Earth Negotiations Bulletin

WGLR-3 FINAL

A Reporting Service for Environment and Development Negotiations

Online at http://www.iisd.ca/biodiv/ltlr3/

Vol. 9 No. 370 *Published by the International Institute for Sustainable Development (IISD)* *Monday, 26 February 2007*

SUMMARY OF THE THIRD MEETING OF THE OPEN-ENDED *AD HOC* WORKING GROUP ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY: 19-23 FEBRUARY 2007

The third 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 19-23 February 2007, in Montreal, Canada. Approximately 170 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. Its mandate is 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 is scheduled to hold two more meetings before reporting to COP/MOP-4 in May 2008 in Bonn, Germany.

At 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 identified (sections IV to XI) pertaining to liability and redress in the context of Article 27 of the Biosafety Protocol (UNEP/CBD/BS/WG-L&R/3/2). Delegates worked through the elements and options included in the Co-Chairs' synthesis and were asked to submit operational text. From Tuesday to Thursday, they were given time in the afternoon to hold regional meetings and consult informally to formulate and clarify their positions. With an eye towards the end of the Working Group's mandate at COP/MOP-4, participants expressed satisfaction that this meeting had achieved progress in preparing to enter the negotiating phase at the Working Group's next meeting to be held in Montreal in October 2007.

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 intended for intentional introduction into the environment, and incorporates the precautionary approach and mechanisms for 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 139 Parties to the Protocol.

IN THIS ISSUE

This issue of the *Earth Negotiations Bulletin* © <enb@iisd.org> is written and edited by Kati Kulovesi, LL.M., William McPherson, Ph.D. and Nicole Schabus. The Editor is Pamela S. Chasek, Ph.D. <pam@iisd.org> and the Director of IISD Reporting Services is Langston James "Kimo" Goree VI <kimo@iisd.org>. The Sustaining Donors of the *Bulletin* are the United Kingdom (through the Department for International Development – DFID), the Government of the United States of America (through the Department of State Bureau of Oceans and International Environmental and Scientific Affairs), the Government of Canada (through CIDA), the Danish Ministry of Foreign Affairs, the Government of Germany (through the German Federal Ministry of Environment - BMU, and the German Federal Ministry of Development Cooperation - BMZ), the Netherlands Ministry of Foreign Affairs, the European Commission (DG-ENV) and the Italian Ministry for the Environment and Territory General Directorate for Nature Protection. General Support for the *Bulletin* during 2007 is provided by the Swiss Federal Office for the Environment (FOEN), the Norwegian Ministry of Foreign Affairs and the Ministry of Environment, the Government of Australia, the Austrian Federal Ministry for the Environment, the Ministry of Environment of Sweden, the New Zealand Ministry of Foreign Affairs and Trade, SWAN International, the Japanese Ministry of Environment (through the Institute for Global Environmental Strategies - IGES) and the Japanese Ministry of Economy, Trade and Industry (through the Global Industrial and Social Progress Research Institute - GISPRI). Funding for translation of the *Earth Negotiations Bulletin* into French has been provided by the International Organization of the Francophonie (IOF) and the French Ministry of Foreign Affairs. Funding for the translation of the *Earth Negotiations Bulletin* into Spanish has been provided by the Ministry of Environment of Spain. The opinions expressed in the *Earth Negotiations Bulletin* are those of the authors and do not necessarily reflect the views of IISD or other donors. Excerpts from the *Earth Negotiations Bulletin* may be used in non-commercial publications with appropriate academic citation. For information on the *Bulletin*, including requests to provide reporting services, contact the Director of IISD Reporting Services at <kimo@iisd.org>, +1-646-536-7556 or 212 East 47th St. #21F, New York, NY 10017, USA.

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 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.

WORKING GROUP ON LIABILITY AND REDRESS: 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 progress 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) 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.

WORKING GROUP ON LIABILITY AND REDRESS: At its second meeting (February 2006, Montreal) the Working Group focused on a Co-Chairs' working draft 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. The Working Group achieved progress by considering all options identified in the Co-Chairs' text and also produced 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.

COP/MOP-3: COP/MOP-3 (March 2006, Curitiba, Brazil) considered various issues relating to the Protocol's operationalization, including funding for the implementation of national biosafety frameworks, risk assessment, the rights and responsibilities of transit parties, the financial mechanism and capacity building. Also the Compliance Committee's voting procedures were addressed but the issue was not resolved. The main outcome of COP/MOP-3 was that, after lengthy discussions, an agreement was reached on detailed requirements for documentation and identification of LMO-FFPs (Article 18.2(a)).

WORKING GROUP REPORT

On Monday, 19 February 2007, Co-Chair Jimena Nieto (Colombia) opened the third meeting of the Working Group. She explained that after this session, two more sessions remain until the Working Group is to report to COP/MOP-4 in May 2008. Welcoming participants to Montreal, Eric Théroux, Government of Quebec, highlighted Quebec's strategies to implement the Protocol and its support for Canada's ratification of the Protocol. Speaking on behalf of United Nations Environment Programme (UNEP) Executive Director Achim Steiner, Shafqat Kakakhel called for balance between the benefits of modern biotechnology and protection from damages. Recalling Principle 13 of the Rio Declaration on Environment and Development on liability and compensation, he emphasized the role of the Working Group in the full implementation of the Protocol. Taïeb Chérif, Secretary-General of the International Civil Aviation Organization (ICAO), highlighted common objectives of the CBD and ICAO and said ICAO strives to minimize adverse environmental effects of aviation. CBD Executive Secretary Ahmed Djoghlaf called the Protocol the "new legal regime of the 21st Century." He commended UNEP for including biosafety in the Bali Plan of Action, and proceeded to sign a Memorandum of Understanding with ICAO inscribing future collaboration. Delegates then adopted the agenda and agreed to the organization of work (UNEP/CBD/BS/WG-L&R/3/1 and Add.1). René Lefeber (the Netherlands) and Jimena Nieto (Colombia) continued as Co-Chairs and Maria Mbengashe (South Africa) as rapporteur.

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 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/3/INF/2);
- a note on the experience of other international instruments and forums as regards damage suffered in areas beyond the limits of national jurisdiction or control of states (UNEP/CBD/BS/WG-L&R/3/INF/3);
- a compilation of documents of the CBD relating to the application of tools for valuation of biodiversity and biodiversity resources and functions (UNEP/CBD/BS/WG-L&R/3/INF/4); and
- a compilation of further information on financial security to cover liability resulting from transboundary movements of living modified organisms (UNEP/CBD/BS/WG-L&R/3/INF/5).

Delegates then heard expert presentations on valuation methods of biodiversity and biodiversity resources, financial security to cover liability resulting from transboundary movements of LMOs, and a private international law analysis of cross-border environmental damage.

Regarding valuation methods and their possible application in the liability and redress context, Markus Lehmann, CBD Secretariat, explained basic concepts, noting that value is a complex notion determined subjectively through aggregation of individual preferences. He said that in marketed goods, the market price reflects some of those preferences, whereas environmental assets are often considered public goods without a market and market price. Lehmann then presented different valuation methods, including cost-benefit analysis and cost-effectiveness analysis and their possible integration into national accounting and legal decision-making. He also outlined the revealed preference method, based on determining the cost of using surrogate goods; and the stated preference method based on the evaluation of questionnaires; and the benefit transfer method based on applying existing research to similar cases. Lehmann noted that the stated preference method is the only way of establishing non-use preferences, but requires time and care in preparing proper questionnaires and ensuring that the sample questioned is representative and has the necessary information. In the liability and redress context, Lehmann suggested the application of valuation methods to determine the best restoration and/or compensation options following ecological damage.

