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SUMMARY OF THE FIRST MEETING OF THE GROUP OF FRIENDS OF THE CO-CHAIRS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY: 23-27 FEBRUARY 2009

The first Meeting of the Group of Friends of the Co-Chairs on Liability and Redress under the Cartagena Protocol on Biosafety convened from 23-27 February 2009, at the Mexican Ministry of Foreign Affairs in Mexico City, Mexico. The meeting further negotiated international rules and procedures on liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs) in the context of the Biosafety Protocol, based on the proposed operational texts on liability and redress, annexed to decision BS-IV/12 (Liability and Redress) adopted at the fourth meeting of the Conference of the Parties serving as Meeting of the Parties to the Cartagena Protocol on Biosafety (COP/MOP4).

The meeting produced a draft text for a supplementary protocol on liability and redress to the Biosafety Protocol, which will serve as basis for further consideration at the second meeting of the Group of Friends of the Co-Chairs, to be held in early 2010 in Kuala Lumpur, Malaysia. While many hailed the draft supplementary protocol text as a positive outcome and an important step towards concluding the regime in time for adoption at COP/MOP5, many also expressed concerns about the amount of work still ahead. Most delegates agreed that the supplementary protocol is far from complete, but that the meeting has put it within reach.

A BRIEF HISTORY OF THE CARTAGENA PROTOCOL ON BIOSAFETY

The Cartagena Protocol on Biosafety addresses the safe transfer, handling and use of LMOs that may have adverse effects 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 for intentional introduction into the environment, and also 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 153 parties.

NEGOTIATION PROCESS: In 1995, the second Conference of the Parties (COP2) to the Convention on Biological Diversity (CBD), held in Jakarta, Indonesia, established a Biosafety Working Group (BSWG) to comply with Article 19.3 of the CBD, which requests 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 adverse effects on biodiversity and its components.

The BSWG held six meetings between 1996 and 1999. The first two meetings identified elements for the future protocol and helped to articulate positions. BSWG3 developed a consolidated draft text to serve as the basis for negotiation. The fourth and fifth meetings focused on reducing and refining options for each article of the draft protocol. At the final meeting of the BSWG (February 1999, Cartagena, Colombia), delegates attempted to complete negotiations and submit the draft protocol to the first Extraordinary Meeting of the COP (ExCOP), convened immediately following BSWG6. Despite intense negotiations,

IN THIS ISSUE

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delegates could not agree on a compromise package that would finalize the protocol, and the meeting was suspended. Outstanding issues included: the scope of the protocol; its relationship with other agreements, especially those related to trade; its reference to precaution; the treatment of LMOs for food, feed or processing (LMO-FFPs); 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 negotiations: the Central and Eastern European Group; the Compromise Group (Japan, Mexico, Norway, the Republic of Korea and Switzerland, joined later by New Zealand and Singapore); the European Union; 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 adopted the Cartagena Protocol on Biosafety on 29 January 2000 in Montreal, Canada. The meeting also established the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP) to undertake preparations for COP/MOP1, and requested the CBD Executive Secretary to prepare work for development of a BCH. During a special ceremony held at COP5 (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) of LMOs; 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. 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 (WGLR), co-chaired by Jimena Nieto (Colombia) and René Lefeber (the Netherlands), under Article 27 of the Protocol, which requires the elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs, within four years after the Protocol's entry into force.

WGLR1: 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/MOP2: At its second meeting (May/June 2005, Montreal, Canada), the COP/MOP adopted decisions on capacity building, and public awareness and participation; and agreed to establish an intersessional technical expert group on risk assessment and risk management. COP/MOP 2 did not reach agreement on 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."

WGLR2: 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 for liability and redress; and 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/MOP3: At its third meeting (March 2006, Curitiba, Brazil), the COP/MOP adopted detailed requirements for documentation and identification of LMO-FFPs, and 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.

WGLR3: At its third meeting (February 2007, Montreal, Canada) the Working Group considered a working draft text synthesizing views submitted by governments and other stakeholders on approaches, options and issues regarding liability and redress. 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.

WGLR4: At its fourth meeting (October 2007, Montreal, Canada), the Working Group focused on the elaboration of options for rules and procedures for liability and redress, based on a working draft synthesizing submissions with respect to approaches and options on liability and redress in the context of Article 27. Delegates focused on streamlining options for operational text related to damage, administrative approaches and civil liability resulting in a consolidated text to be used for further negotiations.

