one of the parties, decline jurisdiction if the law of the court described in *paragraphs 1 and 2 of*

Operational Text 3 permits the consolidation of related actions and the court first seized has jurisdiction over both or all actions.

6. When related actions are brought in the courts of different Parties, and all courts are described in

Operational Text 3, 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 rules and procedures. 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.

7. For the purposes of *paragraphs 4 to 6*, 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.

C. Applicable law

Operational Text 9 (from old OT 11):

All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in these rules and procedures shall be governed by procedural and substantive law of that court. 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 these rules and procedures.

Or

Operational Text 7 (from old OTs 2, 4 & 6):

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

D. Recognition and enforcement of judgments

Operational Text 12 (from old OT 11):

1. Judgments entered by the competent court under
2. *Operational Text 3* 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 Parties as soon as the formalities required by the 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.
3. 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.
4. If an action is brought against a Party under this Convention, such Party may not, except in respect of measures of execution, invoke any jurisdictional immunities before the court competent in accordance with this article.

E. Other rights of persons who have suffered damage

Operational Text 14 (from old OT 2):

Nothing in these rules and procedures 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.

F. Additional provisions

Operational Text 17 (from old OT 11):

1. Courts shall have the power to order remediation and restoration as well as compensation and may order costs and interest.
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. To rebut the presumption a person must prove to the standard required by the procedural law applied pursuant to

Operational Text 9 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.

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.

4. 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.

E. Standing/right to bring claims

*Operational Text 3 (old OT 9)*1. The principle of wide access to justice 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 these rules and procedures.

2. Nothing in these rules and procedures 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.

3. Financial and other barriers to justice shall not impede access to justice under this article and Parties shall take appropriate steps to remove or reduce such barriers.

Greenpeace International Explanatory Documents on the Biosafety Liability and Redress Negotiations

Preparation for the
Fifth 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

Cartagena, March 12-19 2008

Putting it all together: The Preferred Operational Texts Combined

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