The ensuing discussion focused on the application of economic techniques to biodiversity issues. China enquired about actual case studies and Argentina about applications of scientific criteria. Japan inquired about national versus international applications of the tools and Liberia observed that early warning can avoid or minimize the need for valuation and compensation for damage. Lehmann responded by pointing to 13 case studies in different regions. He explained that the tools applied equally well to economics, biodiversity and environment, but that, in general, they have not been incorporated into national legislation.

Presenting on financial security, Chris Bryce, Marsh Ltd., predicted a gradual response by the insurance industry to the need for commercial insurance that covers losses related to LMOs. Explaining that the supply depends on the ratio between risk and reward in underwriting, he indicated the insurance industry is weary of risks that are difficult to quantify and estimated that insurance is likely to exclude some risks related to LMOs. He estimated that the insurance market will embrace the concept of ecological damage, but financial limits will be imposed and scope of coverage will fluctuate. Bryce also indicated that the industry's response to LMOs will depend, among other things, on the applicable legal regime and the frequency of litigation. Bryce explained that insurable risks are placed into "silos" and that for LMOs and genetically modified organisms (GMOs), this would mainly be legal liability. Highlighting that it is challenging for the insurance industry to stay abreast of the emerging technology, Bryce explained that the focus is shifting from LMOs and GMOs within the food chain to industrial use. In his view, commercial insurance will play an important role in dealing with damage from LMOs but alternative sources of financial security are also needed.

In the ensuing discussion, the US asked whether, for the insurance industry, some issues are particularly relevant to the regime. Pointing to provisions of Directive 2004/35/EC on environmental liability defining which authorities are competent to bring claims, Bryce explained that for the insurers, such provisions eliminate the risk of multiple claims by multiple stakeholders. In response to Canada's question concerning strict liability, he said that it may currently seem like a good response, but may not 20-30 years from now. He also highlighted that insurance may not necessarily match the type of liabilities arising

from GMOs and LMOs. Replying to Co-Chair Nieto on issues relevant to commercial insurance, Bryce identified financial caps, avoidance of punitive damages and some sort of risk assessment benchmark as elements of the liability regime that could encourage involvement of the insurance industry.

Christophe Bernasconi, Hague Conference on Private International Law, made a presentation on how international private law provisions can assist in developing a liability and redress regime. He defined private international law as procedural norms setting out a process for dealing with legal problems arising from factual situations involving more than one state. Stressing that private international law does not contain substantive legal provisions or solutions, he noted that these norms can be useful when agreement cannot be reached on some substantive issues. Noting that private international law is constituted by national conflict of law norms, which may vary from country to country, he explained that the Hague Conference on Private International Law strives towards its progressive unification, also concerning environmental damage.

Based on recommendations of the International Law Association's Committee on Transnational Enforcement of Environmental Law, Bernasconi suggested provisions that could be included in a regime on liability and redress. On jurisdiction, he suggested that the plaintiff can sue in the country of domicile of the defendant, where the injury occurred, or where an injury may arise. Regarding applicable law, he proposed to leave to the injured party the choice between the law where the polluter is domiciled and the law where the damage occurred. On recognition and enforcement of a judgment, he urged that it be recognized by any state party to the regime. In closing, Bernasconi proposed to include a provision in the instrument under negotiation concerning the relationship with other international regimes, stressing that a harmonized liability regime will benefit from inclusion of private international law provisions, if only to determine where the plaintiff can sue.

During the ensuing discussion, India, the US and Canada wanted to know how jurisdiction is established in various international agreements. Bernasconi replied that there are existing models, including a draft on jurisdiction and recognition on judgments in civil matters. India, Switzerland, Japan and the Public Research and Regulation Initiative (PRRI) also raised questions about how liability is established. Bernasconi responded that this is a question to be determined among member parties, and that private international law can "fill the procedural gaps" in agreements.

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 from Monday to Thursday. The Secretariat introduced:

- a synthesis report of proposed operational texts and views on approaches, options and issues identified (sections IV to XI) (UNEP/CBD/BS/WG-L&R/3/2) (hereafter, the Co-Chairs' synthesis);
- a synthesis report of proposed operational texts and views on approaches, options and issues identified (sections I to III) pertaining to liability and redress in the context of Article 27 of the Protocol (UNEP/CBD/BS/WG-L&R/3/2/Add.1), which covers issues not included in the Co-Chairs' synthesis (scope of damage, damage and causation); and
- a compilation of submissions of further views on proposed operational texts with respect to approaches, options and issues identified as regards matter covered by Article 27 of the Protocol (UNEP/CBD/BS/WG-L&R/3/INF/1).

The main focus at the meeting was on the Co-Chairs' synthesis. This document contains the different options and elements developed at the Working Group's previous sessions and intersessionally on Chapters IV-XI, namely: Channeling of Liability (Chapter IV); Limitations of Liability (Chapter V); Mechanisms for Financial Security (Chapter VI); Settlement of Claims (Chapter VII); Standing/Right to Bring Claims (Chapter VIII); Non-Parties (Chapter IX); Complementary Capacity-Building Measures (Chapter X); and Choice of Instrument (Chapter XI). During the week, these chapters were discussed in detail and mainly in chronological order.

The Co-Chairs' synthesis also contains several proposals for operational text, namely possible wording that could be introduced into a regime as substantive provisions. Operational text has been submitted by parties and relevant stakeholders at the sessions of the Working Group and intersessionally. Questions related to scope of damage, damage and causation contained in the addendum had been discussed in detail at the Working Group's second session and were not reviewed in detail at this session. During the week, the Co-Chairs also introduced:

- a new synthesis of proposed operational texts and views on approaches, options and issues identified (sections I to III on scope of damage, damage and causation) (UNEP/CBD/BS/WG-L&R/3/CRP.1), which is a revised and streamlined version of Chapters I-III, namely: Scope of Damage (Chapter I); Damage (Chapter II); and Causation (Chapter III); and
- a blueprint for a COP/MOP decision on international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs (UNEP/CBD/BS/WG-L&R/3/CRP.2).

The blueprint (now contained in Annex I of the meeting's report) also served to restructure the Co-Chairs' synthesis and its addendum (now contained in Annex II of the report). Annex II contains eight chapters, namely: Possible Approaches to Liability and Redress (Chapter I); Scope (Chapter II); Damage (Chapter III); Primary Compensation Scheme (Chapter IV); Supplementary Compensation Scheme (Chapter V); Settlement of Claims (Chapter VI); Complementary Capacity Building Measures (Chapter VII); and Choice of Instrument (Chapter VIII). The chapters contain different options for the overall structure of a regime on liability as well as operational text.

Co-Chair Lefeber explained that the objective of this meeting is to discuss and clarify elements and options in the Co-Chairs' synthesis, allowing delegates to come to the next session with clear negotiating mandates. China called for the Working Group to develop operational text as a concrete result of this meeting, taking into account the effectiveness criteria developed at the previous meeting. Japan stressed the need for an outcome that conforms to the Protocol and for a common understanding on how to redress damage.

On Thursday, delegates finalized consideration of the Co-Chairs' synthesis. Highlighting that he did not imply any emerging consensus, Co-Chair Lefeber identified some trends emerging from the process. Recalling Principle 4 (Prompt and Adequate Compensation) of the International Law Commission's (ILC) Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Transboundary Activities adopted by the UN General Assembly (GA Resolution 56/83) (hereafter, the ILC's Principles). Co-Chair Lefeber stated that primary liability should be placed on the operator and that this does not exclude residual state liability. Regarding damage to biodiversity, he proposed that delegates consider administrative approaches and on traditional damage, Co-Chair Lefeber suggested that civil liability rules could be the most suitable approach. He invited delegates to discuss these observations when negotiations begin in October.

