

# TWN

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# Briefing Paper

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3<sup>rd</sup> Meeting of the Group of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety  
15-19 June 2010, Kuala Lumpur, Malaysia

## Comments by Third World Network (TWN) on the Draft Guidelines on Civil Liability and Redress

Note: TWN comments are highlighted in the following ways:

- (i) Comments are in bold and italicized
- (ii) Additional text suggestions are in bold and italicized within the Guidelines
- (iii) Strikethrough is used for text suggested for deletion within the Guidelines

### DRAFT GUIDELINES ON CIVIL LIABILITY AND REDRESS IN THE FIELD OF DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS

#### Proposal of Co-Chairs<sup>1</sup>

*At the outset, TWN reiterates that a legally-binding international civil liability instrument would best fulfil the mandate of Article 27 of the Cartagena Protocol on Biosafety for international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organism (LMOs), and would best ensure an adequate level of protection in the field of the safe transfer, handling and use of LMOs.*

*Guidelines on Civil Liability must not substitute for the legally binding provision on civil liability in the Supplementary Protocol (SP), and the review of the effectiveness of the SP and the provision on civil liability which may lead to a binding international civil liability regime in the future.*

*The relationship between the draft Guidelines and the draft SP must be understood in light of the Bonn understanding for one binding provision on civil liability in the legally binding instrument, preserving the right of Parties to put in place domestic laws and policies on civil liability, and to review the Guidelines with a view to considering making them binding.*

*In this light, and in the interim, the Guidelines could be useful in providing guidance to Parties for their domestic civil liability regimes, with a view towards developing a legally-binding international civil liability regime. It is on this understanding that TWN would like to comment on these draft Guidelines.*

<sup>1</sup> The use of brackets appearing in the proposed text of the Guidelines is related to outstanding issues in the draft text of the Supplementary Protocol.

## Guideline 1

### Objective

The objective of these Guidelines is to provide guidance to Parties regarding domestic rules and procedures on civil liability for damage resulting from transboundary movements of living modified organisms **and products thereof**, taking also into account risks to human health.

*In line with the Bonn understanding, and with Article 14 of the draft SP on the review of the effectiveness of Article 13 on civil liability, these Guidelines should not be limited to providing guidance to Parties solely on domestic rules and procedures on civil liability. The Bonn understanding and the intention of Article 14 of the draft SP envisage the possible development of a legally-binding international instrument on civil liability in the future. The conclusions adopted by the 2<sup>nd</sup> meeting of the Group of the Friends of the Co-Chairs on Liability and Redress in paragraph (a) specify that, inter alia, the draft SP and the draft Guidelines are the basis of rules and procedures on liability and redress in the context of the Cartagena Protocol on Biosafety which has mandated the elaboration of international rules and procedures on this matter.*

*If the Guidelines provide guidance to Parties for their domestic civil liability regimes, all damage resulting from LMOs should be covered, not necessarily limited to damage resulting from the transboundary movement of LMOs. As such, the title of the draft Guidelines should also be modified to reflect this. If the Guidelines are later developed into an internationally binding civil liability regime, this scope can be modified accordingly.*

*Products thereof are referred to in the Cartagena Protocol in Article 20(3)(c) on information sharing and the Biosafety Clearing House in the context of risk assessment, in Annex I on information required in notifications, and in Annex III on risk assessment. This points to the fact that products thereof can cause damage, and liability and redress should apply whenever there is damage associated with LMOs and products thereof. In this regard, references to LMOs should be accompanied by “and products thereof”.*

## Guideline 2

### Use of Terms

1. The terms used in Article 2 of the Convention, Article 3 of the Protocol and ~~Article 2 of the Supplementary Protocol~~ apply to these Guidelines except as otherwise defined in paragraph 2 below.

*The relationship between the draft Guidelines and the draft SP must be understood in light of the Bonn understanding and Article 14 of the draft SP. As such, nothing in the draft SP should be understood to obviate any provision in the draft Guidelines. In any case, until Article 2 of the SP is fully agreed, only then can a judgement be made about its merits and whether it can be usefully applied to the Guidelines, as a practical matter.*

2. In addition, for the purposes of these Guidelines:

(a) “Damage” means;

(i) **Impairment of health**, loss of life or personal injury [~~incidental to damage to the conservation and sustainable use of biological diversity~~];

(ii) **Impairment of use of**, loss of or damage to property [~~incidental to damage to the conservation and sustainable use of biological diversity~~];

(iii) **Loss of income or other Pure** economic loss;

(iv) Costs of response measures;

