



**LIABILITY AND REDRESS:
ANALYZIS TOWARDS A SUPPLEMENTARY PROTOCOL**
(Final Version_ *November 12, 2009*)

Executive Summary

This document brings a synthesis of the position from the Brazilian private sector about the negotiations in the context of the Cartagena Protocol on Biosafety. It is based on the document - UNEP/CBD/BS/GF-L&R/1/4 – published by the Secretariat after the First Meeting of the Friends of the Co-chairs about Liability and Redress, realized in Mexico City in February 2009.

The Annex I of the Report shows the achievements of the meeting. The proposals point to the adoption of a Supplementary Protocol, annexed to the Cartagena Protocol, and will be the basis for further negotiations and for the Kuala Lumpur meeting, in February 2010, prior to the 5th Meeting of the Parties that will take place in Nagoya, Japan, in October 2010.

The most important decision from the Mexico meeting refers to the instrument of the Liability and Redress Regime, that would be binding administrative, adopted as a Supplementary Protocol to the Cartagena Protocol. This decision put away, at least by now, the proposal of Malaysia and the Group of African Countries, of a binding civil liability regime to be adopted by the Parties.

It is based on the idea of adopting administrative guidelines that would deal with the concept of damage, it's nature, the casual link between a damage and the Living Modified Organism (LMO) subjected to a transboundary movement, time limits to liability, insurances and other issues that the proposals are analyzed with the aim to bring coherence and objectivity to the negotiation considering the scope of the Cartagena Protocol and the interests of the agricultural sectors from Brazil.

The arguments presented below are made base on the actual state of the negotiations, and would be modified during the new negotiations that will happen until the MOP 5.

UNEP/CBD/BS/GF-L&R/1/4

Appendix I

Draft Decision BS-V/--

International rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms

[*Welcoming* the private-sector initiative to provide for a contractual compensation mechanism concerning recourse in the event of damage to biological diversity caused by living modified organisms,]

A. SUPPLEMENTARY PROTOCOL ON DAMAGE ~~CARTAGENA PROTOCOL ON BIOSAFETY ON DAMAGE TO THE CONSERVATION AND SUSTAINABLE USE OF BIOLOGICAL DIVERSITY~~ RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS TO THE CARTAGENA PROTOCOL ON BIOSAFETY

The concept of damage is essential to a balanced outcome aiming to reflect the objectives of the Cartagena Protocol. For that reason, it is necessary to add after the word **damage**, the expression **to the conservation and sustainable use of biological diversity** in light of Article 1 of the Protocol.

1. *Decides* to adopt the Supplementary Protocol to the Cartagena Protocol on Biosafety on Damage to the Conservation and Sustainable Use of Biological Diversity Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety, as contained in annex I to the present decision (hereinafter referred to as “the Supplementary Protocol”);
2. *Requests* the Secretary-General of the United Nations to be the Depositary of the Supplementary Protocol and to open it for signature at ... by Parties to the Cartagena Protocol on Biosafety from ... to ..., and at the United Nations Headquarters in New York from ... to
3. *Encourages* Parties to the Cartagena Protocol on Biosafety to implement the Supplementary Protocol pending its entry into force;
4. *Calls upon* the Parties to the Cartagena Protocol on Biosafety to sign the Supplementary Protocol from ----- or at the earliest opportunity thereafter and to deposit instruments of ratification, acceptance or approval or instruments of accession, as appropriate, as soon as possible;

Annex I

[SUPPLEMENTARY PROTOCOL ON DAMAGE to the Conservation and Sustainable Use of Biological Diversity RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS TO THE CARTAGENA PROTOCOL ON BIOSAFETY]

Put the expression **to the conservation and sustainable use of biodiversity** after damage.

ARTICLE 1^o - OBJECTIVE

[Article 1^o - The objective of this Supplementary Protocol is to contribute to ensuring that prompt, adequate and effective response measures are taken in the event of damage or **imminent threat of damage** to the conservation and sustainable use of biological diversity resulting from living modified organisms that find their origin in transboundary movements.]

