

## SUMMARY OF THE FOURTH MEETING OF THE OPEN-ENDED *AD HOC* WORKING GROUP ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY: 22-26 OCTOBER 2007

The fourth 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) took place from 22-26 October 2007, in Montreal, Canada. Approximately 200 delegates 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 by the first Conference of the Parties to the Convention on Biological Diversity 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;
- analyze general issues relating to potential and/or actual damage scenarios of concern; and
- elaborate options for elements of rules and procedures on liability and redress.

At the meeting, the Working Group focused on the elaboration of options for rules and procedures referred to in Article 27 of the Protocol based on a working draft compiled by Co-Chairs René Lefeber (the Netherlands) and Jimena Nieto (Colombia), synthesizing submissions of operational texts with respect to 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).

During the week, delegates addressed most sections in the Co-Chairs' synthesis, focusing on streamlining options for operational text related to damage, administrative approaches and civil liability.

As a result, the working document was reduced from 80 pages in the Co-Chairs' synthesis to 53 pages in Annex II of the meeting's report (UNEP/CBD/BS/WG-L&R/4/L.1). Many participants felt that this was a good outcome and that the

Working Group had produced a document that could be used as the basis for negotiations at its next meeting. The Co-Chairs were also given a mandate to streamline specific parts of Annex II during the intersessional period. While happy with the results, several delegates indicated that expeditious progress is essential given that the Working Group is scheduled to hold only one more meeting before reporting to COP/MOP-4 in May 2008 in Bonn, Germany. They emphasized that, in practice, this means that only approximately ten negotiating days remain before the deadline for adopting international rules and procedures relating to liability and redress in the context of the Cartagena Protocol on Biosafety.

## A BRIEF HISTORY OF THE BIOSAFETY PROTOCOL AND LIABILITY AND REDRESS

The Cartagena Protocol on Biosafety addresses the safe transfer, handling and use of living modified organisms (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

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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 and currently has 143 parties.

**NEGOTIATION PROCESS:** Article 19.3 of the Convention Biological Diversity 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. BSWG-4 and BSWG-5 focused on reducing and refining options for each article of the draft protocol. BSWG-6 (February 1999, Cartagena, Colombia), was mandated to complete negotiations and submit the draft protocol to the first Extraordinary Meeting of the COP (ExCOP), convened immediately following BSWG-6. However, 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); 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 (HTPI); monitoring and reporting; and liability and redress.

**COP/MOP-1:** COP/MOP-1 (February 2004, Kuala Lumpur, Malaysia) adopted decisions on: information sharing and the BCH; capacity building; decision-making procedures; HTPI;

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, which specifies that the process of elaborating international rules and procedures in the field of liability and redress should be completed within four years.

#### **WORKING GROUP ON LIABILITY AND REDRESS-1:**

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.

#### **WORKING GROUP ON LIABILITY AND REDRESS-2:**

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 considered 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.

#### **WORKING GROUP ON LIABILITY AND REDRESS-3:**

At its third meeting (February 2007, Montreal, Canada) the Working Group continued analytical work, focusing on a working draft prepared by the Co-Chairs synthesizing proposed texts and views submitted by governments and other stakeholders on approaches, options and issues pertaining to liability and redress in the context of Article 27 of the Protocol. At the meeting, delegates worked through the elements and options included in the Co-Chairs' synthesis, were asked to submit operational text, held regional meetings and consulted informally to formulate and clarify their positions. The Co-Chairs presented the Working Group with a blueprint for a COP/MOP decision on international rules and procedures in the field of liability and redress. The blueprint, annexed to the meeting's report, contains a matrix of elements to structure and guide future deliberations and to be taken into account in developing one or more annexes to a possible COP/MOP decision. Many participants felt that the Working Group's third meeting had achieved progress towards the negotiating phase.

## WORKING GROUP REPORT

The fourth meeting of the Working Group opened on Monday morning, 22 October 2007. Co-Chair Jimena Nieto (Colombia) stressed that only one more meeting is scheduled before the Working Group is to report to COP/MOP-4 in May 2008, and expressed hope that delegates had come to the meeting with flexible negotiating mandates.

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 use 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 the Working Group's next meeting must be financed through voluntary contributions and said progress during this week will determine whether donors will see the fifth meeting as a "good investment."

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

On Monday morning, 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 introduced another document on supplementary collective compensation arrangements in international environment-related liability instruments (UNEP/CBD/BS/WG-L&R/4/INF/3).

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

The Working Group considered the agenda item on analysis of issues and elaboration of options for rules and procedures referred to in Article 27 of the Protocol throughout the week. 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) (hereafter, the Co-Chairs' synthesis) and the Working Group based its discussions on the options for operational text. The document contains the different options and elements developed at the Working Group's previous sessions and intersessionally. It is divided into eight sections on:

- Possible Approaches to Liability and Redress (Section I);
- Scope (Section II);
- Damage (Section III);
- Primary Compensation Scheme (Section IV);
- Supplementary Compensation Scheme (Section V);
- Settlement of Claims (Section VI);
- Complementary Capacity-Building Measures (Section VII); and
- Choice of Instrument (Section VIII).

At its fourth meeting, the Working Group focused on Sections I, III and IV, which were addressed in plenary and in sub-working groups throughout the week. Sections II and V were briefly discussed on Friday morning, while sections VI and VII were not addressed by the Working Group at this meeting. Section VIII on the choice of instrument was taken up by plenary on Monday and Friday, and subject to an informal brainstorming session on Thursday evening.

During the course of the meeting, the Working Group streamlined and consolidated options for operational text in the Co-Chairs' synthesis. The results of this work are contained in Annex II of the meeting's report (UNEP/CBD/BS/WG-L&R/4/L.1/Add.1) (hereafter, Annex II). When comparing the Co-Chairs' synthesis and Annex II, the key outcome from the meeting was that the Working Group reduced the number of options for operational text and sometimes categorized the remaining options in a way that reflects the main choices for elaborating international rules and procedures on liability and redress. As a result, the working document has been reduced from 80 pages in the Co-Chairs' synthesis to 53 pages in Annex II. The meeting's report also contains Annex I with a blueprint for a COP/MOP decision on international rules and procedures on liability and redress in the field of biosafety. The following summary of the deliberations on this agenda item is structured on the basis of Annexes I and II of the meeting's report.

### BLUEPRINT FOR RULES AND PROCEDURES ON LIABILITY AND REDRESS:

A revised version of the 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 (hereafter, the blueprint) was considered in plenary on Friday when delegates agreed to append it to the meeting's report (UNEP/CBD/BS/WG-L&R/3/L.1) as Annex I.

The blueprint originates from the Working Group's third meeting, where it was introduced by the Co-Chairs as a tool covering all approaches and options, to provide maximum flexibility in structuring the COP/MOP decision and its annexes and is not intended to prejudice the outcome of the process. Although delegates did not substantively discuss the blueprint, the document was revised by the Co-Chairs to reflect progress made in analyzing options and elements for international rules and procedures in the field of liability and redress.

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 setting out possible combinations of annexes is contained under the heading "Optional Components of the Annex(es) to the Decision." 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.