(v) ~~Damage to the~~ **environment and the** conservation and sustainable use of biological diversity; ~~not redressed under the Supplementary Protocol.~~

(vi) **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.**

*The categories of damage and scope of the categories of damage should be broadened to reflect the definition of damage contained in Appendix II of the report of the 2<sup>nd</sup> meeting of the Group of the Friends of the Co-Chairs on Liability and Redress. These are important areas of damage for developing countries, and the definition of damage in the Guidelines should be as wide as possible to capture any damage that may occur, given that the draft SP has a limited definition of damage.*

*References to the SP, and text that are contingent upon the SP should be deleted. There is no agreement that the Guidelines will only cover damage not covered by the SP. None of the use of terms in the Guidelines are contingent on or related to definitions in the SP.*

~~—(b) “Damage to the conservation and sustainable use of biological diversity” means damage as defined in Article 2, paragraph 2(e), of the Supplementary Protocol;~~

~~—(c) “Pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the conservation and sustainable use of biological diversity;~~

(d) “Supplementary Protocol” means [Supplementary Protocol on [Liability and Redress for] Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety].

*Relevant text from section III B on ‘Valuation of damage’ from Appendix II of the report of the 2<sup>nd</sup> meeting of the Group of the Friends of the Co-Chairs on Liability and Redress, in particular 1 (b), (c), (d), 2, 3 (i) and (ii) should be included as further clarification on the valuation on damage provides necessary guidance particularly for developing countries.*

*Further definitions may also be necessary as the draft Guidelines evolve.*

### **Guideline 3**

#### **Scope**

1. These Guidelines apply to damage resulting from transport, transit, handling and use of living modified organisms ~~{and products thereof} provided that these [living modified organisms][activities] find their origin in a transboundary movement.~~ The living modified organisms referred to are those:
  - (a) Intended for direct use as food or feed, or for processing;
  - (b) Destined for contained use;
  - (c) Intended for intentional introduction into the environment.
2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any authorized or **unauthorized** use of the living modified organisms ~~{and products thereof}~~ referred to in paragraph 1 above.
3. These Guidelines also apply to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.
4. *These Guidelines also apply to damage resulting from the transboundary movements from non-Parties, in accordance with Article 24 of the Protocol.*

*Products thereof are referred to in the Cartagena Protocol in Article 20(3)(c) on information sharing and the Biosafety Clearing House in the context of risk assessment, in Annex I on information required in notifications, and in Annex III on risk assessment. This points to the fact that products thereof can cause damage, and liability and redress should apply whenever there is damage associated with LMOs and products thereof.*

*If the Guidelines provide guidance to Parties for their domestic civil liability regimes, all damage resulting from LMOs and products thereof should be covered, not necessarily limited to damage resulting from the transboundary movement of LMOs and products thereof. If the Guidelines are later developed into an internationally binding civil liability regime, this scope can be modified accordingly.*

*An intentional transboundary movement i.e. which has been approved by a country of import, may still contain unauthorized LMOs, hence the scope of the Guidelines should cover both authorized and unauthorized use of LMOs and products thereof.*

*As specified in Article 24 of the Cartagena Protocol, transboundary movements of LMOs between Parties and non-Parties shall be consistent with the objective of the Protocol. Furthermore, Parties to the Convention on Biological Diversity that are not Parties to the Cartagena Protocol are still bound by the Convention's relevant provisions, including Article 8(g) and Article 19(4), which address LMOs. All this points to the necessity to include transboundary movements of LMOs and products thereof from non-Parties within the scope of the Guidelines. At the national level, LMOs should be regulated regardless of their origin. The bulk of LMOs and products thereof originate from countries which are not Parties to the Cartagena Protocol.*

#### **Guideline 4 Liability**

1. ~~The standard of liability should be strict where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous.~~
2. ~~In cases where the standard of liability is strict,~~ Liability should be channelled to the operator.
3. ~~In cases where the standard of liability is strict and~~ **Where** two or more operators have caused the damage, their liability should be joint and several.
4. ~~In cases where the standard of liability is strict,~~ **The** right of recourse or indemnity that an operator may have against another person should not be limited or restricted.