WGLR5: At its fifth meeting (March 2008, Cartagena de Indias, Colombia), the Working Group continued the elaboration of options for rules and procedures for liability and redress based on a revised working draft compiled by the Co-Chairs. Delegates agreed on a certain core elements, including the definition of damage and further streamlined the remaining options. The Working Group decided to convene a Friends of the Co-Chairs Group immediately before COP/MOP4 to consider outstanding issues, including standard of liability, causation and the choice of instrument.

FRIENDS OF THE CO-CHAIRS GROUP: From 7-10 May 2008, delegates convened in Bonn, Germany, for regional consultations and in the Friends of the Co-Chairs Group to continue negotiating an international regime on liability and redress.

COP/MOP4: The fourth meeting of the COP/MOP (May 2009, Bonn, Germany) marked the deadline for adopting a decision on international rules and procedures for liability and redress. While the meeting did not adopt an international regime, delegates decided to reconvene the Friends of the Co-Chairs Group to complete negotiations on an international regime on liability and redress based on a compromise that envisions a legally binding supplementary protocol focusing on an administrative approach but including a provision on civil liability that will be complemented by non-legally binding guidelines on civil liability. COP/MOP4 also adopted decisions on, among other issues: the Compliance Committee; HTPI of LMOs; the BCH; capacity building; socioeconomic considerations; risk assessment and risk management; financial mechanism and resources; and subsidiary bodies.

REPORT OF THE MEETING

On Monday, 23 February 2009, Amb. Juan Manuel Gómez Robledo, Mexican Foreign Affairs Ministry, welcomed delegates to Mexico and stressed the importance of adopting an international regime on liability and redress, given the relevance of LMOs and their potential impact on the environment and human health. Charles Gbedemah, CBD Secretariat, stressed the importance of achieving consensus during this meeting, since a second meeting would be subject to voluntary contributions. Co-Chair Jimena Nieto (Colombia) noted that the high level of participation at the meeting showed the commitment towards finalizing the task mandated by COP/MOP4. Sandra Herrera, Undersecretary of the Mexican Ministry of the Environment and Natural Resources, stressed the importance of obtaining clear results during this meeting, both for parties and non-parties to the Biosafety Protocol.

ORGANIZATIONAL MATTERS: Delegates adopted the provisional agenda and organization of work (UNEP/CBD/BS/GF-L&R/1/1/ and 1/Add.1).

Co-Chair Nieto outlined the composition of the Group of the Friends of the Co-Chairs according to COP/MOP Decision BS-IV/12, noting that representatives are nominated by the regional groups: six representatives for the Asia-Pacific region (Bangladesh, China, India, Malaysia, Palau and the Philippines); six representatives for the African region (Burkina Faso, Namibia, Ethiopia, Liberia, Zambia and South Africa); six representatives for the Latin American and Caribbean region (Mexico, Paraguay, Cuba, Colombia, Brazil and Panama); Moldova for the Central and Eastern European region; the Czech Republic and the European Commission for the EU; and New Zealand, Norway, Switzerland and Japan.

FURTHER NEGOTIATIONS ON INTERNATIONAL RULES AND PROCEDURES IN THE FIELD OF LIABILITY AND REDRESS

On Monday morning, the Secretariat introduced COP/MOP4 Decision BS-IV/12 (UNEP/CBD/BS/GF-L&R/1/2) and the outline of a draft decision for consideration by COP/MOP5 (UNEP/CBD/BS/GF-L&R/1/3). On Friday the group adopted the meeting's report (UNEP/CBD/BS/GF-L&R/1/4), containing in Appendix I the draft decision for consideration at COP/MOP5. Annex I to the draft decision contains the draft supplementary protocol as negotiated during the meeting. The report also contains other appendices on operational texts for guidelines on working towards non-legally binding provisions on civil liability, and the supplementary compensation scheme, which were not considered at this meeting. This report summarizes the discussion on the articles in the order in which they occur in the draft supplementary protocol text.

OBJECTIVE AND NATURE: These issues were discussed on Monday. Co-Chair René Lefeber explained that the draft decision proposes that the instrument be a supplementary protocol to the Biosafety Protocol, and that it would not amend the latter but be a self-standing treaty. All delegates supported working towards a legally binding approach in the form of a supplementary protocol. Malaysia underscored that the legally binding instrument should be based on the administrative approach with one provision on civil liability, and Paraguay recalled that a final decision on the instrument's nature has not yet been taken.

Regarding state responsibility in the context of the administrative approach, delegates discussed whether a provision that the supplementary protocol shall not affect the rights and obligations of states under the rules of general international law should be addressed in a preambular paragraph or included as an operational text. The African Group, supported by India and Cuba, preferred an operational text, since preambular paragraphs do not carry the same weight.

