



Public Research & Regulation Initiative  
Secretariat  
Julianalaan 67  
2628 BC Delft  
The Netherlands  
Phone: +31-15-278-6654  
Email: kim.meulenbroeks@pubresreg.org  
Website: www.pubresreg.org

**PRRI contribution to the First meeting of the Group of the Friends of the  
Co-Chairs Concerning Liability and Redress in the Context of the  
Cartagena Protocol on Biosafety, 23 - 27 February 2009, Mexico City.**

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## **Introduction**

Article 27 of the CPB instructs the Meeting of the Parties (MOP) to “adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the ongoing processes in international law on these matters, and shall endeavour to complete this process within four years”.

There are options of different *form* of the MOP decision (legally binding vs. guidelines) and there are options of different *content* (a civil liability regime, an administrative approach, a trans-national process regime, and a dispute settlement mechanism). The first two substantive approaches work on the national level, whereas the latter two address trans-national questions.

PRRI believes that the debate in the context of article 27 is intended to focus on damage to biodiversity rather than on traditional damage, i.e. damage to persons, goods, economic interests, which is covered in most – if not all – national civil liability systems. Those national civil liability systems could be complemented by Private International law, where appropriate.

PRRI believes that central in the debate on damage to biodiversity should be speedy and adequate *remediation of damage to biodiversity*. PRRI is therefore of the opinion that the goal of conserving biodiversity would best be achieved by systems that would empower national competent authorities to require remediation or undertake remediation of damage to biodiversity and claim the costs from the responsible operator. Such a so-called ‘*administrative approach*’ would be similar in many respects to existing environmental liability systems in several countries and in the EU Directive on environmental liability. Where necessary, the administrative approach can be complemented by a dispute resolution mechanism on the international level, e.g. the Permanent Court of Arbitration in The Hague.

The advantages of an administrative approach for liability are:

- *The interest of biodiversity*: the emphasis of the administrative approach is on remediation and the system allows the competent authority to take immediate action where necessary.
- *The interest of the Government*: An administrative approach will by itself provide a standing for instructions to the responsible operator to cover the costs, because they do not require the involvement of lengthy and costly court procedures.



- *The interest of the general public*: the system contains access to justice for individuals and groups who believe that in specific cases the national competent authorities have not adequately executed the powers granted to them in this respect.
- *The interest of public sector research in modern biotechnology*: by channelling actions and decisions through the competent authority, the public research sector will not have to reserve a portion of their limited resources to handle lengthy and costly law suits, which is particularly important for public research institutes in developing countries.

Finally, although PRRI has in principle no objections against binding international agreement on an administrative approach, PRRI believes that for purely practical reasons the MOP would be advised to focus on getting clear, transparent and workable guidance that would enable countries to transpose the content quickly at the national level. The outline of an administrative approach presented at the end of this paper is therefore presented in the form of guidelines.

With this introduction, PRRI is encouraged by the overall direction of the outcome of MOP4, and offers the following general observations with regard to the sections 1 and 2 in the annex of decision BS-IV-12:

#### “1. Working Towards Legally Binding Provisions - 1.A. Administrative approach”

##### a) Definition of damage.

Negotiations on liability and redress for damage to biodiversity can only meaningfully be done if there is a clear definition of such damage. The draft outline for an administrative approach below contains a proposal for a definition. The definition should also reflect that out crossing from agricultural fields to other cultivated crops, wild relatives or land races is a natural phenomenon and not damage in itself. Whether or not such outcrossing could cause damage depends, among other things, on the characteristics of the trait that is outcrossed. The use of the term ‘contamination’ is scientifically incorrect and aims to create fear rather than understanding.

##### b) Causality

With regard to any damage to biodiversity, liability should only arise where it is possible to establish a causal link between the damage, the genetic modification and the activities or omissions of the operator(s).

##### c) Exemptions

PRRI believes that the ‘state of the art’ as well as ‘the prior risk’ exemptions should be applied to liability, i.e.:

An operator shall not be required to bear the cost of remedial actions taken pursuant to this XX in case of:

- Damage that could not have been foreseen given the scientific knowledge at the time when a risk assessment was undertaken as part of the approval process for the transboundary movement



- Risks that were deemed acceptable by the competent authority in a risk assessment that is part of the approval process for the activity.
- d) Financial security.  
Mandatory financial security (insurance) is only appropriate for activities that are intrinsically hazardous, and not for modern biotechnology or GMOs. A system of mandatory insurance would only be affordable for multinationals, and would most certainly hinder and even stop essential public research in modern biotechnology.
- e) Need for a complete text.  
PRRI strongly recommends that once the negotiations on the square brackets in document BS-IV-12 are conducted, a group of legal experts goes through the remaining text to check whether the remaining text actually offers a complete system, rather than a negotiated text that is not a complete system or a system with inconsistent provisions.