*Strict liability is the appropriate standard of liability for LMOs and products thereof, in accordance with the Precautionary Principle that underpins both the Cartagena Protocol and the Convention on Biological Diversity.*

*Damage may occur even if no risk assessment has been conducted e.g. in cases where there is unintentional or illegal release of experimental LMOs or products thereof that have yet to undergo a risk assessment or in cases where no risk assessment was conducted but release occurred due to human error such as in the Bt 10 case where Bt 10 was mixed up with Bt 11 which had been approved in some countries.*

*Damage may occur even if a risk assessment does not identify a LMO or product thereof as 'hazardous', given the dynamic state of current scientific knowledge on LMOs and products thereof and the uncertainty and gaps in knowledge that exist.*

*Liability and redress should therefore apply whenever there is damage; this should not be qualified.*

*The operator should be defined to include any person in direct or indirect control of the activity at the time of the incident causing damage resulting from LMOs or products thereof, or any person in direct or indirect control the LMO or product thereof at the time that the condition giving rise to the damage arose, and could include the permit holder, person who placed the LMO or product thereof on the market, developer, producer, notifier, exporter, importer, carrier or supplier.*

#### **Guideline 5 Exemptions or mitigation**

Parties ~~should~~ **may** consider the application of exemptions **or mitigation** from liability, in particular:

- (a) Act of God or *force majeure* **of an exceptional, inevitable and uncontrollable nature**;
- (b) Act of war or civil unrest, **except in the case of the hostile use of LMOs.**

*If a country allows for exemptions or mitigation from liability on the basis of (a), this should only be allowed in the case where the operator proves that the damage was caused by natural phenomena of an exceptional, inevitable and uncontrollable nature.*

*If a country allows for exemptions or mitigation from liability on the basis of (b), this should not be allowed to exempt or mitigate the operator from liability for damage in the case of deliberate use of LMOs in an act of war or civil unrest.*

#### **Guideline 6 Time Limits**

Parties ~~should~~ *may* consider the application of relative and/or absolute time limits, including the commencement of the period *and the life cycle of the LMO* to which a time limit applies.

*The consideration of the life cycle of different LMOs must be taken into account in cases where there is an application of time limits, as some LMOs (e.g. transgenic trees) have extremely long life cycles and it may take decades before damage is known to have been caused by it.*

#### **Guideline 7 Financial Limits**

*Parties should consider the application of minimum financial limits.* Parties ~~should~~ *may* consider the application of *maximum* financial limits.

*Minimum financial limits are necessary to attempt to ensure that the damage is sufficiently redressed and that the burden is not passed on to the public or the authorities. Maximum financial limits should be large enough to attempt to ensure that the damage is sufficiently redressed and that the burden is not passed on to the public or the authorities.*

#### **Guideline 8 Financial Security**

1. [~~Parties *should* may~~, consistent with international [~~law~~][~~obligations~~],] require the operator to establish and maintain, during the period of any applicable time limit, 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.~~]

*Given that the operator may be unable to meet his or her liability, financial security should be required. A minimum amount of financial security should be determined.*

#### **Guideline 9 Claims for Compensation**

1. Any person or group of persons, including public authorities, should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage resulting from the transboundary movement of living modified organisms *and products thereof* in addition to, where appropriate, the reimbursement of the costs of response measures.
2. [~~Parties may allow claims for compensation of damage to the conservation and sustainable use of biological diversity.~~]

*Claims for liability and redress by any persons should be allowed for all types of damage; this should not be qualified.*

*If the Guidelines provide guidance to Parties for their domestic civil liability regimes, all damage resulting from LMOs and products thereof should be covered, not necessarily limited to damage resulting from the transboundary movement of LMOs and products thereof. If the Guidelines are later developed into an internationally binding civil liability regime, this scope can be modified accordingly.*

*Products thereof are referred to in the Cartagena Protocol in Article 20(3)(c) on information sharing and the Biosafety Clearing House in the context of risk assessment, in Annex I on information required in notifications, and in Annex III on risk assessment. This points to the fact that products thereof can cause damage, and liability and redress should apply whenever there is damage associated with LMOs and products thereof.*

#### **Guideline 10 Settlement of Claims**

1. Parties should provide for civil law procedures to settle claims for compensation of damage.
2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

#### **Guideline 11 Access to Information**

Any person or group of persons ~~sustaining~~ *claiming compensation for damage* should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent authority in possession of such information, ~~unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties.~~

*Any information directly relevant to the claim for compensation of damage must be made available to any person or group of persons claiming compensation for damage. This is in order to ensure that the victims are enabled to seek full redress for the damage.*

#### **Further additions:**

*In addition, the text from Section IV A 2 on the provision of interim relief from Appendix II of the report of the 2<sup>nd</sup> meeting of the Group of the Friends of the Co-Chairs on Liability and Redress should be included: “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 imminent threat of damage”. This is to ensure that the damage or the threat of damage does not continue or perpetuate.*

*Additional and supplementary compensation measures should also be included, in the event that cases of damage are not redressed through the primary compensation scheme.*