

GLOBAL INDUSTRY COALITION VIEWS ON THE ARTICLE 27 NEGOTIATION PROCESS UNDER THE
CARTAGENA PROTOCOL ON BIOSAFETY (PROTOCOL)

The Global Industry Coalition (GIC)¹ supports a decision on liability and redress under the Protocol that: creates an administrative approach to address damage to the conservation and sustainable use of biodiversity; and, ensures that any financial security requirements are based on applicable national business laws or are insurable, and do not inhibit trade or the development of and access to the technology.

The Path Forward Following the MOP-4 Decision on Liability and Redress

At the fourth meeting of the Parties to the Protocol (MOP-4), Parties agreed to a decision that continued the Parties' work elaborating appropriate international rules and procedures on liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs) through the establishment of a Group of the Friends of the Co-Chairs Concerning Liability and Redress in the Context of the Cartagena Protocol on Biosafety ("Group of Friends").² Parties' agreed at MOP-4 that the Group of Friends should meet up to two times before the fifth meeting of the Parties (MOP-5) in October 2010. The first meeting will occur 23-27 February 2009 in Mexico City, Mexico. Outcomes from the Group of Friends meeting(s) will be presented by the Co-Chairs to the Parties at MOP-5.

The Parties' decision from MOP-4 also includes proposed operational text that makes a clear distinction between text "working toward legally binding provisions" on an administrative approach for damage to the conservation and sustainable use of biodiversity, and text "working toward non-legally binding provisions on civil liability" that would address other types of traditional damages (such as damage to human health and property damage). Parties emphasized at MOP-4 that the decision did not prejudice any particular outcomes with respect to the format and type of the product (international regime or guidance for national laws; binding and/or non-binding; civil liability guidelines and/or administrative processes), nor did it mandate that a final decision creating a liability and redress regime would necessarily result from the negotiations. Several Parties also made clear statements indicating that they would only support a final decision that did not have a negative impact on the global trade of LMOs.

GIC Views on the MOP-4 Decision

1. Administrative Approach: The GIC supports development of an administrative approach to address damage to the conservation and sustainable use of biodiversity caused by LMOs.

- An administrative system empowers National Competent Authorities to act in order to ensure that the responsible persons or entities are held responsible if they cause damage to the conservation and sustainable use of biodiversity, allowing an appropriate focus on biodiversity protection and remediation. Such a regime can be developed by the Parties quickly and efficiently during the Group of Friends meetings in order to be adopted by decision of the Parties at MOP-5. Because this system does not interact with existing civil liability laws, it can then quickly be incorporated into existing national biosafety legislation, *making it immediately legally binding*.
- The type of "damage" addressed by an administrative system under the Protocol can only be understood to mean damage to the conservation and sustainable use of biodiversity.³ **This is clear from the objectives, scope and context of the Protocol**, which aims to contribute to

¹ The Global Industry Coalition (GIC) for the Cartagena Protocol on Biosafety receives input and direction from trade associations representing thousands of companies from all over the world. Participants include associations representing and companies engaged in a variety of industrial sectors such as plant science, seeds, agricultural biotechnology, food production, animal agriculture, human and animal health care, and the environment.

² The Group of Friends will include six representatives of the Asia-Pacific region (Bangladesh, China, India, Malaysia, Palau, and the Philippines); two representatives of the European Union; two representatives of Central and Eastern Europe; six representatives of the African Group; six representatives of the Latin American and Caribbean Group; and New Zealand, Norway, Switzerland and Japan. Other Parties may participate as advisors to the Group of Friends, and observers, including the Global Industry Coalition (GIC), may also be invited to participate at the discretion of the Co-Chairs.

³ Please see Annex I for GIC views on preferred operational text for the definition of "damage", as well as for other relevant elements under negotiation by the Parties in the Group of Friends.

environmental biosafety (see Articles 1 and 4 of the Protocol). In addition, to qualify as “damage”, the alleged harm must be adverse, significant, measurable using objective scientific criteria, and clearly caused by a specific LMO. Impacts on human health are included only to the extent that they affect public health and *arise from damage to biodiversity*. Other types of damage, including personal injury, property damage or loss of income, which are commonly referred to as traditional damages, are outside the scope of the Protocol and should be left to the jurisdiction of national civil law systems.

