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SUMMARY OF THE FIFTH MEETING OF THE OPEN-ENDED AD HOC WORKING GROUP 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 in the context of the Cartagena Protocol on Biosafety (hereafter, the Working Group) took place from 12-19 March 2008, in Cartagena de Indias, Colombia. Approximately 215 delegates attended the meeting, representing governments, intergovernmental organizations, 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 spent the first three days focusing on the elaboration of options for rules and procedures referred to in Article 27 of the Protocol based on a revised working draft compiled by Co-Chairs Jimena Nieto (Colombia) and René Lefeber (the Netherlands).

On the fourth day of the meeting, the Co-Chairs introduced a core elements paper as a tool intended to move the negotiations forward. The paper contained four pieces and essentially set out a "package deal" on the administrative approach, civil liability, the supplementary compensation scheme and capacity building. After significant discussion, delegates did not agree with the choices made in the core elements paper and decided instead to revise it in a Friends of the Chair group.

A group was convened on Tuesday to undertake a first read through, and subsequently a closed small Friends of the Chair group convened to negotiate the core elements. Agreement was reached on definition of damage, but many outstanding issues remain, including standard of liability and causation. Delegates also deferred debate on the choice of instrument until the next session. When comparing the revised working draft and Annex I to the report of the Working Group's fifth meeting, the key outcome from the meeting was that the Working Group agreed on certain core elements, reduced the number of options for operational text and 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 53 pages in the revised working draft to 27 pages in Annex I. The Working Group also agreed to convene an intersessional Friends of the Chair group to further negotiate the core elements, to be held just prior to COP/MOP 4 in Bonn, Germany in May.

IN THIS ISSUE

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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 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 144 parties.

NEGOTIATION PROCESS: Article 19.3 of the Convention on Biological Diversity (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 preparations for COP/MOP 1. 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 of Legal and Technical Experts on Liability and Redress (WGLR) 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. 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.

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. 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' working draft, focusing on streamlining options for operational text related to damage, administrative approaches and civil liability. The resulting text constituted a consolidated version of the key options. The Co-Chairs were also given a mandate to streamline specific parts of the working draft during the intersessional period.

WORKING GROUP REPORT

The fifth meeting of the Working Group opened on Wednesday morning, 12 March 2008. Co-Chair Jimena Nieto welcomed delegates and emphasized the importance of the session as the last chance to deliver on proposed rules and procedures before reporting to the COP/MOP in Bonn. She reiterated the need to work in a spirit of compromise.

Charles Gbedemah, Convention on Biological Diversity Secretariat, on behalf of Ahmed Djoghlaf, Executive Secretary, acknowledged progress made during the fourth meeting of the Working Group that resulted in a streamlined and comprehensive working document. He called on the Working Group to complete its work before the imminent expiration of its mandate.

Juan Lozano, Minister of Housing, Environment and Territory Development, Colombia, welcomed delegates to Cartagena, recalling the city as the birthplace of the Biosafety Protocol in 1999. He drew attention to the need to reconcile development with the conservation of biological diversity, especially in the context of global warming and the Millennium Development Goals. He called on delegates to look beyond national interests and seek creative solutions in order to achieve consensus at a critical time for the global environmental agenda.

Delegates then adopted the agenda and agreed to the organization of work (UNEP/CBD/BS/WG-L&R/5/1/Add.1).

REVIEW OF INFORMATION

On Tuesday in plenary the Secretariat introduced information documents on recent developments in international law relating to liability and redress, including third party liability instruments (UNEP/CBD/BC/WG-L&R/5/INF/1) and a list of documents in the Biosafety Clearing House addressing liability and redress for damage resulting from LMOs (UNEP/CBD/BS/WG-L&R/5/INF/2). This information had been requested from the Secretariat at WGLR 4.

Dane Ratcliff, legal counsel for the Permanent Court of Arbitration (PCA), presented on settlement of claims. Noting that arbitration can play an important role in the implementation of Article 27 of the Cartagena Protocol, Ratcliff explained that the PCA is open to all states as well as private parties. He then addressed specific references to the PCA in the revised working draft (UNEP/CBD/BS/WG-L&R/5/2/Rev.1) on approaches and options pertaining to liability and redress, commenting that although mandatory arbitration is desirable, the respective public policy issues should be considered. He also pointed to the PCA Rules for Environmental Arbitration as a tool that could be used in settlement of claims referred to specifically in the operative text. Ratcliff finally highlighted the PCA's fact-finding role that could help determine technical issues, as a less adversarial and more cost-effective method for resolving disputes before entering into arbitration.

Ratcliff explained that parties share the cost of arbitrators, which usually constitute around 10% of the total cost of the arbitration process, and highlighted a financial assistance fund available to developing countries to offset those costs. He said that the arbitration procedure can be tailored to fit various types of instruments.

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

The Secretariat introduced the revised working draft 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/5/2.Rev.1) (herein the revised working draft) and the Working Group based its discussions on the options for operational text. The document contains the different options and elements developed during the Working Group's previous sessions and intersessionally. It is divided into eight sections:

- I. State Responsibility;
- II. Scope;
- III. Damage;
- IV. Primary Compensation Scheme;
- V. Supplementary Compensation Scheme;
- VI. Settlement of Claims;
- VII. Complementary Capacity-Building Measures; and
- VIII. Choice of Instrument.

During the course of the meeting, the Working Group consolidated options for operational text in the revised working draft. The Working Group focused on Sections II, III, IV, V, VI and VII, which were addressed in plenary and in sub-working groups. On Saturday, the Co-Chairs tabled a core elements paper, and on Monday delegates convened a Friends of the Chair group to revise these elements. Negotiations on the core elements continued on Tuesday and Wednesday. Section VIII on the choice of instrument was taken up by the Friends of the Chair group on Tuesday, but deferred so as to not prejudge the outcome of the negotiation on other elements. Section I was not addressed. The results of the deliberations were presented in the further revised working draft, contained in Annex I to the report of the meeting (UNEP/CBD/BS/WG-L&R/5/L.1).

The following summary of the deliberations on this agenda item is structured on the basis of Annex I of the meeting's report.

I. STATE RESPONSIBILITY: The Working Group did not discuss the issue of state responsibility at the meeting.

Outcome: The section on the state responsibility contains two options, preambular and operational, as forwarded from WGLR 4.

II. SCOPE: The Working Group discussed scope briefly on Friday, when Co-Chair Lefeber noted that this had been discussed during WGLR 4 in Montreal. He asked for a show of hands to ascertain if any of the operational texts could be deleted, but most were retained.

Scope was also addressed by the Friends of the Chair group during consideration of the core elements paper. Under both the administrative approach and civil liability, many delegates supported a broad functional scope and a narrow geographical scope. Norway underlined that the geographical scope must take into account damage resulting from transboundary movement of LMOs by non-parties.

***Outcome*:** The section on scope in the further revised working draft contains six subsections on: functional scope; geographical scope; limitation in time; limitation to the authorization at the time of the import of LMOs; determination of the point of the import and export of LMOs; and non-parties.