***Outcome*:** Article 1 states that the supplementary protocol is to contribute to ensuring that prompt, adequate and effective response measures are taken in the event of damage or imminent threat of damage to the conservation and sustainable use of biodiversity resulting from transboundary movements of LMOs. The article is bracketed in its entirety.

DEFINITIONS: Definitions were discussed as a separate item as well as in the context of other substantive provisions on Monday, Thursday and Friday and in an informal group on Thursday evening.

Damage: The definition of "damage" was discussed in plenary on Monday, Thursday and Friday. On a paragraph linking damage to the conservation and sustainable use of biological diversity, delegates agreed to refer only to "adverse" and not "negative" effects on biodiversity. The African Group and Malaysia preferred referencing damage to human health. Japan highlighted that the proposed definition applies only to the legally binding administrative approach, and that a different definition would have to be developed for a legally binding provision on civil liability. New Zealand suggested referencing the specific articles of the supplementary protocol to clarify that the definition of damage relates to the administrative approach, and this formulation was retained.

On a paragraph on how damage is determined, delegates debated whether to combine sub-paragraphs on the extent of qualitative or quantitative changes that affect biodiversity, and on reduction of the ability of components of biodiversity to provide goods and services. Most preferred separate paragraphs, and that formulation was retained.

On a paragraph listing factors for determining "significant" adverse or negative effects on the conservation and sustainable use of biodiversity, delegates debated alternative sub-paragraphs on the extent of such effects on human health. Ethiopia preferred referencing the adverse or negative effects on human health, whereas India, Mexico and Paraguay preferred making effects on human health contingent on adverse or negative effects to the conservation and sustainable use of biodiversity.

Japan added a new paragraph stating that the definition of damage "shall not affect the domestic law of parties in the field of civil liability." India suggested changing the text to state "shall be without prejudice to" domestic law, which was accepted. The text remains bracketed.

***Outcome*:** Article 2 contains a list of definitions. The paragraph on the definition of damage states: "damage to the conservation and sustainable use of biological diversity, in relation to the administrative approach as contained in Articles xx – xx, means an adverse effect on biological diversity that: is measurable or otherwise observable taking into account, wherever available, scientifically established baselines recognized by a competent national authority that takes into account any other human induced variation and natural variation; and is significant." The definition further specifies that it shall be "without prejudice to the domestic law of parties in the field of civil liability," although this last sentence remains bracketed.

Incident: The definition of "incident" arose in plenary on Tuesday in the context of the discussion on response measures. Colombia proposed a definition stating that "incident" should mean "any occurrence or series of occurrences originating in a transboundary movement of LMOs having the same origin that causes damage or creates a grave and imminent threat of causing damage." New Zealand called for the deletion of "grave" and Panama bracketed the phrase "or creates an imminent threat of causing damage." India and Switzerland argued that this issue is covered under scope, so there is no need to define it. Brazil said the definition would have systemic effects on the supplementary protocol and called for its deletion.

***Outcome*:** The definition of "incident" is bracketed in its entirety and contains a number of options. It reads: "incident means any occurrence or series of occurrences originating in/from a transboundary movement of LMOs, having the same origin that causes damage or creates a grave and an imminent threat of damage."

Response Measures: The definition of "response measures" was discussed in plenary on Tuesday, Thursday and Friday, and was addressed by an informal group on Thursday evening. Delegates remained unable to decide between two formulations of the chapeau to the definition, with the first proposal, by the EU, stating that response measures are "reasonable actions in the event of damage or imminent threat of damage" and the second proposal, by Brazil, emphasizing reasonable actions not covered under domestic law concerning civil liability. Both options remain bracketed.

On preventing, minimizing or containing damage, many delegates opposed a reference to prevention, while the EU and Malaysia said this term referred to cases of immediate risk. Brazil and South Africa, opposed by Panama, added that the text should contain the phrase "minimize or contain damage or, as appropriate, imminent threat of damage." Mexico suggested an abbreviated text reading: "minimize or control damage and prevent further spread of damage, if necessary." Malaysia, supported by Brazil, insisted on retaining the notion that response measures should be legitimized, not only to prevent further damage, but also where there is an imminent threat.

Ecuador provided revised language that response measures are actions to "minimize or contain damage or, as appropriate, control imminent threat of damage or prevent further spread of damage." New Zealand called for the inclusion of measures that "mitigate" and "avoid" damage. Co-Chair Lefeber referred the definition of "response measures" to an informal group.