Annex I includes notes explaining that the blueprint for a COP/MOP decision does not prejudice 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 and one annex to a COP/MOP decision may cover one or more approaches to liability, and *vice versa*. Since the line on state liability now sets out that there will be no rules and procedures on primary state liability, a note was added that the blueprint would not prejudice the outcome on residual state liability.

**I. STATE RESPONSIBILITY AND PRIMARY STATE LIABILITY:** Issues relevant to state responsibility and primary state liability were first taken up in plenary on Monday. State responsibility was subsequently addressed in plenary on Wednesday and Thursday.

On Monday, Argentina, Brazil, Canada, Japan, New Zealand, Paraguay, South Africa and several others indicated that they did not support primary state liability and Mexico proposed removing the option. Burkina Faso, Colombia, Ecuador, Malaysia, Senegal, Thailand and others expressed support for some form of residual state liability. 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. On the basis of these discussions, delegates agreed to delete the option of primary state liability. Delegates also agreed the possibility of residual state liability would be considered in the context of the supplementary compensation scheme.

Monday's discussions also addressed state responsibility for internationally wrongful acts, including breach of obligations of the Protocol. The European Community (EC), speaking on behalf of the Community and its member states and supported by several others, stated that there is no need to develop new international rules on state responsibility. South Africa preferred explicitly stating that the existing rules on state responsibility are adequate. Egypt noted that in bilateral relations, developing countries are often left in an unfavorable position with regard to state responsibility. Based on the discussion, Co-Chair Lefebvre indicated that the Co-Chairs would produce a paper on state responsibility with operational text that could be included in the instrument in case parties decide to explicitly address the issue.

On Wednesday, Co-Chair Lefebvre introduced draft operational text on state responsibility (UNEP/CBD/BS/WG-L&R/4/CRP.1). He explained the choice of terms, namely "rules and procedures" rather than "instrument" in order not to preclude outcomes, "states" rather than "contracting parties" since the latter term was ambiguous; and "responsibility of states for internationally wrongful acts," based on wording developed by the UN International Law Commission.

On Thursday, Co-Chair Lefebvre opened the discussion on the paper. Japan, opposed by Norway, Uganda, India, Ecuador and Belize, suggested placing the text on state responsibility into the preamble of the instrument. Following discussion,

Co-Chair Lefebvre suggested that the text be forwarded for further discussion as two identical options, preambular and operational, and delegates agreed.

**II. SCOPE: Functional scope:** This issue was addressed in plenary on Friday morning. Discussion was based on the sixteen options for operational text contained in the Co-Chairs' synthesis.

The discussions revealed diverging views on the functional scope of the rules and procedures in the field of liability and redress. Essentially, functional scope concerns which transboundary movements of LMOs the international rules and procedures should cover, including whether the coverage is limited to intentional transboundary movement of LMOs or extends to unintentional and illegal transboundary movement. Norway, the African Group, Saint Lucia, India, the EC, Belize, Cuba, Peru, Panama, Malaysia, Bhutan, Mexico and Malaysia favored a broader functional scope. New Zealand, Peru, Canada and Argentina preferred operational text with a narrower functional scope. On the basis of plenary discussions, eight unsupported options of operational text were deleted. Annex II retains eight options for operational text, grouped into two categories, on broad and narrow scope, respectively.

**Geographical scope:** This issue was addressed in plenary on Friday morning based on the Co-Chairs' synthesis containing fourteen options for operational text on the geographical scope of international rules and procedures in the field of liability and redress. The discussions focused on three options:

- limiting the applicability of the rules to damage in areas within national jurisdiction of the parties;
- extending their applicability also to areas within the national jurisdiction of non-parties; and
- extending coverage to areas beyond the limits of national jurisdiction or control of states.

During the discussions, the African Group, Belize and others supported a broad geographical scope, meaning that the rules and procedures would also apply to damage in areas within the national jurisdiction of non-parties and areas beyond the national jurisdiction of states.

India, Norway and others preferred covering damage in national territories of parties and areas beyond the limits of national jurisdiction.

The EC, supported by New Zealand, indicated that extending application to areas beyond national jurisdiction would be problematic, for instance, with respect to the right to bring claims concerning such damage. Japan, Mexico and others argued for limiting the geographical scope to damage occurring in areas within the national jurisdiction of parties, while the US stated that there was no need for specific rules on geographical scope.

On the basis of the plenary discussions, seven options for operational text were deleted. The remaining texts were grouped in three categories:

- damage in parties only;
- damage in parties and areas beyond national jurisdiction; and
- damage in parties, non-parties, and areas beyond national jurisdiction.

Annex II retains three options for operational text concerning damage in parties only; three options for operational text on damage in parties and areas beyond national jurisdiction; and one option for operational text on damage in parties, non-parties and areas beyond national jurisdiction.

**Limitation in time:** The temporal scope of rules and procedures was addressed in plenary on Friday morning based on the Co-Chairs' synthesis with eleven options for operational text.

The discussion focused on possible time limits to the applicability of the international rules and procedures in the field of liability and redress. The US, Colombia and others supported some time limits, with the US stating that the actual number of years should be subject to further negotiation. Several delegates, including the EC, the US and Trinidad and Tobago, highlighted the general legal principle that rules should not be applied retroactively. Argentina emphasized that the rules should not apply to damage that has been caused prior to their adoption even if it occurs only after the rules and procedures have been adopted. While acknowledging the general legal principle, the African Group and Malaysia, supported by Bangladesh and others, stressed that since the damage caused by LMOs can be ongoing, damage occurring after the adoption of the rules should be covered even if it had been caused prior to their adoption. On the basis of the plenary discussion, five options for operational text were deleted. The remaining six options were retained for further consideration without any grouping or categorization.

**Limitation to the authorization at the time of the import of the LMOs:** This issue was discussed in plenary on Friday, based on five options for operational text in the Co-Chairs' synthesis.

Argentina, supported by India and China, indicated preference for text limiting damage to that related to activities authorized in terms of the Protocol. The African Group preferred text including all damage resulting from transboundary movement of an LMO. The EC, supported by Malaysia, Mexico and Ecuador, preferred text that would single out damage resulting from a use different from that authorized.

Based on the plenary discussion, one option for operational text was deleted. Co-Chair Lefebvre indicated that there would be no grouping of the remaining operational texts and four options for operational text would be included in Annex II.

**Determination of the point of the import and export of the LMOs:** This issue was discussed in plenary on Friday, based on eight options for operational text in the Co-Chairs' synthesis.

Argentina and China indicated preference for text that transboundary movement commences when an LMO leaves the territorial jurisdiction of a state and ends when it enters another state. The African Group preferred text that specifies that the carriage of the LMO transfers responsibility for damage on the carrier. Norway and India preferred text that delineates different responsibilities for sea, land and air transport. The EC, Mexico and India preferred text that spells out special responsibilities for contracting parties and non-parties. Brazil, Malaysia and New Zealand suggested deleting this section, but Japan stated it was useful for further consideration.