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
<p>1. Article 1 is in line with the objectives of the Protocol: to allow appropriate measures in case of damage – adverse and significant - to the conservation and sustainable use of biodiversity caused by LMOs subjected to a transboundary movement. Except for the expression <i>imminent threat of damage</i>, the text can be accepted.</p> <p>2. Since Article 1 deals with the Protocol’s objectives, it is fundamental to link the concept of damage to adverse effects to the conservation and sustainable use of biodiversity resulting from LMOs subjected to transboundary movements. Those three elements are the scope of the Protocol (Article 4) and are critical to the Liability and Redress Regime.</p>	<p>1. Imminent Threat of Damage: this expression must be excluded from the Liability and Redress Supplementary Protocol for various reasons: a) damage in the context of the Protocol must be adverse and significant; b) LMOs are not inherently dangerous and for this reason cannot be treated as potential sources of damage; c) it is important to point out that LMOs subject to transboundary movements must be approved by Parties; d) if the Protocol aims to allow compensation and restoration of adverse, significant and measurable damages, cannot manage the concept of damage based on threat, risk or other vague elements about what should be damage;</p> <p>2. Any mention to imminent threat of damage must be necessarily treated as exception by the Supplementary Protocol.</p>

ARTICLE 2.2 *In addition, for the purposes of this Supplementary Protocol*

(d) “Damage to the conservation and sustainable use of biological diversity” [in relation to the administrative approach as contained in Articles xx – xx] means an adverse effect on biological diversity that:

(i) 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

(ii) Is significant as set out in paragraph 3 below; [This definition of damage shall be without prejudice to the domestic law of Parties in the field of civil liability.]

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
<p>1. Article 2.2 (d) is essential to characterize damage in light of the Protocol’s objectives, and must be basis of the definitions of the Liability and Redress regime within the Supplementary Protocol;</p>	<p>1. The final text between brackets [This definition of damage shall be without prejudice to the domestic law of Parties in the field of civil liability.] cannot be accepted and must be deleted. Once the aim of the Supplementary Protocol is</p>

2. Damage must be closely linked to adverse and severe effects to the conservation and sustainable use of biodiversity. Only like this it would be possible to avoid misunderstandings with other types of damage, that by definition are not covered by the Cartagena Protocol;
3. A damage must be necessarily scientifically measured and must consider, when it's possible, *baselines* considering specificities of the place where the damage occurred in order to allow a consistent analysis of the case; the role of national authorities in this case can be very relevant;
4. Besides being serious and measurable, the damage must be caused by the genetic modification of the LMO. This casual link is important to characterize the damage caused by a specific LMO;
5. Moreover, a damage must be significant as stated in item (ii).

to build an administrative regime that would allow Parties to seek for compensation in case of effective damages to the use and conservation of the biological diversity caused by LMOs, it is not reasonable to work towards this aim addressing possible Civil Liability Regimes by the Parties. The Supplementary Protocol would be weakened, and this must be avoided.

ARTICLE 2.2 In addition, for the purposes of this Supplementary Protocol

[(e) "incident" means any occurrence or series of occurrences, [originating [in][from] a transboundary movement of LMOs][having the same origin] that causes damage[or creates [a grave and] an imminent threat of causing damage];]

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
<ol style="list-style-type: none"> 1. The definition of incident is not necessary to the Liability and Redress regime. At the contrary, the concept of damage is crucial; 2. If the negotiations advance considering the concept of incident, it must take into account the following: (e) "incident" means any occurrence or series of occurrences, from a transboundary movement of LMOs that causes damage to the conservation and sustainable use of biological diversity. 	<ol style="list-style-type: none"> 1. The expression [...imminent threat of causing damage] is not appropriate to define and incident in the context of the Protocol, once a damage must be measurable and significant; only like this a damage could be called an incident. Besides, LMOs subject to transboundary movements must be approved and for that reason cannot be considered hazardous <i>per se</i>; 2. It is not reasonable to consider something that is not concrete as an incident, which means that only effective cases of damage could be called like this.