The subsection on the functional scope sets out a core element applying to the administrative approach and civil liability a broad functional scope, as stated in Article 4 of the Protocol, provided that these activities find their origin in transboundary movement. The subsection retains four operational texts setting out alternative rules and procedures for damage resulting from transport.

The subsection on the geographical scope sets out the core element. With regard to the administrative approach and civil liability, it covers a narrow geographical scope: damage to parties. The subsection retains three operational texts with alternative formulations on damage under the jurisdiction or control of parties; damage that occurred within the limits of national jurisdiction and response measures taken to avoid, minimize or contain impact of such damage; and damage that was caused within the limits of national jurisdiction or control of parties.

The subsection on limitation in time contains six operational texts establishing time limits on the rules and procedures.

The subsection on limitation to the authorization at the time of the import of the LMOs contains three operational texts on the authorization of use of LMOs.

The subsection on determination of the point of the import and export of LMOs contains six operational texts on transboundary movements of LMOs affected by transport.

The subsection on non-parties contains three operational texts on the relationship of the rules on scope to non-parties.

III. DAMAGE: Damage was discussed in plenary on Thursday, in the respective sub-working group on Friday and Saturday, and in the Friends of the Chair group on Tuesday.

Regarding the definition of damage, Japan, New Zealand, Canada, Argentina and Colombia supported a narrower definition. Delegates also agreed to add a paragraph stating that the mere presence of an LMO in the environment does not constitute damage.

The broader definition of damage was supported by the European Community (EC), Brazil, Mexico, Panama, Cuba, Bolivia and others. Ethiopia proposed a broader definition of damage containing a list of elements of damage to which Malaysia added "damage to the environment." Norway supported the Ethiopian formulation with modifications, while the EC stated that the list of general definitions was not appropriate. Following informal consultations, delegates agreed to a revised consolidated text.

Brazil proposed an operational text focusing on adverse effects on biological diversity. Regarding the chapeau, the EC and Japan suggested using the wording of the Biosafety Protocol on taking into account "risks" to human health. In the remainder of the operational text delegates made additions and bracketed references to: transboundary movements of LMOs; direct or indirect results of human activities; and the mere presence of an LMO in the environment did not constitute damage. Japan, Canada and Colombia expressed willingness to consider this definition with some of the above proposed additions.

The Friends of the Chair group discussed the definition of damage with regard to the administrative approach and civil liability. Regarding the administrative approach, delegates debated the inclusion of "risks to human health" in the definition despite objections from Japan. India, Peru and the African Group maintained the wording was taken from the Biosafety Protocol.

On the definition of damage under civil liability, referring to damage resulting from transboundary movement of LMOs, Peru, supported by Malaysia, suggested that injured parties first seek redress under the administrative approach, before turning to the civil liability regime. Brazil characterized these steps as "reinstatement then compensation" and New Zealand registered its concern with the broad definition of damage.

On valuation of damage to conservation of biological diversity, Japan, Canada and Argentina preferred the narrow operational text that damage to conservation of biological diversity be valued only on the cost of restoration. The EC, Panama, India, Saint Lucia, Saint Vincent and the Grenadines, Bolivia, Bangladesh and Palau preferred the broader operational

text listing various factors to be taken into account in valuing damage. Brazil stressed the importance of human health and proposed a number of deletions and added, opposed by Norway and the EC, other costs to be covered, including loss of income. Malaysia suggested adding a list setting out the elements that liability shall extend to from the remaining operational text.

Mexico, on behalf of the Latin America and Caribbean Group (GRULAC), supported by many, suggested combining the subsections on valuation of damage and on valuation of damage to sustainable use of biological diversity, and also making special mention of centers of origin.

Regarding special measures in case of damage to centers of origin, India, Malaysia, Bangladesh and Bolivia expressed preference for text that sets out monetary measures that issue from damage to centers of origin. On special measures in case of damage to centers of origin and genetic diversity, GRULAC, suggested deleting this subsection, instead including a reference that the unique value of these centers should be considered in the subsection on valuation of damage.

On causation, the option of leaving the burden of proof with the claimant was supported by Mexico, Argentina and New Zealand. The option of placing the burden of proof on the respondent was supported by Saint Lucia, Saint Vincent and the Grenadines, Malaysia, Bangladesh, Palau, Cuba, Bolivia and Ethiopia. Ecuador, India, Norway, the EC, Canada and Japan supported leaving the issue subject to domestic law. Under the option on burden of proof being on the respondent, delegates agreed to a narrower operational text with an addition by Brazil on establishing the causal link between the damage and the activity in question in accordance with domestic rules.

Outcome: The section on damage in the further revised working draft contains four subsections on: definition of damage; special measures in case of damage to centers of origin; valuation of damage; and causation.

The subsection on the definition of damage sets out the core element. With regard to the administrative approach, the core element covers damage to the conservation and sustainable use of biological diversity, taking also into account risks to human health. With regard to civil liability, the core element sets out the intention to cover damage resulting from the transboundary movement of LMOs to legally protected interests as provided for by domestic law, including damage not redressed through the administrative approach. The subsection retains two operational texts under the option that defines damage to conservation and sustainable use of biodiversity and one option under the broader definition of damage.

The subsection on special measures in case of damage to centers of origin and centers of genetic diversity contains one operational text on additional coverage of such damage and another on paying particular regard to such centers.

The subsection on valuation of damage contains one operational text with comprehensive broad parameters and one with narrow parameters that damage to conservation of biological diversity should be valued on the cost of restoration.

The subsection on causation sets out the agreed core element. With regard to the administrative approach, the core element sets out the domestic law approach, and for civil liability the core element retains three options namely, leaving the burden of proof with the claimant, the respondent or subject to the domestic law approach. One operational text is retained for each option.

IV. PRIMARY COMPENSATION SCHEME: Issues relevant to the primary compensation scheme were first taken up in plenary on Thursday, when delegates exchanged views on two possible approaches to liability and redress, namely administrative approaches based on allocation of costs of response measures and restoration measures and civil liability (harmonization of rules and procedures). Discussion was then referred to a sub-working group that convened on Thursday, Friday and Saturday and continued again on Tuesday in the Friends of the Chair group.

Administrative approach: Some delegates argued that the role of the competent authority could be undertaken by the courts. The EC explained that an administrative approach was envisaged to empower competent authorities to prevent damage, as an alternative to the judicial process and without the intervention of a court. Other delegates cautioned against prescribing the activities of the competent authority. Canada pointed out that the administrative approach is supposed to be a form of strict liability for the benefit of government.

On specific issues, many delegates supported a broad functional scope and a narrow geographical scope. Norway underlined that the geographical scope must take into account damage resulting from transboundary movement of LMOs by non-parties.

On the obligation of the operator to inform competent authorities of occurrence of damage, many delegates preferred language requiring the operator to immediately inform the competent authority, while Japan preferred a formulation that parties "endeavor to require" the operator. Others underscored the need to define "operator" and "operational control." On the obligation imposed by national law on the operator to take response and restoration measures to address such damage, discussion centered on the balance of responsibility between the competent authority and the operator, with many countries favoring a proactive role for the competent authority.

