

## **Overview of the current text under negotiation on liability and redress under the Cartagena Protocol on Biosafety**

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The Parties to the Convention on Biological Diversity recognized the unique risks that genetically engineered organisms pose to the conservation and sustainable use of biological diversity when they adopted the Cartagena Protocol on Biosafety. A necessary component of a global biosafety regime is rules and procedures on liability and redress.

Negotiations on a global regime on liability and redress are set to conclude at the upcoming Meeting of the Parties to the Cartagena Protocol this May. Greenpeace considers the resolution of the following issues as key to a successful and meaningful agreement.

### **The nature of the instrument**

Greenpeace supports a **legally binding** regime, reflecting the position taken by many Parties in the ongoing negotiations. Damage will occur and genetic contamination is irreversible. A binding regime would best ensure implementation of the polluter pays principle in the case of damage caused by genetically engineered organisms.

### **Capacity for redress: the overarching need for a legally binding compensation fund**

Regardless of measures taken at the national and international level to hold polluters accountable, there will be situations where the cause and liable actors are not immediately known, yet there is an immediate need for cleanup and redress. To adequately protect biological diversity in such situations, we consider that a **compensation fund**, perhaps modeled on the International Oil Pollution Compensation Funds, is an essential component of the legally binding regime. Greenpeace has submitted detailed analysis and suggested text demonstrating that an **international legally binding fund** is possible. An ancillary mechanism to ensure compensation and redress is a requirement for the exporter to establish and to maintain **financial security** to cover damage from LMOs.

The genetic engineering industry has proposed a voluntary fund whereby the six GE-producing companies (Monsanto, DuPont/Pioneer, Syngenta, Dow AgroSciences, Bayer, BASF) would self-insure for compensation for cases of significant damage to biological diversity, which has yet to be defined. It is unacceptable for an international legally

binding instrument to be dependent on a voluntary private scheme. This is completely contrary to fundamental principles of good governance and transparency. Such privatisation of obligations to correct damage, particularly in the absence of a legally binding framework, is completely unacceptable. Such a fund would be drafted by the polluters, would likely cover very few cases of damage due to LMOs, would be hedged with exceptions and would be so narrow in scope and weighted in favour of the corporations that it is highly unlikely to provide any compensation in all but the most extreme and narrow of circumstances.

Without a supplementary compensation scheme the instrument is next to useless. The supplementary compensation scheme is central and the devil is in the detail.

### **The administrative approach**

The administrative (domestic) approach to response and restoration is an important element of a liability regime, but on its own is not even an international element. Such an approach simply puts the burden on importing countries to take action. It is thus simply a negative burden on importing countries, with no corresponding burden on exporting countries. Of course countries could take all these steps on their own. Moreover, this approach has no relation to redress, no obligation to reimburse importing countries for damage.

A legally binding regime on the administrative approach should not be accepted **unless it is accompanied by an effective supplementary compensation scheme**. If it is accepted, there are some major elements that need to be addressed such as **unintentional movement, damage beyond areas of national jurisdiction, non-parties and human health and socio-economic impacts**. For instance, the scheme as proposed would not cover damage to the high seas, such as that which may be caused by genetically modified fish escaping or being released to the high seas and causing damage to fish stocks there.

### **Civil liability**

Rules for liability for dangerous activities in place with other regimes frequently require strict liability and shifting the burden of proof.

The agreement must provide for **strict liability** as the standard of liability, meaning not having to prove fault. This is absolutely critical. Many elements follow from strict liability, including channeling of liability to importers or operators. Strict liability is the standard of liability in many countries, and any negotiated text therefore should not be weighted against a strict standard of liability.

Any regime should ensure adequate access to justice for victims of damage caused by genetically engineered organisms. Proof of damage from LMOs and issues of causation can put an unfair or even insurmountable burden on victims. Slow moving negative impact, in addition, may be difficult to trace and to attribute. The relevance and importance

of the precautionary principle is also important, in the context of the shifting the burden of proof of damage to those introducing LMOs, and in the context of proving causation. **The burden of proof should shift to the exporter, importer and distributor of the gene**, once any release is found including that gene or any damage occurs directly or indirectly attributable to the gene or to its development or release. Costs, standing, and accessibility to justice are crucial. A scheme which does not assure access to justice, particularly in developing countries, will deny justice.

### **Defining damage**

The definition of damage must be broad enough to cover any kind of damage that can be caused by LMOs. Consistent 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 socioeconomic damage to local and indigenous communities is covered, following Article 24 of the Protocol. Our proposed language on damage is:

‘Damage’ includes

- (i) loss of life or personal injury or disease, together with medical costs including costs of diagnosis and treatment and associated costs;
- (ii) damage to, impaired use of or loss of property;
- (iii.) loss of income derived from an economic interest in any use of the environment, incurred as result of impairment of the environment;
- (iv) the costs of measures of reinstatement or remediation of the impaired environment, where possible, measured by the costs of measures actually taken or to be undertaken;
- (v) the value of the impairment of the environment, where reinstatement or remediation is not possible, taking into account any impact on biodiversity and the non-economic value of the environment including value to future generations or cost of establishment of natural resources equivalent to the damaged or destroyed natural resources; and
- (vi.) the costs of preventive measures, including any loss or damage caused by such measures,

all to the extent that the damage is 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; and includes the damage or threatened damage resulting from the production, culturing, handling, storage, use, destruction, disposal, or release of any such living modified organism.<sup>1</sup>

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<sup>1</sup> Wording from Lugano Convention