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SUMMARY OF THE SECOND MEETING OF THE OPEN-ENDED *AD HOC* WORKING GROUP ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY: 20-24 FEBRUARY 2006

The second meeting of the Open-ended *Ad Hoc* Working Group of Legal and Technical Experts on Liability and Redress in the context of the Cartagena Protocol on Biosafety (hereafter, the Working Group) convened from 20-24 February 2006, in Montreal, Canada. Approximately 100 participants attended the meeting, representing governments, non-governmental organizations, industry and academia.

The Working Group was established pursuant to Article 27 (Liability and Redress) of the Cartagena Protocol on Biosafety (hereafter, the Protocol) by the first Conference of the Parties to the Convention on Biological Diversity (CBD) serving as the meeting of the Parties to the Cartagena Protocol on Biosafety (COP/MOP-1) in 2004. It is mandated to:

- review information relating to liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs);
- analyze general issues relating to the potential and/or actual damage scenarios of concern; and
- elaborate options for elements of rules and procedures on liability and redress.

The Working Group will report its activities to the COP/MOP with a view to completing its work by 2007.

On Monday morning, 20 February, participants considered the review of information relating to liability and redress for damage resulting from transboundary movements of LMOs. From Monday to Friday, delegates convened in the plenary, analyzing issues and elaborating options for elements of rules and procedures on liability and redress, including: effectiveness criteria; scope, definition and valuation of damage; causation; channelling of liability; standard of liability; limitation of liability; and mechanisms of financial security.

During the meeting, deliberations focused on a working draft prepared by the Co-Chairs synthesizing proposed texts and views submitted by governments and other stakeholders on approaches, options and issues pertaining to liability and redress in the context of Article 27 of the Protocol (UNEP/CBD/BS/WG-L&R/2/2). The meeting was characterized by discussions of a highly technical legal and conceptual nature. According to many participants, progress was made as the Working Group considered all the options identified in the Co-Chairs' synthesis, and delegates submitted operational texts on the scope, definition and valuation of damage and causation. Following informal consultations held throughout the week, a non-negotiated and non-exhaustive, indicative list of criteria for the assessment of the effectiveness of any rules and procedures referred to under Article 27 of the Protocol was annexed to the meeting's report (UNEP/CBD/BS/WG-L&R/2/L.1). Even though the process is still at an early stage, many participants felt that the second Working Group meeting was a success as it advanced the process a step closer to actual negotiations.

A BRIEF HISTORY OF THE CARTAGENA PROTOCOL ON BIOSAFETY

The Cartagena Protocol on Biosafety addresses the safe transfer, handling and use of LMOs that may have an adverse effect on biodiversity, taking into account human health, with a specific focus on transboundary movements. It includes an advance informed agreement procedure for imports of LMOs for intentional introduction into the environment, and also incorporates the precautionary approach and mechanisms for

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risk assessment and risk management. The Protocol establishes a Biosafety Clearing-House (BCH) to facilitate information exchange, and contains provisions on capacity building and financial resources, with special attention to developing countries and those without domestic regulatory systems. The Protocol entered into force on 11 September 2003, 90 days after receipt of its 50th instrument of ratification. There are currently 132 Parties to the Protocol.

NEGOTIATION PROCESS: Article 19.3 of the CBD provides for Parties to consider the need for, and modalities of, a protocol setting out procedures in the field of the safe transfer, handling and use of LMOs resulting from biotechnology that may have an adverse effect on biodiversity and its components. A Biosafety Working Group (BSWG) was established for this purpose at COP-2 (November 1995, Jakarta, Indonesia).

The BSWG held six meetings between 1996 and 1999. The first two meetings identified elements for the future protocol and helped to articulate positions. BSWG-3 (October 1997, Montreal, Canada) developed a consolidated draft text to serve as the basis for negotiation. The fourth and fifth meetings focused on reducing and refining options for each article of the draft protocol. At the final meeting of the BSWG (February 1999, Cartagena, Colombia), delegates intended to complete negotiations and submit the draft protocol to the first Extraordinary Meeting of the COP (ExCOP), convened immediately following BSWG-6. Despite intense negotiations, delegates could not agree on a compromise package that would finalize the protocol, and the meeting was suspended. Outstanding issues included: the scope of the protocol; its relationship with other agreements, especially those related to trade; the treatment of LMOs for food, feed or processing (LMO-FFPs); its reference to precaution; and documentation requirements.

Following suspension of the ExCOP, three sets of informal consultations were held, involving the five negotiating groups that had emerged during the Cartagena meetings: the Central and Eastern European Group; the Compromise Group (Japan, Mexico, Norway, Republic of Korea and Switzerland, joined later by New Zealand and Singapore); the European Union (EU); the Like-minded Group (the majority of developing countries); and the Miami Group (Argentina, Australia, Canada, Chile, the US and Uruguay). Compromise was reached on the outstanding issues, and the resumed ExCOP (January 2000, Montreal, Canada) adopted the Cartagena Protocol on Biosafety on 29 January 2000. The meeting also established the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP) to undertake preparations for COP/MOP-1, and requested the CBD Executive Secretary to prepare work for development of a BCH. During a special ceremony held at COP-5 (May 2000, Nairobi, Kenya), 67 countries and the European Community signed the Protocol.

ICCP PROCESS: The ICCP held three meetings between December 2000 and April 2002, focusing on: information sharing and the BCH; capacity building and the roster of experts; decision-making procedures; compliance; handling, transport, packaging and identification; monitoring and reporting; and liability and redress.

COP/MOP-1: COP/MOP-1 (February 2004, Kuala Lumpur, Malaysia) adopted decisions on: decision-making procedures; information sharing and the BCH; capacity building; handling, transport, packaging and identification; compliance; liability and redress; monitoring and reporting; the Secretariat; guidance to the financial mechanism; and the medium-term work programme. The meeting agreed that documentation of LMO-FFPs, pending a decision on detailed requirements, would: use a commercial invoice or other document to accompany the LMO-FFPs; provide details of a contact point; and include the common, scientific and commercial names, and the transformation event code of the LMO or its unique identifier. An expert group was established to further elaborate specific identification requirements. Agreement was also reached on more detailed documentation requirements for LMOs destined for direct introduction into the environment. The meeting established a 15-member Compliance Committee, and launched the Working Group on liability and redress under Article 27 of the Protocol.

LIABILITY AND REDRESS WORKING GROUP: At its first meeting (May 2005, Montreal, Canada) the Working Group heard presentations on scientific analysis and risk assessment, State responsibility and international liability, and expanded options, approaches and issues for further consideration in elaborating international rules and procedures on liability and redress.

COP/MOP-2: COP/MOP-2 (May/June 2005, Montreal, Canada) achieved a number of steps towards the Protocol's implementation, adopting decisions on capacity building, and public awareness and participation. It engaged in constructive discussions on risk assessment and risk management, and agreed to establish an intersessional technical expert group. However, COP/MOP-2 did not reach agreement on the detailed requirements of documentation of LMO-FFPs that were to be approved "no later than two years after the date of entry into force of this Protocol."

GROUP OF LEGAL AND TECHNICAL EXPERTS ON LIABILITY IN THE CONTEXT OF ARTICLE 14.2 OF THE CONVENTION: The Group (October 2005, Montreal, Canada) considered the report from the first meeting of the Working Group on liability and redress under the Protocol, and reviewed information and further analysis of pertinent issues relating to liability and redress under Article 14.2 of the CBD. It concluded that it might be premature to decide whether or not to develop an international liability regime focused on damage to biodiversity.

