

Greenpeace International Explanatory Documents on the Biosafety Liability and Redress Negotiations

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

Frequently Asked Questions (FAQ)

This document sets out some frequently asked questions which arise in the context of the liability and redress discussions. The questions reference the synthesis released in September.ⁱ

I. What Kind of Regime is Needed? Binding or Not?

Reference: *Annex I: Blueprint*

Suggested Operational Text: Whole Protocol

GP Protocol: *Whole Protocol*

Question: Should the rules be legally binding or non-binding, or should they merely provide international guidance for national rules and procedures? Or should there be no rules or procedures at all?

Answer:

Article 27 of the Protocol was negotiated during the Fifth and Sixth Meetings of the Working Group on Biosafety in 1998 and 1999, amid concerns expressed by a number of developing States that omitting substantive provisions on liability and redress resulted in a draft Protocol that was heavily slanted towards trade rather than protection of the environment. So section 27 is very much an integral part of the Protocol, and it would amount to an exercise in bad faith to fail to implement it now. It is needed to balance the Protocol, which without it leaves compensation and liability for trade which would take place under the Protocol unaddressed. This question is discussed in more depth in the attached Backgrounder document.

II.A. Functional Scope

Reference: *II.A p. 5*

Suggested Operational Text: 14

GP Protocol: *Art. 3*

ⁱ *Synthesis of proposed Operational texts on approaches and options identified pertaining to liability and redress in the context of Article 27 of the Biosafety Protocol, Annex II to UNEP/CBD/BS/WG-L&R/4/2, 13 September 2007.*

Question:

What kind of activities should the regime cover?

Answer:

The scope should be broad, and apply to transport, transit, handling and/or use of LMOs resulting from transboundary movements of LMOs. It should include both unintentional and illegal transboundary movements of LMOs.

II.B. Geographical Scope

Reference: II.B p. 7

Suggested Operational Text: 2

GP Protocol: Art. 3

Question:

What is the geographical scope of damage that should be covered? For instance, should damage to areas outside national jurisdiction be covered?

Answer:

All damage stemming from the transboundary movement should be covered, including damage to areas beyond national jurisdiction such as the high seas, and damage within the territory of non-contracting Parties. LMO contamination and other effects can spread and have spread beyond national boundaries. Damage in the high seas (e.g. GM fish or other marine organism) must be covered.

Similarly, if damage occurs in the territory of a non-Party but is otherwise covered by the liability regime, care should be taken about excluding it for that reason alone, since that could hamper clean-up and prevention activities, especially if that non-Party is Party to the Biosafety Protocol but not to the liability instrument. For instance, the country may be part of a regional, multilateral or bilateral instrument that would mean it should be included in the liability and redress regime. See also comments about non-Parties made under II.F below.

II.C. Limitation in Time

Reference: II.C p. 10

Suggested Operational Text: 1

GP Protocol: Art. 3.5

Question:

Should the liability instrument cover situations which arose before it enters into force?

Answer:

The underlying principle is that the instrument should not cover past situations which have ceased to exist, according to Art. 28 of the Vienna Convention on the Law of Treaties.

However, LMOs may cause ongoing damage. These should not be excluded, particularly because the damage may not be discovered or manifested until after the regime has entered into force, even if it was caused before it did.

II.D. Limitation to the authorization at the time of the import of the LMOs

Reference: II.D/p. 11

Suggested Operational Text: 5

GP Protocol: None

Question:

Should there be a requirement that the use be authorised? For instance, if the LMO is used for a different purpose, should damage be excluded?

Answer:

There should be no requirement as to authorised use.

This is very important, since (1) a limitation to authorised use would create a broad and uncertain loophole; (2) such a limitation ignores that a gene from an LMO may escape and cause damage; (3) such a limitation would fly in the face of the precautionary approach, since the possible consequences of the transboundary movement of the LMO may not be known or knowable. Article 27 requires that all damage caused by transboundary movement should be covered.