Based on the discussion, four options for operational text were deleted. Co-Chair Lefebvre indicated that there would be no grouping of the remaining operational texts and four options for operational text would be included in Annex II.

**Non-Parties:** This issue was discussed in plenary on Friday, based on five options for operational text in the Co-Chairs' synthesis.

During the discussions, Argentina and Mexico indicated preference for text that declares that rules and procedures will not apply when neither state is a contracting party. The African Group and Colombia preferred text that includes all states. The EC, Norway, Malaysia and Ecuador preferred text specifying that national rules implemented by this decision should also cover damage resulting from the transboundary movements of LMOs from non-parties. New Zealand suggested deleting this text. Based on the plenary discussion, two options for operational text were deleted. Co-Chair Lefebvre indicated that there would be no grouping of the remaining options and three options for operational text would be included in Annex II.

**III. DAMAGE:** Delegates considered the section on damage in plenary on Tuesday and Wednesday and in a sub-working group chaired by Jürg Bally (Switzerland) from Tuesday to Thursday.

**Definition of damage:** Deliberations on this item started off on Tuesday with the specific definition of damage to conservation and sustainable use of biodiversity, and continued on Wednesday, when plenary considered the general definition of damage. During the week, the specific definition of damage to conservation and sustainable use of biodiversity was integrated into the section on the general definition of damage.

On Tuesday, delegates in plenary first discussed the specific definition of damage to conservation and sustainable use of biological diversity and its components based on seven options for operational text. The EC highlighted the need to focus on this aspect of damage, and said damage to property would be covered to the extent it is related to damage to biodiversity.

Many delegates supported a comprehensive definition of damage to biodiversity. A number of delegates questioned the need for a special emphasis on protected species and habitat. Brazil, Japan and others suggested covering risks to human health as they are also covered by the Protocol, with Canada proposing they be limited to health problems resulting from damage to biodiversity.

Some delegates preferred to only deal with transboundary movements of LMOs. Argentina suggested reference to tangible and significant damage, that is permanent or long-term, and to link it to effects on conservation and sustainable use.

Based on plenary discussions, delegates agreed to delete one option for operational text.

On Tuesday, the sub-working group on damage used the most comprehensive operational text on damage to conservation and sustainable use of biological diversity and integrated parts of other operational paragraphs, including: references to the definition of biodiversity in Article 2 of the CBD; and socioeconomic considerations arising from damage to biological diversity consistent with Article 26 of the Protocol. Delegates also integrated text from other options on "significant and serious damage" and "scientifically established baselines."

Some developing country delegates proposed deleting a specific reference to protected species and habitats, whereas a number of developed countries favored retaining it and it was kept as part of the comprehensive definition. Some delegates warned against creating one single paragraph that contained a lot

of detail and proposed keeping some separate options. Delegates agreed to the consolidated text, but also retained a separate operational text with a very concise definition of damage to biodiversity.

On Wednesday in plenary, delegates discussed the general definition of damage based on fifteen operational texts. The EC emphasized that the notion of damage had already been fully addressed when discussing damage to the conservation and sustainable use of biodiversity, which is a broad notion in itself. Japan called for an approach that addresses measurable and considerable damage to the conservation and sustainable use of biodiversity caused by transboundary movements of LMOs.

The discussions on damage revealed two general groups, one supporting a broader definition, also covering traditional and socioeconomic damage, and another one arguing that the definition of damage should be limited to damage to conservation and sustainable use of biodiversity.

Based on plenary discussions, ten options for operational text were deleted. The remaining options were referred to the sub-working group, which consolidated and streamlined a number of general definitions of damage on Wednesday. Annex II, therefore, contains five operational texts separated into two options, one entailing a broader definition of damage and the other a narrow definition.

**Valuation of damage to conservation of biological diversity/environment:** This issue was discussed in plenary on Tuesday based on nine options for operational text in the Co-Chairs' synthesis.

The EC, supported by Malaysia, stressed the need for a broad interpretation on the "cost of response measures," and for the imposition of a clear obligation on the operator for restoration. Brazil called for flexibility in choosing the method of valuation. Mexico suggested covering costs of introducing equivalent components in the same, or in new, areas when it is not possible to rehabilitate an area. The Washington Biotechnology Action Council stressed the need for valuation of the actual loss. Following plenary discussions one option was deleted.

The issue was taken up by the sub-working group on damage on Wednesday. Delegates combined text from the options, covering: valuation of damage to environment; conservation and sustainable use of biological diversity; compensation; and restoration issues. Chair Bally recalled the mandate of the sub-working group to consolidate a variety of concepts and approaches in a comprehensive text and reach consensus on it. Following extensive discussion, delegates decided consolidation would not be feasible and valuation, restoration and reintroduction of components were retained as separate points. Annex II thus contains two options for operational text, one with broad definitions and one limiting valuation to restoration cost.

**Special measures in case of damage to centers of origin and centers of genetic diversity to be determined:** In plenary on Tuesday, delegates discussed this issue on the basis of three options for operational text in the Co-Chairs' synthesis. New Zealand, Canada and Norway, opposed by Cuba and Colombia, said there was no need for special rules on this issue. Mexico suggested that damage to centers of origin should take into account the special circumstances of these centers. The Philippines suggested adding a reference to an appropriate mechanism for valuation of such centers. On Wednesday the

sub-working group on damage streamlined the text on this issue and retained two separate options, one setting out details and the other requesting particular regard to be given to these centers.

**Valuation of damage to sustainable use of biological diversity, human health, socioeconomic damage and traditional damage:** In plenary on Wednesday delegates discussed the issue on the basis of three options for operational text in the Co-Chairs' synthesis.

Mexico stated the operational text should be limited to valuation of damage to conservation and sustainable use of biodiversity, including human health, and that discussion of socioeconomic damage was inappropriate in this context. New Zealand and Norway indicated that valuation was already covered elsewhere and Argentina, supported by Malaysia and Japan, proposed deleting the section. On Wednesday, the sub-working group streamlined the text on this issue and retained two separate options for operational text.

**Causation:** In plenary on Wednesday, delegates discussed causation on the basis of twelve options for operational text in the Co-Chairs' synthesis.

The EC, Norway, Japan and South Africa preferred establishing causation in accordance with domestic rules. Canada, Mexico, Malaysia and the US stressed the need for a clear causal link between damage and the transboundary movement of LMOs, and Argentina said if causation of damage cannot be clearly attributed, there should be no responsibility. The African Group emphasized that establishing causation can be challenging and proposed that in cases where multiple causes were possible, the presumption should be that the damage had been caused by LMOs. Following plenary discussions, two options were deleted.

On Thursday, the sub-working group on damage discussed causation of damage and divided the text into three categories: burden of proof with claimant, burden of proof with respondent, and where establishing burden of proof is left to domestic law.

On the burden of proof with claimant, text from four options was consolidated, leaving two options: one with a list of criteria for establishing proof, and one simply stating that liability requires establishment of both "cause-in-fact" and "proximate cause" and the claimant shall bear the burden of proof.

On imposing the burden of proof on the respondent, consisting of three options, 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 options into one and moved the more general parts to other sections.