COMPLIANCE COMMITTEE: The Protocol's compliance committee (February 2006, Montreal, Canada) considered the implementation of its rules of procedure approved by the COP/MOP-2 and reviewed general issues of compliance, including interim national reports and information in the BCH.

WORKING GROUP REPORT

Elected at the first meeting of the Working Group, René Lefeber (the Netherlands) and Jimena Nieto (Colombia) continued as Co-Chairs and Maria Mbengashe (South Africa) as rapporteur.

On Monday, 20 February 2006, Co-Chair Nieto opened the second meeting of the Open-ended *Ad Hoc* Working Group of Legal and Technical Experts on Liability and Redress in the context of the Protocol, expressing hope that the meeting would be able to report positive progress to COP/MOP-3. Speaking on behalf of CBD Executive Secretary Ahmed Djoghlaf, Olivier Jalbert, CBD Secretariat, highlighted that the Working Group is addressing novel aspects of liability and redress and that its deliberations can make an important contribution to international law. Delegates adopted the agenda (UNEP/CBD/BS/WG-L&R/2/1) and the organization of work (UNEP/CBD/BS/WG-L&R/2/1/Add.1).

REVIEW OF INFORMATION

On the review of information relating to liability and redress for damage resulting from transboundary movements of LMOs, on Monday, the Secretariat introduced:

- a note on determination of damage on the conservation and sustainable use of biodiversity (UNEP/CBD/BS/WG-L&R/2/INF/3);
- a note on transnational procedures, including the work of the Hague Conference on private international law (UNEP/CBD/BS/WG-L&R/2/INF/4);
- a note on recent developments in international law relating to liability and redress, including the status of international environment-related third party liability instruments (UNEP/CBD/BS/WG-L&R/2/INF/5);
- a compilation of relevant documents from the work of the International Law Commission (UNEP/CBD/BS/WG-L&R/2/INF/6);
- a note on financial security to cover liability resulting from transboundary movements of LMOs (UNEP/CBD/BS/WG-L&R/2/INF/7), noting that despite its efforts, the Secretariat had not been able to arrange an expert presentation, as requested; and
- the report of the Group of Legal and Technical Experts on Liability and Redress in the context of Paragraph 2 of Article 14 of the CBD (UNEP/CBD/COP8/27/Add.3).

Senegal highlighted that liability and redress is essentially a financial issue and that the question of financial security must be studied carefully. Co-Chair Nieto requested that the Secretariat continue trying to arrange for an expert presentation on financial security and update the document on recent developments in international law relating to liability and redress for the next Working Group meeting. Anne Daniel (Canada) reported on the meeting of the Group of Legal and Technical Experts on Liability and Redress in the context of Article 14.2 of the CBD, held in October 2005, in Montreal, Canada. She said the Group saw no immediate need to develop a liability regime under the CBD, but had identified guidance on damage, valuation and restoration as key issues to discuss if the CBD COP decides to develop a liability regime.

ANALYSIS OF ISSUES AND ELABORATION OF OPTIONS FOR RULES AND PROCEDURES REFERRED TO IN ARTICLE 27 OF THE BIOSAFETY PROTOCOL

The Working Group considered analysis of issues and elaboration of options for elements of rules and procedures referred to in Article 27 of the Protocol throughout the week. The Secretariat introduced:

- a compilation of submissions of further views on approaches, options and issues on matters covered by Article 27 of the Protocol (UNEP/CBD/BS/WG-L&R/2/INF/1);
- a synthesis report of proposed texts and views on approaches, options and issues identified pertaining to liability and redress in the context of Article 27 of the Protocol (UNEP/CBD/BS/WG-L&R/2/2) (hereafter, the Co-Chairs' synthesis); and
- a compilation of submissions on experiences and views on criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Protocol (UNEP/CBD/BS/WG-L&R/2/INF/2*).

EFFECTIVENESS CRITERIA: On Monday, Thursday and Friday, the Working Group addressed criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Protocol. This issue was also considered during informal consultations held on Tuesday and Wednesday.

During the discussions, New Zealand, with Australia, asked whether existing liability rules and rules of private international law are less likely to work in the context of LMOs than in other contexts, and stressed the need for agreement on effectiveness criteria to be presented to COP/MOP-3. The US suggested that effectiveness criteria might include: clear understanding of the type and scope of activities covered; clear definition of the scope of damage covered; easy national implementation of rules and procedures; incentives that ensure cautious and carefully managed transboundary movements; and liability assigned to individuals causing harm. Brazil stressed that effectiveness criteria should include preventive measures. Greenpeace International underscored that elements for effectiveness criteria should include a broad definition of scope, a back-up fund, clear rules on burden of proof and standing, and rules and procedure on compensation beyond national jurisdiction.

Austria, for the European Union (EU), said that developing a liability regime should be a two-stage process; a non-binding instrument could be developed, which, after review, could be followed by a legally binding instrument. Switzerland, supported by Brazil, noted that a liability regime is effective when it is in place, but not invoked, and said that the question of which instrument to use should be resolved at the outset. Senegal stressed that the liability regime should be legally binding.

Norway, supported by Iran and Senegal, expressed interest in discussing substance as opposed to effectiveness criteria. Burkina Faso, supported by South Africa, Malaysia, China, and the Washington Biotechnology Action Council, said that consensus on the liability regime should be reached prior to considering effectiveness criteria. Canada indicated that effectiveness criteria would facilitate negotiation of the liability regime, and Switzerland said such criteria are needed prior to considering elements of the liability regime. Canada said that

defining the effectiveness criteria would also benefit the review of the effectiveness of the Protocol under Article 35 (Assessment and Review).

Co-Chair Nieto proposed that a contact group convene to address effectiveness criteria. Austria, for the EU, suggested, that with so few delegates, submissions could be compiled instead. Malaysia, supported by Burkina Faso and Norway, noted that consensus had not been reached on whether to address effectiveness criteria and elements of the liability regime in parallel. Delegates agreed that the issue would be addressed in informal consultations, and submissions would be made.

On Thursday afternoon in plenary, Switzerland presented a list of effectiveness criteria, prepared based on submissions by the US and New Zealand contained in document UNEP/CBD/BS/WG-L&R/2/INF/2* and during informal consultations. He noted that the list is indicative, but not exhaustive. Delegates agreed to include the indicative list in the meeting's report (UNEP/CBD/BS/WG-L&R/2/L.1/Add.1) as Annex I.

***Final Outcome*:** In the meeting's report, the Working Group invites Parties and other governments to take into account the indicative list of effectiveness criteria, contained in Annex I, when elaborating options for elements for rules and procedures under Article 27 of the Protocol. The indicative list includes, *inter alia*, the following effectiveness criteria:

- all elements of the rules and procedures are clearly defined;
- possible damages can be identified and quantified consistent with the rules and procedures;
- it is possible to remedy damage or compensate accordingly;
- the relationship between the rules and procedures and existing law (domestic and international) on liability and redress is clear;
- financial securities to provide compensation and redress are available; and
- the rules and procedures encourage precaution.

SCOPE OF DAMAGE: Functional Scope of Damage: This issue was addressed on Monday and Thursday. The discussion focused on the two options contained in the Co-Chairs' synthesis:

- damage resulting from transport of LMOs, including transit; and
- damage resulting from transport, transit, handling and/or use of LMOs that finds its origin in transboundary movements of LMOs, as well as unintentional transboundary movements of LMOs.