Ecuador reported back to plenary that the group had defined "response measures" to be actions to "avoid, minimize, contain or mitigate damage or take the necessary preventive measures in case of imminent threat of damage, as appropriate." She explained that delegates had called for the word "avoid" to be considered as an alternative to "necessary preventive measures" and the reference to "imminent threat of damage" remains bracketed.

On restorative measures, delegates first debated the structure of the paragraph, and it was decided that it should constitute a chapeau, which sets out two types of restorative actions that parties can take. The chapeau calls on parties to restore biological diversity through the actions listed. Brazil called for flexibility to allow for national discretion, presenting a number of formulations, which resulted in the following text: "restore biological diversity, if not covered under domestic law concerning civil liability." The EU and New Zealand argued that the phrase is confusing and it remains bracketed.

Delegates decided to provide two types of restorative measures, the first more stringent, the second more flexible. After some debate, it was also decided that the two types of restorative actions should appear in order of preference. Whether they should be linked by "or" or "and/or" was debated. The EU preferred "or," with Malaysia preferring "and/or" because the restoration of damage might necessitate both approaches. Delegates opted for "and/or."

On the first part of the sub-paragraph that calls on parties to restore biodiversity to the condition that existed before the damage occurred, Japan, supported by Brazil, and opposed by the EU, India and Malaysia, called for the phrase "if technically and economically feasible" to be inserted. Mexico, supported by Namibia, suggested the qualification be placed and elaborated in the main provisions of the supplementary protocol. The reference remains in brackets. Delegates debated and agreed to retain reference to restoring biodiversity to the condition that existed before the damage "or its nearest equivalent."

On the part of the sub-paragraph setting out that restoration can take place by, *inter alia*, replacing the loss of components of biodiversity with other components for the same use, Colombia requested adding "another type of use;" and Japan, opposed by many, insisted on retaining a bracketed reference stating that such restoration measures be taken under "appropriate

circumstances." New Zealand, supported by Japan and Malaysia, suggested replacing "*inter alia"* with "as appropriate," and the EU called for this to remain bracketed.

***Outcome*:** The definition of response measures remains heavily bracketed. It contains two options for the chapeau. The first option states: "response measures mean reasonable actions, in the event of damage or imminent threat of damage," and the second option reads "response measures mean reasonable actions not covered under domestic law concerning civil liability." The first sub-paragraph sets out that response measures may include "avoid, minimize, contain or mitigate damage, or take the necessary preventive measures in case of imminent threat of damage, as appropriate."

The second sub-paragraph lists types of restorative actions in order of preference. It states: "restore biological diversity, if not covered under domestic law concerning civil liability, through actions to be undertaken in the following order of preference." It then sets out two types of restorative actions, namely:

- restoration, to the extent it is technically and economically feasible, of biological diversity to the condition that existed before the damage occurred, or its nearest equivalent; and/or
- restoration by, *inter alia,* replacing, as appropriate, the loss of biological diversity with other components of biological diversity for the same, or for another type of use either at the same or, as appropriate, at an alternative location."

Operator: Delegates discussed the definition of "operator" on Tuesday. Japan, Brazil, Cuba, Ecuador, India, Paraguay and Colombia supported an operational text defining operator as any person in operational control of the activity at the time of the incident causing damage. The EU, supported by New Zealand, proposed to refer to persons in "command or control." The African Group opposed this and, with Norway, supported operational text that defines the operator as the "developer, producer, notifier, exporter, importer, carrier or supplier of LMOs."

Stressing the need for flexibility, Switzerland supported an operational text defining "operator" as any person in control of the activity at the time of the incident of the LMO at the time that the condition that gave rise to the damage arose, and as provided by domestic law. Mexico also supported this operational text but, with New Zealand and the EU, asked to remove the reference to provisions of domestic law. South Africa welcomed a definition that identifies the operator responsible for the damage.

Malaysia called for flexibility to allow for a range of actors to be covered and to ensure that the burden is not cast on the wrong person, for example, if the damage occurs because of an intrinsic quality of a seed, then the burden should be on the seed producer. The EU noted that it was important to narrow down who was responsible at which stage.

***Outcome*:** The definition of "operator" consists of three options. The first option remains heavily bracketed and defines operator as: "any person in operational control or direct or indirect command or control of the activity at the time of the incident causing damage from the transboundary movement of LMOs; of the LMOs at the time that the condition that gave rise to the damage or imminent threat of damage arose including, where appropriate, the permit holder or the person who placed the LMO on the market; and/or as provided by domestic law."