- Any rules and procedures that may be developed should include **defences** commonly recognized in most liability systems, including: act of God/*force majeure*; act of war or civil unrest; intervention by a third party; compliance with compulsory measures imposed by a competent national authority; permission of an activity by means of an applicable law or a specific authorization issued to the operator; and 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.
- As a matter of law, nothing in a final decision on the administrative approach can prejudice the right of Parties to have in place or to develop their domestic law or policy in the field of civil liability and redress resulting from the transboundary movement of LMOs. To avoid the risk of being overly prescriptive, and therefore inconsistent with national laws, by listing the elements that must be included in such systems, the GIC believes that the final decision on the administrative approach should **exclude any reference to national civil liability systems**.

- Under any liability rules that may be developed, care must be taken to ensure that any **financial security requirements** are based on applicable national business laws or are insurable, and do not inhibit trade or the development of and access to the technology. Any burdensome requirements will increase cost of products to the consumer, likely inhibit trade, and will be a barrier to public research and small business enterprises.

2. Civil Liability: The negotiation of civil liability rules concerning LMOs would likely be extremely challenging and unproductive due to the important differences in national systems that general guidance cannot address. If Parties proceed with this course, the GIC believes that it will be necessary to limit the work to the creation of non-legally binding guidance that can assist countries to assess the extent to which existing national civil liability provisions are applicable to LMOs.

- **Civil liability** regimes refer to the establishment of a legal system under which courts recognize and adjudicate claims of alleged damage to property and/or persons brought by affected persons or groups against those alleged to have caused such damage. Such regimes already exist at the **national level** in most Parties, and creating a civil liability system applicable exclusively to activities involving LMOs is neither scientifically nor legally justified. International civil liability regimes take years to negotiate and almost universally have failed to take legal effect because countries view them as infringing on important national sovereignty issues and existing national law.
- The most appropriate outcome for civil liability discussions under the Protocol, should Parties agree to address civil liability in a final decision on liability and redress, is non-legally binding **guidance** that can be used by Parties to assess the applicability of existing national legal systems to address traditional damage from LMOs. Such guidance could also serve as a capacity building tool to provide assistance to Parties that do not yet have national civil liability regimes by providing them with various options and helping them to analysis the implications of adopting one option versus another. Creating guidelines, rather than a binding regime, will ensure that the outcomes serve an actual and practical purpose for the Parties. Non-legally binding guidance will allow Parties the flexibility to select from among several options and to ensure any final decision complements their national legal systems and is consistent with their existing domestic laws.

- It is important to emphasize that any final decision addressing guidance on national civil liability regimes must provide **options** to governments that will allow them to consider the most appropriate choice for each element relevant to their unique national legal systems. For example, should such guidance be developed, it must include options for **defences** commonly recognized in fault-based liability systems, including: act of God/*force majeure*; act of war or civil unrest; intervention by a third party; compliance with compulsory measures imposed by a competent national authority; permission of an activity by means of an applicable law or a specific authorization issued to the operator; and 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.

ANNEX I
PREFERRED OPERATIONAL TEXT FOR KEY ELEMENTS

The text below is the preferred operational text for key elements remaining in the MOP-4 decision on liability and redress, including GIC suggestions for text to be deleted (noted by strikethrough marks). The full text that will be considered by the Group of Friends can be found at: <http://www.cbd.int/decisions/mop4/?m=MOP-04&id=11691&lg=0>.