With regard to the sections

- “1. Working Towards Legally Binding Provisions - 1.B. Civil Liability “ and
- “ 2. Working Towards Non-Legally Binding Provisions on Civil Liability”,

PRRI is of the view that any rules or guidance on civil liability for traditional damage should:

- recognise the rights of countries to develop a civil liability system or apply their existing one in accordance with their needs, and
- be limited to different ‘options’ that countries may wish to choose.



## **Draft Guidelines to assist with the establishment of national administrative systems for liability in cases of damage to biodiversity**

*The purpose of these Guidelines is to assist Parties to establish, where necessary and appropriate, a national administrative system based on the “polluter-pays” principle to remedy damage to biodiversity and claim the costs from the responsible operator. This so called administrative approach for damage to biodiversity complements existing national civil liability systems for traditional damage, i.e. damage to persons, goods or economic interests. An administrative approach could be incorporated into national biosafety legislation or be the subject of an independent law, regulation or decree. These Guidelines could be adopted by the Meeting of the Parties in the form of a decision. Where necessary an administrative approach can be complemented by existing mechanisms of dispute settlement, such as the Permanent Court of Arbitration.*

### **Article 1. Objective**

The objective of this regulation/law/decree (XX) is to establish a national administrative system to remedy damage to biodiversity and claim the costs from the responsible operator(s).

### **Article 2. Definitions**

In the context of this XX:

- ‘Damage to the biodiversity’ means damage to species and natural habitats or ecosystems established and regulated by national law in conformity with Article 8 of the Convention on Biological Diversity that has significant and permanent adverse effects on reaching or maintaining the favourable conservation status of such species or habitats. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria and methodology set out in Annex I. Out crossing from agricultural fields to other cultivated crops, wild relatives or land races is a natural phenomenon and not damage in itself. Whether or not such outcrossing could cause damage depends, among other things, on the characteristics of the trait that is outcrossed.
- ‘LMO’ means living modified organism as defined in the Cartagena Protocol on Biosafety.
- et cetera

### **Article 3. Scope**

1. This XX shall apply to damage to biodiversity resulting from the transboundary movement of Living Modified Organisms (LMOs).
2. This XX does not apply to cases of personal injury, to damage to private property or to economic loss, and does not affect any right or obligation under existing civil liability systems regarding these types of damages.
3. This XX shall only apply to damage to biodiversity, where it is possible to establish a causal link between the damage, the genetic modification and the activities or omissions of the operator(s).



#### **Article 4. Remedial Action**

1. Where damage to biodiversity has occurred, the Competent Authority may, at any time:
  - (a) Require the operator to provide supplementary information on the damage occurred;
  - (b) Take, require the operator to take, or give instructions to the operator concerning, all practicable steps to immediately control, contain, remove or otherwise manage the damage factors in order to limit or to prevent further damage to biodiversity;
  - (c) Require the operator to take the necessary remedial measures; and/or
  - (d) Itself take the necessary preventative measures.
2. The Competent Authority shall decide which remedial measures shall be implemented in accordance with Annex II.

#### **Article 5. Remediation Costs**

1. The operator shall bear the costs for the preventative and remedial actions taken pursuant to this XX.
2. An operator shall not be required to bear the cost of remedial actions taken pursuant to this XX in case of:
  - Act of God, force majeure, and Act of war or civil unrest;
  - Intervention by a third party, including intentional wrongful acts or omissions of the third party;
  - Compliance with compulsory measures imposed by a competent national authority;
  - Damage that could not have been foreseen given the scientific knowledge at the time when a risk assessment was undertaken as part of the approval process for the transboundary movement
  - Damage that was deemed acceptable by the competent authority in a risk assessment that is part of the approval process for the activity.

#### **Article 6. Request for Action**

1. Natural or legal persons affected or likely to be affected by damage to biodiversity shall be entitled to request the Competent Authority to take action under this XX.
2. In such circumstances, the Competent Authority shall give the relevant operator an opportunity to respond to the request for action before making a decision on such request for action.

#### **Article 7. Access to Justice**

1. Persons who have requested action under Article 6 of this XX shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the Competent Authority.
2. Operators required by the Competent Authority to take remedial action or to bear the costs of any such actions taken by the Competent Authority shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions and/or orders of the Competent Authority under this XX.