

## WORKING GROUP HIGHLIGHTS

### MONDAY, 22 OCTOBER 2007

The fourth session 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) opened in Montreal, Canada, on Monday morning. After a brief opening session, delegates closed the agenda item on the review of information and began exchanging views on options for elements of rules and procedures on liability and redress. The day's discussions focused on possible approaches to liability and the choice of instrument. In the afternoon, the meeting was adjourned to give delegates time for regional coordination.

#### OPENING SESSION

Opening the meeting, Co-Chair Jimena Nieto (Colombia) stressed that only one more meeting is scheduled before the Working Group is to report to COP/MOP-4, and expressed hope that delegates have come to the meeting with flexible negotiating mandates and an appropriate spirit.

COP/MOP-3 President Fatimah Raya Nasron (Malaysia) welcomed the progress achieved by the Working Group in gathering and reviewing a substantial amount of information and submissions. She urged delegates to start using the information and work towards a consensus on international rules on liability and redress.

Ahmed Djoghlaif, CBD Executive Secretary, welcomed participants to the third week of biodiversity meetings held in Montreal. Thanking donors, he stressed that also the Working Group's next meeting must be financed through extra-budgetary means and said progress during this week will determine whether donors will see the fifth meeting as a "good investment." Djoghlaif said he was confident that the Working Group would achieve good progress and be guided by a sense of urgency.

Delegates then adopted the agenda and agreed to the organization of work (UNEP/CBD/BS/WG-L&R/4/1 and Add.1).

## REVIEW OF INFORMATION

The Secretariat introduced a document 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/4/INF/2). The Secretariat also introduced a document on supplementary collective compensation arrangements in international environment-related liability instruments (UNEP/CBD/BS/WG-L&R/4/INF/3).

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

The Secretariat introduced a synthesis of proposed operational texts on approaches and options identified pertaining to liability and redress in the context of Article 27 of the Protocol (UNEP/CBD/BS/WG-L&R/4/2). He explained that the synthesis integrates submissions in the form of operational text.

Co-Chair René Lefeber (the Netherlands) highlighted the need to narrow down the options contained in the Co-Chairs synthesis as the Working Group cannot send such an extensive document to the COP/MOP. He proposed focusing Monday's discussions on Sections I (Possible Approaches to Liability and Redress) and VIII (Choice of Instrument).

### POSSIBLE APPROACHES TO LIABILITY AND

**REDDRESS:** On possible approaches to liability and redress, delegates considered the options of state responsibility, state liability, civil liability, and administrative approaches.

The EUROPEAN COMMUNITY (EC), supported by several others, stated that there is no need to develop new rules on state responsibility. The EC indicated it may not be necessary to include any provisions on state responsibility while SOUTH AFRICA preferred explicitly stating that the existing rules on state responsibility are adequate. EGYPT, supported by ARGENTINA and PARAGUAY, suggested combining the similar operational texts on state responsibility. EGYPT noted that in bilateral relations, developing countries are often left in an unfavorable position with regard to state responsibility.

ARGENTINA, BRAZIL, CANADA, JAPAN, NEW ZEALAND, PARAGUAY, SOUTH AFRICA and others indicated that they did not support primary state liability and MEXICO proposed deleting the option. BURKINA FASO, COLOMBIA, ECUADOR, MALAYSIA, SENEGAL, THAILAND and others highlighted the option of including some form of residual state liability. MALAYSIA explained that if the victim was otherwise uncompensated, the state of export or the state of the national causing the damage could take on some compensatory role.

BRAZIL and others indicated that they did not support residual state liability. PALAU explained that ultimately, state liability would complicate things as, for example, in Palau this would require approval of the national congress.

The EC, Liberia, for the AFRICAN GROUP, NORWAY and JAPAN expressed preference for a combination of civil liability and administrative approaches. The EC highlighted that liability should be channelled to economic operators handling the activities, and said that the state would only assume liability if it were an operator. SWITZERLAND noted that the concept of the operator is unclear, and that liability requires balance between activities in exporting and importing countries.

NEW ZEALAND noted the absence of consensus on the nature and degree of risk, and also on the scope and nature of the task at hand. He said that the administrative approach obscures as much as it illuminates. The US suggested the administrative approach required exploration and cited concerns with initiating new bureaucracies. ARGENTINA, CANADA and SWITZERLAND suggested that additional proposals on administrative approaches need to be considered.

In summarizing the discussions, Co-Chair Lefebvre concluded that the option of primary state liability would be deleted, but that residual state liability would not be excluded. He explained that the Co-Chairs would provide a paper on state responsibility and that administrative approaches would be explored further. He also indicated that the texts on civil liability and administrative approaches would be merged into Section IV (Primary Compensation Scheme).

**CHOICE OF INSTRUMENT:** Concerning the choice of instrument, the AFRICAN GROUP, CAMBODIA, CUBA, INDIA, NORWAY, SWITZERLAND and others favored a legally binding instrument as the most effective option. MALAYSIA stressed that Article 27 of the Protocol calls for international rules on liability.

The EC proposed a two-step approach consisting of a COP/MOP decision giving guidance for national legislation, followed by an assessment of the effectiveness of the decision and proposals for a binding instrument. He stressed that this way the regime would be effective immediately without ratification.

The US preferred a single-stage approach as the EC's proposal would duplicate the process. RWANDA opposed the two-stage approach citing problems at the national level and MALAYSIA said the EC's proposal would delay the process and postpone the creation of binding rules.

NEW ZEALAND indicated that numerous formulations could be acceptable, but that the EC's concept of a "model law," could also be useful.

JAPAN cited diverging views amongst participants, said these required resolution and, with AUSTRALIA, favored a non-legally binding instrument. BRAZIL, MEXICO and SOUTH AFRICA indicated that they were still considering the various options, with BRAZIL agreeing with the EC on the need to ensure immediate applicability. COLOMBIA, supported by ECUADOR, ARGENTINA, PALAU, PARAGUAY and others, stated that decision on a legally or non-legally binding instrument is contingent on the outcome of the negotiations of the other options.

Summarizing the day's discussions, Co-Chair Lefebvre said the question concerning the choice of instrument would be left open for the time being, but the Co-Chairs would convene a brainstorming session with key negotiators to move forward. Co-Chair Lefebvre suggested that the outcome of the process could include two annexes to the COP/MOP decision, one on civil liability and one on administrative liability. In the ensuing discussion numerous delegates suggested this format could not be presumed and delegates agreed that deliberations should be undertaken without prejudice to the format.

Co-Chair Lefebvre then explained that delegates would be given an "operational texts form" as a tool to guide group discussions and the Co-Chairs' work. After some comments on the proposed format, Co-Chair Lefebvre further explained that during the next days, the plenary would meet in the morning and two contact groups would convene in the afternoon and possibly evening.

### IN THE CORRIDORS

As delegates stepped out of the Montreal sunshine and into the ICAO building for the first day of work, some marveled at the good will and positive atmosphere. Others speculated that the unseasonably warm weather may have impacted the mood and hoped, as the forecast predicts, it would last throughout the week. Many felt optimistic that the Co-Chairs had developed a working method that could expedite the process and help delegates in narrowing down the several options in the Co-Chairs' synthesis. "We made progress already today when we got rid of the option of primary state liability," one delegate observed. "But we will leave Montreal with multiple options still on the table," another one predicted. One more pessimistic delegate noted, however, that negotiations could end in a "train wreck" if consensus cannot be found on the key issues by the end Working Group's next meeting, which will be the last before COP/MOP-4.