On the category of leaving the issue to domestic law, delegates agreed to keep the three separate options.

Annex II contains seven options for operational text grouped into three options: burden of proof on the claimant; burden of proof on the respondent; and the issue is to be determined by domestic law.

**IV. PRIMARY COMPENSATION SCHEME:** Issues relevant to the primary compensation scheme were first taken up in plenary on Monday, when delegates considered possible approaches to liability and redress (Section I of the Co-Chairs' synthesis). During the discussion, summarized in detail above under the heading "state responsibility," delegates agreed that



there was no need to develop new rules of international law on state responsibility and that they would not further consider the option of primary state liability. Delegates also addressed the other two possible approaches to liability and redress, namely civil liability (harmonization of rules and procedures) and administrative approaches based on allocation of costs of response measures and restoration measures. Many delegates, including the EC, the African Group, Norway and Japan, expressed preference for a combination of civil liability and administrative approaches.

As primary state liability had been ruled out, it appeared that the primary compensation scheme would be based on civil liability or administrative approaches, or a combination of both. During the course of the meeting, all remaining options for operational text on civil liability and administrative approaches were therefore moved under the section "primary compensation scheme." It now contains three sub-sections: one addressing elements of an administrative approach; a second one on civil liability; and a third one on additional elements that are relevant to both administrative approaches and civil liability.

#### **Elements of an administrative approach based on allocation of costs of response measures and restoration measures:**

Issues relevant to administrative approaches were addressed in plenary on Tuesday and Wednesday, and in a sub-working group chaired by Jane Bulmer (United Kingdom) on Tuesday, Wednesday and Thursday.

During the plenary discussions, many delegates, including the EC, Japan and the US, identified the need to further define the meaning of administrative approaches. The US cited concerns with creating new bureaucracies. Argentina, Canada and Switzerland suggested that additional proposals on administrative approaches also needed to be considered.

Co-Chair Lefebvre suggested using the term "administrative liability" as an alternative to "administrative approach." Some delegates, including Malaysia and Ecuador, supported the alternative terminology, while Brazil and Japan expressed reservations. Co-Chair Lefebvre indicated that both terms would be retained for further discussion.

New Zealand stated that the notion of administrative approaches "obscures as much as it illuminates," but that in essence the administrative approach is a legal approach. Malaysia, however, pointed to a difference between a legal and an administrative approach. He said that while both are based on national legislation, administrative approaches simplify the situation as national authorities may take action based on administrative procedures instead of having to obtain a decision from a court. The Public Research and Regulation Initiative (PRRI) stressed that the administrative approach provides quick remedies without court action.

The EC cautioned against being too prescriptive concerning administrative approaches based on allocation of costs and response measures, while South Africa and Malaysia favored inclusion of specific measures. Japan highlighted the need to consider and accommodate differences in national legal systems, while Senegal and the PRRI stressed the role of international rules. Several delegates, including Greenpeace International, stressed the importance of defining the term "operator."

After several delegates had elaborated on their understanding of the administrative approach, Co-Chair Lefebvre identified convergence on the concept despite divergence in delegates' preferences for specific operational text. From the plenary discussion, five key elements requiring further consideration seemed to be emerging, namely:

- obligations of the operator;
- obligation in national law for the operator to inform the competent authority about damage to biodiversity;
- obligation in national law for the operator to take restoration and response measures;
- obligation by the state to take reparation and restoration measures if the operator has failed to do so; and
- recovery by the state of the cost of reparation and restoration measures from the operator.

These five elements were referred to the sub-working group, with a mandate to streamline and consolidate the relevant options for operational text in different sections of the Co-Chairs' synthesis. During the discussions, several issues emerged, including divergent views on response measures, with some delegates favoring "reasonable response measures" and others calling for restoration that goes beyond "response." Participants also discussed situations when the operator has failed to act, debating whether measures taken by the competent national authority would be limited to those that should have been taken by the operator, and whether the recovery of costs from the operator should be obligatory. As a result of the sub-working group's efforts on Wednesday and Thursday, unsupported and duplicative options for operational text were deleted and some options were consolidated.

Under the heading "Administrative Approaches in Annex II," there is also a subheading on "Standard of Liability and Channeling of Liability," as delegates agreed these issues are relevant to both civil liability and administrative approaches. Discussion on standard of liability and channeling of liability is contained in the section below.

As a result of these deliberations, Annex II includes 21 options for operational text relevant to the administrative approach, grouped into the four categories:

- obligations by the operator to inform competent authorities of damage to the conservation and sustainable use of biodiversity;
- obligation by the operator to take response and restoration measures to address such damage;
- discretion of states to take response and restoration measures, including when the operator has failed to do so, and to cover the costs; and
- the definition of operator.

**Civil liability:** Issues relevant to civil liability (harmonization of rules and procedures) were addressed in plenary from Monday through Thursday, and in the sub-working group chaired by Jane Bulmer on Wednesday and Thursday.

In general, many delegates highlighted the importance of civil liability with many favoring an approach based on the combination of civil liability and administrative approaches. During the week, discussions focused on topics relevant to the harmonization of rules and procedures concerning the standard of liability, channeling of liability and provision of interim relief.

**Standard of liability and channeling of liability:** This issue was addressed in plenary on Wednesday and the sub-working group on Wednesday and Thursday evenings.

During the general exchange of views in plenary on the standard of liability, both fault-based liability and strict liability, as well as a combination of both, were supported. Canada, the US and New Zealand favored a fault-based approach. South Africa also expressed support for fault-based liability, but stated it could support strict liability where warranted by science. India preferred a combination of strict and fault-based liability. Norway emphasized the need for strict liability, and Greenpeace International stressed that LMOs can cause significant damage and it would be “unjust and inappropriate” to make the claimant shoulder the burden of proof of fault or negligence. The PRRI said administrative regimes rather than civil liability regimes are appropriate for biodiversity because LMOs are not inherently hazardous. Friends of the Earth responded that research has not sufficiently established that LMOs are not hazardous, and the Washington Biotechnology Action Council noted that research has been underfunded and is therefore inconclusive.

On channeling liability, few interventions were made but Norway stressed operational control as a central element.

On the basis of the plenary discussions, five unsupported options for operational text were deleted and issues relevant to the standard of liability and channeling of liability were referred to the sub-working group. Discussion in the sub-working group was based on a text streamlined by the Co-Chairs. The document included operational texts on the standard of liability grouped into three categories: strict liability; mitigated strict liability; and fault-based liability. Five options for operational text were deleted and Chair Bulmer concluded that the concept of mitigated strict liability should be reflected on during the intersessional period.

As a result of these discussions, Annex II contains five options for operational text, grouped into three categories:

- Strict liability (with two options for operational text);
- Mitigated strict liability (with two options for operational text); and
- Fault liability (with one operational text).

**The provision of interim relief:** Discussions on this issue were based the Co-Chairs’ synthesis and took place on Thursday in plenary and in the sub-working group.