The second option states that operator means "the developer, producer, notifier, exporter, importer, carrier or supplier."

The third option sets out that the operator is "any person in operational control of the activity at the time of the incident and causing damage resulting from the transboundary movement of LMOs."

Imminent Threat of Damage: The definition of "imminent threat of damage" was discussed in plenary on Thursday and Friday and in an informal group on Thursday evening. During the discussion of response measures in plenary on Thursday, a contentious debate ensued on whether to include "imminent threat of damage" and, if so, whether a definition was needed. On Thursday, Brazil proposed a new definition of imminent threat of damage, meaning an incident that will cause damage in the near future based on scientific evidence of damage caused by the same LMO in other places or that damage will occur if action is not taken. Malaysia proposed to use the permissive term "may" instead of "will", with Mexico proposing to refer to potential damage instead. Colombia expressed concerns about including such cases under the supplementary protocol.

Wording was put forward by: South Africa, linking imminent threat to scientific evidence of damage caused by the same LMOs in similar environments; the Philippines, linking it to science-based risk assessment; and India, linking it to the probability that significant adverse effects are likely to occur if immediate response measures are not taken. The issue was referred to an informal group for further discussion.

Reporting back to plenary on Friday morning, the Philippines explained that the informal group had worked on the definition of "imminent threat of damage," as well as how to define who would be responsible for determining that issue. He explained that despite differing views on the issue, there was general consensus on the text put forward, except for China, Colombia and Panama, who had rejected its inclusion in the Biosafety Protocol. Panama, supported by Cuba, expressed general opposition to referencing "imminent threat of damage" in any part of the supplementary protocol because it falls outside the mandate of the Group of the Friends of the Co-Chairs under Article 27 of the Biosafety Protocol. She explained that "imminent threat of damage" can be dealt with according to Articles 16 and 17 of the Biosafety Protocol or in domestic law. New Zealand questioned the use of a supplementary protocol on liability and redress for damage if it does not cover imminent threat of damage. Malaysia, supported by the African Group, argued that because the supplementary protocol is in the field of liability and redress, it is appropriate to include this concept. Co-Chair Lefeber suggested rephrasing that the term "threat of imminent damage," would better capture the issue, but this was rejected.

***Outcome*:** The working definition of imminent threat of damage states: "imminent threat of damage is an occurrence or occurrences determined, on the basis of best available scientific

and other relevant information, to be likely to result in damage if not addressed in a timely manner." The definition remains bracketed.

Significant Adverse Effect: The way to determine a significant adverse effect was discussed on Thursday. On a list of factors for determining the significance of adverse effects, Brazil, opposed by Mexico, suggested stating that the list is exhaustive. Delegates could not agree on this issue and it remains outstanding. On a factor addressing reduction of the ability of components of biodiversity to provide goods and services, Japan expressed concerns about the reference to goods and services, and Colombia, opposed by South Africa, proposed to refer to goods and "ecosystem services" instead. Following informal consultations, Japan agreed to retain the original term, thereby referencing only "goods and services."

Delegates discussed whether a factor on adverse effects on human health should be freestanding or contingent on damage to conservation and sustainable use of biodiversity. Brazil, the African Group, India, Malaysia and the EU preferred to refer to adverse effects on human health. New Zealand, supported by Colombia, Paraguay, Japan and the Philippines, provided wording for a factor referencing the extent to which adverse effects on the conservation and sustainable use of biodiversity have adverse effects on human health. Following informal consultations, delegates agreed to refer to adverse effects on human health in the context of the Biosafety Protocol.

Brazil and Colombia opposed a factor considering any locally or regionally important components of biological diversity identified in accordance with CBD Article 7(a) (identification and monitoring of components of biodiversity important for its conservation), arguing that there is an overall obligation to protect biodiversity and no specific aspects should be singled out. Switzerland and the EU clarified that such a factor was not a limiting provision, but meant to help national authorities determine significant adverse effects, and suggested removing reference to CBD Article 7(a) for simplification. The reference was removed. New Zealand proposed reference to the extent of effects on locally or regionally important biodiversity, and this wording remains in brackets as a basis for further discussion.

***Outcome*:** The paragraph on factors to determine a significant adverse effect is broadly agreed. Text in brackets reflects divergence in views remaining about whether the list should be qualified as exhaustive. It lists the following factors:

- the long term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonable period of time;
- the extent of the qualitative or quantitative changes that adversely affect the components of biological diversity;
- the reduction of the ability of components of biological diversity to provide goods and services;
- the extent of any adverse effects on human health in the context of the Protocol; and
- the extent of adverse effects on locally or regionally important components of biological diversity.