The polluter-pays principle requires that all damage is compensated and/or remedied. The exporter takes the risk of the transboundary movement of the LMO. It should not be able to avoid that liability by claiming a different use of the LMO.

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

Reference: II.E/p. 11

Suggested Operational Text: 1

GP Protocol: Art. 3

Question:

How is the point of export and import to be defined?

Answer:

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The instrument needs to carefully define the point of import or export for the purposes of liability. This will be different for intentional (i.e. transport) and unintentional (e.g. wind borne) movements.

For transport, loading on the means of transport should be the starting point. If the LMO is exported by a non-contracting Party, the starting point should be where the importer takes control. This may be important for situations covered by a Fund.

For other movement e.g. unintentional movement, the starting point should be when the LMO leaves the territory.

II.F. Non-Parties

Reference: *II.F/p. 13*

Suggested Operational Text: 5

GP Protocol: *Art. 3.2(b)*

Question: How should the Protocol address non-Parties, especially when the LMO is exported from or transits via a non-Party?

Answer:

The instrument needs to address the situation where an LMO is exported from a non-Party. The Fund should be able to cover damage from LMOs exported from non-Parties.

Note that under Article 3(k) of the Protocol, for the purposes of Articles 17 and 24, transboundary movement extends to movement between Parties and non-Parties. Article 24 requires that transboundary movements of LMOs between Parties and non-Parties shall be consistent with the objective of the Protocol, and allows Parties to enter into bilateral, regional and multilateral agreements and arrangements with non-Parties regarding such transboundary movements. Parties are to encourage non-Parties to adhere to the Protocol and to contribute appropriate information to the Biosafety Clearing-House on LMOs released in, or moved into or out of, areas within their national jurisdictions. Article 17 applies to unintentional transboundary movements.

These two Articles underline that a liability instrument should not simply exclude movements to or from non-Parties.

III. Damage

III.A. Definition of damage

Reference: *III.A/p. 14*

Suggested Operational Text: 13

GP Protocol: *Art. 2 (and see below)*

Question:

How should ‘damage’ be defined?

Answer:

This is a crucial issue for framing the scope of the regime – i.e. what kinds of damage are covered by the instrument. Comments made above under IIA. ‘scope’ are relevant here too.

The definition of ‘damage’ must be broad enough to cover any kind of damage that can be caused by LMOs. Consistently with the polluter-pays principle, damage must include reinstatement, remediation, impairment, and preventive measures, as well as damage to private property, economic losses and injury or disease. It needs to be clear that socio-economic damage to local and indigenous communities is covered, following article 24 of the Protocol.

Reference should be made to the suggested text in OT 9. Some important issues are the need to define ‘environment’ broadly, and the need to include preventive, restoration and remediation measures. Some wording was submitted in July 2007 and is reproduced below.

The damage covered should not be limited to ‘damage to biological diversity’ (e.g. OT 10) since that would include only damage to variability between species etc, rather than the species themselves, and would exclude damage to ecosystems, the environment, socio-economic damage, damage to health and even damage to other farmers. The separate backgrounder explains more about the scope and the definition of damage, but briefly:

- Article 27 is unqualified. ‘Damage resulting from transboundary movements of living modified organisms’ is not further qualified in any way. So damage to be covered must be (a) damage that (b) resulted from transboundary movements (c) of LMOs;
- the scope of the Protocol stated in Article 1 encompasses (a) adverse effects on the conservation and sustainable use of biological diversity, (b) taking also into account risks to human health;
- the ‘sustainable use’ of biological diversity clearly refers to use of its components;
- the CBD itself covers components, ecosystems, habitats and environmental impacts;
- Article 26 of the Protocol shows that scope of the Protocol clearly encompasses socio-economic considerations.

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

Suggested definitions submitted by Greenpeace International in July 2007

1. *‘Environment’ includes all natural resources, including (i) air, water, soil, fauna and flora, and the interaction between the same factors, (ii) ecosystems and their constituent parts, (iii)*

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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.