On the discretion of states to take response and restoration measures, the delegates remained divided over whether the competent authorities should establish which operator caused the damage and undertake remedial measures themselves, or mandate the competent authority to recover costs from the operator. On recourse against a third party by the person who is liable on the basis of strict liability, the EC supported operational text on not prejudicing any right of recourse by the operator/importer against the exporter while others supported operational text that does not limit any right of recourse. Japan suggested deleting this section.

On joint and several liability or apportionment of liability, Brazil, Colombia, China, India, the EC and the African Group supported joint and several liability; Argentina and Paraguay supported apportionment of liability. On limitation of liability,

the African Group, Mexico, Brazil, Colombia, the EC, China, India and Argentina supported provisions on relative time limits. The EC, India and China also supported an absolute time limit.

On coverage of liability, Norway supported the option on compulsory financial security, and Argentina, Colombia, the EC, India and Japan supported the option on voluntary financial security.

On the term "operator" some preferred a technical definition, such as that provided by the International Law Commission, others favored a list of possible examples of operators and both formulations were retained.

On coverage of liability, many delegates opposed the obligation to require evidence of financial security upon import of LMOs, including Brazil stating it could hinder South-South trade, the African Group arguing for national implementation, and New Zealand adding that it may be contrary to World Trade Organization obligations. These objections were countered by Switzerland and Malaysia who explained how the provision could be applied in a non-discriminatory manner, and Norway stating that while all provisions can be implemented domestically, the Working Group would only establish international standards.

Civil liability: Delegates discussed the links between the administrative approach and civil liability, with Peru and Malaysia suggesting that injured parties first seek redress under the administrative approach, before turning to the civil liability regime. Brazil characterized these steps as "reinstatement then compensation."

On standard of liability, Brazil and Panama wanted to see all options: fault-based, strict and mitigated strict liability reflected in the paper. India and Norway insisted on strict liability. Stating that they do not consider LMOs inherently dangerous, the Philippines supported fault-based liability, along with Japan who expressed readiness to support the option set out by the Co-Chairs with fault-based liability as the default standard unless approval of import has been made subject to strict liability. The African Group insisted on a strict liability standard and, with China, suggested making it the default standard if necessary with an exception for fault-based liability. Malaysia agreed and pointed to the Biosafety Protocol's precautionary approach as recognition of the inherent risk of LMOs. Switzerland suggested the use of guidelines allowing parties to choose the appropriate liability standard. On channeling of strict liability, China suggested channeling liability to the operator.

Regarding the provision of interim relief, delegates discussed two operational texts and agreed to merge components of both, including the condition that the defendant's costs and losses be paid by the claimant in cases where interim relief is granted but liability is not established.

Additional elements of an administrative approach and/or civil liability: On additional elements of an administrative approach and/or civil liability and on exemptions to, or mitigation of strict liability, delegates considered exemptions to strict liability and agreed to retain alternative formulations on when exemptions apply. Liberia and Friends of the Earth International opposed any exemption, and Canada highlighted that exemption from liability does not mean exemption from fault. On recourse against third parties by the person who is liable on the basis of strict liability, delegates agreed to retain only the broad operational text.

On exemptions and mitigation, Co-Chair Lefeber explained that the respective operational text would include an exhaustive list from which states could choose, with Switzerland and the EC adding that the list should be restrictive, and Malaysia and Peru underscoring that it must be agreed to internationally. On limitations of time and amount, Switzerland maintained that limits form an intrinsic part of a liability and redress regime. Brazil and others initially rejected this proposition, but altered their position once the optional nature of the minimum limits was clarified.

Outcome: The section on the primary compensation scheme has three subsections: elements of administrative approach based on allocation of costs of response measures and restoration measures; civil liability; and additional elements of an administrative approach and/or civil liability.

The subsection on administrative approach sets out the following core elements:

- obligation imposed on the operator to inform competent authorities of the occurrence of damage to the conservation and sustainable use of biological diversity, under which there are two operational texts;
- obligation imposed by national law on the operator to take response and restoration measures to address such damage, under which there are two operational texts; and
- discretion of states to take response and restoration measures, including when the operator has failed to do so, and to recover the costs, under which there is one operational text with alternative formulations.

The definition for "operator" contains two alternative formulations of operational text. One defines operator as the developer, producer, notifier, exporter, importer, carrier, or supplier. The other defines operator as one in command or control.

On administrative procedures, there are two operational texts, setting out procedures in case civil liability is complemented by an administrative approach.

The subsection on civil liability contains headings on the standard of liability and channeling of liability, and the provision of interim relief. On standard of liability and channeling of liability there are three options including strict liability, mitigated strict liability and fault-based liability. On provision of interim relief there is one operational text.

The subsection on additional elements of an administrative approach and/or civil liability contains five headings on: exemptions or mitigation; recourse against third parties by the person who is liable on the basis of strict liability; joint and several liability or apportionment of liability; limitation of liability; and coverage.

Under the heading on exemptions or mitigation, the core element sets out: on administrative approach, exemptions and mitigation, as provided for in domestic legislation, on the basis of an internationally agreed exhaustive list; and on civil liability,

exemptions and mitigation to strict liability, as provided for in domestic legislation on the basis of an internationally agreed exhaustive list. There are three accompanying operational texts.

On recourse against a third party by the person who is liable on the basis of strict liability, there is one operational text stating that rules and procedures do not limit or restrict any right of recourse or indemnity that a person may have against any other person. On joint and several liability or apportionment of liability there are two options: joint and several liability, and apportionment of liability.

The section on limitation of liability sets out the core elements. Under the administrative approach, the limitations in time, as provided for in domestic legislation, are as follows:

- relative time limit not less than [x] years; and
- absolute time limit not less than [y] years.

Civil liability limitations of strict liability in time, as provided for in domestic legislation, are as follows:

- relative time limit not less than [x] years; and
- absolute time limit not less than [y] years.

Limitation in amount has the following bracketed core elements:

- administrative approach: limitation in amount as provided for in domestic legislation, if the limitation is established, it should be not less than [z] SDRs; and
- civil liability: limitation of strict liability in amount: not less than [z] SDRs. It contains two options: unlimited and limited liability.

On coverage the respective core elements, both the administrative approach and civil liability set out: domestic discretion regarding provision of evidence of financial security upon import of LMOs, including through self-insurance, bearing in mind the need to appropriately reflect that this will be consistent with international law. It contains two options: voluntary financial security and a domestic law approach.

V. SUPPLEMENTARY COMPENSATION SCHEME: This section of the revised working draft was considered in plenary on Thursday, in a sub-working group on Thursday, Friday and Saturday, and as part of the core elements paper by the Friends of the Chair group on Tuesday.

GRULAC stressed the scheme required extensive discussion regarding mechanisms, and Brazil added that the proposed approach is new and required further examination. Malaysia, supported by South Africa, also said that supplementary compensation should be supplementary to both forms of primary compensation. Japan preferred it to be supplementary to the administrative approach only. Norway stated that its support was contingent on the scheme being in accordance with the polluter pays principle. Ethiopia, India, Norway and the Philippines supported retention of the element on residual state liability, but the EC disagreed.

