

WORKING GROUP HIGHLIGHTS: WEDNESDAY, 12 MARCH 2008

The fifth session of the Open-ended *Ad Hoc* Working Group of Legal and Technical Experts on Liability and Redress (WGLR 5) in the context of the Cartagena Protocol on Biosafety (hereafter, the Working Group) opened in Cartagena de Indias, Colombia, on Wednesday morning.

During the morning plenary, delegates heard opening statements and an expert presentation on settlement of claims. Delegates then addressed organizational matters and exchanged views on the feasibility of adopting various types of instruments.

In the afternoon, the meeting was adjourned to give delegates time for regional coordination and for bilateral meetings with the Co-Chairs.

OPENING SESSION

Jimena Nieto (Colombia), Working Group Co-Chair, welcomed delegates and emphasized the importance of this session as the last chance to deliver proposed rules and procedures for liability and redress before reporting to COP/MOP 4 in May 2008, in Bonn. Reiterating the need to make progress and to work in the spirit of compromise, she stressed the need for flexibility in negotiating mandates and declared the meeting open.

Charles Gbedemah, Convention on Biological Diversity (CBD) Secretariat, on behalf of Ahmed Djoghlaif, Executive Secretary, acknowledged progress made during WGLR 4 that resulted in a streamlined and comprehensive working document. He called on WGLR 5 to complete its work by the imminent expiration of its mandate.

Juan Lozano, Minister of Housing, Environment and Territory Development, Colombia, welcomed delegates to Cartagena, recalling the city as the birthplace of the Biosafety Protocol in 1999. He drew attention to the need to reconcile development and the conservation of biological diversity, especially in the context of global warming and of achieving the Millennium Development Goals. Lozano highlighted his country's efforts to strengthen institutions for the comprehensive management of the

environment and its components. He called on delegates to look beyond national interests and seek creative solutions in order to achieve consensus at a critical time for the global environmental agenda.

Co-Chair Nieto presented the agenda (UNEP/CBD/BS/WG-L&R/5/1) and the organization of work as contained in Annex I of the annotated agenda (UNEP/CBD/BS/WG-L&R/5/1/Add.1) and delegates adopted them without amendment.

REVIEW OF INFORMATION

The Secretariat then introduced information documents on recent developments in international law relating to liability and redress, including third party liability instruments (UNEP/CBD/BC/WG-L&R/5/INF/1) and a list of documents in the Biosafety Clearing House addressing liability and redress for damage resulting from Living Modified Organisms (LMOs) (UNEP/CBD/BS/WG-L&R/5/INF/2).

Dane Ratcliff, legal counsel for the Permanent Court of Arbitration (PCA) presented on settlement of claims. Noting that arbitration can play an important role in the implementation of Article 27 (liability and redress) of the CBD, Ratcliff explained that the PCA is open to all states and to private parties. He then addressed specific references to the PCA in the revised working draft (UNEP/CBD/BS/WG-L&R/5/2/Rev.1) on approaches and options pertaining to liability and redress, commenting that although mandatory arbitration is desirable, the respective public policy issues should be considered. He also pointed to the PCA Rules for Environmental Arbitration as a tool that could be used in settlement of claims referred to specifically in the operative text. Ratcliff finally highlighted the PCA's fact-finding role that could help determine technical issues, as a less adversarial and more cost-effective method for resolving disputes before entering into arbitration.

Following questions from PALAU, the US, SENEGAL, SOUTH AFRICA and CANADA, Ratcliff explained that parties share equally the cost of arbitrators, which usually constitute around 10% of the total cost of the arbitration process and

highlighted a financial assistance fund available, to developing countries, to offset those costs. He said that the arbitration procedure can be tailored to fit various types of instruments. He concluded by stating that, on average, the PCA's procedure for environmental disputes lasts between one and three years.