BLUEPRINT FOR RULES AND PROCEDURES ON LIABILITY AND REDRESS: On Wednesday evening, the Co-Chairs distributed their blueprint for a COP/MOP decision on international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs (UNEP/CBD/BS/WG-L&R/3/CRP.2), (hereafter, the blueprint). The blueprint was discussed in plenary on Thursday in conjunction with choice of instrument.

Co-Chair Lefeber emphasized that the blueprint did not prejudge or eliminate any approaches or options. He explained that it contained a matrix setting out elements that could be contained in either binding or non-binding annexes to the COP/MOP decision on liability and redress. Co-Chair Lefeber explained that the first column of the matrix depicts different forms of liability (state responsibility; state liability; civil liability, and administrative approaches), which are cross-referenced in the matrix with the following categories: scope, damage, the primary compensation scheme, the supplementary compensation scheme, and settlement of claims. He clarified that the blueprint is intended to not prejudge outcome, cover all issues, and provide maximum flexibility in structuring the decision and annexes.

Several participants, including Brazil, Germany for the European Union (EU), Egypt, Japan, Peru and the PRRI, commended the Co-Chairs' blueprint without engaging in substantive discussion of it. Trinidad and Tobago especially praised the matrix as a tool for countries that have not yet finalized their positions and stated that time would be needed to ensure that the interests of importers, exporters and researchers are all protected.

The Co-Chairs then indicated that they would restructure the Co-Chairs' synthesis to reflect the blueprint. This newly structured synthesis is contained in Annex II of the meeting's report (UNEP/CBD/BS/WG-L&R/3/L.1).

***Outcome*:** Annex I of the meeting's report contains the blueprint. Under the heading "Optional Components of the Decision," the document lists the following elements:

- preambular paragraphs;
- operative paragraphs on the adoption of international rules and procedures on liability and redress;
- operative paragraph(s) on institutional arrangements;
- operative paragraph(s) on complementary capacity building measures;
- operative paragraph(s) on provisional arrangements; and
- operative paragraph(s) on review of the decision.

The matrix is contained under the heading "Optional Components of the Annex(es) to the Decision" with all the columns retained as set out in Co-Chair Lefeber's introduction of the blueprint. Annex I includes notes explaining that the blueprint for a COP/MOP decision does not prejudge the outcome of the choice of instrument, as both a legally binding instrument and a non-binding instrument on liability and redress would be adopted through a COP/MOP decision.The notes also indicate that the blueprint covers all approaches and options in Annex II and one annex may cover one or more approaches to liability, and vice versa.

POSSIBLE APPROACHES TO LIABILITY AND REDRESS: State liability, residual state liability, civil liability and administrative approaches: This issue was addressed on Monday and Tuesday. Discussions focused on options identified in Chapter IV (Possible approaches to channelling of liability) of the Co-Chairs' synthesis, namely:

- state responsibility (for internationally wrongful acts);
- state liability (for acts not prohibited by international law) with the first alternative of primary state liability having been deleted at the Working Group's second meeting, but the alternatives of residual state liability and no state liability remaining;
- civil liability (harmonization of rules and procedures); and
- administrative approaches.

Co-Chair Lefeber highlighted the recent adoption by the UN General Assembly of the ILC's Principles. He indicated that Principle 7 (Development of Specific International Regimes) should guide the Working Group's efforts. Concerning the options for channelling liability, Co-Chair Lefeber stressed that they are not mutually exclusive and that all subsequent chapters are relevant to all options identified under this heading. South Africa indicated that channelling of liability will also depend on the financial mechanism adopted. Emphasizing linkages between different options, Canada noted that channelling presupposes a binding legal instrument that will direct liability to one entity.

During the discussions, a consensus seemed to be emerging that no new rules on state responsibility are needed and that there is no legal requirement to declare that the liability and redress rules will be without prejudice to existing international law. Some delegates, including Norway and Malaysia, expressed preference for an explicit provision clarifying that general rules on state responsibility will not be affected.

On state liability, a number of participants highlighted civil liability of the operator, with some showing interest in combining civil liability and residual state liability. Colombia and India favored setting out residual state liability in combination with primary liability of the operator, while Brazil called for more discussion on this issue to allow to them to formulate their position. South Africa supported the primary liability of the operator but did not rule out residual state liability. Norway recognized the need for additional regulations on civil liability, and proposed that residual state liability only be discussed once the civil liability provisions are elaborated in detail.

The EU called for a civil liability regime focusing on producers and importers that could include exemptions and defenses. China preferred the option of no state liability and called for the liability being based on the operator. Stressing that states have less control over LMO markets than private actors, Bangladesh said he did not support state liability but favored strict liability of operators. Malaysia said he favored a civil liability regime with no residual state liability but supplemented by administrative measures. Stressing that all parties were not present at the previous meeting, Co-Chair Lefeber suggested undoing the deletion of the option for "primary state liability" in response to Ethiopia's proposal to include a form of primary state liability.

PRRI suggested administrative procedures would be the best approach regarding damage to biodiversity and restoration, and highlighted immediate applicability and access to justice as the key advantages.

***Outcome*:** In Annex II, these issues now form Chapter I (Possible Approaches to Liability and Redress) with all the options retained and structured as follows:

- Subheading A is state responsibility (for internationally wrongful acts) listing eight operational texts;
- Subheading B is state liability (for acts not prohibited by international law) with the sub-options of primary state liability, residual state liability in combination with primary liability of the operator and no state liability. For these four sub-options, operational texts can be found in Chapters IV and V of Annex II;
- Subheading C is civil liability (harmonization of rules and procedures) with one operational text; and
- Subheading D is administrative approaches based on allocation of costs of response measures and restoration measures, with two operational texts.

The option of residual state liability is now also contained as subheading A under Chapter V (Supplementary Compensations Scheme) and contains five operational texts.

PRIMARY COMPENSATION SCHEME: Possible factors to determine the standard of liability and the identification of the liable person: This issue was addressed on Tuesday on the basis of five options listed in the Co-Chairs' synthesis, namely:

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

Discussions on this issue were limited, with Ethiopia suggesting adding capacity to cope with the damage and to handle litigation pertaining to liability and redress as an additional factor.

***Outcome*:** In the new structure contained in Annex II, possible factors to determine the standard of liability and the identification of the liable person issue are under the first subheading in Chapter IV (Primary Compensation Scheme). All the above options have been retained and Annex II contains three operational texts.

Standard of liability and channeling of liability: This issue was discussed on Tuesday. Discussions focused on two main options for standard of liability identified in the Co-Chairs' summary: fault-based liability and strict liability. At the same time, delegates also considered two main options for channelling liability:

- based on a causal link; or
- to certain persons (including the developer, the producer, the notifier, the exporter, the importer, the carrier, and/or the supplier).

On channelling of liability, Ethiopia suggested adding the state and the licensing agency to the list concerning channeling liability to certain persons. During the discussions on standard of liability, Norway called for a strict standard of liability with liability channelled to those responsible for the transboundary movement. Brazil stated that his national biosafety legislation was based on strict liability. Highlighting that the issue is still under consideration nationally, Japan expressed support for fault-based liability. The Global Industry Coalition supported a fault-based liability system, noting that LMOs are not dangerous per se and are already controlled by risk assessments and regulatory reviews. The PRRI asked delegates to distinguish traditional damage and damage to biodiversity, as well as unexpected damages not foreseen in risk assessments and suggested that imposition of strict liability in the latter case would discourage public research.

***Outcome*:** In the new structure contained in Annex II, the topic of standard of liability and channelling of liability is the second subheading under Chapter IV (Primary Compensation Scheme). All the above options have been retained. The section also contains two operational texts on primary state liability; nine operational texts on civil liability and nine operational texts on administrative approaches.

Exemptions to or mitigation of strict liability: This issue was discussed on Tuesday on the basis of following options in the Co-Chairs' synthesis:

- act of God/force majeure (exemption A);
- act of war or civil unrest (exemption B);
- intervention of third parties (exemption C);
- compliance with compulsory measures imposed by a competent national authority (exemption D);
- permission of an activity by means of applicable law (exemption E); and
- the state of the art defense (exemption F).