On residual state liability, delegates disagreed whether residual liability should rest with the state that suffers damage, or with the state in which the operator is registered. The African Group, India, Cuba and Bangladesh supported placing primary liability with the operator, with residual state liability for damage resulting from transboundary movement of LMOs. Colombia and the Republic of Korea supported making the state liable where the person is a national and unable to fully meet compensation for damages. The EC, China, Japan, Palau, Mexico and Ecuador proposed deletion of this section.

On supplementary collective compensation arrangements the African Group and China favored the operational text where compensation under the Protocol does not cover the costs of damage. India and the Republic of Korea supported operational text on additional/supplementary funding mechanisms to ensure appropriate payments for damage. Colombia, Malaysia, Bangladesh, Palau, Indonesia and Cuba supported operational text on preventive, mitigating, restoring and reinstating measures. The EC and Japan supported a no provision option. In addition, Switzerland tabled a proposal setting out that: an affected party may request the COP/MOP to allocate financial resources to redress damage that has not been redressed by the primary compensation scheme; and the COP/MOP may forward the request to the responsible committee and establish a voluntary trust fund to which states, private organizations and institutions are invited to contribute. A number of delegations expressed reservations.

***Outcome*:** The section on the supplementary compensation scheme contains subsections on residual state liability and supplementary compensation arrangements. It sets out the bracketed core element with the options of a supplementary compensation scheme with residual state liability, or no residual state liability. Three alternative operational texts remain:

- where a claim has not been satisfied, the unsatisfied portion shall be fulfilled by the state where that person is domiciled;
- primary liability shall be that of the operator; and
- in case a person liable is unable to meet the compensation for damages, together with costs and interest, the liability shall be met by the state of which the person is a national.

The subsection on supplementary collective compensation arrangements sets out the agreed core element, which states that the supplementary compensation scheme is for the reimbursement of costs of response and restoration measures to redress damage, taking also into account risks to human health, including: consideration of ways and means in accordance with the polluter pays principle to engage the private sector in voluntary compensation schemes; and consideration of supplementary compensation mechanism of the COP/MOP.

The issue of access to the voluntary supplementary collective compensation mechanism of the COP/MOP being conditional on implementation of these rules and procedures remains bracketed.

VI. SETTLEMENT OF CLAIMS: This item was addressed in plenary on Thursday and in a sub-working group on Thursday and Friday and in the Friends of the Chair group on Tuesday.

On inter-state procedures, the option on existing procedures with reference to Article 27 was supported by Mexico, on behalf of GRULAC, the EC, Norway and Ethiopia. Japan preferred to delete the section on inter-state procedures because they were already established under the CBD and strongly opposed any special procedures. Delegates agreed to delete the option on special procedures, and to retain operational text under existing

procedures. Delegates retained operational text that sets out that the Protocol Article 27 applies *mutatis mutandis* as one option and no text as a second option.

Civil procedure options consisted of: special provisions on private international law; an enabling clause on binding international law; and binding arbitration. Co-Chair Lefeber observed in plenary, that binding arbitration contravenes national constitutions and implored delegates not to consider this option, and delegates agreed to delete reference to it. Cuba, Bangladesh, Ecuador, Palau, Ethiopia, Malaysia and Norway supported the option on special provisions on private international law. Acknowledging that private international law is covered in other conventions, Norway said that damage to biodiversity is a special case, while Malaysia stressed the need to harmonize private international laws. Argentina, Japan, the EC, Colombia and others supported an enabling clause on binding international law.

Delegates agreed to delete the option on compulsory settlement of disputes and also accepted, regarding jurisdiction of courts, a formulation initially proposed by Bangladesh, stating that a claim for compensation of damage shall be brought in the court of the party where damage is suffered, the incident occurred, the plaintiff has habitual residence, or the defendant has habitual residence or a principal place of business. Brazil, supported by Colombia and India, preferred the operational text setting out the general rules of private international law, adding that alternative grounds of jurisdiction may be provided for, "according to national legislation." Japan supported operational text stating that all matters before the competent court, not regulated in the rules and procedures, shall be governed by the law of that court, including conflict of law rules. Both operational texts were retained.

Regarding applicable law, delegates agreed to retain only the operational text that all matters before the competent court shall be governed by the law of that court. Delegates agreed to delete some explanatory provisions on recognition and enforcement of judgments. China cautioned against taking on additional private international law obligations, other than under existing conventions, and the entire paragraph was bracketed. Delegates also agreed to retain, on other rights of persons who have suffered damage, the operational text, setting out that the rules and procedures are without prejudice to rights under domestic law for victims, or to reinstatement of the environment.

In the context of a special tribunal, the EC supported the operational text on resorting to special tribunals in specific cases where numerous people are affected. India preferred, however, to make reference to civil/administrative procedures. Delegates agreed to retain the operational text on final and binding arbitration, if agreed to by all parties, for integration in the other paragraphs. Delegates agreed to retain three operational texts, on: resorting to special tribunals such as the Permanent Court of Arbitration (PCA); availing dispute settlement through civil and administrative procedures; and submitting a dispute to final and binding arbitration in accordance with the PCA optional rules for arbitration of disputes relating to natural resources and/or the environment, with an addition by the US, on specific cases where there are large numbers of people affected.

On the issue of standing/right to bring claims, the option on special provisions (directly affected persons or entities and class actions) was supported by Ethiopia, Argentina, Bangladesh, Malaysia and others. The option on a domestic law approach was supported by: Japan, the EC, the Philippines, Brazil, Senegal, Norway, and others. Ethiopia supported the option on special provisions (diplomatic protection) and the option on special provisions (only for directly affected persons and entities) was deleted. Delegates agreed to a merged operational text encapsulating: the principle of access to justice; a caveat that nothing in the rules and procedures shall be construed as limiting the protection or reinstatement of the environment as provided under domestic law; and the entitlement of individuals or organizations to bring a claim in respect of the breach or threatened breach of these rules or procedures.

On administrative procedures, Ethiopia, Japan, Argentina and South Africa supported operational text stating that parties provide administrative remedies as may be deemed necessary. Japan supported administrative remedies and, with Canada, called for a flexible administrative approach at the national level. Senegal, however, supported an alternative formulation with subparagraphs on: persons affected by damage taking actions; operators responding to requests; access to courts; and the right of review of decisions by operators.

***Outcome*:** The further revised working draft contains a section of settlement of claims with subsections on: inter-state procedures; civil procedures; special tribunals; and standing/right to bring claims. Under inter-state procedures there are two operational text formulations: a provision stating that in the event of a dispute between parties concerning the interpretation or application of rules and procedures, the provisions of Article 27 shall apply *mutatis mutandis;* and an alternative text formulation setting out that no provision would be made for inter-state procedures.

Under civil procedures there are two operational texts, a broader formulation stating that civil law procedures should be available at the domestic level to settle claims for damages between claimants and defendants and in cases of transboundary disputes, the general rules of private international law will apply as appropriate and that the competent jurisdiction is generally identified on the basis on the defendant's domicile. The second operational text states that all matters of substance or procedure regarding claims before a competent court not specially regulated by these rules and procedures shall be governed by the law of that court.