Japan and Argentina supported deleting the text on interim relief, 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 the basis of discussions in the sub-working group, Chair Bulmer concluded that it will be necessary to reflect on the issue of interim relief during the intersessional period. Delegates also agreed to a footnote stating the section is primarily applicable to civil liability, but that does not preclude applicability to administrative approaches. Annex II contains two options for operational text on the provision of interim relief.

**Additional elements of an administrative approach and/or civil liability: Exemptions to, or mitigation of, strict liability:** This issue was addressed by the plenary and the sub-working group on civil liability/administrative approaches on Thursday.

The discussions were based on nine options for operational text in the Co-Chairs’ synthesis and focused on the need for exemptions to strict liability or mitigated strict liability.

The EC and 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 contradict 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 that will not be compensated because of exemptions.

Greenpeace International urged delegates to consider how 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 authorization.

On the basis of the plenary discussion, three options for operational text were deleted. The remaining six options were grouped into three categories:

- exemptions to strict liability;
- mitigation of strict liability; and
- exemptions to, and mitigations of, strict liability.

They were then taken up by the sub-working group on civil liability/administrative approaches on Thursday evening and further progress was achieved in streamlining and consolidating the texts. Annex II contains one option for operational text under each of the three categories.

**Recourse against a third party who is liable on the basis of strict liability:** This issue was discussed in plenary and in the sub-working group on administrative approaches/civil liability on Thursday. The discussions were based on five options for operational text in the Co-Chairs’ synthesis.

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 question is already covered under national legal systems. Mexico, Liberia, India, Norway, Malaysia, Cameroon, Palau, Ecuador, Belize, Argentina, Cuba and Greenpeace International supported retaining the section to ensure consistency across legal regimes.

The remaining operational texts were taken up by the sub-working group on civil liability/administrative approaches on Thursday evening, and further progress was achieved in streamlining and consolidating the texts. Annex II contains two options for operational text on this issue.

**Joint and several liability and apportionment of liability:** This issue was discussed in plenary and in the sub-working group on administrative approaches/civil liability on Thursday. The discussions were based on nine options for operational text in the Co-Chairs’ synthesis.

Japan, supported by New Zealand, suggested deleting the texts under this heading, since these issues are covered under national legal systems. Malaysia noted, however, that some of the options would facilitate claims when several parties are involved and



apportionment needs to be retained to make sure the redress is fair. Cameroon, Palau, Belize, Argentina, and Greenpeace International supported retaining the text.

On the basis of the plenary discussion, the options for operational text were divided into two groups, one on joint and several liability and another one on apportionment of liability. They were taken up by the sub-working group on civil liability/administrative approaches on Thursday evening, where further progress was achieved in streamlining the texts. Annex II contains three options for operational text on joint and several liability, and three options for operational text on the apportionment of liability.

**Limitation of liability:** Discussion on limitation of liability in the primary compensation scheme was based on the Co-Chairs' synthesis with eleven options for operational text on limitations on time and seven options for operational text for limitations on amount. Delegates discussed this issue on Thursday in plenary and briefly in the sub-working group on administrative approaches/civil liability.

In the discussion concerning the 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 time limits.

On the limitation of liability 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 the basis of discussions, in the section on limitation in time, six options for operational text were deleted. In the section on limitation in amount, three options for operational text were deleted.

Annex II contains five options for operational text on limitation of liability in time, and four options for operational text on limitation in amount, grouped into two categories: limited liability and unlimited liability.

**Coverage of liability:** Discussions on this issue were based on the Co-Chairs' synthesis and took place on Thursday in plenary. Japan preferred operational text encouraging operators to maintain adequate insurance. 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. On the basis of discussions, in the section on coverage of liability four options for operational text were deleted. Annex II now contains six options for operational text, grouped into three categories:

- compulsory financial security (two options);
- voluntary financial security (two options); and
- domestic law approach (two options).

#### V. SUPPLEMENTARY COMPENSATION SCHEME:

**Residual state liability:** This issue was discussed in plenary on Friday, based on six options for operational text in the Co-Chairs' synthesis.

India, supported by the African Group and Colombia, preferred assigning liability to the operator with residual state liability. The EC indicated no preference for specific text and, with Egypt, asked if the CBD Secretariat could provide more information about national liability systems.

New Zealand, supported by Palau, said that the text in this section does not fully implement the principle of "polluter pays," but he understood parties' concerns on the need for compensation if no one can be held responsible. China, supported by Japan, proposed deleting this section of the text. Panama expressed a preference for text requiring liability of a state where an operator is resident, saying that the primary liable person should be the operator, and if an operator is unable to defray costs, a fund should cover them.

On the basis of the discussion, no deletions or groupings were made but all six options for operational text are retained in Annex II.

#### Supplementary collective compensation arrangements:

This issue was discussed in plenary on Friday, based on six options for operational text in the Co-Chairs' synthesis.

India preferred text that provides for financial security, with residual state liability. Japan said that compensation should be based on fault-based procedures so a fund may not be necessary. Norway indicated no preference but said that if it were not possible to identify a responsible person, the victim would have to absorb the costs unless a fund is established. She added that such a fund should be easy to administer, with possible voluntary and/or obligatory payments. The EC said that the regime would need supplementary compensation arrangements in addition to insurance and financial guarantees, but expressed no preferences for specific text.

New Zealand questioned how a fund would operate, but expressed no preference for specific text. China expressed support for establishing a fund based on contributions by industry and other operators. Greenpeace International said that a fund is essential and it could be financed with levies on exports as is the case with the oil spill fund. Malaysia, supported by Panama, said that there are situations where victims have to bear their own losses and should not be left destitute.

Based on plenary discussions, two options for operational texts were deleted and Annex II retains six options for operational text on supplementary collective compensation arrangements.

Co-Chair Lefebvre requested the Secretariat to prepare a document listing titles of information available in the Biodiversity Clearing House (BCH) on legal arrangements, judgments and other relevant topics, and invited parties to provide more information to the BCH.

**VI. SETTLEMENT OF CLAIMS:** The section in the Co-Chairs' synthesis concerning the settlement of claims was not discussed by the Working Group at this meeting. In the meeting's

report, the Co-Chairs were mandated to streamline and edit the options for operational texts contained in this section “without altering the substance.”

Annex II retains the section on settlement of claims, with sub-headings on inter-state procedures (listing six options for operational text); civil procedures (with eleven options for operational text); administrative procedures (with three options for operational text); special tribunal (with five options); and standing or right to bring claims (with nine options for operational text).

#### **VII. COMPLEMENTARY CAPACITY-BUILDING**

**MEASURES:** The section in the Co-Chairs’ synthesis concerning complementary capacity-building measures was not discussed by the Working Group at this meeting. In the meeting’s report, the Co-Chairs were mandated to streamline and edit the four options for operational texts contained in this section “without altering the substance.”

**VIII. CHOICE OF INSTRUMENT:** This issue was discussed in plenary on Monday afternoon and in an informal brainstorming session on Thursday evening. The Co-Chairs reported back to plenary on the brainstorming session on Friday morning.

On Monday, the African Group, Cambodia, Cuba, India, Norway, Switzerland, Malaysia and others said they favored a legally binding instrument as the most effective option.

