COMMENTS ON THE SOUTH AFRICAN GOVERNMENT'S DRAFT TEXT IN PREPARATION FOR THE FIFTH MEETING OF THE OPEN AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY (WG-L&R5) 12-19 MARCH 2008, CARTAGENA, COLOMBIA

PREPARED BY

AFRICAN CENTRE for BIOSAFETY

February 2008

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Introduction

The African Centre for Biosafety is grateful to the Department of Environmental Affairs and Tourism (DEAT) for the opportunity to make these written comments, and later this month, (29th February 2008), oral submissions, with respect to the 'South African government's draft operational text on liability and redress in the context of the Cartagena Protocol on Biosafety.' It is duly noted that the operational text was prepared by the South African Institute of International Affairs (SAIIA). The ACB will also attend the Cartagena meeting in March 2008, as NGO observer.

At the outset, we would like to make some introductory remarks as follows.

1. We note that according to the letter from Maria Mbengashe, Chief Policy Advisor: International Marine and Biodiversity Cooperation, dated 13 December 2007, the operational text was drafted taking into account the National Biotechnology Strategy for South Africa. Not only is this Strategy considerably dated (having been formulated as far back as 2001), it is fundamentally flawed in a number of respects.
2. South Africa's position should be informed first and foremost by the Constitution of the Republic of South Africa, pertinent environmental laws and the Genetically Modified Organisms Act, as duly amended in 2007. The National Biotechnology Strategy should not trump these laws. Because of the controversial nature of the Biotechnology Strategy, we set out hereunder, some of our concerns with this Strategy, for the record.
3. Whilst we are grateful to the SAIIA and the SA government for having put together the operational text, we believe that it will be prudent and engender greater transparency and participation if the text was accompanied by an explanatory guide. Such a guide should explain the various positions taken and strategic issues and imperatives underpinning the text and provide reasons therefore.
4. We have set out our detailed comments in respect of the operational text below on the 6th of February 2008, in order to meet the deadline set by DEAT;
5. Upon reflection, especially because of the unduly and unnecessarily restrictive positions taken by the South African government, we have done additional work and have supplemented our comments and outlined our preferred options.
6. We place on record our extreme disquiet at the positions taken by the government, and strongly urge it to bring these in line with our Constitution, and environmental laws as well as international law.
7. Due to the extreme time constraints involved and the pressure or our own work, we

ask that our typographical and grammatical errors be forgiven, inasmuch as attention should be paid to the content of the subject matter.

Concerns with South Africa's Biotechnology Strategy

The SA National Biotechnology Strategy of 2001 embodies three distinct and grave shortcomings, which we summarise as follows:

(a) A consistent confusing of non-GE biotechnology (for example the ancient arts of fermentation of beer, cheese and dough, as well as more modern use of bacteria in cleaning waste water) with GE. Consequently, benefits of non-GE biotechnology are regularly claimed in support of GE.

(b) An argument that GE is in the public interest (and therefore deserves not only public acceptance but public support). This argument lines up national priorities (like health, food and income security) and argues that GE will solve them, but always shies away from a detailed consideration of what the causes (and therefore most effective interventions) in health care, for small farmers and in poverty eradication actually would be.

(c) A refusal to engage with criticisms of GE on scientific, economic or value basis. GE protagonists maintain that there is no evidence of adverse effects or dangers of GE, and that public criticism of GE is (therefore) based on a lack of understanding. This strategy is supported by an institutional lockdown[i] on critical research.

Each of these tactics has consequences for other actors in the field, in particular the general public and their public representatives and decision makers.

This confusion also creates difficulties for monitoring the implementation and cost-vs.-benefit of public support for GE.

A very small part of SA biotechnology is GE

The following table – drawn from the survey – gives an overview of the actual biotechnology economy in SA (following the definition given above). It is obvious that "3rd generation biotechnology" or GE, is a very small part of it.

Table 1. Production volumes and annual revenues of the major biotechnology sectors (from Biotech Survey, 2003, p. 17. Figures apply mostly to the year 2000.)