(f) **Option 1 chapeau** "Response measures" mean reasonable actions, in the event of damage [or imminent threat of damage], to:
Option 2 chapeau "Response measures" mean reasonable actions [not covered under domestic law concerning civil liability], which may include:
 (a) [Avoid,] minimize, contain or mitigate damage[, or take the necessary preventive measures in case of imminent threat of damage], as appropriate;
 (b) Restore biological diversity[, if not covered under domestic law concerning civil liability,] through actions to be undertaken in the following order of preference: (i) Restoration[, to the extent it is technically and economically feasible,] of biological diversity to the condition that existed before the damage occurred, or its nearest equivalent; and/or (ii) Restoration by, *inter alia*, replacing[, as appropriate,] the loss of biological diversity with other components of biological diversity for the same, or for another type of use either at the same or, as appropriate, at an alternative location;

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
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1. Option 1 and 2 are adequate, since the expression imminent threat of damage is deleted.
 2. (a) [Avoid] can only be accepted when an adverse damage occurs in different places and it is reasonable to expect that it would happen in other situations.

1. The expression imminent threat of damage must be deleted. All the Options are related to compensation and restoration that must be linked to significant and measurable damages;
 2. In item (a), the term [, or take the necessary preventive measures in case of imminent threat of damage] cannot be accepted since is based on threat of damage; preventive measures or actions should only be applied based in effective cases of adverse and significant damages that would foresee new cases of similar damages caused by the same LMOs.

(g) "Operator" means

Option 1 any person in [operational control][[direct or indirect] command or control]:

(i) of the activity at the time of the incident [causing damage resulting from the transboundary movement of living modified organisms];

[(ii) of the living modified organism [at the time that the condition that gave rise to the damage] [or imminent threat of damage] arose [including, where appropriate, the permit holder or the person who placed the living modified organism on the market];] [and/]or

(iii) as provided by domestic law.

Option 2 The developer, producer, notifier, exporter, importer, carrier, or supplier.

Option 3 Any person in operational control of the activity at the time of the incident and causing damage resulting from the transboundary movement of living modified organisms.

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
<p>1. The liability for an adverse and significant damage caused by a specific LMO depends of a concrete case that allows to characterize an adverse damage to the use and conservation of the biological diversity. The liability will depend of the casual link between the transboundary movement, transit, manipulation and use of a specific LMO that causes adverse damage, in light of Article 4 of the Cartagena Protocol. Because of this, the causality analysis must be done in a case by case basis. In this sense, the Option 3 is preferable, since it must consider the casual link of the adverse damage and the person who has the control of the LMO in when the damage occurred (<i>Liable person</i>).</p>	<p>1. Delete the expression imminent threat of damage from Option1; 2. The expressions [direct or indirect] command or control] and [at the time that the condition that gave rise to the damage] must be deleted because are imprecise and can give rise to unnecessary confusion.</p>

[(h) "Imminent threat of damage" is an occurrence or occurrences determined, on the basis of best available scientific and other relevant information, to be likely to result in damage if not addressed in a timely manner.]

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
<p>No favorable arguments.</p>	<p>1. Imminent Threat of Damage must be deleted from the Liability and Redress Regime. The Protocol deals with LMOs that had passed through risk analysis process and where authorized;</p>

- 2. The expression [...to be likely to result in damage...] is generic and vague;
- 3. Imminent Threat of Damage suggests that LMOs are hazardous by nature and can be a prompt source of damage, which is not science based and true. There is no casual link between imminent threat of damage and possible real adverse damages caused by LMOs;
- 4. It is only reasonable to accept the expression imminent threat of damage as an exception, since it is defined in light of Article 4 of the Protocol.

Article 2.3 A “significant” adverse effect on the conservation and sustainable use of biological diversity, also taking into account risks to human health, is to be determined on the basis [of factors, such as][of the following factors]:

- (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 affect the components of biological diversity;
- (c) The reduction of the ability of components of biological diversity to provide goods and services;
- (d) The extent of any adverse effects on human health in the context of the Protocol;
- [(e) The extent of adverse effects on locally or regionally important components of biological diversity].

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
1. The Article 2.3 can be accepted since the commas in the word “significant” are deleted, and that it is expressly mentioned that the adverse effects must be measurable.	1. Article 2.3 can be an option since item (d) would state that adverse effects to the human health in the context of the Protocol are necessarily linked to adverse and measurable damages caused by LMOs subjected to transboundary movements to the use and conservation o biological diversity.