Argentina, Canada and Australia stressed that the functional scope should be consistent with Article 27 of the Protocol, and cover only "damage resulting from transport of LMOs, including transit." Austria, for the EU, Brazil, Burkina Faso, Cuba, Iran, Malaysia, Mexico, Senegal, South Africa, Switzerland, Uganda, Zambia, Greenpeace International and Universidad Nacional Agraria La Molina of Peru, supported the broader option of "damage resulting from transport, transit, handling and/or use of LMOs that finds its origin in transboundary movements, as well as unintentional transboundary movements of LMOs." New Zealand suggested retaining both options for further consideration, noting that discussion on other issues is still nascent. Co-Chair Lefeber noted that the majority of delegates favored the second option and asked delegates to submit operational text to further elaborate the issue. On Thursday, Co-Chair Lefeber introduced new operational texts, based on submissions.

***Final Outcome*:** Both options under discussion were retained for further consideration and included in Annex II of the meeting's report (hereafter, Annex II). Annex II also lists 11 operational texts submitted by the participants during the week.

Geographical Scope of Damage: This issue was considered on Monday and Thursday. Discussions on optional components for the geographical scope focused on three options identified in the Co-Chairs' synthesis:

- damage caused in areas within the limits of national jurisdiction or control of Parties;
- damage caused in areas within the limits of national jurisdiction or control of non-Parties; and
- damage caused in areas beyond the limits of national jurisdiction or control of States.

***Areas within National Jurisdiction*:** Bahamas, Palau and Universidad Nacional Agraria La Molina of Peru supported retaining the option "damage caused in areas within the limits of national jurisdiction or control of Parties." On non-Parties, Bahamas, Iran, Mexico, New Zealand and Palau proposed retaining the option "damage caused in areas within the limits of national jurisdiction or control of non-Parties," with Palau emphasizing that non-Parties must also handle LMO shipments with care. Norway cautioned that this might discourage non-Parties from ratifying the Protocol. Malaysia and Senegal questioned how the regime could be applied to non-Parties. New Zealand proposed changing the wording from "damage caused" to "damage suffered," while Senegal said he saw no difference between these wordings.

***Areas beyond National Jurisdiction*:** On the option "damage caused in areas beyond the limits of national jurisdiction or control of States," Austria, for the EU, Brazil and New Zealand highlighted difficulties in operationalizing such liability. Co-Chair Lefeber asked delegates supporting this option to consider how it could be implemented, in particular, who could present claims on behalf of areas beyond national jurisdiction. Brazil said this question could be addressed in the context of standing. Senegal called for further studies on this option. Highlighting that environmental damage can also occur in the high seas, Switzerland, supported by Austria, for the EU, Bahamas, Mexico, Greenpeace International and Universidad Nacional Agraria La Molina of Peru, proposed retaining the option in areas beyond national jurisdiction. Canada suggested deleting the words "or control of" and proposed studying possible precedents under existing international instruments, such as the Antarctic Treaty, while Mexico suggested requesting other UN agencies to consider this issue in more detail.

Summarizing the discussions, Co-Chair Lefeber said that the Working Group seemed to agree on the option on damage caused in areas within the national jurisdiction of Parties, but not on the two other options. He also noted the need for additional information on damage caused or suffered in areas beyond the limits of national jurisdiction or control of States. New operational texts on the geographical scope, prepared based on submissions, were introduced to the Working Group on Thursday, and delegates made no further comments.

***Final Outcome*:** All three options identified in the Co-Chairs' synthesis were retained for further consideration and included in Annex II. Annex II also contains 10 operational texts submitted by the participants during the week.

Issues for Further Consideration: On Monday afternoon, delegates discussed issues for further consideration in relation to the scope of damage and addressed, based on the Co-Chairs' synthesis:

- limitation on the basis of geographic scope (i.e. protected areas or centers of origin);
- limitation in time;
- limitation to the authorization at the time of the import of the LMOs; and
- determination of the point of the import and export of the LMOs.

Regarding the option of "limitation on the basis of geographical scope," delegates agreed that there should be no such limitation. The Washington Biotechnology Action Council suggested that there should be no time limitation, considering that some forms of damage may manifest in the long-term, while Canada and Switzerland supported the option of "limitation in time" and stressed the applicability of general rules of international law. Palau stressed that the liability regime should cover damages incurred before the Protocol entered into force. This option was deferred for further consideration.

On the option of "limitation to the authorization at the time of the import of the LMOs," Liberia suggested deferring the issue for further consultation, and Austria, for the EU, noted that rules and procedures under Article 27 of the Protocol should not be limited to the first transboundary movement of LMOs, taking into account the importance of the use for which an LMO has been destined and authorized.

On the option of "determination of the point of the import and export of LMOs," Malaysia noted that the definition of "transboundary movement" in Article 3(k) of the Protocol is unclear and, supported by Austria, for the EU, and Canada, stressed the need for a precise definition in order to identify where the transboundary movement begins and ends, and whether the rules should be applicable to the exclusive economic zone or the contiguous zone. Greenpeace International said that unintentional movements of LMOs should be included. Delegates agreed to defer the option for further discussion.

On Thursday, new operational texts, based on submissions, were introduced to the Working Group, and delegates made no further comments.

***Final Outcome*:** The option of "limitation on the basis of geographical scope" was removed from the list of options identified in the Co-Chairs' synthesis, whereas the other three options were retained for further consideration and included in Annex II. Annex II also contains operational texts submitted by the participants during the week: eight on "limitation in time;" five on "limitation to the authorization at the time of the import of the LMOs;" and six on "determination of the point of the import and export of the LMOs."

DAMAGE: Definition of Damage: This issue was addressed on Monday afternoon and Tuesday morning. Discussions focused on six main options for the definition of damage identified in the Co-Chairs' synthesis:

- damage to conservation and sustainable use of biodiversity;
- damage to environment;
- damage to human health;
- socioeconomic damage, especially in relation to indigenous and local communities;
- traditional damage; and
- cost of response measures.

***Damage to Conservation and Sustainable Use of Biodiversity and Damage to Environment*:** Regarding "damage to conservation and sustainable use of biological diversity or its components," Norway and Austria, for the EU, advocated retaining this option. Argentina, supported by Senegal, stressed the need to identify the relevant evaluation and assessment criteria. On criteria relating to conservation of biodiversity, Austria, for the EU, proposed: a change that has an adverse impact on plants and animal species, especially those protected under national or international law; and a change that is significant compared to baseline data. On criteria relating to sustainable use of biodiversity, he identified changes resulting in the reduction of biodiversity's potential to provide goods and services, or loss of income.

Brazil and Malaysia advocated a broader definition of damage, with Malaysia stating that it should not be limited only to "conservation" and "sustainable use," but should also include other facets, such as damage to human health and income, and the cost of preventive and response measures. Senegal said the option of "environmental damage" could encompass the two elements in "damage to conservation and sustainable use of biological diversity or its components." The Global Industry Coalition announced that it is working on a definition of damage, including the criteria.

Regarding "damage to environment," Liberia and Switzerland noted that this option overlaps with "damage to conservation and sustainable use of biological diversity or its components." Highlighting the overlap, Canada, supported by Liberia, Mexico and Norway, quoted CBD Article 2 (Use of Terms) and proposed deleting the option of "damage to environment." Malaysia, supported by Burkina Faso, stressed that CBD Article 2 may not cover impairment of air, water and soil quality, taking into account the nature of the liability and redress under consideration. Burkina Faso supported including impairment of soil, air and water in the definition of damage and proposed, supported by Iran, retaining "damage to environment" rather than "damage to conservation and sustainable use of biological diversity or its components."

Liberia suggested changing "damage to environment" to "damage to other components of the environment," and Switzerland called for a clearer definition of damage. The Conservation Biology Program at the University of Minnesota, supported by Greenpeace International, said it would be impossible to limit the liability regime to "damage to conservation and sustainable use of biological diversity or its components" without including elements from "damage to environment." Greenpeace International said the options under the latter are necessary, but insufficient. Co-Chair Lefeber requested text proposals.