The subsection on special tribunals consists of four operational texts:

- resorting to special tribunals in special cases, such as when a large number of victims are affected;
- availing dispute settlement through civil and administrative procedures and special tribunals such as the PCA Optional Rules for the Arbitration of Disputes relating to Natural Resources and/or the Environment;
- submitting disputes to final and binding arbitration in accordance with PCA optional rules where persons are liable and damage is being claimed under these rules and

procedures, and the parties have consented to the jurisdiction of the PCA; and
- a no option provision.

Standing/rights to bring claims comprises three options: special provisions (directly affected persons or entities and class action); special provisions (diplomatic protection); and domestic law approach.

VII. COMPLEMENTARY CAPACITY-BUILDING MEASURES: This item was discussed in a sub-working group on Saturday, under the primary and supplementary compensation scheme. Numerous delegates maintained that capacity-building measures related to liability and redress should build on and link to the respective provisions in Article 22 (capacity building) of the Biosafety Protocol, and suggested revising the operational text accordingly.

Regarding review of the action plan for building capacities for effective implementation of the Biosafety Protocol, New Zealand suggested adding reference to strengthening linkages between capacity building in liability and redress and capacity building in risk assessment and risk management. Brazil supported the establishment of an institutional arrangement with its terms of reference in the main body or annex to a COP/MOP decision, while Japan expressed reservations. The EC supported an institutional arrangement, adding that parties were at liberty to disregard advice, and it would not be binding. Brazil, supported by Japan and China, cautioned that the proposal was moving away from the purpose of capacity-building measures and appeared more like a compliance mechanism.

Outcome: The section on complementary capacity-building measures in the further revised working sets out the agreed and bracketed core elements.

One core element is to review the Action Plan for Building Capacities for the Effective Implementation of the Cartagena Protocol on Biosafety to address liability and redress. It also agrees that functions of the institutional arrangement include, upon request, the provision of advice to:
- parties on their domestic legislation in draft or existing form;
- capacity building workshops on legal issues relating to liability and redress; and
- reports on best practices relating to national legislation on liability and redress.

The following items remain bracketed:
- COP/MOP access to the supplementary collective compensation mechanism of the COP/MOP;
- support to national capacity self-assessment activities; and
- advice on providers of adequate technology and procedures to access it.

The bracketed core element refers to the establishment of the institutional arrangement with its terms of reference in the main body of and/or Annex IV to the COP/MOP decision based on the roster of experts.

The further revised working draft also includes two options on capacity building with an institutional arrangement, with two operational texts, and without an institutional arrangement, with one operational text.

VII. CHOICE OF INSTRUMENT: The Working Group did not discuss choice of instrument.

***Outcome*:** The further revised working draft includes six options for instruments:
- one or more legally binding instruments;
- one or more legally binding instruments in combination with interim measures pending the development and entry into force of the instrument(s);
- one or more non-legally binding instruments;
- a two stage approach (initially to develop one or more non-binding instrument, evaluate the effect of the instrument(s) and then consider to develop one of more legally binding instruments;
- a mixed approach (combination of one or more legally binding instruments, e.g. on settlement of claims, and one or more non-binding instruments, e.g. on the establishment of liability); and
- no instrument.

CORE ELEMENTS PAPER: On Saturday Co-Chairs Nieto and Lefeber introduced the core elements paper, intended to be used as a tool to assist delegations in making decisions on key issues. Nieto outlined three scenarios, namely: delegates reject the paper and continue negotiating based on the revised working draft; delegates accept the package deal" contained in the paper with no amendments; or delegates accept the paper with minor amendments with the risk that the "package deal" gets reopened. After considering the paper on Sunday and in regional consultations on Monday morning, delegates did not accept the "package deal" and decided instead to revise the core elements paper. This work was undertaken in a Friends of the Chair Group that met on Tuesday for a first reading of the core elements paper and moved to negotiations after closing the doors to observers. The following section describes the core elements paper initially tabled by the Co-Chairs, then reports on delegates' reactions in plenary along with the corresponding discussion on the establishment of a Friends of the Chair group and finally sets out the core elements as distilled from the further revised working draft as the final outcome.

The core elements paper constituting a "package deal" proposed by the Co-Chairs was comprised of four "pieces," namely: primary compensation scheme (administrative approach); primary compensation scheme (civil liability); supplementary compensation scheme; and capacity-building measures. On the issue of choice of instrument, the Co-Chairs proposed that the legally binding component would be limited to the administrative approach, albeit with an "escape clause," should the content not justify a legally binding instrument. They proposed to deal with the civil liability piece through guidelines for implementation in domestic law. The administrative approach was proposed to include:
- a broad functional and narrow geographical scope;
- damage to the conservation and the sustainable use of biological diversity;

- obligations incumbent on persons in operational control of LMOs to inform competent authorities in the event of damage or imminent threat of damage, and to take response and restoration measures;
- discretion of competent authorities to take such measures and recover the costs;
- exemptions and mitigation;
- limitation in time, including relative and absolute time limits;
- limitation in amount;
- coverage, involving domestic discretion to require evidence of financial security; and
- a domestic law approach to causation.

Similar elements were contained in the piece on primary compensation scheme (civil liability) to be developed as guidelines for implementation in domestic law. Differences included: the definition of damage; the standard of liability, which was fault-based, unless approval of import has been made subject to strict liability; and channeling of strict liability to the importer.

The Co-Chairs proposed including the following elements on a supplementary compensation scheme for the: reimbursement of costs of response and restoration measures to redress damage to conservation and sustainable use of biodiversity; supplementary collective compensation mechanism of the COP/MOP to provide for the allocation of financial resources by the COP/MOP at the request of the state if the damage has not been redressed through domestic law; and access to the supplementary collective compensation mechanism conditional on implementation of a supplementary protocol in domestic law.

On complementary capacity-building measures, the Co-Chairs proposed the following elements: review of the action plan for building capacities for the effective implementation of the Protocol; and functions of the institutional arrangement to include provision of advice to parties, the COP/MOP and domestic public entities of the state in which enforcement of judgment is sought. All four pieces were proposed to be included in an annex to a COP/MOP decision to form the future liability and redress arrangement.

On Saturday, delegates reviewed the paper and sought clarifications in plenary. The Co-Chairs made a number of clarifications, including: the four "pieces" of the core elements paper would be complementary and all form part of the rules and procedures on liability and redress; the definition of damage, and whether it would address risks to human health, remained subject to negotiation; the suggested default standard of liability was fault-based, and only if approval was granted subject to strict liability would the following provisions on channeling of strict liability, and exemptions and limitations, come into play; damage provided for in domestic legislation would be satisfied by the primary compensation scheme, and damage excluded could be met by the supplementary compensation scheme; and the supplementary contractual compensation mechanism by the private sector requires further elaboration.

Delegates had time to consider the core elements paper on Sunday and in regional consultations on Monday. They commented on the paper Monday afternoon in plenary.