Co-Chair Lefeber noted that the exemptions from A to D were standard terms, whereas the exemptions E and F were unusual. Many countries supported strict liability, with some exemptions. Egypt and India opposed exemptions E and F and Ethiopia options D to F, with Trinidad and Tobago also expressing reservations on these exemptions. Mexico opposed options C to F. Several countries called for more consideration of some of these exemptions. Ecuador suggested discussing the definition of damage, before addressing possible exemptions. Japan proposed focusing the discussion on high risk scenarios, and proposed that the exporter and/or importer be held liable for significant damages as a consequence of failure to comply with the provisions of the Cartagena Protocol. Malaysia warned that the introduction of exemptions could lead to a large number of victims remaining uncompensated. He reminded delegates that such exemptions do not apply to contractual obligations, and suggested that the overall risk be allocated to the person profiting

from the transboundary movement of LMOs. Greenpeace International stressed that any exemption shifts the burden to the victim, who would go uncompensated and the environment would still be damaged and suggested establishment of a fund to deal with such circumstances.

***Outcome*:** In the new structure contained in Annex II, exemptions to, or mitigation of, strict liability are now under Chapter IV (Primary Compensation Scheme). Its third subheading sets out the two options: no exemptions or possible exemptions to strict liability, maintaining all the sub-options listed above. Annex II also contains eight operational texts on exemptions.

Limitation of liability: This topic was discussed on Wednesday based on the Co-Chairs' synthesis, which lists two issues:

- limitation in time (relative time-limit and absolute time-limit); and
- limitation in amount, including caps and possible mitigation of amount of compensation under specific circumstances.

Co-Chair Lefeber noted that when it comes to limitation of liability, time limits are common in most jurisdictions and that financial limits are usually connected to regimes adopting a strict liability standard.

During the discussion on time limits, Cameroon suggested that claims for compensation be made within ten years from the date that the claimant knew or reasonably ought to have known of the damage and the liable party. India reminded delegates that the time limit should not be connected only to the incident but also to when the damage occurs. The EU suggested introducing absolute and relative time limits. He elaborated that the shorter relative time limits would be connected to the time that the claimant knew or ought to have known of the damage, and the person responsible for the damage. He said the longer absolute time limit should be connected to the incident causing the damage. The EU also clarified that if the effect of the transboundary movement of LMOs was a continuous occurrence of damage, the time limit would be measured from the end of the event.

***Outcome*:** In the new structure contained in Annex II, limitation of liability is the seventh subheading under Chapter IV (Primary Compensation Scheme). This section retains the options relating to limitations in time and to limitations in amount. It contains eleven operational texts on time limits and six operational texts on financial limits.

Coverage of liability: This issue was discussed on Wednesday on the basis of the Co-Chairs' synthesis, containing two options, compulsory financial security and voluntary financial security.

Co-Chair Lefeber asked delegates to consider whether financial security, namely insurance, should be compulsory or voluntary. Recalling that the presentation by Bryce made it clear that insurance coverage for most incidents contemplated under the regime is not currently available, Japan opposed compulsory insurance. The PRRI noted that if available, compulsory insurance could only be afforded by richer bodies and this could mean the end of public research on LMOs.

Proposing a two-stage approach, whereby the liability regime would first be adopted through a COP/MOP decision, reviewed and then possibly turned into a legally binding instrument, the EU suggested initially including numerous options for financial security to be evaluated for determining the best options for the final regime. Norway suggested requiring insurance, bonds or other financial guarantees, taking into account the likelihood, seriousness and possible costs of damage and the possibilities of obtaining financial security.

Palau expressed concerns that if insurance coverage was mandatory, the insurance industry could effectively dictate the terms of the regime and suggested that states could attach conditions to issuing permits, including proof of insurance. Noting that their national insurance bodies do cover damage to the environment, Argentina warned that multinational insurance corporations would have a lot of control that could affect the operation of the regime. Reiterating the polluter pays principle, Greenpeace International called for financial security mechanisms to ensure that damage will be compensated.

***Outcome*:** This issue is included in Annex II under Chapter IV (Primary Compensation Scheme) as the eighth subheading. Instead of listing the options from the Co-Chairs' synthesis, this section refers to insurance, insurance pools, self-insurance, bonds, state guarantees and other financial guarantees as possible options. It also contains eight operational texts.

Issues for further consideration: These issues relating to civil liability were discussed on Tuesday. The options considered, on the basis of the Co-Chairs' synthesis, included:

- the 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.

Discussion ranged from support for a strong regime of strict liability to prevention and remediation. India suggested that emphasizing the role of states would eliminate the need for identifying persons who are liable, and could resolve issues such as litigation and settling insurance claims. Malaysia suggested that parties can narrow the range of cases where redress is necessary, according to assessment of risks. Norway said that even if the probability of damage may not be high, the consequences could be significant in those few cases when damage occurs. Greenpeace International suggested that the issue is not so much assigning liability in all cases, but prevention and remediation of hazardous activities that would result in significant harm.

The PRRI indicated that fault-based liability is preferable because LMOs could also cause damage unrelated to genetic modification. Co-Chair Lefeber indicated that strict liability is applied in some areas regulating transboundary movement, such as oil transport, where the activity itself is not hazardous but only becomes hazardous when there are oil spills.

***Outcome*:** These issues are included in Annex II under Chapter IV (Primary Compensation Scheme). The option on recourse against a third party who is liable on the basis of strict liability now forms subheading five and contains five operational texts. The option on joint and several liability

or apportionment of liability now forms subheading six and contains nine operational texts. The options on vicarious liability and combination of fault-based and strict liability were omitted.

Provision of interim relief: This issue was not discussed at the meeting but is listed in Annex II under Chapter IV (Primary Compensation Scheme) as subheading four and contains two operational texts.

SUPPLEMENTARY COMPENSATION SCHEME:

Additional tiers of liability: There was no discussion on this issue at the meeting and all six options for designating additional tiers of liability from the Co-Chairs' synthesis are retained in Annex II. They are contained in Chapter V (Supplementary Compensation Scheme) as the first subheading and cover 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.

Annex II contains no operational text on this issue.

Supplementary collective compensation arrangements: The issue of supplementary collective compensation arrangements was considered on Wednesday morning on the basis of three options identified in the Co-Chairs' synthesis, namely:

- a fund financed by contributions from the biotechnology industry to be made in advance on the basis of criteria to be determined (Option 1);
- a fund financed by contributions from the biotechnology industry to be made after the occurrence of damage on the basis of criteria to be determined (Option 2); and
- a combination of public and private funds.

Co-Chair Lefeber explained that the objective of a supplementary compensation mechanism would be to ensure that victims are compensated and the environment is restored, especially in cases where: insurance is not compulsory and the operator goes bankrupt; exemptions apply; or the person causing the damage cannot be identifiable. He stressed ILC Principle 3 (Purposes), which highlights the need to ensure prompt and adequate compensation to victims of transboundary damage and restoration of environmental damage, and Principle 7 (Development of Specific International Regimes) that calls for industry and/or state funds to provide supplementary compensation. He noted that the aim of the regime is to make strong provisions for primary responsibility of the operator in accordance with the polluter pays principle but, in cases where this is not possible, provision for supplementary compensation should be made. Co-Chair Lefeber called on delegates to develop and provide operational text for such possible supplementary compensation mechanisms.

Discussions concentrated on the first two options, a fund financed by contributions from the biotechnology industry to be made in advance and a fund financed by contributions from biotechnology industry to be made after the occurrence of the damage.