2. *“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.*
3. *“Ecosystem” means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.*
4. *A “center of origin” means a geographical area where a species first developed its distinctive properties.*
5. *A “centre of diversity” means a geographic area containing a high level of genetic diversity for species in in situ conditions.ⁱⁱ*

III.A bis. Damage to conservation and sustainable use of biological diversity or its components

Reference: III.A/p. 21

Suggested Operational Text: None

GP Protocol: Art. 2

Question: How should damage to the conservation and sustainable use of biological diversity or its components be addressed?

Answer: Greenpeace has addressed that under the definition of ‘damage’, under III.A above. Care must be taken to include damage to components. If addressed specifically, damage to biological diversity and any baselines used to measure it will need consideration. The precautionary approach means that effects on damage to biodiversity may be difficult to assess as ‘significant’ or ‘adverse’, as is suggested by some suggested text.

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

Reference: III.B/p. 22

Suggested Operational Text: 1

GP Protocol: Art. 2.4(v)

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

Question: How should damage to conservation of biological diversity and/or the environment be valued?

Answer: One method of valuation will be the costs of response and prevention measures, reinstatement or remediation. If this is not possible, the value of the impairment, and introduction of equivalent components, will need to be considered.

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

Reference: III.C/p. 24

Suggested Operational Text: 1

GP Protocol: None

Question: Whether special measures need to be taken in case of damage to centres of origin and centres of genetic diversity.

Answer: OT 1 provides useful text. ‘Centres of origin’ and ‘centres of genetic diversity’ would need to be defined.

This should also be taken into consideration with respect to the fund.

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

Reference: III.D/p. 24

Suggested Operational Text: 3

GP Protocol: Art. 2.4(i) and (iv)

Question: How should damage to sustainable use of biological diversity, human health, socio-economic damage and traditional damage be valued?

Answer: OT 3 provides useful text on valuation of these matters.

III.E. Causation.

Reference: III.E/p. 25

Suggested Operational Text: 11

GP Protocol: Arts. 2.5, 2.11, 9.2

Question: How should causation be addressed?

Answer:

LMOs pose particularly difficult issues for claimants in proving that damage was caused by a particular LMO. If a claim fails due to inability to meet the scientific requirements of proving a causal link, due to lack of foreseeability, due to unavailability of evidence, which may be in another country, or due to the disparate nature of sources of the LMO causing damage, compensation of victims and restoration of the environment will not be realized. A plaintiff may find it difficult or impossible to prove that a particular effect is caused by the suspected LMO rather than through other causes, especially where the science itself is uncertain.

The precautionary principle means that the burden of proving causation should be reversed. Where there are multiple possible causes or a combination of causes, it may be very difficult to prove the damage was caused by the LMO. This is best addressed by reversal of the burden of proof, and/or a rebuttable presumption that damage was caused by the LMO. The Austrian law on genetic engineering (para. 27.) requires the Court to presume that (a) the LMO 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 LMO which was the subject of a transboundary movement is the result of its biotechnology-induced characteristics rather than any natural characteristics.

IV. Civil Liability: Primary Compensation Scheme

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

Reference: IV.1/p. 29

Suggested Operational Text:

GP Protocol: Arts. 4,5

Question: What factors should determine the standard of liability and the identification of the liable person?

Answer:

The ILC Draft Principles in Principle 4 say that “[l]iability should not require proof of fault. Any conditions, limitations or exceptions to such liability shall be consistent with draft principle 3”. Those principles (a) to ensure prompt and adequate compensation to victims of transboundary damage; and (b) to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement.

The ILC Draft Principles apply to ‘to transboundary damage caused by hazardous activities not prohibited by international law.’ ILC Draft Principles principle 2(c) reads that “hazardous activity” means an activity which involves a risk of causing significant harm.” The GM database shows 107 cases of contamination. There is no serious doubt that LMOs can cause significant damage. The ILC noted that “it is widely recognized that it would be unjust and inappropriate to make the claimant shoulder a heavy burden of proof of fault or negligence in respect of highly complex technological activities whose risks and operation the concerned industry closely guards as a secret.”¹

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The object of the regime is protection of biodiversity and its components and the protection of victims of substances which can have transnational implications. This is a question of compensation, prevention and remediation and a direct implementation of the polluter-pays principle.