A representative of six major agricultural biotechnology companies announced they were considering entering into a "compact," a mutually binding contractual obligation to cover actual damage to biodiversity, subject to proof of harm, and based on self-insurance schemes. Palau noted that the industry representative's declaration of confidence in biotechnology products was justification for a strict liability standard. New Zealand supported civil liability based on guidelines, a fault-based liability standard, and a major role for industry. Malaysia stressed that redress should be available where damage is caused by an LMO and that the biotechnology industry stands to gain acceptance and credibility by working under an international arrangement. The EC and Switzerland welcomed the core elements paper as a balanced package and encouraged delegates to find common ground regarding the elements to ensure conclusion of the process by COP/MOP 4, with the EC warning that they could not envision continuation of the process beyond that point.

Rejecting the proposal to develop voluntary guidelines on civil liability, Zambia, on behalf of the African Group, underscored the need for a legally binding civil liability scheme combined with the proposed administrative approach. She stated that the core elements paper required revision to satisfy the needs of all parties, and suggested the COP/MOP provide further guidance. Norway and many developing countries insisted on a strict liability standard. Describing the core elements paper as a guide for negotiations without prejudice to their outcome, Mexico, on behalf of GRULAC, expressed concern that it introduced some novel elements and omitted others, previously considered. ECOROPA asserted that the core elements paper is counterproductive to liability and redress and pointed to a lack of transparency in its preparation. Greenpeace warned that an administrative approach would not be workable without a strong supplementary compensation mechanism.

In the late afternoon in plenary, Lefeber tabled a COP/MOP "draft decision" containing, in annexes, the operative texts connected to the options set out in the core elements paper developed by the Co-Chairs.

In the evening plenary, Co-Chair Nieto invited delegates' comments on whether they preferred to proceed on the basis of the revised working draft or the core elements paper. A number of groups stated their support for the revised working draft, including GRULAC, the African Group, and G-77/China, who underscored that the process was moving towards a legally binding instrument. Japan and New Zealand supported using the core elements paper and cautioned against returning to the revised working draft, explaining the sub-working groups had been unable to engage on substance. Switzerland, supported by Norway and the EC, proposed establishing a Friends of the Chair group and delegates agreed to mandate it to revise the core elements paper. The group was composed of: Switzerland, Japan, Norway, New Zealand, Malaysia, China, India, the Philippines, two EU representatives and four representatives from both the African Group and GRULAC. Representatives could be rotated and additional representatives could attend the negotiations, but only the authorized number of representatives could intervene.

The substantive deliberations of the Friends of the Chair group are reflected under the subject headings of the further revised working draft (Annex 1) above. This was produced by inserting the core elements in the form agreed to by the Friends of the Chair group into the working draft and retaining only operational texts reflecting choices under the core elements.

***Outcome*:** Core elements were agreed under each of the pieces of the package.

Piece A: Primary Compensation Scheme (Administrative Approach):

- functional scope: broad functional scope as set out in Article 4 of the Protocol, provided that these activities find their origin in transboundary movement;
- geographical scope: narrow geographical scope, damage in parties;
- definition of damage: damage to the conservation and the sustainable use of biological diversity, taking also into account risks to human health;
- elements of administrative approach based on allocation of costs of response measures and restoration measures: obligation imposed on the operator to inform competent authorities in the event of damage or imminent threat of damage; obligation imposed by national law on the operator to take response and restoration measures to address such damage; and discretion of the competent authorities to take measures, including when the operator has failed to do so and to recover the costs of such measures;
- exemptions and mitigation: exemptions and mitigation, as provided for in domestic legislation on the basis of an internationally agreed exhaustive list;
- limitation in time: limitation in time, as provided for in domestic legislation, as follows: a relative time limit not less than [x] years and an absolute time limit not less than [y] years;
- limitation in amount: limitation in amount as provided for in domestic legislation. Text stating that "if the limitation is established, it should be not less than [z] SDRs" remains bracketed;
- coverage: domestic discretion regarding provision of evidence of financial security upon import of LMOs, including through self-insurance, bearing in mind the need to appropriately reflect that this will be consistent with international law; and
- causation: domestic law approach.

Piece B: Primary Compensation Scheme (Civil Liability):

- functional scope: broad functional scope as set out in Article 4 of the Protocol, provided that these activities find their origin in transboundary movement;
- geographical scope: narrow geographical scope, damage in parties;
- definition of damage: damage resulting from the transboundary movement of LMOs to legally protected interests as provided for by domestic law, including damage not redressed through administrative approach with no double recovery;
- channeling of strict liability to the operator;
- exemptions and mitigation: exemptions and mitigation to strict liability, as provided for in domestic legislation on the basis of an internationally agreed exhaustive list;
- limitation in time: limitation of strict liability in time, as provided for in domestic legislation, as follows: relative time limit not less than [x] years; and absolute time limit not less than [y] years;
- limitation in amount: limitation of strict liability in amount: not less than [z] SDRs remains bracketed;
- coverage: domestic discretion regarding provision of evidence of financial security upon import of LMOs, including through self-insurance, bearing in mind the need to appropriately reflect that this will be consistent with international law;
- causation: three options remain, namely: burden of proof lies on the claimant, burden of proof lies on the respondent or domestic law approach; and
- settlement of claims: enabling clause on private international law.

Piece C: Supplementary Compensation Scheme:

- residual state liability: there was no decision on the core element and it remains bracketed;
- supplementary collective compensation arrangements: supplementary compensation schemes for the reimbursement of costs of response and restoration measures to redress damage to the conservation and sustainable use of biological diversity, taking also into account risks to human health;
- consideration of ways and means in accordance with the polluter pays principle to engage the private sector in voluntary compensation schemes including alternative and/or supplementary contractual compensation mechanism by the private sector; and
- consideration of the supplementary compensation mechanism of the COP/MOP providing for the allocation of financial resources by the COP/MOP at the request of the state in which damage occurred, if damage has not been redressed through domestic law implementing these rules and procedures or a supplementary contractual compensation mechanism of the private sector.

Text stating "access to voluntary supplementary collective compensation mechanism of COP/MOP is conditional on implementation of these rules and procedures in domestic law," remains bracketed.

Piece D: Complementary capacity building measures:

- review of the Action Plan for Building Capacities for the Effective Implementation of the Cartagena Protocol on Biosafety to address liability and redress; and
- functions of the institutional arrangement include, upon request, the provision of advice to: parties on their domestic legislation in draft or existing form; capacity building workshops on legal issues relating to liability and redress; and reports on best practices relating to national legislation on liability and redress.

The following items remain bracketed:

- COP/MOP access to the supplementary collective compensation mechanism of the COP/MOP;
- support to national capacity self-assessment activities;
- advice on providers of adequate technology and procedures to access it; and

- establishment of an institutional arrangement with its terms of reference in main body of and/or Annex IV to the COP/MOP decision based on the roster of experts.