	Production volumes (tons)	**Annual values (R mil)**
1st Generation		
Barley beer	2 700 000	26 190
Sorghum beer	540 000	1 080
Wine and distilleries		5 546

Ethanol		105
Natural vinegar		38
Maas and buttermilk	70 000	588
Yoghurt	50 000	500
Cheese	45 000	1 260
Yeast	55 000	450
Minerals bioleaching		100
Waste water treatment		4 000
Bioremediation/Environmental		10
Agricultural production[6]		45 000
2nd Generation		
Lysine	11 000	130
Vaccines (animal and human)		120
3rd Generation		
Production of biopharmaceuticals		5

When the survey looks for progress since 2001, even with this limited and illogical definition of biotechnology, it finds that only 10% of activities are connected to GE:

> "The majority of core and non-core biotechnology companies in SA are involved in either the extraction or production of products using relatively "low-tech," though modern methods. In many of these cases, the novelty is in the application of the products to new problems. Only around 10% of the companies are partaking in highly innovative research and development that has the potential to result in groundbreaking technologies and/or products."[ii]

If the definition of biotechnology used in the National Strategy had been used in the survey, the figure for GE would have been very small indeed and the survey would have risked not registering developments in GE at all. However, it would have provided an opportunity for a more measured assessment of the role and contribution of GE.

Most fundamentally, this "confusion" is a semantic colonization of all life forms for

biotechnology and by implication genetic engineering, patenting and exclusive rights to use. It lays claim to the wealth of techniques that form part of organic farming, food preparation and natural heaving that were developed over millennia and form part of the wealth of knowledge of all of us.

This deliberate "confusion" echoes ominously with two other tactics associated with GE proponents. First, the doctrine of "substantial equivalence" claims that there is no substantial difference between GE and non-GE foods. This exempts GE foods in the US and South Africa from more stringent tests than would otherwise have been required. The other is a suspicion that contamination strategies of GM-free ecosystems remove the possibility of GM-free zones and that exposing human populations to GE foods will make baseline comparisons to test immunological effects impossible[iii].

Detailed Comments on Draft Text

For ease of reading, we have reproduced the SA governments' draft text below, and inserted out comments below each of the completed text.

a. *I. POSSIBLE APPROACHES TO LIABILITY AND REDRESS*

b.

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

Operational text 1

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

ACB COMMENTS

(a) We would prefer the words 'These rules and procedures' to be replaced by the word 'This Protocol' to denote the position that a legally binding agreement is supported.

(b) We are in agreement with the balance of this position in so far as state 'responsibility' is concerned, as this refers to intentional wrongful acts including non compliance with the Biosafety Protocol.

(c) However, we also support text on State 'liability', that is, for acts that are not prohibited by international law. State liability therefore can and should still arise and be catered for in cases where the state complies with the provisions of the Biosafety Protocol for instance, and yet damage nevertheless occurs. In this regards, we support the notion of 'residual state liability' in combination with the primary liable person.

II. SCOPE

A. Functional Scope

Operational text 6

The following rules and procedures establish responsibility and provide for remediation of damage to biological diversity resulting from transboundary movements of living modified organisms.

1. "Biological diversity" – is defined in Article 2 of the Convention on Biodiversity
2. "Transboundary movement" means the intentional movement of living modified organisms from the territory of a party to Protocol to the territory of another Party to the Protocol.
3. "Resulting from" means that the damage was:

a) Caused in fact by (would not have occurred but for) the transboundary movement of the LMO; and

b) proximately caused by (there being no superseding or intervening causes) the transboundary movement of the LMO.

ACB COMMENTS

(a) We do not support the text and oppose this vigorously. The scope of a future regime should be broad and apply to transport, transit, handling and use of GMOs resulting from transboundary movement of GMOs. This should include both unintentional and intentional TBMs. We are not sure why the text limits the scope to a narrow definition of TBM, and excludes also TMBs that may occur between non-parties to the Biosafety Protocol. Furthermore, we are opposed to limiting the scope to 'remediation of damage to biodiversity' and seek specific reference to human health. Remediation is in any event, too circumscribed a form of relief, and is not appropriate in an international regime on liability and redress. This is critically important as most GMOs are as food or feed eaten, and others are used as medicine e.g. GE vaccines. We are also extremely concerned about socio-economic effects of damage resulting from the TMB of GMOs.

The long term effects to humans and biodiversity from GMOs released into the environment of an importing party over a period of time should be taken specifically into account. The Conference of the Parties recognition in its decision II/5 the 'significant gaps in knowledge' of interaction between LMOs and the environment. It is also important to say that the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention) applies a much wider interpretation to what constitutes a dangerous activity in relation to genetically modified organisms. Article 2(1) provides that a dangerous activity includes the production, culturing, handling, storage, use, destruction, disposal, release or any other operation dealing with one or more genetically modified organisms which as a result of the properties of the organism, the genetic modification and the conditions under which the operation is exercised, pose a significant risk for humans, the environment or property.