ARTICLE 3

- 1. This Supplementary Protocol applies to damage to the conservation and sustainable use of biological diversity, taking also into account [damage to][risks to][adverse effects on] human health [in the context of the Protocol].
- 2. This Supplementary Protocol applies to transport, transit, handling and use of living modified organisms [and products thereof], provided that these 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.
- 3. With respect to intentional transboundary movements, this Supplementary Protocol applies to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 2. 4. This Supplementary Protocol also applies to unintentional transboundary movements as referred to in Article 17 of the Protocol as well as illegal transboundary movements as referred to in Article 25 of the Protocol.

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
1. In Article 3.1 it is important to defend the adoption of the term damage to human health in the context of the Protocol . Despite the Protocol wording is “taking also into account risks to human health”, the concept of damage has a clear relation to adverse and measurable damages that deserves compensation and restoration. During the First Meeting of the	1.To exclude from Article 3.1 the word [risks]; damage is more appropriate considering the need to be adverse and measurable; risk seems abstract and vague, which may lead to misunderstandings; 2. In Articles 3.2 and 3.3 it is necessary to delete the term [and products thereof]. Accept the inclusion of products thereof in the Supplementary

Friends of the Co-chairs, the proposal of adopting the word damage instead of risks to human health was raised, which, by the way, is very consistent with the scope of the Protocol. This point must be defended with the aim to relate this damage to human health with previous adverse damages to the use and conservation of biological diversity;

2. Damage to human health caused by a previous damage to the biodiversity must be linked to the genetic modification of the LMO that were subjected to a transboundary movement;

3. Articles 3.2 and 3.3 are good options, since the expression **products thereof is deleted**.

Protocol means to bring to the L&R decision, Genetically Modified Organisms that has no capacity to transfer or replicate genetic material, as stated in Article 3 (h) of the Protocol. The demand for the inclusion of products thereof lacks justification before the Protocol's objectives, especially Article 27;

3. **Products containing LMOs seems more appropriate than products thereof**: in the Mexico meeting Parties discussed the possibility to address this issue using products containing LMOs, but at the end of the meeting decided to keep products thereof. By definition, products containing LMOs are, in principle, in the context of the Protocol, as may be the case of bacteria used to produce dairy products, enzymes and other LMOs;

4. In Article 3.3 it is needed to change the word **damage** to **damage to the conservation and sustainable use of biodiversity**.

ARTICLE 4

1. This Supplementary Protocol applies to damage that occurred in areas within the limits of the national jurisdiction of Parties resulting from activities as referred to in Article 3.
2. A causal link needs to be established between the damage and the activity in question in accordance with domestic law.
3. Domestic law implementing this Supplementary Protocol [should][shall] also apply to damage resulting from the transboundary movements of living modified organisms from non-Parties.

FAVORABLE ARGUMENTS

1. Articles 4.1 and 4.2 are good options to the binding administrative regime.

CONTRARY ARGUMENTS

1. When Article 4.3 states that domestic legislation [should][shall] apply to damage resulting from transboundary movement of LMOs that has its origin in Non-Parties, can only be an option with the word [should]. It is important to note that according to Article 24 of the Protocol, Parties may enter in negotiations with non-Parties with a view to adopt rules regarding L&R, since it is consistent with the Protocol's decisions. It is not possible to mandate Parties to negotiate agreements with non-Parties.

ARTICLE 5

- [1. This Supplementary Protocol applies to damage that results from a transboundary movement of living modified organisms that started after the entry into force of the Supplementary Protocol for the Party into whose jurisdiction the transboundary movement was made.
2. Nothing in this Supplementary Protocol shall be interpreted as restricting the right of a Party to require [appropriate measures] in its domestic law to deal with damage resulting from [a] transboundary movement[s] of living modified organisms [consistent with international [obligations] [law]] [that started before the entry into force of the Supplementary Protocol].]

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
1. Article 5.1 is suitable.	1. Article 5.1: Change damage by damage to the conservation and sustainable use of biodiversity ; 2. Article 5.2 is not acceptable because considers possible damages that would occur before the entering into force of the Supplementary Protocol.

ARTICLE 6

[This Supplementary Protocol applies to intentional transboundary movement in relation to the use for which living modified organisms are destined and for which authorization has been granted prior to the transboundary movement. If, after the living modified organisms are already in the country of import, a new authorization is given for a different use of the same living modified organisms, such [different] use will not be covered by this Supplementary Protocol.]

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
1. The text is appropriate.	No contrary arguments.