***Damage to Human Health*:** On "damage to human health," Peru noted that Article 27 of the Protocol does not mention human health. The Washington Biotechnology Action Council said the definitions pertaining to human health should be consistent with those of the World Health Organization. Austria, for the EU, noted the need to determine whether and how to include human health in the liability regime.

***Socioeconomic Damage*:** On "socioeconomic damage," Zimbabwe clarified that this component refers to socioeconomic damage resulting from damage to sustainable use of biodiversity. The Global Industry Coalition said socioeconomic aspects cannot be viewed as damage since these would be too difficult to define. Benin, Burkina Faso, Lesotho, Malaysia, Norway and Senegal said the definition of damage must take into account socioeconomic aspects. Austria, for the EU, said that reference to socioeconomic damage overlaps with damage relating to sustainable use and traditional damage.

***Traditional Damage*:** On Tuesday morning, delegates addressed "traditional damage," including: loss of life or personal injury; loss of or damage to property; and economic loss. Zimbabwe, for the African Group, supported retaining this option. Austria, for the EU, noted that it overlaps with "damage to conservation and sustainable use of biological diversity or its components" and "damage to human health," and proposed addressing traditional damage to the extent it is not covered by other options. While Switzerland argued that States are free to include this option in either a binding or non-binding instrument, Argentina said its inclusion has no legal basis in either the CBD or the Protocol, and that traditional damage is covered by national legislation. Co-Chair Lefeber said the relationship between traditional damage and the other options requires further consideration.

***Cost of Response Measures*:** Regarding "cost of response measures," Austria, for the EU, supported by Switzerland and Norway, said this option is not a separate category of damage, but relevant to all categories, and should be covered by the liability and redress rules under development. Malaysia and Zimbabwe, for the African Group, supported retaining this option as a separate category, and highlighted its link with preventive measures.

***Final Outcome*:** All six options identified in the Co-Chairs' synthesis were retained for further consideration and included in Annex II. In addition, Annex II contains nine operational texts submitted by participants during the week.

Valuation of Damage to Conservation of Biodiversity: This issue was addressed on Tuesday morning. Discussions focused on possible approaches to the valuation of damage to conservation of biodiversity, based on two main options identified in the Co-Chairs' synthesis:

- costs of reasonable measures taken or to be taken to restore the damaged components of biodiversity; and
- monetary compensation to be determined on the basis of criteria to be developed.

The Washington Biotechnology Action Council suggested that monitoring costs relating to restoration must also be considered recoverable. Co-Chair Lefeber noted that the UN Compensation Commission has acknowledged that in other contexts monitoring costs are recoverable.

Austria, for the EU, supported by Norway, said the valuation of damage should reflect costs of reasonable measures taken to ensure both "primary restoration" and "complementary restoration," and noted that the liability regime should provide not only for the recovery of restoration costs, but must also impose obligations on the operator to take restoration measures.

Malaysia, with Norway, argued that monetary compensation should be paid in cases of irreparable damage. Co-Chair Lefeber asked delegates to consider who would be the beneficiary of monetary compensation. Senegal asked who would determine the amount of monetary compensation. Liberia argued that reference to monetary compensation should be deleted, since the valuation of damage is only for purposes of restoration. Zimbabwe, for the African Group, with Malaysia, suggested that when monetary compensation for irreparable damage cannot be made to an individual such payment could go to a community instead. Palau asked whether both States and private actors could be claimants. Malaysia argued that if damage is diffuse, compensation could be paid to the State. Noting that potential shortfalls may arise in the restoration of equivalent components, he also said that such shortfalls could specify the value of a monetary compensation. Responding to Co-Chair Lefeber's question if monetary compensation should be limited to the purchase of environmental goods, Malaysia said that limiting the use of compensation raises the issue of who should bear the cost associated with monitoring the proper use of compensation. Canada noted that work on valuation by the CBD's Subsidiary Body on Scientific, Technical and Technological Advice could benefit the Working Group. Burkina Faso argued that interim compensation must be paid to communities while restoration is underway.

Palau asked how species extinction, or the destruction of the foundation of one's spiritual belief, are to be considered, noting that when these are not valued economically their valuation is arbitrary. Iran noted that in cases of genetic damage, which cannot be reversed, compensation must be continuous. The Public Research and Regulation Foundation urged countries to clarify whether a gene moving into the natural environment constitutes damage. The US cited their national experience with the Superfund and the Oil Pollution Act, noting that under each system monetary compensation is considered only once restoration has occurred. Greenpeace International argued for an approach to valuation that could leave open the possibility of alternative valuation methods and include consequential damage.

***Final Outcome*:** The two main options identified in the Co-Chairs' synthesis were retained for further consideration and included in Annex II. In addition, Annex II contains five operational texts submitted by the participants during the week.

Issues for Further Consideration Regarding Valuation of Damage: This topic was addressed on Tuesday morning. Discussions focused on five options identified in the Co-Chairs' synthesis:

- determination of biodiversity loss;
- obligations to take response and restoration measures;
- special measures in case of damage to centers of origin and centers of genetic diversity;
- formulation of qualitative threshold of damage to conservation and sustainable use of biodiversity; and

- valuation of damage to the environment, sustainable use of biodiversity, human health, socioeconomic damage and traditional damage.

***Determination of Biodiversity Loss*:** On "determination of biodiversity loss," including baseline conditions or other means to measure loss, the Washington Biotechnology Action Council, supported by Malaysia, emphasized the importance of preventive measures, saying that not all damage can be remedied by monetary compensation. Co-Chair Lefeber, referring to the UN Compensation Commission, said that baseline conditions could be used to measure the loss. Iran, with Zimbabwe, for the African Group, said that not much work has been undertaken in developing countries regarding baseline conditions, and that it is therefore difficult to use them for measuring biodiversity loss. Djibouti proposed using baseline data and said other means to measure biodiversity loss should be explored and used. Greenpeace International suggested that baseline assessments could perhaps be tied to risk assessments under the Protocol.

***Response and Restoration Measures*:** On "obligations to take response and restoration measures," no interventions were made, however Co-Chair Lefeber requested delegates to submit operational texts on this issue.

***Damage to Centers of Origin and Genetic Diversity*:** Senegal, supported by Iran, Mexico and Zimbabwe, for the African Group, highlighted the importance of special measures for damage to centers of origin and centers of genetic diversity, and proposed that, in addition to restoration and rehabilitation measures, centers suffering damage should receive monetary compensation. Malaysia highlighted the need to compensate such centers in the event of damage, and said that additional measures should be explored.

Universidad Nacional Agraria La Molina of Peru said that the instrument under development should provide special consideration of these centers. Washington University said that when considering valuation of damage to centers of origin, geographic considerations should be taken into account. New Zealand proposed incorporating this item into the option of "determination of biodiversity loss," noting that the latter could adequately cover the former. Malaysia, with Zambia, favored retaining this issue for further consideration.

Co-Chair Lefeber identified a general consensus that centers of origin and genetic diversity have higher value than other locations and deserve particular attention.

***Formulation of Qualitative Threshold of Damage*:** On "formulation of qualitative threshold of damage to conservation and sustainable use of biodiversity," Liberia said that this issue needs to be considered carefully in view of the genetic composition, especially in case of small populations, the nature of adverse effects and the occurrence of damage. Senegal said that establishing thresholds is necessary for determining damage, and the US stressed that this is a standard practice. Noting that the issue of threshold could be related to burden of proof and quantification of damage, Malaysia opposed establishing a qualitative threshold.