The focus should be on who should bear the risk and on the best way to address the damage that may occur – not on the fault or lack of fault that caused the damage. If liability is based on negligence, negligence will have to be proved, and harm which is not held to be reasonably foreseeable or reasonably avoidable will go uncompensated and the victim, the environment, or society, will bear the loss instead of the polluter. Allowing an LMO exporter to avoid liability on the basis that a risk is not foreseeable would run contrary to the precautionary approach.

The Biosafety Protocol incorporates the precautionary approach, partly in view of the potential magnitude of damage which may be caused by LMOs. The ILC Draft Principles define 'hazardous activity' to mean "an activity which involves a risk of causing significant harm". This would clearly apply to LMOs, whether considered to carry a risk of low probability but high magnitude or high probability and high magnitude.

The ILC has also noted that "on treaty practice, the principle has formed the basis for the construction of liability regimes on the basis of strict liability."² Apart from the Lugano Convention, the 2003 Kiev Protocol³ on industrial accidents on transboundary waters refers to the polluter-pays principle as "a general principle of international environmental law" which has also been accepted by the parties to the 1992 Protection and Use of Watercourses Convention and Lakes and the 1992 Industrial Accidents Convention.⁴ The ILC⁵ cited Birnie and Boyle's observation that:⁶

If liability is based on negligence, not only does this have to be proved, but harm which is neither reasonably foreseeable nor reasonably avoidable will not be compensated and the victim or the taxpayer, not the polluter, will bear the loss. Strict liability is a better approximation of the 'polluter-pays' principle, but not if limited in amount, as in internationally agreed schemes involving oil tankers or nuclear installations. Moreover, a narrow definition of damage may exclude environmental losses which cannot be easily quantified in monetary terms, such as wildlife, or which affect the quality of the environment without causing actual physical damage.

Other than the biotechnology industry, no delegations called for fault based liability.⁷

IV.2. Standard of liability and channeling of liability:

IV.2(a) Primary state liability.

Reference: IV.1(a)/V. p. 52

Suggested Operational Text: 5

GP Protocol: 4/9. 49.2

Question: What provisions should there be on primary State liability?

Answer: Residuary State liability probably is most appropriate, but the structuring of the Fund may have implications for State liability – e.g. some liability instruments include as a tier a contribution

from the State. Also State liability may be relevant to prevention and cleanup scenarios. OT1 has some text which may be useful.

IV.2 Channeling of liability

Reference: IV.2/p. 29

Suggested Operational Text:

GP Protocol: Arts 4,5

Question: Who should be liable? Note: unintentional transfers need to be considered.

Answer: It is suggested that a variation of Option 1 be adopted, which includes as liable parties the notifier, the exporter, the importer, carrier, grower and the distributor, 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. The liability should simply follow the chain of transboundary movement, from the point of export.

For transit, any exporter, notifier and any person having ownership or possession or otherwise exercising control, including the carrier, should be liable.

For unintentional or illegal transboundary movement of a LMO, any person intentionally having ownership or possession or otherwise exercising control over the LMO immediately prior to or during the movement should be liable.

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

If an occurrence is a continuous occurrence, all persons successively exercising the control of the LMO immediately before or during that occurrence should be jointly and severally liable.

Liability should be joint and several i.e. each and all are potentially liable.

IV.2(b) Civil liability (harmonization of rules and procedures).

Reference: IV.1(b)/p. 30

Suggested Operational Text: 9

GP Protocol: Arts 4,5

The Annex has listed the channeling provisions under this heading. OT 9 is suggested. See above under IV.1.

IV.2(c) Administrative approaches based on allocation of costs of response measures and restoration measures

Reference: IV.1(c)/p. 34

Suggested Operational Text: 10

GP Protocol: Art 6

Question: How should the cost of response and restoration measures be allocated?