Article 17 of the Biosafety Protocol, which deals with unintentional transboundary

movements of living modified organisms, also envisages incidents of release that might occur during the process of development, handling, use etc of such organisms at the national level but which might lead to the unintentional transboundary movement. A wide interpretation should in this regard be given to the term 'transboundary movement' so as to also include the unintended movement of living modified organisms even when there is no deliberate act to transport them.

Additional comments:

This is the 'narrow scope' option. The 'but for' and proximate cause tests will unduly limit the scope of damage covered due to the novel and unknown nature of GMOs and difficulties in proving causation, and will thus prevent full recovery. There are many other problems with this option. It doesn't cover unintentional damage or threatened damage, for instance. There is no basis for excluding these types of damage.

There should be a broad scope.

Preferred option: 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

These rules and procedures apply to areas under the jurisdiction or control of the Parties to the Cartage Protocol.

ACB COMMENTS

Whilst we are mindful that the outcome of the current negotiations under the auspices of Article 27 of the Biosafety Protocol cannot bind non-parties to the Biosafety Protocol only if such outcome is a legally binding instrument and linked legally, to the Biosafety Protocol. This underscores the need for the South African government to have a clear position on whether or not it supports a Protocol on Liability and Redress. Furthermore, we would like to see some specific language concerning the areas beyond national jurisdiction, such as the high seas.

Additional Comments

This again is far too narrow. It doesn't cover damage in areas outside

national jurisdiction, such as the high seas, nor does it cover damage to non-Parties, which can be overly restrictive, especially in the case of cleanup.

Preferred option: 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

This instrument applies to damage resulting from a transboundary of LMOs that started after the entry into force of this instrument.

ACB COMMENT

We are in agreement that the instrument should not cover past situations which have ceased to exist. We are not in favour of the narrow phrasing of 'damage resulting from TBM of LMOs' as already canvassed under 'Scope' above.

Additional comments

Yet again, this is too narrow. It won't cover continuing events that may have their origin before the entry into force of the Protocol but continue after its entry into force. It is accepted that The instrument should not cover past situations which have ceased to exist.

Preferred Option: Operational Text 1

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 2

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

ACB COMMENTS

We are of the belief that there should be no requirement as to authorized use, as such we believe the above formulation not to be consistent with the polluter pays principle. The important legal element should not be lost: that the exporter of the GMO must not be able to escape liability by arguing that the GMO was put to a different and thus unauthorised use. This will create huge loopholes in the instrument and render it potentially meaningless. Attempts should be made to ensure that the instrument is credible, will provide adequate relief and as much legal certainty as possible.

Additional comments

This is unduly restrictive. 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.

Preferred option: 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 5 (modified)

A transboundary movement commences when the LMO leaves the territorial jurisdiction of the Party of export (to be clarified for different modes of transport) and end when the LMO enters the jurisdiction of the Party of import.

ACB COMMENT

We are concerned about situations where the point of export is within the jurisdiction of a non-contracting Party. In this regard, some provision should be made for the point of import to commence when the importer takes control of the GMO. It should also be made clear that the TBM also applies to unintended TBMs.

Additional comments

For transport: loading on the means of transport. This 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. For other movement e.g. unintentional movement, the starting point should be when the LMO leaves the territory. OT 5 does not cover unintentional damage. The movement should not end when the LMO enters the

jurisdiction of the importing State; Art 27 covers 'damage resulting from transboundary movements' so all consequences flowing from the movement should be covered. For transport: loading on the means of transport. This 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. For other movement e.g. unintentional movement, the starting point should be when the LMO leaves the territory.

Preferred option: OT1

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 3

These rules and procedures in the field of liability and redress in relation to LMOs shall not apply when neither the state of export nor the state of import is a contracting party.

ACB COMMENTS

It is trite that the instrument cannot bind non parties to the instrument. Nevertheless, we believe that the provisions of the Biosafety Protocol dealing with non-parties should be observed here. In addition, and more importantly, provisions should be crafted for the recovery of damages from a Liability Fund (to which non-parties that produce GMOs should be encouraged to contribute) in the event of damages arising from the export of GMOs from a non-contracting Party.

Additional comments

The instrument needs to address the situation where an LMO is exported from a

non-Party. In particular, a Fund should be able to cover damage from LMOs exported from non-Parties.

Preferred text: OT 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

c. *III. DAMAGE*

A. Definition of damage

Option 1

Operational text 1 (amended)

1. Damage covered under the rules and procedures is restricted to measurable loss or damage caused by the transboundary movements of living modified organisms that has adverse and significant impact upon conservation and use of biological diversity

ACB COMMENTS

The notion of 'measurable damage or loss' specifically rules out socio-economic damage to local and indigenous communities, and is not consistent with Article 24 of the Biosafety Protocol.

