

## WORKING GROUP HIGHLIGHTS:

### THURSDAY, 25 OCTOBER 2007

On Thursday morning and early afternoon, the Working Group met in plenary and addressed state responsibility and aspects of the primary compensation scheme. In the afternoon, the sub-working groups convened to consider damage and civil liability. In the evening, the sub-working group continued working on issues related to administrative approaches and an informal brainstorming session focused on the choice of instrument.

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

In the Wednesday morning plenary, Chair Bally explained that the sub-working group on damage had addressed sections on: definition of damage; valuation of damage to conservation of biodiversity; valuation of damage to sustainable use of biodiversity; and special measures concerning centers of origin and centers of genetic diversity.

Chair Bulmer outlined progress on administrative approaches. She noted reluctance of some delegates to consolidate operational text but expected that further progress could still be achieved. Regarding civil liability, Chair Bulmer explained that the sub-working group had considered the three options of strict liability, mitigated strict liability and fault-based liability. She indicated that mitigated strict liability warranted further consideration in the intersessional period and that the text could not be further streamlined at this meeting.

**STATE RESPONSIBILITY:** In discussing the revised Co-Chairs' paper on state responsibility (UNEP/CBD/BS/WG-L&R/4/CRP.1), JAPAN, opposed by NORWAY, UGANDA, INDIA, ECUADOR and BELIZE, suggested placing the text on state responsibility in the preamble of the instrument. Co-Chair Lefebvre said that the text would be forwarded for further discussion as two options, preambular and operational.

**PRIMARY COMPENSATION SCHEME:** On exemptions to, or mitigation of, strict liability, the EC, with NEW ZEALAND, stressed that exemptions are typical for liability regimes and identified the need to address damage that will not be compensated because of the exemptions.

MALAYSIA opposed broad exemptions that contradicted the precautionary principle and the Protocol. The AFRICAN GROUP, with NORWAY, stressed that exemptions can also constitute a *de facto* subsidy for the LMO industry as the victims or national authorities will have to bear the burden from damage.

GREENPEACE INTERNATIONAL urged delegates to consider how the exemptions would function in relation to LMOs. TRINIDAD AND TOBAGO stressed that the state of the art defense and exemption based on compliance with mandatory regulation could cause problems for developing countries that have to rely on information submitted by the operator. FRIENDS OF THE EARTH stressed that an exemption on the basis of authorization in national law means that nobody will compensate if damage occurs after the authorization.

On the provision of interim relief, JAPAN and ARGENTINA supported a proposal to delete the text, but MALAYSIA, the AFRICAN GROUP, MEXICO, PALAU, ECUADOR, BELIZE and others wanted to retain the text as useful guidance for developing domestic legislation. The WASHINGTON BIOTECHNOLOGY ACTION COUNCIL and GREENPEACE INTERNATIONAL supported retaining the text for audiences other than governments.

On recourse against a third party by the person who is liable on the basis of strict liability, JAPAN, supported by NEW ZEALAND, suggested that this issue is already covered under national legislation. MEXICO, LIBERIA, INDIA, NORWAY, MALAYSIA, CAMEROON, PALAU, ECUADOR, BELIZE, ARGENTINA, CUBA and GREENPEACE INTERNATIONAL supported retaining the section to ensure consistency across legal regimes.

JAPAN, supported by NEW ZEALAND, suggested deleting the text on joint and several liability, or apportionment of liability, as they are covered by national legislation. MALAYSIA noted that some of the text facilitates claims when several parties are involved and apportionment needs to be retained to make sure the redress is fair. Supported by CAMEROON, PALAU, BELIZE, ARGENTINA, and GREENPEACE INTERNATIONAL, he favored retaining the text.

On limitation of liability in time, the AFRICAN GROUP, supported by PANAMA, BRAZIL, MALAYSIA and SAUDI ARABIA, preferred a ten year time limit for bringing a claim

from the date the claimant knew of the damage and its origin. The EC, MEXICO, NORWAY, INDIA, PALAU and CANADA preferred more flexible limits. On the limitation in amount, the AFRICAN GROUP, ARGENTINA, MEXICO, PANAMA, BRAZIL SAUDI ARABIA and MALAYSIA preferred language without specifying limits, while the EC, NEW ZEALAND, INDIA, PALAU and the US preferred text with some limits on liability.

On coverage of liability, JAPAN preferred operational text encouraging operators to maintain adequate insurance. CANADA supported text specifically referencing the administrative approach. NORWAY and the AFRICAN GROUP supported text requiring the person liable to maintain insurance or financial guarantees in accordance with the regulatory framework of the party of import.