This is an appropriate function of the fund. There should be primary responsibility of the operator to take preventive or remedial action to address an incident, and if the action is not taken, the State can take action and be reimbursed by the operator, or failing that, the fund.

IV.3 Exemptions to or mitigation of strict liability

Reference: IV.3/p. 40

Suggested Operational Text: 8

GP Protocol: Arts 4,5

Question: What exemptions, if any, should be available?

Option 1 No exemptions.

Option 2 Possible exemptions to or mitigations of strict liability:

(a) Act of God/force majeure;

(b) Act of war or civil unrest;

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

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

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

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

Answer:

Option 1 is preferred. Any exemption shifts the risk to the victim or leaves the damage where it falls, or leaves the environment without prevention or remedy.

The fact is that the victim suffers the burden of the damage or the environment is damaged, whether or not is caused by act of God, force majeure or third party. This is occurring in a no-fault regime and the damage should not be left uncompensated or unremedied. Finally raise the issue of a fund, which can have the function of compensating or remedying a situation where no compensation is forthcoming.

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Two common exemptions which were spoken to on the floor of the 3rd meeting included (a) *force majeure* and Act of God. However care must be taken with these. Firstly, 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.

Secondly, these exemptions have particular pitfalls for LMOs in particular.

(a) Act of God/force majeure

Climate change means that exceptional weather events such as hurricanes, storms and floods may be more intense and/or frequent. These pose serious risks of causing damage by LMOs, yet an Act of God defence may mean that the damage is not compensated or remedied. Secondly, because LMOs by their nature involve genetic modification, evolution and other biological events may qualify as Act of God, yet these are exactly the kinds of events which the liability and redress regime should address. These exemptions have been in play recently. Bayer CropScience, which created the GMO rice LL601, in responses to a recent lawsuit blamed contamination on “unavoidable circumstances which could not have been prevented by anyone”; “an act of God”; and farmers’ “own negligence, carelessness, and/or comparative fault.”⁸

If contrary to our suggestions, any exemptions are accepted, the following wording may assist:

- (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), shall be considered an Act of God or *force majeure*, and
- (b) no weather or climatic occurrence or effect shall be considered Act of God or *force majeure*.

(b) Act of war or civil unrest

This exemption also raises some issues specific to LMOs. It has been suggested, for instance, that GMOs can be used to produce biological weapons, such as GMOs producing a toxin or venom,⁹ or to attack crops.¹⁰ If GMOs are released intentionally to cause damage, then an exemption should not necessarily automatically apply to exempt actors in the exporting State.

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

Other defences are problematic. (c) ‘Intervention by a third party’ simply suggests that the liable party should escape liability because a third party’s actions may have contributed to or caused the damage. However, this simply amounts to an introduction of element of fault. The damage is still caused by the LMO and should be covered. The range of actions by a third party that may be cited by a liable party is enormous and should not be excluded.

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

This exemption amounts to the introduction of an element of fault, since it shifts the blame to the national authority. Such an exception should not exclude the application of the fund, in particular.

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

This exemption must be avoided, since it would contravene the precautionary principle. The fact that an operator is complying with permission, standards or controls should not excuse the operator from liability, still less mean that the environment is not protected. Those standards or controls are at best based on the best knowledge at the time they were imposed. They may also be inadequate, being based on whatever evidence was produced at an authorisation hearing or on whatever administrative procedures were used.

Incidents arising due to lack of knowledge or foresight should not be excused: otherwise the strict liability is no longer strict and amounts to a form of fault liability. The precautionary principle demands that all damage which flowed from the transboundary movement of the LMO is compensated.

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

A ‘state of the art’ exemption is particularly to be avoided since LMOs may well be claimed to be ‘state of the art’ yet later cause damage. It is exactly the kind of damage that should be covered. This is why the precautionary approach is included in the Protocol, for a very good reason. The modification of genes may give rise to unexpected consequences.

The nature of LMOs should even be considered in the context of an Act of war or civil unrest, since LMOs could conceivably be used as a weapon, for instance against crops. The fundamental principle should be that the environment should be protected.