ARTICLE 7

1. . . . **Option 1** A Party shall[, consistent with international obligations,] provide for domestic response measures consistent with the provisions outlined below. **Option 2** A Party shall[, consistent with international obligations,] in accordance with its domestic law implement the provisions outlined below.

2. Parties shall require the operator, in the event of **damage [or imminent threat of damage]**, subject to any requirements of the competent authority, to: (a) immediately inform the competent authority; (b) evaluate the damage [or imminent threat of damage]; and (c) take appropriate response measures.

3. The competent authority[, in accordance with domestic law]: (a) [should][shall] identify the operator which has caused the damage [or the imminent threat of damage]; (b) [should][shall][may] evaluate the significance of the damage and determine which response measures should be taken by the operator.

4. The competent authority has the discretion to implement [appropriate][response] measures[, in accordance with domestic law including in particular][where necessary and, in particular,] where the operator has failed to do so.

[5. The Party may define, under domestic law, which response measures may be required or taken by the competent authority, taking into account those that are already addressed by civil liability.]

6. The competent authority has the right to recover from the operator the costs and expenses of, and incidental to, [the evaluation of the damage and] the implementation of any [such appropriate][response] measures.

7. Decisions of the competent authority imposing or intending to impose response measures should be reasoned and notified to the operator, where identified, who should be informed of the remedies available, including the opportunity for [the][an independent] review of such decisions[, *inter alia*, through access to an independent body, such as a court] [, provided that recourse to such remedies shall not impede the right of the competent authority to take such response measures, as may be necessary].

[8. Decisions required or taken by the competent authority of a Party pursuant to paragraphs 2, 3 and 4 above shall be consistent with international law.]

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
1. Article 7.1: Option 1 is suitable;	1. In Article 7.2, it is important to change the expression [... in the event of

2. Article 7.3: The text is appropriate since it is adopted with the expressions **[should]** or **[may]** instead of **[shall]**. The Supplementary Protocol cannot regulate how Parties regulations would be, what explains why the word **[shall]** must not be accepted. The Supplementary Protocol should encourage the adoption of practices that would favour the establishment and implementation of Liability and Redress regimes by Parties.

damage] by [... in the event of damage to the conservation and sustainable use of biodiversity;

2. Delete the term **[or imminent threat of damage]** in Articles 7.2, 7.2 (b), 7.3 (a), for the reasons explained above;

3. Article 7.5: the Parties must have sovereignty to adopt its systems to address liability and redress provided that it is in compliance with the Protocol's rules; for this reason, it is not the task of the Supplementary Protocol to define how the Parties will regulate this issue. Besides, the text foresees that there will be a civil liability regime in place, which is not mandatory once the negotiations are pursuing an administrative binding regime. Article 7.5 must be deleted;

4. Article 7.7 is not suitable.

ARTICLE 8

1. Parties may provide, in their domestic law, for the following exemptions that may be invoked by the operator: (a) Act of God or *force majeure*; (b) Act of war or civil unrest; [(c) National security exceptions [or international security]].

2. **Option 1 chapeau** [Parties may provide, in their domestic law, for the following [exemptions or] mitigations that may be invoked by the operator [in the case of recovery of the costs and expenses]:

Option 2 chapeau Parties may provide, in their domestic law, for [differentiated responsibility for][not bearing wholly or partially] the costs and expenses of, and incidental to, the implementation of any response measures under article -- if the operator proves that the damage or imminent threat of damage arose from any one or more of the following exhaustive list: [(a) Intervention by a third party [that caused damage despite the fact that appropriate safety measures were in place];] [(b) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;] [(c) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;] [(d) 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;]

FAVORABLE ARGUMENTS

1. Article 8.1 is adequate, provided that the *force majeure* exception comprise natural catastrophes.

CONTRARY ARGUMENTS

1. The Options 1 and 2 chapeau may conflict with the Brazilian Biosafety Law, what must be avoided.

ARTICLE 9

This Supplementary Protocol does not limit or restrict any right of recourse or indemnity that an operator may have against any other person.

FAVORABLE ARGUMENTS

1. The text is suitable.

CONTRARY ARGUMENTS

No contrary arguments.

ARTICLE 10

Domestic law may provide for relative and/or absolute time limits for the recovery of costs and expenses.