The reference to locally or regionally important components of biological diversity is bracketed.

SCOPE AND LIMITATIONS: The Friends of the Co-Chairs discussed the scope and limitations in time of the supplementary protocol on Monday and Thursday.

A major issue when discussing the functional scope was whether to refer only to LMOs, as preferred by Japan, the EU, the Philippines, Paraguay, Mexico, India, Colombia, Cuba, Brazil, Panama, Norway, China and Switzerland, or also to products thereof, as favored by Malaysia and the African Group. The latter highlighted that recent scientific evidence of horizontal gene transfer among higher organisms was a reason for extending the scope of the supplementary protocol to products of LMOs. The debate continued during the second reading of the text on Thursday and, unable to reach consensus, the group decided to leave the reference to "products thereof" bracketed.

On geographical scope, and whether to include a reference to exclusive economic zones, delegates agreed to a proposal by Japan to apply the supplementary protocol to damage in areas within the limits of national jurisdiction of parties.

Application of the supplementary protocol to damage, risks or adverse effects on human health proved to be another intricate issue. Following lengthy discussions on Thursday, most countries would have accepted aligning language with that used in the Biosafety Protocol. New Zealand, though, preferred to postpone the discussion.

The EU proposed to exclude from the scope of the supplementary protocol activities related to national defense, international security or natural disaster management, evoking language from the draft UNEP guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment. Most delegates considered this text unnecessary, and preferred its deletion. The EU listened to the concerns raised, but asked to relocate the proposed wording to the section on exemptions, for discussion at a later stage.

Limitations in time: Limitations in time was discussed in plenary on Monday and Friday, and on Thursday in an informal group. When discussing the overall formulation of the provision, delegates preferred an option stating that the rules and procedures apply to damage resulting from a transboundary movement of LMOs that started after the entry into force of the supplementary protocol. India expressed concern about the formulation "started after" and Colombia proposed to use the term "occurred" instead. The EU and New Zealand opposed, noting that the starting point should be the transboundary movement of LMOs, not the occurrence of damage. Raising concerns about difficulties in proving whether an LMO came into the country before or after the supplementary protocol's entry into force, South Africa proposed referring to the event when damage occurred rather than the time of import.

The EU, opposed by India, proposed clarifying that the rules and procedures would refer to the entry into force for the party into which the transboundary movement took place. Switzerland and New Zealand clarified their understanding that the supplementary protocol must have entered into force for both parties. Malaysia suggested developing a consolidated text. Co-Chair Lefeber invited the EU, Colombia, New Zealand and South Africa to draft text for further discussion.

On Friday, Switzerland reported back from the informal group that met on Thursday evening. He presented a drawing depicting the movement of LMOs to assist delegates in considering the issue. He explained that Mexico had underscored the difficulty of accepting retroactive application of the supplementary protocol. After further consideration, he presented a final text that remains bracketed in its entirety.

***Outcome*:** Article 3, on functional scope, states that the supplementary protocol applies to damage to the conservation and use of the biological diversity regarding activities, such as transport, transit, handling and use of LMOs, originated in a transboundary movement. On also taking into account human health, the article contains alternative wording in brackets regarding "damage to," "risks to" or "adverse effects" on human health. Another paragraph sets out that the supplementary protocol applies to transport, transit, handling and use of LMOs and products thereof, provided that these activities find their origin in a transboundary movement. LMOs covered under this provision are those: intended for direct use as food or feed, or for processing; destined for contained use; and intended for intentional introduction into the environment. A further paragraph clarifies that in regard to intentional transboundary movement of LMOs, the supplementary protocol applies to damage resulting from any authorized use of LMOs and products thereof. A final paragraph sets out that the supplementary protocol also applies to unintentional transboundary movements, as covered in Article 17 of the Biosafety Protocol, as well as illegal transboundary movements, as referred to in Article 25 of the Biosafety Protocol. The reference to "products thereof" remains bracketed throughout the article.

Article 4, on geographical scope, states that the supplementary protocol applies to damage that occurred in the areas within the limits of the national jurisdiction of parties resulting from activities referred to in Article 3 (functional scope) of the supplementary protocol. It further sets out that a causal link needs to be established between the damage and the activity in question in accordance with domestic law and that domestic law should/shall also apply to damage resulting from the transboundary movements of LMOs from non-parties.