INDIA supported mandatory financial guarantees and insurance cover for transboundary movements of LMOs, while the EC favored operational text allowing for flexibility in the choice of financial security instruments. MALAYSIA called for additional financial instruments in cases where insurance coverage is capped and, with PALAU, supported a text covering a range of instruments. Highlighting the announcement of a moratorium on commercial planting of genetically modified (GM) crops in France, GREENPEACE INTERNATIONAL stressed concerns about uncontrolled dissemination of GM crops and considered financial security a pivotal element.

### **SUB-WORKING GROUPS AND INFORMAL CONSULTATIONS**

**DAMAGE:** The sub-working group discussed causation of damage, arranged into three different options on: burden of proof on the claimant; burden of proof on the respondent; and where establishing burden of proof is left to domestic law. On placing the burden of proof on the claimant, four operational texts were consolidated, leaving two options: one with a list of criteria for establishing proof, and another stating that liability requires establishment of both "cause-in-fact" and "proximate cause."

On imposing the burden of proof on the respondent, delegates agreed to separate the more general operational paragraph on causation, the adverse effects of LMOs and the presumption that the operator is liable. They integrated the specific parts relating to the burden of proof of two other operational texts into one and moved the more general parts to other sections.

On the option leaving the issue to domestic law, delegates agreed to keep the three separate operational texts. The sub-working group completed its work early in the evening.

### **ADMINISTRATIVE APPROACHES AND CIVIL**

**LIABILITY:** Meeting in the afternoon, the sub-working group addressed issues related to the primary compensation scheme. Participants agreed to streamline and consolidate text on exemptions to strict liability and mitigation of strict liability. On the provision of interim relief, some delegates cited concern that there was no agreement that the outcome document would contain separate sections on civil liability and administrative approaches, and delegates agreed to a footnote stating the section is primarily applicable to civil liability, but that does not preclude applicability to administrative approaches. Progress was also made in streamlining texts under the options on recourse against

third parties by the person who is liable on the basis of strict liability and joint and several liability and apportionment of liability.

Meeting late in the evening, the sub-working group focused on a working document streamlined by the Co-Chairs on the standard of liability and channeling of liability. Under the guidance of Chair Bulmer, delegates considered the five elements of the document specifically, compared them to those in the former draft, and where necessary, reinserted text.

**CHOICE OF INSTRUMENT:** In the morning plenary, delegates agreed that the informal brainstorming session on the choice of instrument should take place in the plenary hall instead of a more informal and limited setting at the premises of the CBD Secretariat as was originally planned.

Late on Thursday evening, the Co-Chairs opened the session on the choice of instrument. Recalling contentious debates at past sessions of the Working Group, they described the issue as "a dark cloud hanging over the negotiations."

In the following exchange of views and ideas relevant to the choice of instrument, two possible options were addressed, each entailing non-legally binding guidelines on substantive issues and a legally binding procedural instrument either on private international law or the administrative approaches. Many participants appreciated the opportunity to discuss this difficult issue in an informal setting. A number of delegates highlighted the advantages and disadvantages of legally binding and non-legally binding approaches respectively, but seemed to agree that a combination of the two approaches might be too ambiguous and further complicate issues.

Some delegates referred to the negotiating history of the Protocol and the underlying compromise, which they saw as entailing strong rules on liability and redress. Others stressed that non-binding rules would not achieve very much, while others stressed difficulties with creating legally binding rules on LMOs.

Continuing the discussions late in the evening, delegates also addressed the different modes for adopting the rules and procedures on liability and redress.

### **IN THE CORRIDORS**

As delegates entered the fourth day of the meeting, most eyes and ears were on plans for the Co-Chairs' brainstorming session on choice of instrument. Co-Chair Lefebvre announced the gathering would be on a Bring Your Own (BYO) basis and since no drinks were allowed inside ICAO premises, he clarified he meant BYO lawyer. As delegates hurried into the session, some were hoping for resolution of this issue that has been hanging over the week like a Damocles sword, while others said it could be resolved simply by making the instrument a non-binding agreement. According to most delegates, the proposed hybrid approach combining legally and non-legally binding elements, took them by surprise. They felt, however, that the proposal might have had the desired effect of uniting the majority of delegates in their opposition to the hybrid approach, forcing them to put their cards on the table and potentially reshuffling positions in the process.

**ENB SUMMARY AND ANALYSIS:** The *Earth Negotiations Bulletin* summary and analysis of the Working Group will be available on Monday, 29 October 2007, online at: <http://www.iisd.ca/biodiv/wglr4/>