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
<p>1. No favorable arguments. Proposal: The Parties has 2 years to search for compensation and restoration from an adverse and significant damage caused by an LMO subjected to a transboundary movement, counted from the date the damage is known.</p>	<p>1. The Supplementary Protocol must define a period of time that would allow a Party to seek for compensation from a specific damage. Considering that damage in the context of the Protocol must be adverse and measurable, it seems reasonable to impose a limit of 2 years from the date the Party had notice of the damage to look for redress; 2. To let the definition of time limit for the Parties in order to look for compensation for damage caused by a specific LMO will certainly difficult the chance of effective restoration in cases of significant damages. How the Party affected by a specific damage will look for compensation if the deadline imposed by the other Party has already expired? 3. The time limit question has a clear relation with the credibility of the liability and redress regime. For that reason, it is important to consider a reasonable period of time (2 years) that would allow Parties to seek for compensation when adverse damages have occurred.</p>

ARTICLE 11

Domestic law may provide for financial limits for the recovery of costs and expenses[, provided that such limits shall not be less than [z] special drawing rights].

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
<p>1. Article 11 can be accepted once the expression between brackets is deleted; to establish minimum limits to the compensation is not reasonable and science based, once there are no cases of damage that would be a basis to quantify the amount needed to restore or compensate a specific damage; 2. The text can only be accepted with the expression <i>may provide</i>.</p>	<p>1. To link the establishment of this limit to the Parties could be interesting since each one has its own biodiversity and knows its specificities deeply; nevertheless, it looks more appropriate to establish that the amount of the compensation should be determined using the specific conditions on a case by case basis, using scientific criteria and the best available information. Only like this the amount of the compensation would be better measured and appointed.</p>

ARTICLE 12

1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of the 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.]

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
No favorable arguments.	<p>1. The Articles 12.1 and 12.2 cannot be accepted: a) The establishment of any type of insurances or other guarantees would impact the production costs and exports of LMOs and even products thereof that are not comprised by the scope of the Protocol; this would certainly impact food prices, what is totally outside of the Protocol's objectives; b) The LMOs traditionally subjected to transboundary movements are approved by the countries, and even in the case of Low Level Presence or Adventitious Presence of some specific LMO, it do not need to be handled and treated as a hazardous product that would represent a damage <i>per se</i>; c) To require the operator or the liable person to maintain insurances for the time limit of liability (3 to 15 years, or other period) is almost an impossible achievement; how to manage insurances for different types of LMOs for producers, exporters, importers, transportation companies, and other possible operators during all the time limit of liability? Would it be possible to trace every LMO and keep records of this information, once the casual link between a specific damage and the LMO must be clear?; d) How to manage the logistics implications in this regard?</p>

ARTICLE 13

Option 1 [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.]

Option 2 1. Parties shall provide in their domestic law for rules and procedures that address liability and redress in the event of damage resulting from the transboundary movement of living modified organisms. To [implement this obligation][this end], Parties may apply or develop, as appropriate: (i) their existing domestic laws, including where applicable general provisions on civil liability; (ii) a specific civil liability regime; or (iii) a combination of both. 2. Any specific civil liability regime as referred to in paragraph (1)(ii) [shall][may, as appropriate] address, *inter alia*, the following elements:

- a. Damage;
- b. Standard of liability: that may include strict, fault or mitigated liability;
- c. Channelling of liability, where appropriate;
- d. [Financial security, where [feasible][appropriate]] [Redress or compensation];
- e. Right to bring claims.

[3. Parties shall recognize and enforce foreign judgments in accordance with [the applicable rules of procedures of the domestic courts] [domestic law][governing the enforcement of foreign judgments] in respect of matters within the scope of these rules and procedures/this instrument/ the Guidelines in

Annex [x] to this [supplementary Protocol].[Parties who do not have legislation concerning recognition of foreign judgments should endeavour to enact such laws.]

[4. While this provision does not require any change in domestic law, and does not in itself constitute a treaty on reciprocal enforcement of foreign judgments, Parties[, whose domestic law requires bilateral reciprocity agreements for recognition of foreign judgments] [shall endeavour to extend their domestic law governing the reciprocal enforcement of foreign judgments to other Parties not presently covered by their domestic law].]