***Valuation of Different Types of Damage*:** Regarding "valuation of damage to the environment, sustainable use of biodiversity, human health, socioeconomic damage and traditional damage," Malaysia suggested developing an indicative list of factors to be taken into account with respect to socioeconomic damage and traditional damage, considering that the discussion has not yet matured. Switzerland, opposed by Norway, proposed not discussing valuation of damage to human health and traditional damage given that there is plenty of information available. Senegal suggested taking into account the CBD indicators for the 2010 biodiversity target.

***Final Outcome*:** In Annex II, the section was re-titled as "issues for further consideration" and lists three items with operational texts submitted by the participants during the week:

- obligations to take response and restoration measures, including seven operational texts;
- special measures in case of damage to centers of origin and centers of genetic diversity to be determined, including three operational texts; and
- valuation of damage to sustainable use of biodiversity, human health, socioeconomic damage and traditional damage, including two operational texts.

CAUSATION: This issue was addressed on Tuesday afternoon. Discussion focused on the three options identified in the Co-Chairs' synthesis, including:

- level of regulation (international or domestic level);
- establishment of the causal link between the damage and activity; and
- burden of proof in relation to establishing the causal link.

Co-Chair Lefeber asked whether the Working Group should formulate rules on causation, or whether this should be left to the national level. Austria, for the EU, proposed retaining the section as it stands. Malaysia proposed postponing discussions on this issue until after the standard of liability, including strict liability, has been considered.

On Thursday morning, Co-Chair Lefeber circulated a revised operational text on causation, prepared on the basis of submissions by delegates.

***Final Outcome*:** The issues and options for further consideration listed above are all retained for further consideration and included in Annex II. Annex II also contains nine operational texts submitted by the participants during the week.

CHANNELLING OF LIABILITY: State Responsibility and State Liability: This issue was addressed on Wednesday morning. Discussions focused on two main options identified in the Co-Chairs' synthesis:

- State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol);
- State liability (for acts not prohibited by international law), including the sub-options of: primary State liability; residual State liability; and no State liability;

Co-Chair Lefeber asked whether special rules need to be developed on State responsibility, or whether existing rules under international law are sufficient. Austria, for the EU, supported by Argentina, Iran, Norway, Palau and Switzerland, indicated that there is no need to formulate special rules on State responsibility under Article 27 of the Protocol. Switzerland, supported by Trinidad and Tobago, proposed adding a provision stating that the rules developed under Article 27 of the Protocol should not prejudice the general rules of international law for State responsibility.

Senegal said that States are responsible for the security of their citizens and highlighted the role of information, including the advanced informed agreement procedure and the BCH, when authorizing the import of LMOs. Trinidad and Tobago, supported by Barbados, said channelling responsibility to importing States that rely on the information they receive during the authorization process "would be harsh." Norway, with Zimbabwe, for the African Group, said notifiers should be responsible for the information they provide during the process of import authorization. Namibia stressed the need to distinguish between the responsibility of importing and exporting States.

Co-Chair Lefeber noted that to channel liability to non-Party exporting States is not possible under international law. The Washington Biotechnology Action Council said imports can be made conditional, but procedures for Parties and non-Parties should be consistent. Greenpeace International stressed that an importing State can require an indemnity or guarantee of liability from a non-Party exporter, and identified the need for a special tribunal with compulsory jurisdiction.

Co-Chair Lefeber noted an emerging consensus that no special rules on State responsibility need to be developed under Article 27 of the Protocol, that the liability and redress rules under development are without prejudice to the general rules of international law, and that "primary State liability" could be deleted from the list of options.

***Final Outcome*:** Annex II retains both options, State responsibility and State liability, for further consideration. On State responsibility, Annex II lists two new sub-options: (i) there is no need to develop special rules for State responsibility and (ii) there is a need to clarify that the general rules of international law for State responsibility continue to apply. On State liability, the sub-option "primary State liability" has been deleted from the list, while the options of "residual State liability" and "no State liability" are retained.

Civil Liability and Administrative Approaches: This issue was addressed on Wednesday morning. Discussions focused on two main options identified in the Co-Chairs' synthesis:

- civil liability (harmonization of rules and procedures); and
- administrative approaches based on allocation of costs of response measures and restoration measures.

Delegates started discussions by clarifying the difference between civil liability and administrative approaches. Austria, for the EU, said that under civil liability those who have suffered damage can initiate compensation proceedings, while public authority plays a decisive role in the case of an administrative approach. Co-Chair Lefeber explained that the option on administrative approaches means that in case of an environmental emergency, a State authority would take response and restoration measures where the operator does not take action. He further elaborated that in case neither the operator nor the State takes action, a third party can step in and the operator is required to contribute to a fund. Replying to the US, Co-Chair Lefeber commented that under this option the State plays an oversight role. Austria, for the EU, indicated that this depends on the nature of damage and in a case of purely ecological damage the State should bear liability.

***Final Outcome*:** Both options, civil liability and administrative approaches, were retained for further consideration and included in Annex II.

Issues Relating to Civil Liability: This issue was addressed on Wednesday morning. Discussions focused on five issues identified in the Co-Chairs' synthesis:

- type of damage;
- places where damage occurs;
- degree of risk involved in a specific type of LMO as identified in the risk assessment;
- unexpected adverse effects; and
- operational control of LMOs.

Co-Chair Lefeber requested views on issues relating to civil liability, but Switzerland noted that it was difficult to discuss this issue, including types of damage, separate from the standard of liability.

***Final Outcome*:** All the issues were retained for further consideration and included in Annex II.

STANDARD OF LIABILITY AND CHANNELLING OF LIABILITY: This issue was addressed on Wednesday. Discussions focused the standard of liability and channelling of liability based on options identified in the Co-Chairs' synthesis:

- fault-based liability, including the following options for channelling such liability: a person in the best position to prevent the damage; a person with operational control; a person in non-compliance with the Protocol; an entity responsible for putting in place the provisions for implementing the Protocol; and a person to whom intentional, reckless or negligent acts or omissions can be attributed.
- strict liability, channelled either based on a causal link, or to one or more of the following: the developer, producer, notifier, exporter, importer, carrier and supplier.

Standard of Liability: Austria, for the EU, said that strict liability should be the point of departure and explained that its position on this issue is guided by several considerations, including the polluter pays principle, workability and effectiveness, and incorporation of an effective remedy. Brazil, Iran, Malaysia, Mexico, Norway, Palau, Senegal, Switzerland, Zimbabwe and the Washington Biotechnology Action Council agreed that liability should be strict. The Washington Biotechnology Action Council also said that strict liability is common for new technologies due to the information disparity between producers and possible victims of damage, and noted the importance of joint and several liability because this would give victims broader recourse, especially when those liable have gone bankrupt. Greenpeace International said that strict liability is essential, stressing that it should also be joint and several so as to ensure effective and adequate compensation.

New Zealand noted that there are advantages and disadvantages with both strict liability and fault-based liability. The US advocated fault-based liability, explaining that in other regimes that apply strict liability the hazard in question is ubiquitous, whereas with LMOs the potential hazard depends on the receiving environment. Noting that strict liability is appropriate for cases involving high risk, Argentina said that, in the case of LMOs, liability should be fault-based.

The Global Industry Coalition noted that for traditional damage Swiss Re no longer excludes coverage of biotechnology-related risk, and stressed that insurance will not be available if rules at the national and international levels do not meet the criteria for insurability. Palau asked why insurance companies do not insure LMO-related risks when, according to some, LMO technology is not considered hazardous. The Public Research and Regulation Foundation responded that insurance companies do not insure LMO-related risks because they are unable to measure the risk and therefore cannot set premiums. Switzerland noted that in cases when classic insurance does not cover hazards associated with LMOs, alternative insurance arrangements and insurance pooling could be explored. Co-Chair Lefeber concluded that the issue of strict liability needs further consideration.