CLOSING PLENARY

The closing plenary convened on Wednesday afternoon. Co-Chair Lefeber explained the small Friends of the Chair group met until 4:30 am Wednesday morning. He said the group made good progress and agreed on many core elements and produced the further revised working draft, which would form Annex I of the report of the Working Group (UNEP/CBD/BS/WG-L&R/L.1). He also introduced Annex II, the blueprint for a COP/MOP decision, and delegates adopted both annexes without amendment.

The EC praised the work of the Friends of the Chair group, and acknowledging progress, said there was major work outstanding. He proposed convening an intersessional Friends of the Chair group to continue negotiating the further revised working draft. This was supported by Colombia, Norway, Mexico, the African Group, Brazil and others. Underscoring the need for legitimacy, Paraguay called for establishing a clear mandate. The meeting adjourned briefly for regional consultations.

When the meeting resumed, GRULAC, supported by the African Group, observed an intersessional meeting was an excellent opportunity and proposed the meeting be held immediately prior to COP/MOP 4 to allow maximum time for national consultations and preparation. Regional groups requested additional participants and the Working Group agreed to, six "Friends" from GRULAC, six from Asia Pacific, six from Africa, and two from the EC and two from Central and Eastern Europe. They agreed to not limit the number of advisors.

Rapportuer Maria Mbengashe (South Africa) presented the report of the Working Group (UNEP/CBD/BS/WG-L&R/L.1). Co-Chair Nieto invited comments. Norway and Palau drew attention to the disproportionate focus on the intervention by industry on the "compact," and the Co-Chairs' appraisal of the intervention. Bolivia maintained this created a distorted impression of the meeting and this was noted in meeting report. Delegates then adopted the report.

Co-Chair Nieto thanked delegates for their constructive work. The African Group and GRULAC extended gratitude to the Co-Chairs and the Government of Colombia. Colombia noted the need for a liability and redress regime and thanked the Co-Chairs for their sustained efforts. Co-Chair Nieto gaveled the meeting to a close at 7:12 pm.

A BRIEF ANALYSIS OF THE MEETING

With just seven weeks remaining before COP/MOP 4 in Bonn, Cartagena warmly welcomed delegates for the critical last mandated meeting of the Working Group of Legal and Technical Experts on Liability and Redress. The baggage some delegates brought to Cartagena included vivid recollections of the final meeting of the Biosafety Working Group and the first meeting of the Ex-COP in Cartagena nine years earlier when negotiations of the Biosafety Protocol could not be concluded. Despite some uncomfortable memories, most delegates seemed happy to return to sunny Cartagena. After a cold spell of meetings in Montreal with only incremental progress, many felt that a little Caribbean spice and heat might just be what was needed to stimulate the process and begin the long-awaited "negotiating dance."

This analysis examines the negotiating dynamics and the diverse interests at play during this meeting and considers the core elements of the discussion, the outcomes and the way forward in light of the impending deadline to conclude negotiations in May in Bonn.

THE CARTAGENA METHOD: DANCING TO A DIFFERENT TUNE

The Cartagena meeting got off to a slow start, continuing to work according to the "Montreal method" of streamlining text in sub-working groups. However, by Saturday, the fourth day of the meeting, delegates achieved a discernable momentum, as they began to negotiate and make necessary trade offs. But then, just as delegates seemed to be learning the steps and making some progress, everything came to an abrupt halt when the Co-Chairs changed the tune and tabled their core elements paper. In the paper, the Co-Chairs set out their proposals for a "package deal" comprising four core pieces of a future liability and redress arrangement: a legally binding administrative approach; guidelines on civil liability; a supplementary compensation scheme; and capacity building.

Many were surprised by some of the proposals of the Co-Chairs, particularly that civil liability would be addressed through non-binding guidelines and the administrative approach could be legally binding if the content justified it. Legally binding provisions on civil liability had always been a sticking point for importing countries, because they felt that this would be the only way to effectively secure redress for individuals affected by LMO contamination. The administrative approach lends itself better to incidents of major damage when governments would be seeking redress, and developing countries have little experience working with this approach.

Another controversial proposal was that fault-based liability would be the default standard unless approval of import had been made subject to strict liability. Again importer countries had been insisting on a strict liability standard, where operators would be held liable, without having to engage in the difficult process of attributing fault or proving intention. As a result, some complained that the paper was slanted towards the interests of exporter countries and alleged that non-exporter developing countries had been shortchanged and asserted that a better outcome could be achieved through political negotiations rather than accepting the "package deal." Others took the view that the core elements paper struck a realistic compromise.

Over the weekend delegates were left to decide whether to accept the package or take a gamble and fight for something more. On Monday developing countries took the lead in rejecting the "package deal" and delegates agreed to substantively revise the core elements paper in a Friends of the Chair group. Thus, with less than 24 hours remaining, negotiations began in earnest. Behind closed doors the 18 negotiators, representing the parties from the different UN regions, managed to agree on some, and

make tangible progress on the substance of other core elements to form the basis of the future arrangement on liability and redress. The core elements were integrated into the "further revised working draft," tabled and accepted in closing plenary, with corresponding agreed or alternative operational texts. Delegates welcomed the revisions to the core elements reflected in the further revised working draft, noting that it managed to retain a lot of the substance, made progress in some key areas and still left critical issues open for negotiation.

DANCING WITH THE CORE ELEMENTS

Negotiators made progress when they managed to agree on some of the core elements in the early morning hours, representing the first negotiated outcomes of this process. One of the breakthroughs was that negotiators agreed on a definition of damage. From the outset of negotiations, the question of whether the definition of damage should cover conservation and sustainable use of biodiversity and take into account human health was one of the major points of contention and many delegates were pleased with the agreement reached that the administrative approach's definition would include this. Arguably the definition is even broader for the part on civil liability where the definition of damage is taken from the wording of Article 27 of the Biosafety Protocol referring to "damage resulting from the transboundary movement of LMOs" without any limitations. Of course the detailed definitions of damage contained in the operational texts are yet to be negotiated, but the core elements contain the political direction and broad parameters that will guide the elaboration of the operational texts.

The determination of the standard of liability remained heavily disputed. Many governments had previously insisted that any choice had to be consistent with their national legislation, but given the diversity of legal systems, any specific choice would have caused a problem for one country or another. Many delegates were surprised that compromise formulations leaving the choice between fault-based or strict liability standard to domestic discretion were rejected, since they effectively implement the domestic approach that had been demanded by so many countries. The important achievement is that previously entrenched positions, where importer countries insisted on strict liability and exporter and hybrid countries maintained fault-based liability, have broken down. Delegates remained helpful that agreement on a compromise formulation leaving the determination of the standard of liability to domestic discretion could be reached.

Progress was also made on the supplementary compensation scheme. An announcement from an industry representative that six major agricultural biotechnology companies were prepared to enter into a "compact" to provide compensation in the event of damage was met with excitement from a few participants. Other delegates were cautiously optimistic and wanted to see the details of the compact, arguing that its limitations may be designed to serve the interests of the corporations wanting to promote the broader distribution of LMOs. While the significance of the offer remains to be seen, the Working Group agreed on the need for supplementary compensation, with some developing countries proposing it apply to both the administrative approach and civil liability. Divergent views remain on whether a proposed fund should be binding or voluntary and the details of any supplementary compensation arrangement remain to be negotiated.