Most of the discussion focused on the types of funds that might be established. Malaysia explained that existence of the Protocol itself constituted recognition of the special aspects of LMOs, and that funds are established to address damage from normal activities such as oil transport, from which this body can learn about types of funding and equity for victims. The EU suggested that industry enter into dialogue with stakeholders on the question of supplementary compensation. Burkina Faso, Liberia, Senegal, Ethiopia and Kenya all supported a fund to be set up in advance as the most fair and equitable arrangement for small importers, and all noted that such a fund would demonstrate the commitment of the biotechnology industry to fair treatment. Japan expressed reservations about the establishment of a fund, and asked if there are actual cases demonstrating the need for a fund. Greenpeace International noted that it has provided a number of examples of existing funds in its submission. Armenia said that insurance or other forms of financial guarantees are extremely important, but also highlighted national and regional funds.

***Outcome*:** In Annex II, this section is retained as subsection B of Chapter V (Supplementary Compensation Scheme). All three options are retained for further consideration. This section also contains four operational texts.

SETTLEMENT OF CLAIMS: This issue was considered on Wednesday based on four options concerning settlement of claims identified in the Co-Chairs' synthesis:

- inter-state procedures;
- civil procedures, including jurisdiction of courts or arbitral tribunals, determination of applicable law and recognition and enforcement of judgments or arbitral awards;
- administrative procedures; and
- a special tribunal.

The European Community (EC) indicated that civil procedures should be provided at the domestic level and private international law rules should apply, as appropriate. He explained that in Europe in most cases the place where a claim is brought is the domicile of the defendant but, according to existing rules, claims could sometimes also be settled where the damage occurred. Regarding a special tribunal, the EC said that the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment could be used in special cases where a large number of victims are affected. Reiterating his position on state responsibility and state liability, India only supported inter-state procedures and civil procedures, not administrative procedures or a special tribunal. Drawing attention to dispute settlement provisions in the United Nations Convention on Law of the Sea, Greenpeace International stressed the importance of provisions for binding dispute settlement and suggested that the International Law of the Sea Tribunal could be used as a cost-effective model for settling claims.

***Outcome*:** In Annex II, questions concerning settlement of claims are contained in Chapter VI (Settlement of Claims). Subheading A concerns inter-state procedures and contains four operational texts. Subheading B on civil procedures lists three relevant issues, namely:

- jurisdiction of courts and arbitral tribunals;
- determination of applicable law; and

- recognition and enforcement of judgments or arbitral awards.

It also lists 12 operational texts. Subheading C on administrative procedures contains two operational texts. Subheading D concerns a special tribunal and contains five operational texts.

Standing/Right to Bring Claims: This issue was considered on Wednesday based on issues identified in the Co-Chairs' synthesis, including:

- level of regulation;
- distinction between inter-state and civil procedures;
- level of involvement in the transboundary movement of LMOs as a requirement of standing; and
- type of damage (traditional damage, cost of response measures, damage to environment/biodiversity, damage to human health and socioeconomic damage).

Co-Chair Lefeber explained that the right to bring claims depends on who is considered an interested party in relation to different types of damage. He highlighted the role of governments concerning damage to environment and biodiversity.

During the discussion, the EC proposed a combination of civil and administrative approaches; he explained that affected persons would have the right to bring claims under civil law and under administrative law, competent authorities would act on behalf of the environment with civil society having the right to request authorities take action. Ethiopia called for an open, transparent and inclusive system using a liberal approach to standing. Highlighting the importance of access to justice, Malaysia quoted Principle 10 of the Rio Declaration on Environment and Development and the provisions of the UN Economic Commission for Europe Convention on Access to Information, Public Participation, Decision Making, and Access to Justice on Environmental Issues (Aarhus Convention), emphasizing that denying the right to bring claims is equivalent to denying justice. Stressing the role of states in bringing claims on behalf of their citizens, India supported inter-state procedures and emphasized civil society's role in civil litigation. Norway expressed preference for domestic regulation, indicating that her country has implemented the Aarhus Convention. Stressing that damage to biodiversity needs to be addressed, the PRRI suggested that governments could bring claims to ensure restoration, with civil society having standing to ensure that the government is performing this function. Regarding traditional damage, he said it could be addressed through civil procedures.

***Outcome*:** Instead of being a separate chapter as in the Co-Chairs' synthesis, in Annex II issues relating to standing and right to bring claims have been incorporated into Chapter VI (Settlement of Claims) as subheading E. Options from the Co-Chairs' synthesis have been omitted but seven operational texts now reflect the former options.

NON-PARTIES: The question concerning possible special rules and procedures for LMOs imported from non-parties was addressed on Thursday morning on the basis of the Co-Chairs' synthesis. Recalling rules of international law, Co-Chair Lefeber noted that it is important to develop an instrument that is effective but it cannot impose obligations on non-parties. He further explained that parties could seek to impose rules on trade with non-parties, or refuse to trade if necessary.

The US emphasized that from a legal perspective, Article 27 of the Protocol applies only to trade between parties and that other provisions such as Article 24 allow development of bilateral arrangements. Canada said that some options, such as the choice of instrument, may attract the interest of non-parties in the regime. Norway said it is important that the scope of the regime not be unduly limited to parties but that the application of the Protocol and the CBD should extend to trade with non-parties. Ethiopia said that all parties will be expected to act consistently with agreed rules, while encouraging non-parties to become parties, rather than making separate bilateral arrangements. The EU indicated that domestic law will be implemented regardless of whether trade is with parties or non-parties, so there is no need for separate rules for non-parties. Greenpeace International suggested that non-parties may be affected by some provisions, such as requirement of a bond or applicability of a compensation fund to party/non-party trade.

***Outcome*:** In Annex II, the question concerning non-parties is included under Chapter II (Scope) as subsection F. It consists of the heading and five operational texts submitted by the participants.

COMPLEMENTARY CAPACITY-BUILDING MEASURES: The issue of capacity building was addressed on Thursday on the basis of the Co-Chairs' synthesis, listing two possible approaches, namely:

- 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.

Co-Chair Lefeber explained that listing a roster of experts and developing specific capacity-building measures are complementary to other provisions of the Protocol. Armenia said that there is a need for both, and appealed for the development of a laboratory in the Caucasus to measure damage from LMOs. Norway said she appreciated the need for capacity building to implement a legally binding instrument. The EU proposed a committee that would report to COP/MOP-7 on parties' implementation of domestic legislation for rules and procedures. The EU noted that its proposal is a new idea that has not been discussed before, and that it is not designed to impose a top-down approach. He suggested that countries will still be able to develop their own national rules, and that developing country concerns can be accommodated in a package of measures to be adopted.

Malaysia and Brazil expressed concern with the EU's proposal, noting that developing countries have had bad experiences with model instruments and templates. Malaysia also noted that all parties are obligated to take measures under Article 2 (Capacity Building) of the Protocol and it will be helpful to have support from the Secretariat for developing domestic legislation. Brazil also suggested that capacity building is the centerpiece of implementation of the Protocol, not just for legislation but also for technical and institutional development. Ethiopia averred that the two approaches – roster of experts and capacity building – are complementary.

Greenpeace International suggested that the Secretariat could maintain databases on case law, legislation, damage from LMOs, and national liability and redress regimes. Palau and Norway supported this proposal, and the Consultative Group on International Agricultural Research, on behalf of the CG System, said it is also in the process of implementing tracking systems for domestic rules and regulations on genetic resources for food and agriculture. The EU also supported Greenpeace International's proposal and asked if it would fit within existing resources. Co-Chair Lefeber said that it is within the mandate of the Secretariat, which also has resources to undertake this activity.

***Outcome*:** This issue and the two options are retained in Annex II as Chapter VII (Complimentary Capacity-Building Measures). It also contains two operational texts submitted by the participants.