Channelling of Liability: Austria, for the EU, supported by Mexico, Norway and Switzerland, said liability should be channelled to a single person, with Switzerland noting that this person could be the exporter and that liability could be shared. New Zealand said liability should be channelled to a specific actor. Palau said liability should be channelled to multiple persons, and did not support state liability. Zimbabwe, for the African Group, with Brazil, favored channelling liability to one or more persons. Iran said that liability should be channelled to the exporter. Malaysia said that channelling should be based on the polluter pays principle, but that channelling to multiple persons is desirable, like under the Basel Protocol on Liability and Compensation. He also said that subject to certain conditions there should be some residual state liability. Co-Chair Lefeber asked Malaysia if diffuse liability under the Basel Protocol on Liability and Compensation might explain why it has not entered into force, to which Malaysia responded that the reasons are more complicated. Senegal said there might be cases that justify State liability, for instance, when the State fails to establish appropriate rules and controls. The US, with Brazil, said that channelling should be based on a causal link.

The Public Research and Regulation Foundation stressed the importance of clearly defining the producer and polluter, and noted that while the licensor of a technology can be easily identified, the technology's application lies beyond his or her control. He also emphasized the importance of identifying specific risk scenarios and developing insurance solutions that specifically address those risks.

Highlighting that biotechnology is a cutting-edge industry that carries both benefits and risks, Zimbabwe, for the African Group, advocated for a strict liability regime to prevent hazards, and warned of the consequences of not taking precautionary measures.

***Final Outcome*:** Both strict liability and fault-based liability, together with all the related channelling options, were retained for further consideration and included in Annex II.

Exemptions to, or Mitigation of, Strict Liability: This issue was addressed on Wednesday afternoon. Discussions focused on exemptions to, or mitigation of, strict liability, based on two options identified in the Co-Chairs' synthesis:

- no exemptions; and
- possible exemptions to, or mitigations of strict liability, including Act of God/*force majeure*; act of war or civil unrest; intervention by a third party; compliance with compulsory measures imposed by a competent national authority; permission by applicable law or specific authorization; and "state-of-the-art" in relation to activities not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

Senegal advocated the option of "no exemptions," noting that it will eliminate legal excuses for not being liable. Austria, for the EU, supported, in principle, possible exemptions, and suggested retaining all options for exemptions and mitigations for further consideration. Burkina Faso, supported by Malaysia, suggested deleting reference to "exemptions" and referring only to "mitigation." Lesotho, Mexico, Norway and Zambia supported the option of "possible exemptions to or mitigation of strict liability" only in circumstances of acts of *force majeure* and war or civil unrest, and suggested deleting other options for exemptions. Switzerland opposed the deletion of the option of exemptions in the case of permission by an applicable law or a specific authorization, noting that it does not constitute liability shifting and that the issue needs further consideration.

Malaysia proposed deleting the "state-of-the-art" option, and with the Washington Biotechnology Action Council, highlighted the limited support for research on biotechnology risk assessment. The Global Industry Coalition highlighted that numerous academic and government institutions are engaged in research on the safety of biotechnology, and said that all relevant information is available on the BCH website. Greenpeace International stressed that any exemption may encourage the shifting of risks and eventually escaping liability.

***Final Outcome*:** All the options were retained for further consideration and included in Annex II.

Additional Tiers of Liability: The issue of additional tiers of liability was addressed on Wednesday afternoon. Discussions focused on options identified in the Co-Chairs' synthesis, namely situations where:

- the primary liable person cannot be identified;
- the primary liable person escapes liability on the basis of a defense;
- a time limit has expired;
- a financial limit has been reached;
- financial securities of the primary liable person are not sufficient; and
- the provision of interim relief is required.

Zimbabwe, supported by Greenpeace International, emphasized the need for additional tiers of liability, but said that some options are irrelevant such as the situation where a time limit has expired. He suggested adding to the list of options a compensation fund to which industry would make contributions. Co-Chair Lefeber raised questions relating to the proposed fund, including: the basis for its establishment; criteria for determining the contributions; and the institution responsible for managing the fund. He cited the International Fund for Compensation for Oil Pollution Damage as an example, but said it only involves a small number of companies, while the proposed fund would involve a large number of companies. Australia asked how an industry fund would be relevant in cases where damage has been caused by public research institutions.

***Final Outcome*:** All six options were retained for further consideration and included in Annex II.

Issues for Further Consideration Relating to Civil Liability: Issues for further consideration relating to civil liability were addressed on Wednesday afternoon. Discussions focused on options listed in the Co-Chairs' synthesis:

- combination of fault liability and strict liability;
- recourse against a third party by the person who is liable on the basis of strict liability;
- joint and several liability or apportionment of liability; and
- vicarious liability.

***Combination of Fault Liability and Strict Liability*:** Co-Chair Lefeber noted that a combination of fault liability and strict liability can be found in the Basel Protocol on Liability and Compensation, while the Nuclear Liability Convention and the Oil Pollution Damage Convention establish regimes where strict liability is channelled to a single person. He also noted that this may be one of the reasons why the latter two regimes are both in force and successful. New Zealand proposed retaining this option.

***Recourse against a Third Party by the Person Liable on the Basis of Strict Liability*:** Co-Chair Lefeber noted no interventions and said this option will be retained for further consideration.

***Joint and Several Liability or Apportionment of Liability*:** Senegal proposed retaining this option, stressing that without prejudice to its responsibility under international law a State may also be held civilly liable. Malaysia stated that these two options are not as exclusive as the wording implies, and noted the Convention on International Liability for Damage Caused by Space Objects where a victim can choose to claim full compensation from any of the launching States, but that States may also agree to apportion liability amongst themselves.

***Vicarious Liability*:** Malaysia explained that the concept of vicarious liability applies when a principal is liable on behalf of the agent and is not peculiar to fault-based liability, and, supported by Namibia, proposed retaining the option.

***Final Outcome*:** All six options were retained for further consideration and included in Annex II.

LIMITATION OF LIABILITY: This issue was addressed on Wednesday afternoon. Discussions focused on the following issues and options identified in the Co-Chairs' synthesis:

- limitation in time (relative time-limit and absolute time-limit);
- limitation in amount, including: caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined, and to be considered in conjunction with mechanisms of financial security.

Limitation in Time: Austria, for the EU, supported by Iran and Norway, said that both absolute and relative time limits are required. Switzerland warned that the liability regime will never come into effect if limits are removed. Malaysia noted the possibility of having both absolute and relative time limits in one instrument, and said that in other liability regimes relative time runs from the moment you are aware of, or ought reasonably be aware of, damage. Zimbabwe, for the African Group, said that there should be no absolute time limit, but that a relative time limit is needed. Trinidad and Tobago, for the Caribbean region, supported by Senegal, said there should be no limits.

***Final Outcome*:** This option was retained for further consideration and included in Annex II.

Limitation in Amount: The Washington Biotechnology Action Council said that the exporter might not be able to pay compensation in the case of an accident, which is why the question of caps is relevant. Co-Chair Lefeber noted that unlimited liability may not be appropriate if damages are so large that they cannot be compensated through insurance or the assets of the liable person. Malaysia, supported by Iran, Liberia, Senegal and Zambia, said that the focus should be on justice and equity, that the victim should not go uncompensated nor inadequately compensated, and that there should be no upper limit on the amount of compensation. Burkina Faso suggested differentiating categories of damage and proposed using environmental accounting to assess damages for each category. Co-Chair Lefeber concluded that participants seemed to agree on the need for a prompt and adequate compensation to victims, but the issue of limitation of liability should be further explored.