2. To constitute damage to the conservation and sustainable use of biological diversity, there must be a change to the conservation and sustainable use of biological diversity that is adverse, significant and measurable, within a timescale meaningful in the particular context, from a baseline established by a competent national authority that takes into account natural variation and human-induced variation.

ACB COMMENTS

Damage is circumscribed as 'adverse', 'significant' and 'measurable.' Will damages that include reinstatement, remediation, preventative measures and socio-economic damage suffered by local and indigenous communities be covered? If not, why not?

Additional comments

This definition is far too restrictive. The definition of 'damage' must be broad enough to cover any kind of damage that can be caused by LMOs. 'Measurable loss' is far too narrow to cover the kinds of damage that can be caused by LMOs. There are numerous other problems, including that the term 'timescale meaningful it the particular context',

which could exclude considerable damage caused in differing timescales. To limit the definition of damage in this way will unduly limit prevention, cleanup, remediation and mitigation as well as compensation.

For a definition of damage, reference can be made to the Lugano Convention. 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.

<u>Preferred text: Operational Text 4</u>

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 2 (expanded)

Damage to conservation of biological diversity shall be valued on the cost of restoration where restoration shall mean the cost of measures of reinstatement of impaired biological diversity; **ACB COMMENTS** This circumscribes damage to the cost of restoration and then only to biodiversity-we would prefer that the damage not be so circumscribed and prefer the term environment, as is noted in our primary environmental legislation, and which will include: all natural surroundings, including (i) air, water, soil, fauna, and flora, and the interaction between these; (ii) ecosystems and their constituent parts; (iii) biodiversity; (iv) cultural heritage and so forth. All of these aspects need to be covered. The definition of biological diversity of the Convention on Biological Diversity is limited –as it is defined in terms of variability, whereas we are looking for the inclusion of components and ecosystems. There is a need to ensure that a broad and clear definition is created for the valuation of damage, as opposed to a narrow one focussed on reinstatement of impaired biodiversity.

loss of income deriving from an economic interest in any use or enjoyment of the biological diversity incurred as a result of the impairment of the environment; and the costs of measures undertaken or to be undertaken to prevent damage to biological diversity. Such costs must be reasonable and foreseen.

ACB COMMENTS

How will it be possible for such costs to be foreseeable? Unless there was *mens rea* on the part of the person who caused the damage?

Additional comments

This option is far too limited. To name a few examples, it is restricting recoverable damages to foreseen costs, when the nature of LMOs means they may be unforeseeable, and the proposed definition excludes socio-economic damage, as well as even prevention.

It needs to be clear that socio-economic damage to local and indigenous communities is covered, following article 24 of the Protocol.

Preferred text: 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.

Additional comments

It needs to be clear that socio-economic damage to local and indigenous communities is covered, following article 24 of the Protocol. OT 2 will exclude that. Worse, the modified option even excludes "and any loss of or damage to property and loss of income" from OT2.

Preferred text

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.

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.

ACB COMMENTS

We are strongly in favour of provisions dealing with damage to centres of origin and diversity and thank the SA government sincerely for inserting these provisions. It will be important to take into account the inputs made by local and indigenous people

whose cultural values and heritage is inextricably linked to these centres. Preventative measures should be considered to prevent damage from occurring in the first place. Suitable definitions should be created for such centres.

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

Operational text 2 (amended)

Compensation for damage shall cover the costs of the necessary measures taken or to be taken to assess, reduce or repair the damage. **ACB Comments** We would like to see specific reference to socio-economic damage to local and indigenous communities, following on, from Article 24 of the Biosafety Protocol. (see above)

E. Causation

Option 1 – Burden of proof lies on the claimant

Operational text 2

The entity/claimant seeking redress for a claim of damage bears the burden of demonstrating all of the following: **ACB COMMENTS**

We do not support the position that the claimant should bear the legal burden of proving causation. We believe that more latitude should be built in the SA position taking into account the difficulties concerning causation. The balance of power is not on the side of the claimant and it will be more equitable to reverse the burden of proof. Such reversal will be consistent with the precautionary principle

(a) Proximate causation between the transboundary movement of an LMO and claimed damage;

(b) A direct causal link between an act or omission on the part of the persons involved with the transboundary movement and the claimed damage.

Additional comments

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.

OT 2 simply puts the burden on the victim. There is no justification for this or support under international law.