ELABORATION OF OPTIONS FOR ELEMENTS OF RULES AND PROCEDURES REFERRED TO IN ARTICLE 27 OF THE PROTOCOL

Following the adoption of the revised working draft (UNEP/CBD/BS/WG-L&R/5/2/Rev.1) as the working document under this agenda item, Co-Chair Lefeber underscored the time limitations facing the Working Group and invited comments on the four options contained in paragraph 33 of the report of the WGLR 4 (UNEP/CBD/BS/WG-L&R/4/L.1) and in paragraph 4 of the annotated agenda of this meeting (UNEP/CBD/BS/WG-L&R/5/1/Add.1)

Zambia, on behalf of the AFRICAN GROUP, rejected the adoption of a non-legally binding instrument on civil liability, calling instead for a legally binding instrument on substantive rules and procedures and on the administrative approach. She stated that the elements on standards and channeling of liability under the primary compensation scheme are acceptable, and called for a compulsory financial security mechanism to be established under a liability instrument. NORWAY supported the AFRICAN GROUP and said a legally binding instrument most closely met the obligations under Article 27.

JAPAN noted that the four options as developed following the informal brainstorming session at WGLR 4, have not been officially discussed or considered in the Working Group and as such could not to be assumed to form the basis for a compromise or consensus package. Co-Chair Lefeber confirmed that the four options were presented as ideas for consideration and reflection.

PUBLIC RESEARCH AND REGULATION INITIATIVE (PRRI), noted that biotechnology has great potential to ensure human wellbeing, particularly in the context of the escalating challenges of population growth, climate change and loss of arable land. He cautioned that some liability regimes could hamper technology transfer, without improving safety, and said PRRI favored a liability system that implores national competent authorities to undertake work addressing damage to biodiversity and to claim back associated costs.

Noting that developing countries are at the highest risk from damage to biodiversity, BOLIVIA stressed that all outcomes should be legally binding.

The EUROPEAN COMMUNITY (EC), emphasized that time had come to find common ground and said the options were useful for focusing discussion. He explained the EC supports an administrative approach, implemented in a two-step manner in which voluntary guidance is agreed to, and transformed into an instrument later on. The EC said it was still considering the concept of a supplementary compensation arrangement.

SENEGAL opposed the EC two-step approach, and regarding options proposed merging a legally binding instrument on private international law together with a non-legally binding

instrument on substantive rules and procedures relating to civil liability; with the option of a domestic law requirement making it incumbent on the importer of a LMOs to maintain financial security to cover any damage caused by LMOs. MALAYSIA also opposed the EC two-step approach and emphasized the need for an internationally recognized and enforceable administrative approach encapsulated within a legally binding regime. On civil liability, he noted that basic substantive rules such as causation, burden of proof and definition of damage also need to be articulated within a legally binding regime. Regarding private international law he pointed to the efficacy of integrating key features of this into a binding international regime and also for a financial mechanism to meet remediation costs where the operator or the State did not have the necessary means and capacity to do so. INDIA, REPUBLIC OF KOREA, BANGLADESH, and ECOROPA supported a legally binding regime. CANADA noted its support for a non-legally binding approach, based on an administrative regime.

IN THE CORRIDORS

With snowstorms currently raging in Montreal, where the last three sessions of the working group were held; delegates deeply appreciated the final session of the Working Group being convened against the backdrop of a sunny Cartagena skyline.

Delegates arrived at the conference center, complete with enticing harbor views, acutely aware of the need for the meeting to deliver a tangible outcome. Most agreed that political commitment is a prerequisite to breaking down the entrenched positions on key issues evident during the last meeting. However, many delegates noted that the limited time remaining might serve as an incentive to meaningful engagement, since the mandate for the Working Group expires by COP/MOP 4. Moreover, others warned that future funding would be harder to come by in the absence of substantive achievement.

Despite the mounting pressure, several delegates expressed reservations on whether the meeting would achieve the necessary breakthrough. Many commented on the challenge ahead in shaping a 50+ page text into a pliable, coherent, negotiated document. Others lamented the restatement of previously entrenched positions during the opening plenary discussion on choice between binding or non-binding instrument. Whilst acknowledging these realities, one delegate countered these fears, saying that the apparent stalemate is a "fact of life in any negotiation."

Others were more optimistic, saying they had already begun to identify some movement in parties' negotiating positions, and awaited more details from a number of key players, who had either not spoken during plenary, or had limited their comments to procedural issues. Many expressed hope that Colombian hospitality and good coffee would foster a spirit of compromise or better still "compromiso"— meaning commitment in Spanish - to making the Biosafety Protocol enforceable.