IV.4 The provision of interim relief

Reference: IV.4/p. 43

Suggested Operational Text: 11 of VI. B.

GP Protocol: Arts 8,9

Question: How should interim relief such as injunctions be addressed?

Answer: It is essential to have interim relief to take urgent action to protect the environment. This is addressed in section VIB. Civil Procedures on page 73.

IV.5. Recourse against third party by the person who is liable on the basis of strict liability.

Reference: IV.5/p. 43

Suggested Operational Text: 3

GP Protocol: Art 7

Question: How should recourse against a third person be addressed?

Answer:

Rights of recourse need to be provided. This allows cross-claims and claims for contributions where multiple persons may be liable.

IV.6. Joint and several liability or apportionment of liability

Reference: IV.6/p. 44

Suggested Operational Text: 8

GP Protocol: Arts. 4.7, 4.8, 49.3

Question: How should liability be apportioned?

Answer:

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

IV.7 Limitation of Liability

IV.7(a) Limitation in time (relative time limit and absolute time limit).

Reference: IV.7(a)/p. 45

Suggested Operational Text: 11

GP Protocol: Art. 14

Question: How should time limitations be structured? How and when should claims be barred?

Answer:

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. The time must run from the date of the occurrence of the damage or the date of discovery of the occurrence of the damage, whichever is later, since the damage may take time to manifest itself.

IV.7(b) Limitation in amount.

Reference: IV.7(b)/p. 48

Suggested Operational Text: 1

GP Protocol: None

Question: Should there be a financial limit on claims?

Answer:

One of the reasons given for limited liability is that insurers will not underwrite unlimited liability. While some argue that a reason to limit liability is to avoid industry going out of business, the converse of this is that limited liability can put the victim out of business. Delegates should remember (a) that there is no limit on the damage that can be caused to the environment and (b) damage from LMOs could, unlike even the Exxon Valdez oil spill, be unlimited in time and extent.

IV.8 Coverage of liability

(Insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees).

Reference: IV.8/p. 49

Suggested Operational Text: 1

GP Protocol: Art. 18

Question:

Should insurance or other financial securities be required?

Answer:

Insurance and/or other financial guarantees are critical to a liability regime. If the liability of the operator is not secured by insurance or other financial guarantees, then the potentially liable party (e.g. exporter) can simply avoid exposure through undercapitalization, limited liability companies etc.

The claimed unavailability of insurance is no answer to this: if the risk is uninsurable, there is no justification for the risk to be undertaken. Otherwise the risk is simply transferred to the victim, the public or the environment.

ILC Draft Principle 4 state that:

3. These measures should also include the requirement on the operator or, where appropriate, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

The ILC noted that “The importance of such mechanisms cannot be overemphasized,”¹¹ citing an observation¹² that

financial assurance is beneficial for all stakeholders: for public authorities and the public in general, it is one of the most effective, if not the only, way of ensuring that restoration actually takes place in line with the polluter-pays principle; for industry operators, it provides a way of spreading risks and managing uncertainties; for the insurance industry, it is a sizeable market.

V. Supplementary Compensation Scheme

V.A Residual State Liability

Reference: Chap. V.A/p. 52

Suggested Operational Text: 5

GP Protocol: Art. 4.9, 49.2.

Question: What is the issue with residual State liability and what solutions are suggested?

Answer: The issue is to what extent the State should provide a back-up liability if for some reason compensation is not obtained from the individual(s) who may be liable.

The ILC Draft Principles say in Principle 4.5. that “In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are made available.” That implies residual liability in the exporting State.

Some issues here are:

1. Residual liability may act as an effective subsidy in that if the State pays the money in effect comes from the taxpayer rather than those responsible. The burden is in effect shifted to the taxpayer.
2. If there is no residual liability then damage may go uncompensated or unremedied, thus shifting the burden to the victim or environment.