The EC suggested 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. A number of delegates expressed concerns that the EC’s proposal would delay the process and postpone the creation of binding rules.

Japan and Australia favored a non-legally binding instrument, with New Zealand liking the formulation “model law.” Brazil, Mexico and South Africa indicated that they were still considering the various options.

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.

On Thursday evening delegates convened for an informal brainstorming session under Chatham House Rules on the choice of instrument. Many participants appreciated the opportunity to discuss this difficult issue in an informal setting and noted that much more work was required to come to an agreement. A number of delegations indicated that obtaining a clear negotiating mandate on the “choice of instrument” was difficult as long as the key substantive elements had not been agreed.

Concerning the choice of instrument, many 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 indicated that non-binding rules would not achieve much, while others stressed difficulties with creating legally binding rules on LMOs. Other delegates from developing countries noted that as their countries were becoming more involved in biotechnology, they were looking for international regulation to ensure safety and also to balance competing interests. Some delegates encouraged increased use of insurance, financial guarantees and bonds.

Some of the possible options raised during the discussions entailed non-legally binding guidelines on substantive issues and a legally binding instrument on procedural issues. Depending on the choice of primary compensation scheme, the procedural instrument would focus on private international law or on administrative approaches. For a civil liability regime, the procedural instrument would focus on private international law. 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.

Essentially, a private international law instrument concentrates on “conflicts of law” situations and would address issues of jurisdiction and the recognition and enforcement of judgments. A private international law instrument would also determine the applicable national substantive law. Concerns were raised, however, that if substantive issues were only set out in guidelines, it might not be possible to enforce judgments on that basis. A number of delegates also noted that they had limited knowledge about private international law instruments and that additional expertise would be required to produce a private international law instrument. Some emphasized that experience shows that private international law instruments take a long time to develop and to be ratified. Other delegates noted that the CBD and the Protocol were public international law instruments, which is why governments were expecting a public international law instrument as an outcome of this process. They indicated that such an instrument could include private international law rules, but should not be limited to them.

Regarding a legally binding instrument, delegates listed the following concerns: if too prescriptive, it might not be ratified and might never enter into force, like a number of other international liability regimes; legally binding rules tend to take a while to enter into force; and they are difficult to integrate into domestic law. Non-legally binding guidelines or model laws were described as more flexible and immediately operable, but in turn delegates noted the following concerns: guidelines are often ignored and they lack incentives for domestic implementation.

Delegates also addressed the different modes for adopting the rules and procedures on liability and redress. They indicated that one option would be annexing the instrument to the CBD or the Protocol, stressing that this would only work for procedural, not substantive rules. They also addressed the possibility of adopting a Protocol to the CBD or the Cartagena Protocol; or amending them. Delegates noted that amendments often do not enter into force, due to lack of the requisite number of ratifications.

No document was produced as the result of this session, but Co-Chair Lefebvre reported the discussions back to plenary on Friday morning and encouraged delegates to continue discussions intersessionally. A number of delegates also requested a presentation on the Permanent Court of Arbitration at the next session.

The section in Annex II on the choice of instrument retains the same structure and the same six operational texts as contained in the Co-Chairs’ synthesis. The general options set out in Annex II are the following:

- one or more legally binding instruments;
- one or more legally binding instrument 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.

### CLOSING PLENARY

On Friday afternoon, rapporteur Maria Mbengash (South Africa) introduced the meeting's report (UNEP/CBD/BS/WG-L&R/4/L.1 and Add.1). The report contains two annexes. Annex I includes the blueprint for a COP/MOP decision on international rules and procedures on liability and redress in the field of biosafety and Annex II contains the options for operational text streamlined and consolidated over the course of the meeting.

Concerning the informal brainstorming session on the choice of instrument on Thursday evening, Japan proposed indicating that the report did not "necessarily capture the casual and informal nature" of the session. Based on further textual proposals by Co-Chair Lefebvre and New Zealand, delegates agreed to language indicating, *inter alia*, that the Co-Chairs' invitation for delegates to consider options related to the choice of instrument during the intersessional period was not "trying to reflect in any way the positions of the participants in the brainstorming session."

Mexico, for the Latin American and Caribbean Group, expressed concerns about wording requesting the Co-Chairs to "consolidate" the proposed operational texts during the intersessional period. After discussion, delegates agreed to indicate that the Co-Chairs should only work on specific sections of Annex II and add language on the Co-Chairs "grouping and editing without altering the substance." Co-Chair Nieto emphasized that delegates could always refer back to the text annexed to this meeting's report if they felt that the Co-Chairs had exceeded their mandate. Delegates then adopted the report, including its two annexes.

CBD Executive Secretary Djoghlaif thanked the Co-Chairs for their able leadership and said the Working Group had made good progress. Representatives of the Latin American and Caribbean Group, the African Group, the Asia Pacific Group and Greenpeace International thanked the Co-Chairs and other participants for a productive and constructive meeting. Friends of the Earth highlighted France's decision to suspend the commercialization of GM crops and the EU's plans to ban certain GM products, stating that these illustrated the need for a legally binding instrument on liability and redress in the context of biosafety.

Co-Chair Nieto thanked delegates for a successful meeting and appealed to bring flexible negotiating mandates with them to the Working Group's fifth meeting. Also thanking the Secretariat, interpreters and the *Earth Negotiations Bulletin*, she closed the meeting at 5:23 pm.

## A BRIEF ANALYSIS OF THE MEETING

### COLORFUL OPTIONS

As delegates met in autumnal Montreal to consider international rules and procedures on liability and redress in the field of biosafety, they found as many possible options for operational texts on the table, as colors of leaves on the trees outside. As the trees shed their leaves, the Working Group managed to shed duplicative operational texts and group positions to create a decision tree, with various branches to be the basis for negotiation at the next meeting.

The following brief analysis sets out to root this meeting of the Working Group in the history of negotiations on rules and procedures under the Biosafety Protocol. It discusses how this session managed to prune the working document while maintaining its essence and substance. This analysis also looks ahead to the negotiations on rules and procedures on liability and redress at the Working Group's fifth meeting and COP/MOP 4, and how the outcomes of this meeting will contribute to this task.

### FROM ROOTS TO SHOOTS: THE DECISION TREE

Throughout the week in Montreal, negotiators frequently referred to Article 27 (Liability and Redress) of the Biosafety Protocol. Delegates commonly accepted that Article 27 mandated COP/MOP-1 to launch a process for elaborating international rules and procedures on liability and redress for damage resulting from transboundary movements of LMOs within four years, and that the deadline for completing the process was COP/MOP-4, scheduled for May 2008. Delegates' opinions were divided, however, as to whether Article 27 mandates the development a legally binding regime. Many stressed the need to interpret the article in light of the history of its negotiation. They recalled that prior to the adoption of the Biosafety Protocol, many developing countries had insisted that there would be no Protocol without provisions on liability. Those developing countries argued that they had agreed to Article 27, which defers the development of the rules and procedures on liability for four years in the spirit of a good faith compromise to break the deadlock in the negotiations. It was thus against this background that the Working Group has tried to address the various options for a regime, binding or non-legally binding, on liability and redress.