***Final Outcome*:** This option was retained for further consideration and included in Annex II.

MECHANISMS OF FINANCIAL SECURITY: Coverage of Liability: This issue was addressed on Wednesday afternoon. The discussion focused on two options identified in the Co-Chairs' synthesis: compulsory financial security and voluntary financial security.

Iran and Lesotho supported a compulsory financial security, while Austria, for the EU, supported a voluntary financial security. Australia cautioned that financial security should not restrict the movement of LMOs. Co-Chair Lefeber mentioned compulsory insurance as a means for financial security, and Norway explained that in the Norwegian Gene Technology Act financial security is a condition for approval of certain activities.

***Final Outcome*:** Both options were retained for further consideration and included in Annex II.

Supplementary Collective Compensation Arrangements: This issue was addressed on Thursday morning. Discussions focused on options for supplementary collective compensation arrangements contained in the Co-Chairs' synthesis:

- funds financed by contributions from the biotechnology industry to be made in advance;
- funds financed by contributions from the biotechnology industry to be made after the occurrence of the damage;
- a public fund; and
- a combination of public and private funds.

Co-Chair Lefeber stated that the polluter pays principle would prevail in cases where States have not violated international law. He noted that there are some exceptions where the liability cannot be channelled to the polluter, and questioned whether a special fund should be used in cases of such exemptions. Referring to draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the International Law Commission (UNEP/CBD/BS/WG-L&R/2/INF/6), he highlighted two principles: ensuring prompt and adequate compensation to victims of transboundary damage, including damage to the environment; and developing appropriate international agreements to make special arrangements such as compensation funds and financial security measures.

Zambia, on behalf of the African Group, proposed retaining for further consideration the options of funds financed by contributions from biotechnology industry to be made in advance and the combination of public and private funds. Senegal supported funds financed by contributions from the biotechnology industry to be made after the occurrence of the damage, and questioned the legal basis for contributions to be provided in advance. Responding to Senegal, Co-Chair Lefeber gave some examples such as the International Oil Pollution Compensation Funds. The Global Industry Coalition questioned whether the term "biotechnology industry" is inclusive of government and public institutions engaged in biotechnology research.

***Final Outcome*:** The option of a "public fund" was removed from the list of options, while all the other options were retained for further consideration and included in Annex II.

SETTLEMENT OF CLAIMS: Optional Procedures: This issue was addressed on Thursday morning. Discussions focused on optional procedures for the settlement of claims based on four main options identified in the Co-Chairs' synthesis:

- inter-State procedures (including settlement of disputes under CBD Article 27);
- civil procedures (involving: jurisdiction of courts or arbitral tribunals; determination of the applicable law; and recognition and enforcement of judgments or arbitral awards;
- administrative procedures; and
- a special tribunal (such as the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment).

Mexico expressed interest in inter-State procedures, but noted that the issue requires more analysis. Greenpeace International stressed that jurisdiction should be granted to the place the damage occurred, and that the applicable law should be the law of the place the damage occurred, noting that victims should be able to rely on their own national laws. He also emphasized the need for an international tribunal and mentioned the International Tribunal for the Law of the Sea. Namibia, for the African Group, said that all the dispute settlement options should be retained. Canada said that without clearer resolution on other issues, such as the definition and valuation of damage, discussion on the claims methodology would be premature and abstract. Switzerland said more clarity is needed on the possible dispute settlement arrangements.

***Final Outcome*:** All the options were retained for further discussion and included in Annex II.

STANDING/RIGHT TO BRING CLAIMS: On Thursday morning, the issue of standing/right to bring claims was opened for discussion, but no interventions were made.

***Final Outcome*:** The four main options identified in the Co-Chairs' synthesis were retained for further consideration and included in Annex II, namely:

- level of regulation (international and/or domestic level);
- distinction between inter-State procedures and civil procedures;
- level of involvement in the transboundary movement of LMOs as a requirement of standing/right to bring claims; and
- types of damage.

NON-PARTIES: This issue was addressed on Thursday morning. Discussions focused on the option identified in the Co-Chairs' synthesis, namely the development of possible special rules and procedures in relation to LMOs imported from non-Parties, such as bilateral agreements requiring minimum standards.

Zimbabwe stated that the provisions of the Protocol should be applied when Parties enter into agreements with non-Parties. The Washington Biotechnology Action Council said that when Parties trade with non-Parties they should ensure that the transboundary movements of LMOs are consistent with the Protocol. Canada raised a question about the applicability of rules and procedures to a State that is a Party to the Protocol, but not a Party to the future instrument on liability and redress. Co-Chair Lefeber replied that the issue should be further explored.

***Final Outcome*:** The issue was retained for further consideration and the option of possible special rules and procedures was included in Annex II.

USE OF TERMS: This issue was addressed on Thursday morning, and was based on the Co-Chairs' synthesis. Co-Chair Lefeber said it was not necessary to consider this issue at the present stage, noting that a list of terms with their definitions will be compiled at a later stage.

***Final Outcome*:** The section on use of terms was deleted and not included in Annex II.

COMPLEMENTARY CAPACITY-BUILDING MEASURES: This issue was addressed on Thursday morning focusing on the options contained in the Co-Chairs' synthesis:

- use of measures adopted under Article 22 of the Protocol, including the use of a roster of experts and the Action Plan for Building Capacities for Effective Implementation of the Protocol; and
- development of specific complementary capacity-building measures, based on national needs and priorities, for the design and implementation of national rules and procedures on liability and redress.

Zambia emphasized the need for capacity building, especially in developing countries. Co-Chair Lefeber said that capacity-building measures will not replace rules and procedures on liability and redress.

***Final Outcome*:** Both options were retained for further consideration and included in Annex II.

CHOICE OF INSTRUMENTS: This issue was considered on Thursday morning based on the options identified in the Co-Chairs' synthesis:

- one or more legally binding instruments, including: a protocol or an annex to, or an amendment of, the Biosafety Protocol; and a liability protocol to the CBD;
- one or more legally binding instruments in combination with interim measures pending the development and entry into force of the instrument(s);
- one or more non-binding instruments, including guidelines and model law or model contract clauses;
- a two-stage approach whereby a non-binding instrument(s) is developed first, and a legally-binding instrument(s) is considered later;

- a mixed approach (combination of one or more legally binding instruments, or combination of one or more non-binding instruments); and
- no instrument.

As no interventions were made, Co-Chair Lefeber concluded that it was premature to discuss this item.

***Final Outcome*:** All options were retained for further consideration and included in Annex II.

CLOSING PLENARY

On Friday morning, Co-Chair Nieto opened the closing plenary and Rapporteur Mbengashe introduced the meeting's draft report (UNEP/CBD/BS/WG-L&R/2/L.1) and its two annexes (UNEP/CBD/BS/WG-L&R/2/L.1/Add.1). Malaysia proposed, and delegates agreed, that the meeting's report should indicate that Annex I, which contains the indicative list of criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Protocol, was "finalized after informal consultations and on the basis that it was not negotiated and is non-exhaustive." Delegates then adopted the report, as amended.

Olivier Jalbert, CBD Secretariat, congratulated the Working Group for achieving its objectives "with flying colors" and for taking another step towards fully operationalizing the Protocol. Thanking the participants, translators, interpreters and conference center staff, Co-Chair Nieto commended the meeting's positive atmosphere and productive results, and Co-Chair Lefeber expressed his hope that this would continue in the future. Co-Chair Nieto gaveled the meeting to a close at 10:44 am.