DANCING TO THEIR OWN BEAT

The diversity of negotiating positions and the dynamics within regional groups added to the complexity of the task in Cartagena. Over the last nine years the number of countries having an interest in the production of LMOs has steadily increased and some developing countries have become exporters of LMOs. Especially "hybrid" countries, who are both exporters and importers of LMOs, find themselves attempting to balance the interests of exporters of LMOs and potential harm to biodiversity and livelihoods of their populations from imports of LMOs. As a result, delegations of countries with a greater stake have grown to include trade, agriculture, environment and foreign affairs ministries.

The negotiating dynamics in Cartagena were also affected by the fact that some regional groups found themselves agreeing on procedural issues, including which document should form the basis of negotiations and the creation of a Friends of the Chair Group, but unable to establish joint positions on many substantive issues. The divergence of opinion in certain regional groups also made it hard for interregional groups, like the Group of 77 and China, to come together and throw their collective bargaining power into the balance. Interregional cooperation, which had proven to be very efficient in past biosafety negotiations, was effectively blocked in Cartagena. Increased diversity of positions marked the debates in the Friend of the Chair Group and some more cynical delegates suggested the "divide" between usual allies made it much easier for a few seasoned negotiators to "conquer." Since a few countries have been consistently maintaining a "bottom line," insisting on lower standards than the majority, developing countries will require a unified front in order to exert leverage and secure higher standards in the substantive negotiations.

THE ELEMENT IN THE ROOM

The one issue hanging over the entire process like a Damocles Sword is the choice of instrument. One delegate commented that the most critical issue usually gets resolved at the last moment, when all options and negotiators have been exhausted. Clearly securing legally binding provisions on civil liability remained a sticking point for the majority of countries, and whether this can be secured will largely depend on the ability of developing country regional groups to come together and hold the line until that very last moment. The proposal on a legally binding administrative approach, which seemed to have gained general acceptance, if adopted, would set an important precedent by making an administrative approach part of an international arrangement on liability and redress.

FROM CARTAGENA TO BONN – THE LAST DANCE

Before making the critical decision on the choice of instrument, operational texts on core substantive issues will have to be negotiated in detail. Delegates agreed that the further revised document still required a lot of work, much more than

realistically could be done during the COP/MOP. Given that the Friends of the Chair group had, by the assessment of many, qualitatively and quantitatively advanced the negotiations, delegates agreed to reconvene the group for three days before the COP/MOP. This decision may well contribute to a working document on the basis of which negotiators can engage in creating their own kind of "package deal." The progress of the intersessional Friends of the Chair group and the acceptance of the outcome by the remainder of the parties will likely determine whether Bonn will indeed become the venue where rules and procedures on liability and redress will be finally agreed upon.

UPCOMING MEETINGS

INTERNATIONAL CONFERENCE ON BUSINESS AND BIODIVERSITY: This conference, organized by the environmental foundation Global Nature Fund (GNF) and GTZ in preparation for CBD COP 9, will take place from the 2-3 April 2008 in Bonn, Germany. It aims to exchange knowledge among national and international business representatives, authority officials and stakeholders. For more information, contact: Stefan Hörmann, Project Manager; tel: +49-228-24290-18; fax: +49-228-24290-55; e-mail: hoermann@globalnature.org; internet: http://www.globalnature.org/

SUSTAINING CULTURAL AND BIOLOGICAL DIVERSITY IN A RAPIDLY CHANGING WORLD: LESSONS FOR GLOBAL POLICY: This symposium, organized by the American Museum of Natural History, IUCN and Terralingua, will take place from 2-5 April 2008 in New York City and will explore the linkages and policy implications between biological and cultural diversity. For more information, contact: Fiona Brady, American Museum of Natural History; tel: +1-212-496-3431; fax: +1-212-769-5292; e-mail: brady@amnh.org; internet: http://symposia.cbc.amnh.org/biocultural/

INTERNATIONAL ASSESSMENT OF AGRICULTURAL SCIENCE AND TECHNOLOGY FOR DEVELOPMENT INTERGOVERNMENTAL PLENARY: This meeting will take place from 7-12 April 2008, in Johannesburg, South Africa. The International Assessment of Agricultural Science and Technology for Development is an international effort to evaluate the relevance, quality and effectiveness of agricultural knowledge, science, and technology; and effectiveness of public and private sector policies as well as institutional arrangements. For more information, contact: Robert Watson, Director (IAASTD); tel: +1-202-473-6965; fax: +1-202-522-7122; e-mail: rwatson@worldbank.org; internet: http://www.agassessment.org

CITES 17TH MEETING OF THE PLANTS COMMITTEE AND 23RD MEETING OF THE ANIMALS COMMITTEE: These meetings of the Convention on International Trade in Endangered Species will convene from 15-19 April 2008 (Plants Committee), and 19-24 April 2008 (Animals Committee) in Geneva, Switzerland. For more information, contact the CITES Secretariat: tel: +41-22-917-8139/40; fax: +41-22-797-3417; e-mail: info@cites.org; internet: http://www.cites.org/eng/news/calendar.shtml

BIODIVERSITY RESEARCH – SAFEGUARDING THE FUTURE: This scientific meeting will convene from 12-16 May 2008 in Bonn, Germany, in parallel to the fourth Meeting of the Parties to the Biosafety Protocol, and aims to channel results and needs regarding biodiversity research into the political discussion at the Conference of the Parties to the Convention on Biological Diversity. It will consist of three symposia on: acceleration of biodiversity assessment and inventorying; functions and uses of biodiversity; and biodiversity change relating to the 2010 target and beyond. For more information, contact: Jobst Pfaender, Zoologisches Forschungsmuseum Alexander Koenig; tel: +49-228-9122-277; fax: +49-228-9122-212; e-mail: precop9@uni-bonn.de; internet: http://www.precop9.org

PLANET DIVERSITY: LOCAL, DIVERSE AND GMO-FREE – WORLD CONGRESS ON THE FUTURE OF FOOD AND AGRICULTURE: This meeting, organized by several NGOs, will be held from 12-16 May 2008, in Bonn, Germany, in parallel to the fourth Meeting of the Parties to the Biosafety Protocol. The meeting will consist of an international conference, as well as celebrations, exhibitions and events. For more information, contact: Planet Diversity Secretariat; tel: +49-30-275-90-309; fax: +49-30-275-90-312; e-mail: info@planet-diversity.org; internet: http://www.planet-diversity.org/

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. This meeting will be preceded by three days of intersessional meetings of the Friends of the Chair of the Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Biosafety Protocol. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: http://www.cbd.int/mop4/

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. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: http://www.cbd.int/cop9/

INTERNATIONAL DAY FOR BIOLOGICAL DIVERSITY: "Biodiversity and Agriculture" is the theme of the International Day for Biological Diversity, to be celebrated on 22 May 2008. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; email: secretariat@cbd.int; internet: http://www.cbd.int/ibd/2008/