Previous sessions of the Working Group have seen compilations of options and operational text as proposed by different governments and observers, and in many cases the respective documents even identified who had submitted the text. Many delegates felt that the compilation documents tabled to date were unwieldy, making it difficult to develop clear negotiating mandates and coordinate regional positions. As a result, this session of the Working Group set an important objective: to streamline and consolidate the text to create a document that could form the basis of "proper" negotiations at the next session.

To achieve this objective, the Co-Chairs initiated a new working method and created sub-working groups to streamline the most crucial elements of the prospective regime. In an effort to increase ownership of the text, they mandated the groups to categorize operational texts that would result in similar outcomes. In cases where there was convergence of views, text was integrated and consolidated. In cases where there were



more divergent views, separate options were set out. Although time-intensive, the development of such a negotiating text by the Working Group itself will likely prevent long procedural debates about which text should form the basis for negotiation. Many delegates also called on the Co-Chairs to assist with the streamlining of text, a show of good faith and trust, and a clear departure from previous sessions, when delegates insisted that all proposed operational text be retained in its original form. During the intersessional period the Co-Chairs have been mandated to further streamline the text of sections that were not discussed at this meeting as well as a section on the limitation of liability.

Given that the number of pages and options in the outcome document is considerably lower than before, many described the meeting and the working method as successful. However, the Working Group's fourth meeting can still be best described as the pre-negotiation stage. To meet the deadline of completing the process in Bonn next year, it seems that it is imperative to start negotiations in earnest at the fifth Working Group's meeting. Noting that four weeks have been spent in pre-negotiations, some delegates wondered if negotiations can be completed by the end of COP/MOP-4.

### **DIFFERENT BRANCHES**

WGLR-4 set the scene for the negotiation phase by focusing on the definition of damage and the primary compensation scheme, which, after ruling out primary state liability at this meeting, would be based either on administrative approaches or civil liability, or a combination of the two. Both approaches will entail important choices concerning the standard of liability and channeling. These issues were strategically chosen for substantive deliberations, since they arguably comprise some of the more contentious issues and what some described as the "heart" of any future instrument. The decision to start strategizing and conceptualizing around these core issues first, rather than concentrate energy on the more political and legal debate about the choice of overall instrument, proved productive.

From the outset there was agreement that damage to biodiversity should be a key element addressed under the international instrument. The focus on this element constitutes a major achievement in itself, since damage to biodiversity has not been included in any international liability regime before. It also added a further dynamic to the discussions because there is no international precedent how to integrate damage to biodiversity with other issues like the standard of liability. Despite convergence on the focus on damage to biodiversity, some elements remained controversial. A few parties preferred to keep a separate, narrow definition of damage to biodiversity, while the majority agreed that starting negotiations with a broader definition, that could then be limited, was most appropriate.

The broad definition of damage to biodiversity opened the door for some delegations to argue that what had been intended as the definition of one specific aspect of damage, should now become the general definition of damage for the whole regime. In contrast, others argued that other aspects of damage, for example damage to human health, or socioeconomic damage and traditional damage, such as loss of income, should also be covered. By the end of the meeting, some important divides remained around these issues and the general definition of

damage will certainly be one of the key issues addressed in the upcoming negotiations.

The other key substantive issue discussed at this meeting related to the primary compensation scheme. The question concerning the standard of liability proved to be as controversial as ever. The majority of developing countries maintained that a strict liability standard was necessary and they were supported by the EC, Norway and a number of other developed countries. A few developing countries and countries with economies in transition also considered mitigated strict liability or fault-based liability, but most agreed that mitigated strict liability was a new concept that required intersessional consideration. Japan and New Zealand, as parties to the Protocol, took the lead on requesting fault-based liability, supported by non-party members of JUSSCANNZ, and generally called for narrower definitions and non-binding approaches that would leave key substantive issues subject to domestic law.

Nowhere were the dynamics and complications ahead more evident than during the informal brainstorming session on the choice of instrument and the old question of "to bind or not to bind." The session put the various options, including a legally binding regime, non-legally binding guidelines or model laws, or a hybrid approach squarely on the table. Delegates were invited to reflect on different options and to develop innovative proposals aligning the differing positions during the intersessional period. While the informal brainstorming yielded no specific outcomes, many agreed the session was useful and necessary in order to negotiate text on this issue at the next session.

### **THE END GAME: CULTIVATING THE TREE**

For the cultivation of the bonsai tree, the Japanese use a practice called "nemawashi," or working the roots, so that the trunk and branches can be shaped. Similarly, the Working Group has tried to shape the final outcome. To reach the declared goal of all – effective rules and procedures on liability and redress – the Working Group will ultimately have to make a decision on the "choice of instrument" and choose whether the outcome will be one tree, with a legally binding trunk, or a model forest, constituted of international guidelines that would then be implemented nationally. Even more interesting will be how delegations agree to shape the branches of the decision tree. After all, the beauty and essence of a tree are found in the shapes of the branches and the colors of the leaves.

## **UPCOMING MEETINGS**

### **SECOND SESSION OF THE ITPGRFA GOVERNING**

**BODY:** Organized by the FAO, the second session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture will be held from 29 October - 2 November 2007, in Rome, Italy. For more information, contact: Shakeel Bhatti, ITPGR Secretary; tel: +39-06-570-53057; fax: +39-06-570-56347; e-mail: shakeel.bhatti@fao.org; internet: <http://www.planttreaty.org>

### **FIFTH TRONDHEIM CONFERENCE ON**

**BIODIVERSITY:** The fifth Trondheim Conference on Biodiversity will be held from 29 October - 2 November 2007, in Trondheim, Norway, under the theme "Ecosystems and

People: Biodiversity for Development - the Road to 2010 and beyond." For more information, contact: Norway's Directorate for Nature Management; tel: +47-73-58-05-00; fax: +47-73-58-05-01; e-mail: [trondheim.conference@dirnat.no](mailto:trondheim.conference@dirnat.no); internet: <http://www.trondheimconference.org/>

**HIGH-LEVEL CONFERENCE ON BUSINESS AND BIODIVERSITY:** Organized by the Portuguese Presidency of the EU, the Council and the European Commission, this conference will be held from 12-13 November 2007, in Lisbon, Portugal. It aims to contribute to an improved understanding of the competitive advantages gained from conserving biodiversity and using biological resources sustainably. For more information, contact: Sebastian Winkler, Head of Countdown 2010 Secretariat, tel: +32-2-739-0322; fax: +32-2-732-9499; e-mail: [smw@iucn.org](mailto:smw@iucn.org); internet: <http://www.countdown2010.net/business/european-business-and-biodiversity-initiative>

**ARCTIC REGION WORKSHOP ON INDIGENOUS COMMUNITIES, TOURISM AND BIODIVERSITY: NEW INFORMATION AND WEB-BASED TECHNOLOGIES:** This workshop will take place from 19-23 November 2007, in Quebec City, Canada. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/meetings/>

**FOURTH MEETING OF THE COMPLIANCE COMMITTEE UNDER THE CARTAGENA PROTOCOL:** This meeting will take place from 21-23 November 2007, in Montreal, Canada. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/doc/meeting.aspx?mtg=BSCC-04>