Given the above, Greenpeace has suggested (P 16): Option 2: Residual State liability in combination with primary liability of operator, but that the liability is restricted to (a) the exporting State and (b) the State of which the liable Party is a national. The suggested liability is in effect third tier: it comes in only if primary liability fails and the Fund fails. Another advantage of this is that this implements the ‘polluter-pays principle’ if the exporting State does pay.

V.B Supplementary collective compensation arrangements.

Reference: Chap. V.B/p. 53

Suggested Operational Text: 5

GP Protocol: Art. 6.2, 19-33

Question: What supplementary collective compensation arrangements should there be? Translation: should there be a fund? How should it be funded and structured?

Answer:

The ILC Draft Principles state that international regimes should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.¹³

This argues in favour of Option 1: a Fund financed by contributions from biotechnology industry to be made in advance on the basis of criteria to be determined. A fund is essential both to provide a backstop where liability fails and to ensure prevention, cleanup and remediation are undertaken.

It is suggested that a fund be financed by a levy on LMO exports, similar to the way the Oil Fund is funded.¹⁴ Greenpeace in its Protocol has provided detailed procedural text to illustrate how such a Fund could operate.

VI. Settlement of Claims

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

Reference: Chap. VI.A/p. 60

Suggested Operational Text: 5

GP Protocol: Art. 34-48 (as amended in Greenpeace submission of July 2007: see below)

Question: What dispute settlement procedures should be put in place?

Answer: Modern environmental governance requires comprehensive dispute settlement provisions, to ensure compliance and enforcement and to avoid protracted disputes. Greenpeace has suggested some detailed provisions, modeled largely on the Law of the Sea Convention provisions.

Substituted new art. 43:

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.

VI.B. Civil procedures

- (i) Jurisdiction of courts or arbitral tribunals;
- (ii) Determination of the applicable law;
- (iii) Recognition and enforcement of judgments or arbitral awards.

Reference: Chap. VI.B/p. 63

Suggested Operational Text: 11

GP Protocol: Art. 8,12

Question: What provisions should there be on procedural issues known as conflict of laws or private international law?

Answer:

These procedures are important as they determine how disputes are settled in practice.

It is important to ensure that cases are tried in the courts - firstly where the damage occurred, and otherwise e.g. in the high seas, to the State most closely connected with the damage. Jurisdiction where the defendant is resident may be necessary to ensure recovery of damages.

Otherwise (1) the plaintiff may have to engage lawyers and experts in another country, (2) the evidence of damage is likely to be called in other than the country the damage occurred, (3) this would be very expensive and complicated and (4) the courts deciding the case may for policy or other reasons decline compensation.

The applicable law should normally be those of the place where the damage occurred. This is the place most connected with the incident and is likely to be the most relevant law. (Art 8 Greenpeace Protocol).

There should be enforcement provisions so judgments can be enforced in other member States. (Art 12 of Greenpeace Protocol)

VI. C Administrative procedures

Reference: *Chap. VI.C/p. 72*

Suggested Operational Text:

GP Protocol: *Arts 19-33*

Question: What administrative procedures should be put in place

Answer: Suggested administrative procedures are set out below under fund provisions V.B (p. 15) for prevention, remediation and restoration.

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

Reference: *Chap. VI.D/p. 72*

Suggested Operational Text: 6 on page 60

GP Protocol: *Arts 34-48*

The suggested 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. Additional jurisdiction as suggested in OT 5 for specific cases such as when a large number of victims are affected is worth considering.

A linkage to the International Tribunal for the Law of the Sea, in Hamburg, may be worth considering. There is a purpose built International Court there with a functioning Secretariat and it is very seldom used.

Arbitration should be avoided, as it tends to be very expensive. Each arbitrator is paid for by the parties, in equal shares, pending the determination, and the cost is likely to be prohibitive.

VI.E Standing/right to bring claims

Reference: Chap. VI.E/p. 73

Suggested Operational Text: 9

GP Protocol: Art. 9

Question:

What provisions should there be on standing and the right to bring claims?

Answer:

The Aarhus Convention¹⁵ promotes wide access to justice, which is necessary to ensure that damage does not go unremedied. In cases of environmental damage in particular, individuals and environmental groups must have standing to sue, since no private rights may be involved.