[3 & 4 alt. Parties may, in accordance with domestic law, recognise and enforce foreign judgments arising from the implementation of the above guidelines.]

[5. Parties may also take into account the guidelines contained in the annex 2 to decision BS-V/-- when developing their legislation or policy on civil liability.]

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
<p>1. Option 1 can be accepted. However, if the Supplementary Protocol determine a review process aiming to adopt a civil liability regime, the expression <i>may or may not</i> can bring problems in the future.</p>	<p>1. Option 2 (1) cannot be accepted; the Supplementary Protocol would bring guidelines and recommendations with the aim to support Parties to address adverse cases of damage; in this sense, it is not reasonable to use the expression Parties shall provide in their domestic law ...;</p> <p>2. It seems clear that the Supplementary Protocol would bring guidelines about civil liability in order to help Parties if they want to adopt such a system; however, the wording in Option 2 states that the Protocol oblige Parties to have a civil liability system; the item 2 is very clear about elements that would be required;</p> <p>3. Delete the insurances provision in Option 2 (2) (d).</p>

ARTICLE 14

[1. The [institutional mechanism under the Supplementary Protocol] shall undertake [3] years after the entry into force of this Supplementary Protocol a review of the effectiveness of the Supplementary Protocol.

2. This review shall include a consideration of [further and necessary steps][whether further steps are necessary] to provide for an effective civil liability regime on liability and redress.]

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
<p>1. Article 14.1 can only be accepted if the period for a review process of the Supplementary Protocol would be 6 years. A review process is important, but it must be realistic, since the Parties would need time to implement the decisions of the Protocol. There are no cases of damage to require the revision of the regime in a short period (3 years);</p> <p>2. Article 14.2 can be suitable if the expression [whether further steps are necessary] is maintained.</p>	<p>1. The three years period is a short time to promote the revision of the Supplementary Protocol. Article 35 of the Cartagena Protocol, Assessment and Review, foresees that the COP-MOPs must review the implementation and effectiveness of the Protocol every five years. It does not seems feasible to establish a period of three years, considering moreover, that the MOPs are realized in a biannual basis;</p> <p>2. The Parties must have a reasonable time to implement the Supplementary Protocol; capacity building actions can play an important role in this regard; for that reason, reform the Supplementary Protocol after only three years do not seems to be a correct alternative.</p>

ARTICLE 15

This Supplementary Protocol 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.

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
1. Article 15.1 is appropriate.	No contrary arguments.

NOTE: The proposals for the Articles 16 to 24 were not discussed nor negotiated. The following arguments are based on the proposals presented by the Secretariat, and can be changed as long as the Parties adopt new positions.

ARTICLE 16

Option 1 Non-Parties to the Supplementary Protocol participate in taking decision 1. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall serve as the governing body of the Supplementary Protocol. 2. The Conference of the Parties serving as the meeting of the Parties to the Protocol shall keep under regular review the implementation of this Supplementary Protocol and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Supplementary Protocol and, *mutatis mutandis*, the functions assigned to it by paragraphs 4 (a) and (f) of Article 29 of the Protocol.

Option 2 Non-Parties to the Supplementary Protocol participate as observers in decision taking 1. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall serve as the governing body of the Supplementary Protocol. 2. The Conference of the Parties serving as the meeting of the Parties to the Protocol shall keep under regular review the implementation of this Supplementary Protocol and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Supplementary Protocol and, *mutatis mutandis*, the functions assigned to it by paragraphs 4 (a) and (f) of Article 29 of the Protocol. 3. Parties to the Protocol that are not Parties to this Supplementary Protocol may participate in the proceedings of any meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol that deals with matters concerning the Supplementary Protocol except for the adoption of decisions. Decisions under this Supplementary Protocol shall be taken only by Parties to it.

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
1. Option 2 is suitable.	1. Option 1 cannot be accepted since only Parties can take and adopt decisions in the Cartagena Protocol and its Supplementary Protocol. To allow non-Parties participation is unacceptable and is against the international law practice.

ARTICLE 17

The Secretariat established by Article 24 of the Convention shall serve as the secretariat to this Supplementary Protocol.

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
1. No objections.	1. No contrary arguments.