**CENTRAL AND EASTERN EUROPE REGIONAL WORKSHOP ON CAPACITY-BUILDING AND EXCHANGE OF EXPERIENCES ON RISK ASSESSMENT AND RISK MANAGEMENT OF LMOS:** This meeting will take place from 26-28 November 2007, in Chisinau, Republic of Moldova. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/doc/meeting.aspx?mtg=RWCCEE-01>

**INTERNATIONAL CONFERENCE ON SUSTAINABLE FOREST MANAGEMENT AND POVERTY ALLEVIATION: ROLES OF TRADITIONAL FOREST-RELATED KNOWLEDGE:** This conference, organized by the International Union of Forest Research Organizations, the FAO and others, will take place from 17-20 December 2007, in Kunming, China. It will provide a platform for sharing of information and exchanging experiences related to traditional forest-related knowledge in the Asia-Pacific region. For more information, contact: Liu Jinlong, Chinese Academy of Forestry; e-mail: [liujl@caf.ac.cn](mailto:liujl@caf.ac.cn); internet: <http://www.iufro.org/download/file/1928/3500/kunming07-tftfk-1st-announcemt-call.doc>

**SIXTH MEETING OF THE CBD AD HOC OPEN-ENDED WORKING GROUP ON ABS:** The sixth meeting of the CBD *Ad Hoc* Open-ended Working Group on Access and Benefit-Sharing (ABS) will meet from 21-25 January 2008, in Geneva, Switzerland. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/doc/meeting.aspx?mtg=ABSWG-06>

**SECOND MEETING OF THE CBD AD HOC OPEN-ENDED WORKING GROUP ON PROTECTED AREAS:** The second meeting of the CBD *Ad Hoc* Open-ended Working Group on Protected Areas will take place from 11-15 February 2008, in Rome, Italy. This meeting will consider future action on the Programme of Work on Protected Areas, including country reports on implementation and recommendations from a series of workshops. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/doc/meeting.aspx?mtg=WGPA-02>

**CARTAGENA PROTOCOL LIAISON GROUP ON CAPACITY-BUILDING FOR BIOSAFETY:** This meeting will take place from 14-15 February 2007, in Montreal, Canada. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/meetings/default.shtml>

**THIRTEENTH MEETING OF THE CBD SBSTTA:** The 13th meeting of the CBD's Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) will take place from 18-22 February 2008, in Rome, Italy. This meeting will review progress in the CBD's implementation and address scientific and technical issues in relation to the Convention. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/doc/meeting.aspx?mtg=SBSTTA-13>

**FIFTH MEETING OF THE WORKING GROUP ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY:** The scheduling of this meeting is pending voluntary contributions and is tentatively set for the second week of March 2008 in Colombia. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/meetings/default.shtml>

**SEVENTH SESSION OF THE UN PERMANENT FORUM ON INDIGENOUS ISSUES:** This meeting will be held from 21 April - 2 May 2008, at UN headquarters in New York. For more information, contact: UNPFII Secretariat; tel: +1-917-367-5100; fax: +1-917-367-5102; e-mail: [indigenouspermanentforum@un.org](mailto:indigenouspermanentforum@un.org); internet: [http://www.un.org/esa/socdev/unpfii/en/session\\_seventh.html](http://www.un.org/esa/socdev/unpfii/en/session_seventh.html)

**CARTAGENA PROTOCOL COP/MOP 4:** The fourth meeting of the Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety (COP/MOP 4) will take place from 12-16 May 2008, in Bonn, Germany. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/meetings/default.shtml>

**NINTH CONFERENCE OF PARTIES TO THE CONVENTION ON BIOLOGICAL DIVERSITY:** CBD COP-9 will take place from 19-30 May 2008, in Bonn, Germany, including a high-level segment from 28-30 May. The COP will consider, *inter alia*, progress in the implementation of the Programme of Work on Protected Areas and recommendations arising from the second *Ad Hoc* Open-ended Working Group on Protected Areas. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/doc/meeting.aspx?mtg=COP-09>

## "Your Meeting" Bulletin

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### *A Daily Report from the International Conference for Renewable Energies*

Published by the International Institute for Sustainable Development (IISD)

DAILY REPORTS AND WEB COVERAGE AT [HTTP://WWW.IISD.CA/SD/REN2004/](http://www.iisd.ca/sd/ren2004/)  
VOLUME 95, No. 5, MONDAY, 7 JUNE 2004

#### SUMMARY REPORT OF THE INTERNATIONAL CONFERENCE FOR RENEWABLE ENERGIES - RENEWABLES 2004: 1-4 JUNE 2004

The International Conference for Renewable Energies (*renewables 2004*) took place from 1-4 June 2004, in Bonn, Germany. Approximately 3600 participants from 154 countries attended the Conference, including several Heads of State, 121 Ministers and representatives from governments, intergovernmental organizations (IGOs), non-governmental organizations (NGOs), the scientific community and the private sector.

The *renewables 2004* programme consisted of nine Plenary Sessions, including a Multi-Stakeholder Dialogue and a Ministerial Segment. The Multi-Stakeholder Dialogue addressed: the value of, and opportunities for, renewable energy - policy frameworks and regulatory certainty; and promoting renewable energy - finance and capacity for the future. Other Plenary Sessions addressed best-practice examples and success stories.

The Ministerial Segment included three Ministerial Roundtables that considered policies for renewable energy market development, financing options, and strengthening capacities, research and policy



Members of major groups and delegations in the main plenary room.

developing countries, and the mobilization of financial resources for new and renewable sources of energy. However, it was only following the 1992 UN Conference on Environment and Development (UNCED) that renewable energy issues began to feature more promi-

*"IISD proved to be as professional as their reputation is. The group covered all events taking place at the conference venue itself as well as many side events which were located in the vicinity of the conference hall.*

*IISD produced a well-designed bulletin including informative text and pictures of all important meetings, discussions and results of the main conference events. This bulletin was very useful for participants to follow events they could not attend or were also interested in.*

*IISD also published plenty of information and photos on their web site. This service was a real added value to our own conference coverage. The services of IISD, being an independent organization, were especially appreciated by the conveners of the conference, ie the Federal Ministry for Economic Cooperation and Development and the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety"*

**Dr. Heinrich Schneider**  
Conference Secretariat  
International Conference for  
Renewable Energies, Bonn 2004

This product was developed in 2003 **specifically for large conferences that include both substantive discussions and side events.** Building on the success of the *Earth Negotiations Bulletin* and *ENB on the Side*, "*Your Meeting*" Bulletin was created as a conference daily report. **IISD Reporting Services** was hired to publish in this format at the World Forestry Congress, Renewables 2004 and the IUCN World Conservation Congress.

"*Your Meeting*" Bulletin is a 4-6 page daily report and summary issue that includes coverage of policy discussions and/or negotiations, and extensive reporting from side events and special events during the conference.

For further information or to make arrangements for IISD Reporting Services to cover your meeting conference or workshop, contact the Managing Director:

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