1. Working Towards Legally binding Provisions

1.A Administrative Approach

III. Damage

A. Definition of Damage OT6 (page 6)

1. These rules and procedures apply to damage to the conservation and sustainable use of biological diversity, taking also into account ~~{damage}~~ ~~{risks}~~ to human health ~~},~~ resulting from transboundary movements of living modified organisms.
2. For the purpose of these rules and procedures, damage to the conservation ~~{and sustainable use}~~ of biological diversity as defined in Article 2 of the Convention on Biological Diversity, means an adverse or negative effect on biological diversity that:
 - (a) is measurable or otherwise observable taking into account, wherever available, scientifically-established baselines recognized by a competent national authority that takes into account any other human induced variation and natural variation; and
 - (b) is significant as set out in paragraph 4 below.
3. ~~{F}~~For the purposes of these rules and procedures, damage to the sustainable use, as defined in Article 2 of the Convention on Biological Diversity, means an adverse or negative effect on biological diversity that is significant as set out in paragraph 4 below ~~and {may have resulted in loss of income} {has resulted in consequential loss to a state, including loss of income}.~~
4. A “significant” adverse or negative effect on the conservation and sustainable use of biological diversity as defined in Article 2 of the Convention on Biological Diversity is to be determined on the basis of factors, such as:
 - (a) the long term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonable period of time;
 - (b) ~~{the extent of the qualitative or quantitative changes that adversely or negatively affect the components of biodiversity;~~
 - (c) the reduction of the ability of components of biological diversity to provide goods and services~~};~~
~~{(b and c alt) a qualitative or quantitative reduction of components of biodiversity and their potential to provide goods and services;}~~
 - ~~(d) {the extent of any adverse or negative effects on human health;}~~
(d alt) ~~{the extent of any adverse or negative effects of the conservation and sustainable use of biological diversity on human health.}~~

IV. Primary Compensation Scheme

A bis. Additional elements of an administrative approach

1. Exemptions or mitigation OT15 (page 9)

~~{Domestic law may provide for}~~ exemptions or mitigations ~~{that}~~ may be invoked by the operator ~~{in the case of recovery of the costs and expenses}~~. Exemptions or mitigations ~~{may be}~~ ~~{are}~~ based on ~~{any one or more elements of}~~ the following ~~{exhaustive}~~ list:

- (a) Act of God or force majeure;
- (b) Act of war or civil unrest;
- (c) Intervention by a third party ~~[that caused damage despite the fact that appropriate safety measures were in place];~~
- (d) ~~{Compliance with compulsory measures imposed by a public authority;}~~
- (d alt) ~~A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;}~~
- (e) ~~{An activity expressly authorized by and fully in conformity with an authorization given under domestic law;}~~
- (f) ~~[An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out;]~~
- (g) ~~National security exceptions [or international security]. (NOTE: this section is acceptable with or without sections (f) and (g).)~~

A bis. Additional elements of an administrative approach

5. Coverage OT19 (page 10)

- 1. ~~[Parties may], consistent with international [law][obligations], require the operator to establish and maintain, during the period of time limit of liability, financial security, including through self-insurance.}~~
- 2. ~~[Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic measures implementing these rules and procedures.}~~

1.B Civil Liability

OT 1 (page 10)

~~{Parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with living modified organisms.}~~

OT 2 (page 10)

(delete entire section in favour of OT 1)

2. Working Towards Non-Legally Binding Provisions on Civil Liability

III. Damage

A. Definition of Damage OT1 (page 12)

~~{1. These rules and procedures apply to damage [resulting from the transboundary movement of living modified organisms] as provided by domestic law.}~~

~~{2. — For the purposes of these rules and procedures, damage [resulting from transboundary movement of living modified organisms] as provided by domestic law may, inter alia, include:~~

- ~~(a) Damage to the conservation and sustainable use of biological diversity not redressed through the administrative approach~~
- ~~(b) Damage to human health, including loss of life and personal injury;~~
- ~~(c) Damage to or impaired use of or loss of property;~~

- (d) ~~Loss of income and other economic loss [resulting from damage to the conservation and sustainable use of biological diversity];~~
- (e) ~~[Loss of or damage to cultural, social and spiritual values, or other loss or damage to indigenous or local communities, or loss of or reduction of food security.]~~

(NOTE: first option is to include only OT1 above; second option is to include OT1 and OT2 sections (a-d, removing all square brackets in this text.)