CHOICE OF INSTRUMENT: This issue was addressed on Monday afternoon, Tuesday morning and Thursday. At the request of Canada, participants first addressed the issue in conjunction with channeling of liability at the beginning of the meeting. On Thursday, delegates returned to the issue, this time discussing it together with the blueprint.

Each day, discussions on the choice of instrument revealed divergent views. The options under consideration in the Co-Chairs' synthesis were:

- one or more legally binding instruments;
- one or more legally binding instruments in conjunction with interim measures pending the development and entry into force of the instrument(s);
- one or more non-binding instruments (guidelines or model law or model contract clauses);
- two-stage approach;
- mixed approach; and
- no instrument.

Trinidad and Tobago recalled that the choice of instrument had been extensively discussed at previous meetings and said it would not be useful to repeat those discussions. She asked this question only be addressed once other elements have been clarified.

Calling for a promptly applicable liability and redress regime, the EU proposed a two-stage approach whereby the COP/MOP would adopt a set of rules that would enter into force immediately, followed by implementation and evaluation and, as a possible second step, the development of a legally binding regime. Clarifying the EU's proposal, the EC explained that, in the first stage, the rules would not be binding but parties would implement them in their domestic legislation, and explained that a committee would be identified to facilitate implementation and provide legal and technical advice. Regarding the second stage, he explained that the COP/MOP decision would also contain a review clause, and after evaluation based on experience in national implementation, the liability rules could be turned into a legally binding instrument.

During the week, the EU distributed a draft COP/MOP decision with an annex containing the suggested rules and procedures on liability and redress.

Canada said the EU's approach is interesting because it would be immediately applicable, but many delegates, including Norway, Japan, Switzerland, the US and the majority of developing countries, opposed the EU's proposal. In response to the opposition, the EC explained the rationale of the two-stage approach, stressing that the intention was not to delay the adoption of a regime but to produce a substantive result at COP/MOP-4. The EC elaborated that his interpretation of Article 27 allowed for both, a COP/MOP decision setting out an interim framework and a final regime. He emphasized that the review provisions of the Protocol would also apply to the COP/MOP decision and questioned the efficacy of a legally binding regime negotiated but not in force due to lack of ratification.

Several countries called for the immediate negotiation of a legally binding instrument. Palau rejected the EC's interpretation of the term "rules" in Article 27, noting that in common law systems "rules" implied legally binding obligations and attached enforcement mechanisms. He expressed concerns that a non-binding regime would be of only symbolic value. Switzerland and Ecuador highlighted that the clear mandate under Article 27 cannot be fulfilled through non-binding guidelines and national legislation. Malaysia emphasized that the question of liability and redress was a core element during the negotiation of the Protocol, almost leading to a deadlock. He recalled that developing countries had agreed to deal with this issue later to ensure the adoption of the Protocol, but only with the understanding that the rules on liability and redress would eventually be a binding part of the Protocol. Characterizing the discussion about guidelines and a two-tiered approach as a possible breach of good faith, he urged delegates to respect the spirit of the earlier compromise.

Highlighting enforcement difficulties, Ethiopia identified the need for a binding instrument forcing the polluter to pay, deterring damage and promoting internalization of environmental costs. Cambodia reminded delegates that they had been waiting for a legally binding regime on liability and redress for a long time. Egypt warned that the Protocol would not be very effective without a legally binding liability and redress regime, especially for developing countries lacking resources for civil litigation. Also Armenia, Bangladesh, Cuba, Colombia, India, Peru and Saudi-Arabia highlighted the need for a legally binding instrument.

Indicating that contamination from LMOs reached record levels last year, Greenpeace International highlighted ILC Principle 7 (Development of Specific Legal Regimes) and the fund mentioned therein as crucial to the process. He warned against the conclusion that just because a number of liability regimes had not entered into force, it would have been better to adopt non-binding or weaker instruments. Also recalling the ILC's principles, Norway called for a binding liability and redress instrument, while allowing profit from, and minimizing the risk of, transboundary movements of LMOs. She questioned the added value of a two-step approach, reminding delegates that a legally binding regime also can be revised.

Cameroon said a legally binding regime was the only way to do justice to the Working Group and to all the resources that had been put into the process. The US opposed the two-step approach and said that time and money being spent on developing an interim solution would be wasted, as it would distract the work/mandate of the group to produce a final and complete outcome.

Brazil questioned whether adequate rules and procedures could be developed in the absence of a legally binding regime. Recalling that the New Partnership for African Development (NEPAD) has emphasized biotechnology's role in African development, South Africa favored balanced and practical rules that will not hamper innovation, trade and economic development. She said that the binding nature of the instrument depends on the other elements being discussed. Canada said that more time is needed to develop the approach and favored guidelines and national instruments given that a non-binding solution can be more flexible and would likely have more broad based support.

Japan opposed a legally binding regime since it might not be the most effective option and reminded delegates that the Protocol is already structured to minimize risks. She also opposed the two-step approach since it would result in a legally binding regime in the long-term. The PRRI noted that guidelines can be developed faster and that a legally binding instrument may not be ratified.

Outcome: In Annex II, Chapter VIII (Choice of Instrument) retains all six options from the Co-Chairs' synthesis.

SCOPE, DAMAGE AND CAUSATION: These issues, contained in the addendum to the Co-Chairs' synthesis (UNEP/CBD/BS/WG-L&R/2/Add.1), were not discussed in detail. They were considered at the Working Group's second meeting, with delegates submitting operational text at the second and third meetings as well as intersessionally.

On Wednesday, Co-Chair Nieto introduced a Co-Chairs' proposal streamlining the options for the Chapters on Scope of Damage, Damage and Causation (UNEP/CBD/BS/WG-L&R/3/CRP.1). She clarified that no substantive text and options had been deleted. Brazil, on behalf of the Latin American and Caribbean Group (GRULAC), welcomed the development of operational text during the session and the streamlining by the Co-Chairs, but noted that some countries and regions might not be in a position to develop operational text yet and asked that all options be kept on the table since the Working Group had not yet entered into substantive negotiations. Egypt, for the African Group, also indicated that the development of operational text might require more time, given that delegations were small and issues had to be reconsidered at the national level.

***Outcome*:** Issues relating to scope, damage and causation are now contained in Chapter II (Scope) and Chapter III (Damage) of Annex II. Chapter II (Scope) contains sections on:

- functional scope, with 14 operational texts;
- geographical scope, with 12 operational texts;
- limitation in time, with nine operational texts;
- limitation to the authorization at the time of the import of the LMOs, with five operational texts;
- determination of the point of import and export of the LMOs, with eight operational texts; and
- non-parties, with five operational texts.

Chapter III (Damage) contains sections on:

- definition of damage, with 11 operational texts;
- damage to conservation and sustainable use of biological diversity or its components, with seven operational texts;
- valuation of damage to conservation of biological diversity/environment, with seven operational texts;
- special measures in case of damage to centers of origin and centers of genetic diversity to be determined, with three operational texts;
- valuation of damage to sustainable use of biological diversity, human health, socioeconomic damage and traditional damage, with three operational texts; and
- causation, which had been a separate chapter in previous texts, with ten operational texts.

CLOSING PLENARY

On Friday morning, Co-Chair Nieto convened the closing plenary. Uganda, on behalf of the Group of 77 and China, proposed a one-day regional meeting preceding the fourth session of the Working Group in October 2007. Highlighting the importance of regional meetings for achieving progress in the Working Group, Co-Chair Lefeber identified possible funding constraints but said time would be reserved for regional meetings with interpretation on the first afternoon of the next session. Uganda appealed to donors to facilitate participation in the process. Rapporteur Mbengashe introduced the meeting's draft report (UNEP/CBD/BS/WG-L&R/3/L.1) and its two annexes, and delegates adopted the report.