Article 5, on limitations in time, remains heavily bracketed, and reads: This supplementary protocol applies to damage that results from a transboundary movement of LMOs that started after the entry into force of the supplementary protocol for the party into whose jurisdiction the transboundary movement was made. It further states that nothing in this supplementary protocol shall be interpreted as restricting the right of a party to require appropriate measures in its domestic law to deal with damage resulting from transboundary movement of LMOs, consistent with international obligations/law that started before the entry into force of the supplementary protocol.

PRIMARY COMPENSATION SCHEME: Negotiations focused on how flexible the supplementary protocol should be to allow states to implement it without requiring national legislation. Brazil, Malaysia, Paraguay and Japan supported a scheme flexible enough for domestic implementation. Conversely, Norway, New Zealand, Switzerland and Ethiopia preferred to remove the operational text proposed on this subject. After protracted discussions, the group agreed to retain two alternative texts for further consideration requiring parties to provide for domestic measures in accordance with international obligations and domestic law.

Obligations of the Operator: Regarding obligations of the operator to investigate, assess and evaluate damage and take appropriate response measures, the EU, Mexico and India preferred the operator to notify the competent authority in the event of damage, whereas Colombia favored to limit such an obligation to the requirements of the competent authority. The African Group, Brazil, Norway and New Zealand, opposed by China, suggested referring to "imminent threat of damage" rather than damage alone, whereas Malaysia proposed also referring to "the incident causing damage". The EU suggested stating that the operator must notify the competent authority "whenever the threat is not dispelled by response measures by the operator." Debate led delegates to develop new wording reflecting the different options, for discussion at a later stage.

The Competent Authority: On Tuesday, the Friends of the Co-Chairs agreed that the competent authority shall: identify the operator who caused the damage, assess the significance of such damage and determine the response measures to be taken by the operator, including general references to undertake such activities in accordance with domestic law. Throughout the debate, delegates repeatedly cautioned against limiting the competent authority's discretion in taking response measures when prescribing specific actions or procedures.

Exemptions or Mitigation: During discussions held on Tuesday and Wednesday, some parties called for allowing flexibility for parties wanting to provide certain exemptions or mitigations, whereas others argued that this would potentially undermine the supplementary protocol. Some delegates highlighted that the proposed list is not mandatory, and parties need not use any exemption or mitigation.

Delegates debated whether the text should refer to exemptions and mitigations, or just mitigations. Japan, opposed by many, preferred referring only to exemptions. The EU proposed stating that parties may provide for differentiated responsibility if the operator proves that the damage arose from any one or more of the circumstances on the exhaustive list, but India and Malaysia cautioned against using the phrase "differentiated responsibilities" because of its meaning in international law.

Delegates doubted the convenience of exempting the intervention by a third party in cases where damage was caused despite the fact that appropriate safety measures were in place. The same occurred when considering compulsory measures imposed by a public authority, activities expressly authorized by domestic law, and activities not considered likely to cause environmental damage, according to the state of scientific and technical knowledge at the time when the activity was carried out.

Finally, delegates agreed to provide for exemptions on acts of God, *force majeure* and acts of war or civil unrest, with the other provisions constituting a list of mitigating factors, preceded by a chapeau for which two alternate texts are proposed.

Limitation of Liability: On Wednesday, the group agreed to allow for domestic law to provide for time limits for recovering costs and expenses, without setting any specific cut-off times. Ethiopia, India and Brazil saw no need for limiting the recovery of costs and expenses, thus favoring full recovery, while Panama, Paraguay, Colombia, Mexico and the Philippines preferred to allow flexibility for setting domestic limitations in amount.

Coverage: On Wednesday, the Latin American and Caribbean Group (GRULAC) and Japan opposed language providing that parties require the operator to establish and maintain financial security during the time limits, with GRULAC noting its potential repercussions on developing countries' economies and food prices. The EU, India, Norway and Switzerland preferred to keep the requirement, whereas New Zealand preferred to delete it. Further debate on Friday centered on whether the costs of evaluation of damage conducted by the competent authority should be included, and whether the text should specify that cost be recovered from the operator. On the competent authority informing the operator of the remedies available when imposing or intending to impose response measures, delegates debated at length whether such notification should include the opportunity for review and whether or not to specify the review as "independent."

***Outcome*:** The primary compensation scheme regarding the administrative approach is covered in Articles 7-12. The references to "imminent threat of damage" and "consistency with international law" remain bracketed throughout.

Article 7 has eight paragraphs. The first paragraph contains two options: one specifically referring to response measures setting out that a party shall, consistent with international obligations, provide for domestic response measures consistent with the provisions outlined below; the other is more general and just sets out that a party shall, consistent with international obligations, in accordance with its domestic law, implement the provisions outlined below. The second paragraph sets out the obligations of the operator, foreseeing that parties shall require the operator, in the event of damage or imminent threat of damage, subject to the requirements of the competent authority to: immediately inform the competent authority; evaluate the damage or imminent threat of damage; and take appropriate response measures.