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

1. Standard of liability and Channelling of Liability

1. Obligation Imposed by national law on the operator to inform competent authorities of the occurrence of damage to the conservation and sustainable use of biological diversity

Operational Text 2

Where there occurs or is a likelihood of damage to the conservation of biological

diversity as a result of the transboundary movement of an LMO, the operator shall, as soon as possible, notify the competent authority

ACB COMMENTS

We have already canvassed our objections to confining damage to biodiversity and the narrow formulation of TBM of the LMO.

Additional comments

This option unreasonably restricts the damage to damage to the conservation of biological diversity. It simply needs to provide for a simple obligation to inform the competent authority immediately. 'As soon as possible' could even mean years, if the operator argues that it was not sure of the cause, for instance.

Preferred text: Operational text 1

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

2. Obligation Imposed By National Law On The Operator To Take Response And Restoration Measures To Address Such Damage

Merger of operational text 7 and operational text 4

In the event of damage resulting from the operator's intentional or negligent act or omission stemming from the transboundary movement of LMOs, an operator shall in consultation with the competent authority investigate, assess and evaluate the damage caused by the activity on the biological diversity and implement measures including but not limited to:

(a) Cease, modify or control any act, activity or process causing the damage;

(b) Minimise, contain or prevent the movement of any living modified organisms causing the damage in the event that an activity cannot reasonably be avoided or stopped

(c) Eliminate any source of the damage; or

(d) Remedy the effects of the damage caused by the activity

ACB COMMENT

Issues that do not strictly require international rules will not find its way easily into an international regime, especially where the obligation is placed on the operator alone, as opposed to also including other actors that may also be liable for the damage. In any event, a definition of 'operator' is required in order to ensure that it covers the broad scope of actors that may be jointly or severally liable: these include the notifier and exporter, the importer, anyone having control over the GMO etc. We have noted that that the issue of the definition of operator is dealt with below. Damages arising during transit, handling and use should be specifically noted.

Additional comment:

The States should be required to take prevention and cleanup.

Preferred option:

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.]

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 14

1.Where the operator fails to take or inadequately implements the measures required, the competent authority of the State in which the damage occurs may take those measures, cause them to be taken or direct the operator to take them.

2.The competent authority may recover the costs and expenses of and incidental to the taking of any measures, from the operator.

ACB COMMENTS

Provision should be made for the possibility of more than one person being liable for the damage, and for situations where the person/s liable may not be within the jurisdiction of the state where the damage occurs.

Additional comments/preferred options

OT 7 is restricted to intentional or negligent acts or omissions.

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.

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. The Term Operator needs to be defined

Operational text 20 (amended)

"Operator" means any natural or juridical person, whether governmental or non-governmental who engages in the transboundary movement of a living modified organism and which has the control of the LMO at the time of the incident causing damage occurs, owns or has the charge or management of an LMO during its transboundary movement. ACB COMMENTS Care should be taken to ensure that the following actors are covered within this definition: distributor, carrier, person on charge of storage, grower, etc. and thus for the possibility/probability that more than one person may be liable.

Additional comments

This proposed definition of an operator is far too restrictive. Its restriction to the person who has control of the LMO at the time of the incident could leave wide gaps, as could defining an operator in terms of ownership or charge of management during the movement. This could be restricted to the transporter, for instance.

Preferred options:

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 2: Mitigated Strict Liability

Operational text 3

1. A Fault based standard of liability shall be used except a strict liability standard shall be used in cases where a risk assessment has identified an LMO as ultrahazardous. **ACB COMMENTS** We do not support fault based liability. It is too tenuous to link strict liability to the outcome of the findings of a risk assessment. Our position is that liability should be strict, and anyone else who acts intentionally, recklessly or negligently should also be liable. The only circumstances for the relaxation of the strict liability rule that is justifiable is damage that resulting from force majeure (an act of God).
2. In cases where a fault based standard of liability is applied, liability shall be channeled to the entity having operational control of the activity that is proven to have caused the damage, and to whom intentional, reckless, or negligent acts or omissions can be attributed.
3. In cases where a strict liability standard has been determined to be applicable, pursuant to paragraph 1 above, liability shall be channeled to the entity that has operational control over the activity that is proven to have caused the damage.

Additional comments

Obviously, this option is far too limited. There is no justification for restriction of strict liability to ultrahazardous LMOs. The focus must be on the consequences. The object is protection of biodiversity and the protection of victims of activity which can have transnational contexts. This is a question of compensation, prevention and remediation, not a question of fault.

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. The polluter-pays principle, and the ILC Draft Principles, strongly support strict liability.

Preferred option: 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.

ACB COMMENTS

We do not support these differentiations between fault based and strict liability.