Co-Chair Nieto urged parties to study Annex II at home as this document will form the basis for future negotiations. She emphasized that the time for general discussion and compiling information is now over. Co-Chair Nieto stated that the only way forward is to form positions and come to the next meeting with a flexible mandate to negotiate. She thanked a number of parties for their financial support for the process as well as translators, interpreters and the Secretariat for their hard work. Brazil, for GRULAC, thanked the Co-Chairs for the way they conducted the meeting and especially for making time available for regional meetings. Co-Chair Nieto then closed the meeting at 1:35 pm.

A BRIEF ANALYSIS OF THE MEETING

FROM SKELETON TO LIVING STRUCTURE

A representative group of delegates from all around the world met in Montreal for the third meeting of the Working Group on Liability and Redress to add substantive options to the conceptual skeleton drawn up during the previous sessions of the Working Group. From the outset, delegates drew guidance and insights from a number of expert presentations on core components of the regime, such as the potential role of commercial insurance in remedying damage caused by LMOs, and the relevant elements of private international law for cross-boundary environmental damage. Discussions at the meeting also reflected the recent adoption by the UN General Assembly of the International Law Commission's Principles on the Allocation of Loss in Case of Transboundary Harm Arising out of Hazardous Transboundary Activities (Resolution 56/83). Finally, delegates also looked to contents and experiences from other liability regimes, a number of which have never entered into force. Some delegates suggested that a more flexible and non-binding approach, at least at the outset of the current negotiations, might be more efficient. This led to heated discussions towards the end of the week on the choice of instrument. This brief analysis outlines some of the major issues concerning the structure of

the negotiations, possible timelines, and hurdles that need to be overcome to ensure their successful outcome in the time remaining before COP/MOP-4 convenes in May 2008.

THE PROCEDURAL ROADMAP

Even before delegates arrived in Montreal, it was clear that this session of the Working Group would not engage in political negotiations of operational text, but rather continue analytical work to better understand the options and elements necessary for constructing a liability regime. The objective of the Co-Chairs was to steer the course towards a negotiating mode and have countries come to the next meeting in October 2007 with negotiating mandates and positions. In the morning sessions, substantive chapters of the Co-Chairs' synthesis document were discussed in plenary. These discussions on the various options also helped inform those countries whose positions are still in flux. Delegates were also given ample time for regional coordination and other informal meetings on Tuesday, Wednesday and Thursday afternoons. This *modus operandi* proved promising in the sense that several operational texts were submitted during the week and the Co-Chairs' compilations of the various options and submissions were well received by delegates. However, many delegations and regional groups stressed the need for further consultation and review at the national level. Therefore, only after national positions are solidified and delegates return to Montreal in October will it be known just how well received these proposals really are.

COMPETING TIMELINES

One of the critical forces influencing the process is the approaching May 2008 deadline. It looks as if the Working Group's fourth and penultimate session may be crucial in determining whether the regime will be ready for adoption by COP/MOP-4. During the week, the EU distributed a draft COP/MOP decision, with liability rules and procedures attached, for adoption by COP/MOP-4. This decision constitutes the first phase of a two-stage approach that would first see an interim non-binding instrument and, in the second phase, based on the review of viability of the different options, possibly a binding legal regime. Expressing concern about delaying the adoption of a legally binding regime, a number of developing countries reminded participants that the liability and redress provisions were of central importance to them within the context of the overall biosafety regime. In order to break the deadlock and allow for the adoption of the Cartagena Protocol, developing countries had agreed to develop provisions on liability and redress separately, based on the understanding that they would be legally binding, and now urged other delegations to respect this earlier spirit of compromise.

While there are different interpretations on whether Article 27 of the Protocol calls for mandatory rules and procedures, the mandate of the Working Group clearly requires that a regime be developed by COP/MOP-4. Yet looking at the overall progress so far, this goal seems to be far away, given that substantive negotiations have not even started. Even if negotiations begin in the fall, delegates need to use their two remaining sessions efficiently to reach agreement before the deadline. Conscious of these challenges, a number of delegates from both developing and developed countries have already mentioned extending the mandate of the Working Group. Referring to experiences with other liability regimes that have been pending entry into force for a long time, their argument is that it will be difficult to make substantive changes to a legally binding regime, which is why it is important to continue the negotiations long enough to ensure the quality of, and broad support for, the final outcome.

In terms of timing, the interim rules proposed by the EU for adoption at COP/MOP-4 would apply immediately and universally to all parties. They would then be reviewed at COP/MOP-7 in 2014 and possibly turned into a legally binding instrument. On the other hand, it looks less likely that a comprehensive legally binding agreement will be ready for adoption in May 2008. However, if the EU's proposal means that negotiations for a legally binding regime would not resume until after the proposed review at COP/MOP-7, the adoption of a legally binding instrument could be pushed off for over a decade.

Another immediate concern seems to be whether or not developing countries and regions will have strong, coordinated negotiating mandates in time for the next session of the Working Group. If negotiations do not start in earnest during the fourth session in October 2007, the fifth session, currently scheduled for March 2008, might be in jeopardy. The organization of this session will be subject to voluntary funding and donor countries are likely to measure progress in deciding whether to make contributions. A delay in starting the negotiations might also affect the continuation of the Working Group in its current form, since its mandate expires at COP/MOP-4.

SIGNIFICANT HURDLES

During the session, the Co-Chairs tabled a blueprint for a COP/MOP decision on international rules and procedures in the field of liability and redress. This blueprint contains a matrix of issues that could be filled with possible legally or non-legally binding annexes. The positive way in which the blueprint was received by most delegates and that fact that it was not opposed by any serves as an indicator that the roadmap for successful negotiations could already be in the hands of participants. Overall, the third meeting saw some of the first sketches for a regime, both in the form of the text consolidated by the Co-Chairs, leaving all different options open, and some comprehensive submissions by delegations.

Yet, before developing any kind of instrument, delegates will have to overcome a number of substantive hurdles, first and foremost the debate about the choice of instrument. The push for a binding instrument continues to come from developing countries. JUSCANZ seemed to be split on this question with Norway supporting a binding instrument, and Japan, Canada and the US seemingly favoring a soft-law approach and others remaining silent at this session. The EU proposal foreseeing interim guidelines as a first stage, and a legally binding regime as a second stage, was rejected by both the US and developing countries as distracting from the mandate of the working group to produce a final outcome. On the other hand, several delegations have argued that a binding instrument is not likely to be ratified, and requires more time to negotiate because of the stakes involved.

Delegates must face the fact that that there are several international examples of liability regimes that have never entered into force. These include the Basel Protocol on Liability

and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal; the Convention on Compensation for Damage in Connection with Carriage of Hazardous and Noxious Substances by Sea; the International Convention on Civil Liability from Bunker Oil Pollution Damage and the Lugano Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels. As some delegates observed, to avoid creating another such example, the goal must be to have a balance that does not deter the progress of the biotechnology industry but still offers adequate protection in cases of damage from the transboundary movement of LMOs.

Another relevant substantive hurdle could be the standard of liability. While both options – fault-based liability and strict liability – have their supporters, some proposals for a strict liability standard are less rigid than the term suggests. In principle, adopting a strict liability standard means that the entity to which liability is channeled is responsible for the damage regardless of fault. This is also where the role of states under the regime enters the picture. While there seemed to be consensus that no new rules on state responsibility were necessary, the question of residual state liability is likely to cause some debates in the future. A somewhat related question concerning the inclusion of inter-state dispute settlement procedures remains open, with some feeling that a failure to include these provisions might undermine the application of any regime developed.