A BRIEF ANALYSIS OF THE WORKING GROUP MEETING

Since 2004, under a mandate based on Article 27 (Liability and Redress) of the Cartagena Protocol on Biosafety (hereafter, the Protocol), legal and technical experts have been constructing a conceptual skeleton for a possible instrument governing liability and redress for damage caused by the transboundary movement of living modified organisms (LMOs) (hereafter the instrument). The culmination of these conceptual discussions, along with intersessional submissions, resulted in a Co-Chairs' synthesis, which served as the basis for discussion at the second meeting of the Open-ended *Ad Hoc* Working Group of legal and technical experts on liability and redress (hereafter, the Working Group), held from 20-24 February 2006, in Montreal, Canada. While none of the substantive issues raised in the preparatory process were resolved at this meeting, progress was made in mapping out the issues and in articulating their underlying legal rationales.

This brief analysis considers some process-related aspects of the meeting and highlights issues that surfaced and will likely be contentious in the future. The analysis concludes with some general remarks on what this meeting might mean in the broader context of international law and global environmental politics.

PROCESS: CAUTIOUS BUT SURE…AT LEAST, FOR NOW

In keeping with the preliminary nature of its work, the Working Group exchanged views on the twelve elements appearing in the Co-Chairs' synthesis in a methodical, issue-by-issue approach. As such, the Co-Chairs strongly encouraged delegations to flesh out the meaning that the various proposed elements of the possible instrument might have in the context of the transboundary movement of LMOs. The result was a highly technical, legal and conceptual discussion. Although one observer noted that this process did little to clarify the issues in any significant way, several others viewed this approach, along with the strong leadership from the Co-Chairs, as very useful, since it resulted in the formulation and collation of operational texts on three of the most important issues: scope of "damage resulting from transboundary movements of LMOs," definition and valuation of damage, and causation. While these operational texts still reflect considerable divergences of opinion among the delegations, they nevertheless move the process a step closer, albeit tentatively, to something resembling negotiations, since they set the substantive parameters for future deliberations. Accordingly, this represents the most positive outcome from this meeting and sets a clear expectation that the Co-Chairs will continue to play a strong role intersessionally and at subsequent meetings by pressing countries to go deep into the issues and propose operational texts on the nine remaining elements.

Some have also noted that if this process is to yield any lasting results, engagement from all key importing and exporting countries will be critical. However, for at least two reasons, such engagement does not appear to be as forthcoming as perhaps it should be at this stage of the process. First, many key players in this process, notably New Zealand, China and Protocol non-Parties, such as Canada, the United States and Australia, while present at this meeting, were noticeably reserved during the substantive deliberations, adopting what appears to have been a "wait and see" approach. This is not to say that these countries are not engaged in the process. They were and this is especially demonstrated by their active participation in the discussion on effectiveness criteria. But their silence on some of the other elements does represent a certain degree of reluctance on their part to debate and clarify the issues in a way that would benefit the process from the outset.

Secondly, there was a noticeable absence of many different countries at the meeting as well as a surprisingly low number of country views submitted intersessionally on the various elements. Many developing countries were not present due to a lack of available funds in the Special Trust Fund. But this lack of funds does not account for their low number of intersessional submissions. Least developed countries and small island developing States did receive funding to attend this meeting, and thereby played a key role in articulating developing country concerns. Moreover, there appears to have been a complete lack of engagement on the part of countries with economies in transition. These countries neither attended the meeting, nor submitted their views intersessionally. It is also worth noting that both Japan and India were absent from the meeting.

Limited engagement during this preliminary stage of the process should not, however, be taken as a sign that the process is doomed or, for that matter, that countries are not interested in the process or its outcome. It is simply too early make any such predications. If anything, it is not unreasonable to expect greater engagement from countries as the process proceeds, contingent of course on the availability of funds. This is because as more

operational texts are submitted, countries will likely realize that if they are not more actively engaged they could risk being marginalized in the process.

SUBSTANCE: TOO EARLY TO TELL

At this very early stage in the process, it would be premature to draw any conclusions about the resolution of substantive issues raised during this meeting. It is, however, worth highlighting some issues that might become major points of contention later in the process. Most would agree that the type of instrument – legally binding, non-binding, or none – is perhaps the most central and, therefore, the most critical issue. Yet this important question was not discussed in depth at the meeting because many delegates wanted clarification of other issues, such as scope, damage and causation, before any discussion on the type of instrument could be meaningful.

Another contentious issue that countries will invariably face as the process continues is the standard of liability. Here the Working Group had what one observer thought was a very productive debate on whether the instrument should be governed by strict liability or fault-based liability and on how liability should be channelled. Not surprisingly country views on liability were split, although some did not rule out the possibility of a combination of strict and fault-based liability.

Closely linked to this is another likely point of contention, namely how to finance any potential liability. After all, as one developing country delegate said, a liability regime is basically a financial matter. Here again countries were split. This is an extremely multi-faceted debate, but at the most general level, potential importers of LMO technology were of the view that damages must be adequately and fully compensated. Exporters were of the view that mechanisms of financial security, such as compulsory insurance, might operate as an economic trade barrier. However, in the absence of any clear agreement on the scope and valuation of damage, or the standard of liability and channelling, the question of securely financed compensation will remain open. It is also worth noting that Co-Chair Lefeber suggested that a compensation fund resembling that used in the International Oil Pollution Compensation Fund might be appropriate for LMOs. At this stage, there is considerable uncertainty as to whether or not such a fund could come into effect, since the issue of financial security is so closely tied into so many of the other critical issues.

CONTEXT: NEW BUT NOT DIFFERENT

While it might too early to make any inferences or draw any conclusions about either the legal or political implications of a potential liability regime for LMOs, it is possible to consider the process under Article 27 of the Protocol in the context of other environmental liability regimes. The issue of environmental liability itself is not new. Liability regimes have been developed for other areas of environmental policy, such as oil pollution, nuclear damage and the transboundary movement of hazardous wastes. But what is new is the complex nature of the transboundary movement of LMOs and their potential long-term environmental effects, especially given the broad and undefined nature of the damage that might be caused by LMOs. Therefore, in the broader policy context, one of the many challenges that countries face in designing this instrument concerns how to take into account lessons learned from the design of these other international liability regimes and how to apply these lessons to the unique context of LMOs.

In particular, one such challenge concerns how to avoid the problem encountered by the Basel Protocol on Liability and Compensation, which, after six years of development and seven years in waiting, has yet to enter into force. Why the Basel Protocol has not come into effect is an extremely complex matter. Some have suggested it has to do with compulsory insurance, financial limits and the difficulty of introducing a liability regime into existing domestic law. That the Co-Chairs have decided to construct this regime from scratch, rather than using an existing instrument as a template, suggests that they are well aware of the potential pitfalls accompanying environmental liability and that these problems may be avoided.

WHERE TO NEXT?

All in all, the meeting certainly achieved progress in mapping out options and elements for a future LMO liability regime and this bodes well for the next meeting. Moreover, as a matter of process, under Article 27 this process is expected to finish within four years, which means that a COP/MOP decision would likely be required to extend it. But this process is still in its infancy and has a considerable way to go before yielding any tangible results in the form of agreed text given that the issues are potentially so divisive.

UPCOMING MEETINGS

BIOSAFETY-CLEARING HOUSE TRAINING WORKSHOP: The Biosafety-Clearing House training workshop for developing countries will be held from 11-12 March 2006, in Curitiba, Brazil. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; internet: http://www.biodiv.org/doc/meeting.asp?mtg=BCHTW-03

BIOSAFETY COP/MOP-3: The third meeting of the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety will take place from 13-17 March 2006, in Curitiba, Brazil. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; internet: http://www.biodiv.org/doc/meeting.aspx?mtg=MOP-03