2. Interim Relief

Operational text 1

Interim relief may be granted by a competent court only in the case of an imminent, significant and likely irreversible damage to biodiversity. The defendant's costs and losses shall be paid by the claimant in any case where interim relief is granted but liability is not established subsequently in the case.

ACB COMMENTS We are really astounded by the almost 'right wing', conservative positions taken by the SA government. Why would the SA government want to restrict in an international regime, the ambit of an aggrieved person's right to receive emergency relief? Or for urgent action to be taken? Surely, a regime creates the opportunity for such relief to be obtained and leaves the parameters under which such relief may be claimed to the discretion of the courts?

Additional comments

There is no justification for such a limitation on interim relief, let alone for explicitly holding the claimant liable. For instance, the claimant may be a public interest litigant simply attempting to protect the environment.

Preferred option:

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. x

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

1. Exemptions to or mitigation of strict liability

Operational text 1[1]

Liability shall not attach in the following circumstances:

(a) Act of God, *force majeure*, and Act of war or civil unrest; **ACB COMMENTS:** As mentioned above, we agree with this.

(b) Intervention by a third party, including intentional wrongful acts or omissions of the third party; **ACB COMMENTS** We do not believe that liability should just fall away because of the wrongful acts of third parties-in respect to what are these wrongful acts?

(c) Compliance with compulsory measures imposed by a competent national authority; **ACB Comments** We especially do not agree with these. We are concerned here precisely with the realm of uncertainty, and even if national legislation has been complied with, a wrong decision to grant authorization by a national regulator, cannot absolve someone from being liable for the faultiness or risky of their product

(d) Damage that could not have been foreseen given the scientific knowledge at the time when a risk assessment was undertaken as part of the approval process for the transboundary movement. **ACB COMMENTS** The Biosafety Protocol is littered with references to the precautionary approach and has an operational reference to the precautionary principle-all hard won battles for developing countries and the Africa group, precisely because of the uncertainty regarding the risks inherent in GMOs. If this is the SA government's position, then it must support a strong provision on state liability, and assume the liability for the damage that may arise that the risk assessment assessors did not foresee at the time of authorization.

(e) Damage that was deemed acceptable by the competent authority in the approval process for the activity. **ACB COMMENTS** See comments in this section

Additional comments

These exemptions are unjustifiable and shift the risk. Foreseeability should not be required since the nature of LMOs mean that the damages may be unforeseeable. 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.

Damage deemed acceptable also should not be a defence, since the damage may be from a cause or of a type unknown, undiscovered or undisclosed during the approval process. This defence places far too much weight on the evidence brought by the LMO applicant and

[1] This text will only apply in the event of a choice for strict liability.

assumes all facts were put before the panel.

The 'authorization' exemption 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.

Further, any defence such as force majeure or Act of God shifts the risk to the victim, or to society or the environment. See ILC Draft Principles Principle 4.2.

Care must be taken with force majeure and Act of God. 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.

(b) 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."

The Act of war 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, or to attack crops. If GMOs are released intentionally to cause damage, then an exemption should not necessarily automatically apply to exempt actors in the exporting State.

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.

<u>Preferred option</u>:

Operational text 2 has some merit in its inclusion of (b):

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.

1. **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. **<u>ACB COMMENTS</u>** Whilst we support cross-claims and claims for contributions where multiple persons may be liable, we are not sure about the notion of 'indemnity' and how this applies in the context of providing for the rights of recourse.

<u>Additional comment</u>: This allows cross-claims and claims for contributions where multiple persons may be liable.

<u>Preferred text</u>: Operational text 2

2. **Joint and Several liability or Apportionment of liability**

Option 1: Joint and severable liability

Operational text 1

When damage results from the transboundary movement of LMOs for which two or more persons may be held liable the persons referred to are jointly and severally liable.

<u>ACB COMMENTS</u>: 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. OT 2

covers necessary matters. The other options may leave gaps.

<u>Preferred option</u>:

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.

2. Limitation of Liability

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

Operational text 2

1. A claim for damages under these rules and procedures should be exercised within 5 years from the date by which the claimant knew or ought reasonably to have known of the damage and the person liable and in any event not later than 10 years from the date of the transboundary movement of LMOs.
2. Where the transboundary movement of LMOs consists of a series of occurrences having the same origin, the time limits under this rule should run from the date of the last such occurrence. Where the effect of the transboundary movement consists of a continuous occurrence, such time limits should run from the end of the continuous occurrence.

<u>ACB COMMENTS</u>

We are prepared to live with these formulations, although we would prefer lengthier periods of time.

