

FIFTH 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: 12-19 MARCH 2008

The fifth meeting of the Open-ended *Ad Hoc* Working Group of Legal and Technical Experts on Liability and Redress (WGLR) in the context of the Cartagena Protocol on Biosafety (hereafter, the Working Group) is taking place from 12-19 March 2008 in Cartagena de Indias, Colombia.

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 (CBD) serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety (COP/MOP 1) in 2004. Its mandate is to:

- review information relating to liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs);
- analyze 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 its fifth meeting, discussions will focus on the working draft revised by the Co-Chairs René Lefeber (the Netherlands) and Jimena Nieto (Colombia), streamlining 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/5/2/REV1). Expedient progress is essential as this represents the final meeting before the Working Group reports to COP/MOP 4 in May 2008 in Bonn, Germany, which is 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 CARTAGENA PROTOCOL

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

incorporates the precautionary approach and mechanisms for risk assessment and risk management. The Protocol establishes a Biosafety Clearing-House (BCH) to facilitate information exchange, and contains provisions on capacity building and financial resources, with special attention to developing countries and those without domestic regulatory systems. The Protocol entered into force on 11 September 2003 and currently has 143 parties.

NEGOTIATION PROCESS: Article 19.3 of the CBD provides for parties to consider the need for, and modalities of, a protocol setting out procedures in the field of the safe transfer, handling and use of LMOs resulting from biotechnology that may have an adverse effect on biodiversity and its components. A Biosafety Working Group (BSWG) was established for this purpose at COP 2 (November 1995, Jakarta, Indonesia). The BSWG held six meetings between 1996 and 1999. The first two meetings identified elements for the future protocol and helped articulate positions. BSWG 3 (October 1997, Montreal, Canada) developed a consolidated draft text to serve as the basis for negotiation. 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 at the ExCOP 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; liability and redress; 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

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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: At its first meeting (February 2004, Kuala Lumpur, Malaysia) the COP/MOP 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. Article 27 specifically points to a process for the elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs, analyzing and taking due account of the ongoing processes in international law on these matters. It also mandates that the process should be completed within four years.

WGLR 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.

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

WGLR 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.

COP/MOP 3: At its third meeting (March 2006, Curitiba, Brazil) the COP/MOP considered various issues relating to the Protocol's operationalization, including funding for

the implementation of national biosafety frameworks, risk assessment, the rights and responsibilities of transit parties, the financial mechanism and capacity building. The main outcome of COP/MOP 3 was agreement on detailed requirements for documentation and identification of LMO-FFPs (Article 18.2(a)).

WGLR 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.

WGLR 4: At this 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 the Co-Chairs synthesizing submissions of operational texts with respect to approaches and options identified pertaining to liability and redress in the context of Article 27. 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. The resulting text constitutes a consolidated version of the key options to be used as the basis of negotiations at this meeting. The Co-Chairs were also given a mandate to streamline specific parts of Annex II during the intersessional period, and the revised text has been tabled as the main document (UNEP/CBD/BS/WG-L&R/5/2/REV1) of WGLR 5.

INTERSESSIONAL HIGHLIGHTS

BIOSAFETY PROTOCOL COMPLIANCE

COMMITTEE: The Compliance Committee under the Protocol held its fourth meeting from 21-23 November 2007, in Montreal, Canada. The Committee considered further information and experience regarding repeated cases of non-compliance under the compliance mechanisms of other multilateral environmental agreements and review of general issues of compliance as identified through an analysis of the first national reports. The Committee continued to develop, for the consideration of the COP/MOP, an indicative list of measures that may be taken in cases of repeated non-compliance, including measures such as suspension of trade and/or suspension of rights or privileges. The Committee agreed to prepare for the COP/MOP a consolidated report of its two meetings held since the previous meeting of the Parties, together with an addendum containing the information regarding the experience on repeated cases of non-compliance.

OTHER MEETINGS: Also in the intersessional period, the fourth coordination meeting for Implementing or Funding Biosafety Capacity Building activities convened from 11-13 February 2008 (New Delhi, India) and was immediately followed by the fifth meeting of the Liaison Group on Capacity Building for Biosafety, from 14-15 February 2008. Regional workshops on capacity building and exchange of experiences on risk assessment and risk management of LMOs were also held for Eastern Europe from 26-28 November 2007 (Chisinau, Moldova) and the Latin America and the Caribbean Region from 10-12 December 2007 (Bridgetown, Barbados).