Also, functional access to justice is important: access should not be made difficult or impossible in practice due to cost considerations in particular.

VII Complementary Capacity Building Measures

Reference: Chap. VII/p. 76

Suggested Operational Text:

GP Protocol: Art. 9

Question: What capacity building measures are needed?

Answer: Capacity building to help build and maintain effective legal systems to complement a liability regime is important.

VIII Choice of Instrument

Reference: Chap. VIII/p. 78

Suggested Operational Text:

GP Protocol:

Question: What kind of instrument should be used?

Answer:

The instrument of choice is Option 1 a) A liability Protocol to the Biosafety Protocol. Amendment of the Biosafety Protocol would be unnecessarily difficult with no real advantage, as would an Annex. A liability protocol to the CBD for this purpose would be inappropriate as this is specifically for LMOs.

*Greenpeace International FAQ
for the 4th Biosafety Liability and Redress Meeting*

With respect to other suggestions of a two-stage process: the EU proposal, which involves very significant delays (until 2014, in practice) shows the pitfalls of such an approach. Simply put, the Biosafety Protocol is in force, the LMO trade is under way, and liability provisions should be in place as soon as possible.

¹ ILC Commentary on Principle 4, para. 13

² See activities of the International Law Commission in International liability in case of loss from transboundary harm arising out of hazardous activities, at http://untreaty.un.org/ilc/guide/9_10.htm and the ILC's 2006 Report, Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006), Supplement No. 10 (A/61/10), Chapter V, Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (International Liability in case of Loss from Transboundary Harm Arising out of Hazardous Activities), at <http://untreaty.un.org/ilc/reports/2006/2006report.htm>. See also General Assembly resolution 61/36 on Allocation of loss in the case of transboundary harm arising out of hazardous activities. At <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/61/36&Lang=E>. (ILC Report), para. 13, page 245.

³ 2003 Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, signed at Kiev, 21 May 2003, not in force (2003 Kiev Protocol), at <http://www.unece.org/env/civil-liability/protocol.html>.

⁴ See ILC Report, para. 13, page 145.

⁵ ILC Report, para. 14, page 146.

⁶ Patricia Birnie and Alan Boyle, *International Law and the Environment* (Oxford: Oxford University Press, 2002) (2nd ed), p. 93-94.

⁷ ENB, Third meeting of the *Ad Hoc* Open-ended Working Group (AHOE-WG) of Legal and Technical Experts on Liability and Redress in the context of the Cartagena Protocol, at <http://www.iisd.ca/biodiv/ltlr3/>. PRRI is considered to be industry for these purposes.

⁸ R. Weiss, Firm Blames Farmers, 'Act of God' for Rice Contamination, in Washington Post (22 November 2006), at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/21/AR2006112101265.html>.

⁹ Edgar J. DaSilva, "Biological warfare, bioterrorism, biodefence and the biological and toxin weapons convention," 2:3 Electronic Journal of Biotechnology (1999)

¹⁰ See generally Ecker DJ, et al. "The Microbial Rosetta Stone Database: a compilation of global and emerging infectious microorganisms and bioterrorist threat agents." 5:1 BMC Microbiology: 19, 2005. <http://www.biomedcentral.com/1471-2180/5/19#IDAYUPLH> and citations therein.

¹¹ ILC Commentary paragraph 32, page 164.

¹² Citing Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, Brussels, 23.1.2002, COM (2002) 17 final, pages. 7-9. At <http://www.entemp.ie/publications/environment/2002/environmentalliabilitydraft.pdf>.

¹³ ILC Draft Principles 7.2

¹⁴ International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.

¹⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998. See Article 1s and 3, requiring non-discriminatory access to justice in environmental matters in accordance with the provisions of the Convention.

Greenpeace International
Frequently Asked Questions (FAQ)

for the

Fourth Meeting of the *AD HOC* Open-ended Working Group (AHOE-WG) of Legal
and Technical Experts on Liability and Redress in the context of the Cartagena
Protocol

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