<u>Additional comments</u>: 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. 5 years from date of knowledge and 10 years in any event is far too short. Why should damage which took 11 years to manifest itself be exempted?

***Preferred option*: Option 2, but with reasonable time limits; perhaps 10 and 20 years respectively. However these time frames need to be informed by scientific advice on how long it may take for damage to manifest itself and be discovered.**

(b) Limitation in amount

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.

ACB COMMENTS

We support the notion of no limit. But this formulation is something that we can live with.

Additional comments

There is no limit on the damage that can be caused to the environment and damage from LMOs could, unlike even the Exxon Valdez oil spill, be unlimited in time and extent. *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.*

Preferred text: 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.

3. Coverage of Liability

Option 2 Voluntary Financial Security

Operational Text 4

The parties should encourage any legal or natural person who takes on the operational control of living modified organisms that are subject to

transboundary movements to maintain adequate insurance or other financial security.

ACB COMMENTS

It is our opinion that that the international regime deal with the issue of insurance and/or other financial guarantees and we would like to see some obligation placed on the Parties to provide in their domestic law, to oblige the operator to take our adequate insurance or provide financial guarantees. If no insurance can be secured, then the risk is uninsurable and the GMO or activity in question should not be authorised.

Additional comments

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.

Preferred option: 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***

*The preferred option appears to be missing***.**

ACB COMMENTS: 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. But if there is no residual liability then damage may go uncompensated or unremedied, thus shifting the burden to the victim or environment. Residual State liability should therefore be in combination with primary liability of operator, but 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.

Preferred option:

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 providedin 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 Compensation Arrangements***

Option missing

SETTLEMENT OF CLAIMS

Option missing

A. Inter-State procedures (including settlement of disputes under article 27 of the Convention on Biodiversity)

Operational text 2

Parties shall settle any dispute arising out of the application and/or interpretation of this Instrument through the dispute settlement mechanism/s provided under Article 27 of the CBD and its Annex.

ACB COMMENT

Modern environmental governance requires comprehensive dispute settlement provisions, to ensure compliance and enforcement and to avoid protracted disputes. See the provisions of the Law of the Sea Convention, and generally, the submissions of Greenpeace in this regard.

B. Civil Procedures

Operational text 10

1. Following exhaustion of inter-state procedures under Article 27 of the Convention on Biological Diversity (CBD) and pursuant to the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment of the Permanent Court of Arbitration, a Party may submit a claim for damage to the conservation and sustainable use of biological diversity resulting from the transboundary movement of LMOs to a competent court as determined by private international law.
2. Determination of applicable law shall be in accordance with private international law provided that parties to a dispute can agree in writing on a different set of applicable law.
3. Following exhaustion of dispute resolution and arbitration requirements, a Party to the Cartagena Protocol on Biosafety may bring a claim for damage to the conservation and sustainable use of biological diversity resulting from the transboundary movement of LMOs in a competent court.
4. Recognition and enforcement of judgments or awards shall be in accordance with private international law. However states can enact domestic laws that

grant more rights of recognition and enforcement of judgments than under Private International Law.

ACB COMMENTS

All of these provisions seem to deal with actions brought by one Party against another and thus not with private law claims through the courts by persons who may suffer damages. This seems to be a serious omission?

Additional comments:

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 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.

There should be enforcement provisions so judgments can be enforced in other member States.

OT 10 concerns claims by Parties, rather than individual victims. What is needed are substantial provisions which assist individual victims to claim from operators. Some such provisions are set out in OT 11. However, the expense and time delays involved in such legal proceedings mean that they are likely to be of limited assistance to claimants. That is why a fund is so important, to ensure that prompt and accessible compensation and redress can be forthcoming.

5. Administrative procedures

Operational text 1

1. Contracting Parties may, as appropriate, provide for such administrative remedies as may be deemed necessary for liability and redress in respect of all matters arising under this Instrument.
2. The procedures for the preferring and determination of decisions of administrative authorities shall be as provided by the domestic law of the Contracting Party.

ACB COMMENTS: Suggested administrative procedures are provided in

the context of a Supplementary Fund. To the extent necessary, OT 1 provides some useful elements.

Preferred text:

Operational text 1

1. Contracting Parties may, as appropriate, provide for such administrative remedies as may be deemed necessary for liability and redress in respect of all matters arising under these rules and procedures.

2. The procedures for the preferring and determination of decisions of administrative authorities shall be as provided by the domestic law of the Contracting Party.