IV. Primary Compensation Scheme

A. Civil liability OT 4 (page 14)

Parties ~~{may}~~ ~~{shall}~~ ~~{should}~~ have civil liability rules and procedures for damage ~~{resulting from the transboundary movement of living modified organisms}~~ in accordance with domestic law. Parties ~~{should consider the inclusion of}~~ ~~{may include}~~ the following ~~{minimum}~~ elements and procedures.

1. Standard of liability and channelling of liability

(NOTE: Preferred option is OT 5 (page14))

~~{The standard of liability, whether fault-based liability, strict liability or mitigated strict liability, needs to be established in accordance with domestic law.}~~

(NOTE: Alternate option is to include all of the following text for strict liability option, mitigated strict liability option and fault-based liability option.)

Option 1: Strict liability OT 6 (page 14)

~~{The operator ~~{shall}~~~~{should}~~ be liable for damage ~~{under these rules and procedures}~~ [resulting from transport, transit, handling and/or use of living modified organisms that finds its origin in such movements], regardless of any fault on his part.}~~

Option 2: Mitigated strict liability OT 7 (page 14)

~~{1. A fault-based standard of liability ~~{shall}~~~~{should}~~~~{may}~~ be used except a strict liability standard ~~{should}~~~~{shall}~~ be used in cases ~~{such as}~~~~{where}~~[:]
{(a) a risk assessment has identified a living modified organism as ultra-hazardous; and/or.}
{(b) acts or omissions in violation of national law have occurred; and/or}
{(c) violation of the written conditions of any approval has occurred.}~~

~~2. In cases where a fault-based standard of liability is applied, liability ~~{shall}~~~~{should}~~ be channelled to the ~~{entity having operational control}~~~~{operator}~~ 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 channelled to the ~~{entity that has operational control}~~~~{operator}~~ over the activity that is proven to have caused the damage.~~

Option 3: Fault-based liability OT 8 (page 14)

In a civil liability system, liability is established where a person:

- (a) Has operational control of the relevant activity;
- (b) Has breached a legal duty of care through intentional, reckless or negligent conduct, including acts or omissions;
- (c) ~~{Such breach has resulted in actual damage to biological diversity; and}~~
- (d) Causation is established in accordance with section [] of these rules.

A bis. Additional elements of civil liability

2. Exemptions or mitigation OT10 (page 15)

~~[Domestic law may provide for]~~ exemptions or mitigations ~~[that]~~ may be invoked by the operator ~~[in the case of recovery of the costs and expenses]~~. Exemptions or mitigations ~~[may be]~~ ~~[are]~~ based on ~~{any one or more elements of}~~ the following ~~[exhaustive]~~ list:

- (h) Act of God or force majeure;
- (i) Act of war or civil unrest;
- (j) Intervention by a third party ~~[that caused damage despite the fact that appropriate safety measures were in place];~~
- (k) ~~{Compliance with compulsory measures imposed by a public authority;}~~
- (d alt) ~~A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;}~~
- (l) ~~{An activity expressly authorized by and fully in conformity with an authorization given under domestic law;}~~
- (m) ~~[An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out;]~~
- (n) National security exceptions ~~[or international security]~~. **(NOTE: this section is acceptable with or without sections (f) and (g).)**

IV. Primary Compensation Scheme

A bis. Additional elements of civil liability

5. Coverage OT15 (page 16)

- 1. ~~[Parties may], consistent with international [law][obligations], require the operator to establish and maintain, during the period of time limit of liability, financial security, including through self-insurance.]~~
- 2. ~~[Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic measures implementing these rules and procedures.]~~

3. Other Provisions

I. Supplementary Compensation Scheme

B. Supplementary collective compensation arrangements OT 1 alt (page 17)

No Provision

OR

The Parties may consider the necessity of any solidarity arrangement for cases of damage which are not redressed through the primary compensation scheme in light of the experience gained through the implementation of the rules set out in this document.