ARTICLE 18

Option 1 The provisions of the Protocol shall apply, *mutatis mutandis*, to the Supplementary Protocol, except as otherwise provided in this Supplementary Protocol.

Option 2 Once this Supplementary Protocol enters into force, it shall form an integral part of the Protocol.

Option 3

1. This Supplementary Protocol shall supplement the Cartagena Protocol on Biosafety and shall neither modify nor amend the Protocol.

2. Nothing in this Supplementary Protocol shall derogate from the rights and obligations of the Parties to this Supplementary Protocol under the Convention on Biological Diversity and the Cartagena Protocol on Biosafety.

3. Except as otherwise provided in this Supplementary Protocol, the provisions of the Convention on Biological Diversity and the Cartagena Protocol on Biosafety shall apply to this Supplementary Protocol.

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
1. Option 3 (3) brings the more suitable language. To link the Supplementary Protocol to the Cartagena Protocol and the Convention on Biological Diversity strengthens the objective of protecting the biodiversity; it is important to consider that the Convention is a framework treaty that is the basis for the Protocol and its obligations	No contrary arguments.

ARTICLE 19

Option 1: 1. Amendments to this Supplementary Protocol may be proposed by any Party to this Supplementary Protocol. 2. Amendments to this Supplementary Protocol shall be adopted by a two-third majority vote of the Parties to the Protocol. 3. Amendments adopted in accordance with paragraph 2 above shall enter into force among Parties to the Protocol having accepted them on the ninetieth day after the deposit of instruments of ratification, acceptance or approval by at least two-thirds of the Parties to the Supplementary Protocol. 4. Paragraphs 3 to 5 of Article 29 of the Convention shall apply to this Supplementary Protocol.

Option 2 No text

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
1. Option 1 seems adequate, but it is important to clarify if the 2/3 votes required to approve amendments are from the Supplementary Protocol's Parties or the Cartagena Protocol's Parties.	No contrary arguments.

ARTICLE 20

This Supplementary Protocol shall be open for signature at ... by Parties to the Cartagena Protocol on Biosafety from ... to ..., and at the United Nations Headquarters in New York from ... to

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
No objections.	

ARTICLE 21

1. This Supplementary Protocol shall enter into force on the ninetieth day after the date of deposit of the [fiftieth] [thirtieth] instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Protocol. 2. This Supplementary Protocol shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves it 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, on the date on which the Protocol 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.

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
1. To link the entry into force of the Supplementary Protocol to the ratification of at least 52 Parties seems a reasonable option.	1. The entry into force of the Supplementary Protocol must be due to the ratification of a minimum of 52 Parties. Today the Cartagena Protocol has 156 Parties, which justifies at least 1/3 of its Parties.

ARTICLE 22

No reservations may be made to this Supplementary Protocol.

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
No objections.	

ARTICLE 23

1. At any time after two years from the date on which this Supplementary Protocol has entered into force for a Party, that Party may withdraw from the Supplementary Protocol by giving written notification to the Depositary. 2. Any such withdrawal shall take place upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal. 3. Any Party which withdraws from the Protocol in accordance with Article 39 of the Protocol shall be considered as also having withdrawn from the Supplementary Protocol.

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
No objections.	

ARTICLE 24

The original of this Supplementary Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Protocol. DONE aton thisday of, two thousand and.....]

FAVORABLE ARGUMENTS	CONTRARY ARGUMENTS
No objections.	

Annex II

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

APPENDIX II

Despite the fact that this Annex has not been negotiated in the first meeting of the Group of the Friends of the Co-chairs that took place in Mexico City in February 2009, it is essential to point out that the Supplementary Protocol would be a binding administrative instrument and not a binding civil liability regime. When the parties agree to discuss guidelines to a civil liability regime it is needed to have clear that the Supplementary Protocol would do that with the aim to bring clarity and to support countries that would engage in the adoption of such regimes. It is not reasonable that the Supplementary Protocol would require mandatory actions by Parties regarding the adoption of civil liability schemes. Otherwise, the Parties must have sovereignty to establish such a regime using the Protocol's guidelines as a basis, but that cannot be mandated by the Protocol.

The Brazilian private sector view about these guidelines would be stated after the 2nd meeting of the Group of the Friends of the Co-chairs that will take place in Kuala Lumpur in February 2010.