6. Special tribunal (e.g. Permanent Court of Arbitration – optional rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment

Operational text 3

In the event of a dispute between persons claiming for damage pursuant to this instrument and persons liable under this instrument, and where agreed by both or all parties, the dispute may be submitted to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment provided that the parties may agree that any other rules of Arbitration should apply to the dispute.

ACB COMMENTS:

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. A disputes mechanism, modeled largely on the dispute settlement provisions of the Law of the Sea Convention, could focus on an International Tribunal for the Protection of Biodiversity. Additional jurisdiction as suggested 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. This is suggested under VI.A (Inter State procedures (including settlement of disputes under Article 27 of the Convention on Biological Diversity)

Preferred text: See OT 6 under VI.A.

7. Standing/right to bring claims

Operational text 8

1. Parties should provide for standing to bring claims by affected natural or legal persons as appropriate under domestic law. **ACB COMMENT** We would like to see some language here that denotes that wide (*locus standi*) standing is being sought, in order to promote access to justice.
2. In case civil liability is complemented by an administrative approach, natural and legal persons, including NGOs promoting environmental protection and meeting relevant requirements under domestic law, should have a right to require the competent authority to act according to this decision and to challenge through a review procedure, the competent authority's decisions, acts or omissions, as appropriate under domestic law.

Full ACB Comments

The Aarhus Convention 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.

OT 8 unduly restricts access to justice, except for very limited circumstances.

Preferred text:

Operational text 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 this Protocol.

2. Nothing in the Protocol shall be construed as limiting or derogating from any rights of persons who have suffered damage, or as limiting the protection or reinstatement of the environment which may be provided under domestic law.

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

COMPLIMENTARY CAPACITY BUILDING MEASURES

Operational text 1

The next review of the Updated Action Plan for Building Capacities for the Effective Implementation of the Cartagena Protocol on Biosafety, as contained in the annex to decision BS-III/3 should, as appropriate, take into account the present decision including capacity building measures so as to facilitate the coming into force of a liability and redress regime under the protocol.

CHOICE OF INSTRUMENT

Option 1

One or more legally binding instruments:

1. A liability Protocol to the Biosafety Protocol
2. Amendment of the Biosafety Protocol
3. Annex to the Biosafety Protocol
4. A liability Protocol to the CBD

ACB COMMENTS: OT1 is the European 'two-step' model. This prioritizes the non-binding incorporation of rules and procedures in domestic law, and postpones further discussions on a legally binding mechanism to a much later stage. It is more than likely that the "first step" domestic system would become permanent purely through lack of willingness to continue this process any further or to reopen the issues. This is especially so as the aim of the Protocol under Article 27 is to complete the process for the elaboration of international rules within 4 years. This would undermine the intention behind Article 27 of the Cartagena Protocol which requires States to adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress. It is also inconsistent with the understandings that formed the basis of the negotiation of the Biosafety Protocol, according to which the development of a liability and redress regime addressing the effects of international trade in GMOs was crucial. At that time, a number of States expressed concern that the omission of substantive provisions on liability and redress would result in a Protocol heavily slanted towards trade rather than towards protection of the environment.

Preferred text:

Operational text 5

1. These rules and procedures shall enter into force on the ninetieth day after

the date of deposit of the [fiftieth] instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Convention.

2. These rules and procedures shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves these rules and procedures or accedes thereto after its entry into force pursuant to paragraph 1 above, on the ninetieth day after the date on which that State or regional economic integration organization deposits its instrument of ratification, acceptance, approval or accession, or on the date on which the Convention enters into force for that State or regional economic integration organization, whichever shall be the later.

3. For the purposes of paragraphs 1 and 2 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

Notes

[i] Scientists who are known to have felt this lockdown include Dr Arpad Pusztai, of the Rowett Institute (observed toxic effects of GE potato diet on rats), Prof. Ignacio Capela at the University of Berkeley, California (found genetic contamination of maize by transgenic DNA in its centre of origin in Oaxaca, México), Shiv Chopra, Margaret Haydon and Gerard Lambert of the Canadian Veterinary Drugs Directorate (critical of approval procedures for Monsanto's bovine growth hormone), David Kronfeld of the Virginia Polytechnic Institute (writing articles questioning safety of GE bovine growth hormone), John Losey, Associate Professor, Cornell University (damage and death in Monarch butterfly caterpillars fed with pollen from transgenically-modified corn), and Angelica Hilbeck (planned to assess if a product of a bacterial gene that has been introduced into a plant is still active after it has passed through the digestive tract of a sheep or pig).

[ii] Biotech Survey, 2003, 37

[iii] Personal communication Terje Traavik during HBS Biopolitics School, 2006.