Another issue, relevant to both the industry and the victims, is how compensation is funded. One supplementary funding option would be a compensation fund but at this stage it does not seem clear whether there will be enough support for a fund or whether another supplementary financial mechanism will be found. The presentations at the outset of the session established that commercial insurance does not currently cover most risks associated with LMOs, so a number of delegates used this new information to call for supplementary subsidiary financial mechanisms and the introduction of financial limits to liability. Similarly, some delegates suggested that private international law could serve as a fallback mechanism if substantive agreement cannot be reached on a number of issues. This might, at first, look like a lack of commitment to substantive negotiations at the international level. However, in the absence of international agreement, conflict of law norms under private international law would come into play and determine which national law applies and which court has jurisdiction. *De facto*, this might result in stronger substantive provisions being applied since a number of countries have much more detailed and binding liability provisions enshrined in their national legislation than what they have currently put on the table in the negotiations of a possible regime.

BREATHING LIFE INTO THE STRUCTURE

With the conclusion of the third session of the Working Group, the ball is now squarely in the court of governments to provide written submissions during the intersessional period and to return to Montreal in October 2007 prepared to negotiate. While the previous session of the Working Group had drawn up a conceptual framework for a possible regime and this session added a lot of substance in the form of operational text, it now remains up to the parties at the fourth session to breathe life into this structure and to start shaping the form that a future regime will take.

UPCOMING MEETINGS

THIRD COORDINATION MEETING FOR GOVERNMENTS AND ORGANIZATIONS IMPLEMENTING AND/OR FUNDING BIOSAFETY CAPACITY-BUILDING ACTIVITIES: This meeting will take place from 26-28 February 2007, in Lusaka, Zambia. 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=BSCMCB-03

FOURTH MEETING OF THE LIAISON GROUP ON CAPACITY-BUILDING FOR BIOSAFETY: This meeting will take place from 1-2 March 2007, in Lusaka, Zambia. 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=BSLGCB-04

SECOND INTERNATIONAL AGARWOOD CONFERENCE: The second International Agarwood Conference will be held from 4 -11 March 2007, in Bangkok, Thailand. For more information, contact: Rainforest Project Foundation; tel: +31-20-624-8508; fax: +31-20-624-0588; e-mail: trp@euronet.nl; internet: http://www.therainforestproject.net

THIRD MEETING OF THE COMPLIANCE COMMITTEE UNDER THE PROTOCOL: This meeting will take place from 5–7 March 2007, in Kuala Lumpur, Malaysia. 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=BSCC-03

28TH SESSION OF THE CODEX COMMITTEE ON METHODS OF ANALYSIS AND SAMPLING: The 28th Session of the Codex Committee on Methods of Analysis and Sampling will be held from 5-9 March 2007, in Budapest, Hungary. This meeting will address criteria for the methods for the detection and identification of foods derived from biotechnology. For more information, contact: Codex Secretariat; tel: +39-06-57-051; fax: +39-06-5705-4593; e-mail: codex@fao.org; internet: http://www.codexalimentarius.net/download/report/679/ma28_01e.pdf

14TH MEETING OF THE CMS SCIENTIFIC COUNCIL: The 14th meeting of the Convention on Migratory Species' Scientific Council will be held from 14-17 March 2007, in Bonn, Germany. For more information, contact: CMS Secretariat; tel: +49-228-815 2401/02; fax: +49-228-815 2449; e-mail: secretariat@cms.int; internet: http://www.cms.int/bodies/ScC_mainpage.htm

UNPFII-6: The 6th session of the UN Permanent Forum on Indigenous Issues will be held from 14 -25 May 2007, at UN headquarters in New York. The special theme is territories, land and natural resources. For more information, contact: Secretariat of the Permanent Forum on Indigenous Issues; tel: +1-917-367-5100; fax: +1-917-367-5102; e-mail: indigenouspermanentforum@un.org; internet: http://www.un.org/esa/socdev/unpfii/en/session_sixth.html

2007 INTERNATIONAL BIODIVERSITY DAY: International Biodiversity Day is celebrated worldwide on 22 May. The 2007 International Biodiversity Day will focus on biodiversity and climate change. 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/programmes/outreach/awareness/biodiv-day-2007.shtml

CITES COP-14: The 14th Conference of the Parties of the Convention on International Trade in Endangered Species will be held from 3-15 June 2007, in The Hague, the Netherlands. For more information, contact: CITES Secretariat; tel: +41-22-917-8139; fax: +41-22-797-3417; e-mail: info@cites.org; internet: http://www.cites.org/eng/cop/index.shtml

SBSTTA-12: The twelfth meeting of the CBD's Subsidiary Body on Scientific, Technical and Technological Advice will take place from 2-6 July 2007, in Paris, France. 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=SBSTTA-12

OPEN-ENDED WORKING GROUP ON REVIEW OF IMPLEMENTATION OF THE CBD: The second meeting of the CBD Open-Ended Working Group on the Review of Implementation of the CBD will take place from 9-13 July 2007, in Paris, France. 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=WGRI-02

FIRST INTERNATIONAL TECHNICAL CONFERENCE ON ANIMAL GENETIC RESOURCES: This conference will take place 1-7 September 2007, in Interlaken, Switzerland. It aims to address priorities for the sustainable use, development and conservation of animal genetic resources. For more information, contact: Irene Hoffmann, Chief, FAO Animal Production Service; tel: +39-06-570-52796; fax: +39-06-570-55749; e-mail: irene.hoffmann@fao.org; internet: http://www.fao.org/ag/againfo/programmes/en/genetics/angrvent2007.html

ABS WG-5: The fifth meeting of the CBD *ad hoc* Open-ended Working Group on Access and Benefit Sharing is scheduled to take place from 8-12 October 2007, in Montreal, Canada. 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=ABSWG-05

ARTICLE 8(J) WG-5: The fifth meeting of the CBD *ad hoc* Open-ended Working Group on Article 8(j) and related provisions is scheduled to take place from 15-19 October 2007, in Montreal, Canada. 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/meetings/default.shtml

LIABILITY AND REDRESS WG-4: The fourth meeting of the *ad hoc* Open-ended Working Group on Liability and Redress the context of the Biosafety Protocol is scheduled to take place from 22-26 October 2007, in Montreal, Canada. 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/meetings/default.shtml

OUTLINE OF ANNEX II

I. Possible Approaches to Liability and Redress
- A. State responsibility for internationally wrongful acts, including breach of obligations of the Protocol
- B. State liability for acts that are not prohibited by international law, including cases where a state party is in full compliance with its obligations of the Protocol
- C. Civil liability (harmonization of rules and procedures)
- D. Administrative approaches based on allocation of costs of response measures and restoration measures

II. Scope
- A. Functional scope
- B. Geographical scope
- C. Limitation in time
- D. Limitation to the authorization at the time of import of the LMOs
- E. Determination of the point of import and export of the LMOs
- F. Non-parties

III. Damage
- A. Definition of damage
- A *bis*. Damage to conservation and sustainable use of biological diversity or its components
- B. Valuation of damage to conservation of biological diversity/environment
- C. Special measures in case of damage to centers of origin and centers of genetic diversity to be determined
- D. Valuation of damage to sustainable use of biological diversity, human health, socioeconomic damage and traditional damage
- E. Causation

IV. Primary Compensation Scheme
- 1. Possible factors to determine the standard of liability and identification of the liable person
- 2. Standard of liability and channeling of liability
- 3. Exemptions to or mitigation of strict liability
- 4. Provision of interim relief
- 5. Recourse against a third party by the person who is liable on the basis of strict liability
- 6. Joint and several liability or apportionment of liability
- 7. Limitation of liability
- 8. Coverage of liability

V. Supplementary Compensation Scheme
- Additional tiers of liability
- A. Residual state liability
- B. Supplementary collective compensation arrangements

VI. Settlement of Claims
- A. Inter-state procedures
- B. Civil procedures
- C. Administrative procedures
- D. Special tribunal
- E. Standing/right to bring claims

VII. Complementary Capacity-Building Measures

VIII. Choice of Instrument