The following paragraphs address the competent authority. The first sets out the powers of the competent authority, namely that the competent authority, in accordance with domestic law: should/shall identify the operator that has caused the damage or imminent threat of damage; should/shall/may evaluate the significance of the damage and determine which response measures should be taken by the operator. The operative wording "should, shall or may" remains bracketed. The next paragraph sets out that the competent authority has the discretion to implement appropriate response measures, in particular where the operator has failed to do so. References to "appropriate" and "response" measures, as well as wording specifying that the competent authority should do so "in accordance with domestic law" or "where necessary," remain bracketed.

The following paragraph is bracketed in its entirety and sets out that the party may determine, under domestic law, which response measures may be required to be taken by the competent authority, taking into account those that are already addressed by civil liability. A further paragraph sets out that the competent authority has the right to recover from the operator all costs of, and incidental to, the evaluation of the damage and the implementation of any such appropriate response measures. The references to evaluation of damage and the specification of "response" measures remain bracketed. The penultimate paragraph foresees that decisions of the competent authority imposing or intending to impose response measures should be reasoned and notified to the operator, where identified, who should be informed of the remedies available, including the opportunity for an independent review of such decisions, *inter alia,* through access to an independent body, such as a court, provided that recourse to such remedies shall not impede the right of the competent authority to make such response measures as may be necessary. The latter specifications remain bracketed. The final paragraph remains bracketed in its entirety and foresees that decisions required to be taken by the competent authority of a party pursuant to the above paragraphs shall be consistent with international law.

Article 8, on exemptions or mitigations, contains two paragraphs. The first paragraph on exemptions foresees that parties may provide for exemptions that may be invoked by the operator in cases of: acts of God or *force majeure*, acts of war or civil unrest, or national security exceptions. The other paragraph deals with more limited exemptions or mitigations. There are two alternative proposals for a chapeau for that paragraph, followed by a list of such possible exemptions or mitigations, with delegates still debating whether the list should be exhaustive or not. The entire text remains heavily bracketed and neither the chapeau, nor any of the factors have been agreed to. The first option for the chapeau stipulates that parties may provide, in their domestic law, for the following exemptions or mitigations that may be invoked by the operator in the case of recovery of the costs and expenses. The second option for the chapeau narrows even further the scope of possible exemptions or mitigations, by stipulating that: parties may provide, in their domestic law, for differentiated responsibility for not bearing wholly or partially the costs and expenses of, and incidental to, the implementation of any response measures if the operator proves that the damage or imminent threat of damage arose from any one or more of the following exhaustive list.

The list contains four possible exemptions or mitigations, namely: intervention by a third party that caused damage despite the fact that appropriate safety measures were in place; a specific order imposed by a public authority on the operator and the implementation of such order causes the damage; an activity expressly authorized by and fully in conformity with the authorization given under domestic law; and an activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out.

Article 9, on recourse against third parties, states that the supplementary protocol's rules and procedures do not limit or restrict any right of recourse or indemnity that an operator may have against any other person.

Articles 10 and 11, on limitations of liability, state that domestic law may provide for: relative and/or absolute time limits for the recovery of costs and expenses; and financial limits for the recovery of costs and expenses. A final reference in brackets states that such limits shall not be less than a given number of special drawing rights, with the number still to be determined.

Article 12, on coverage, contains two paragraphs. The first states that parties may, consistent with international law/obligations, require the operator to establish and maintain, during the period of the time limit on liability, financial security, including through self-insurance. The second paragraph urges parties to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic measures implementing this supplementary protocol. Both paragraphs remain bracketed in their entirety.

CIVIL LIABILITY: Delegates addressed civil liability on Wednesday, starting with operational texts laying out options for a chapeau providing alternatives on parties applying their existing civil liability systems to damage from LMOs or on developing special systems. The texts also included different options linking civil liability to a list of conditions, including elements to take into account, a provision on the recognition and enforcement of foreign judgments and reciprocal enforcement of judgments.

Debate first centered on the nature of these conditions and their impact on newly implemented civil liability systems. The EU, New Zealand and Japan said they should be non-binding and not require states to harmonize their laws. Brazil raised concerns that the conditions could require parties to implement special systems for civil liability if their existing systems did not meet the conditions. Malaysia clarified that the provision should: ensure that parties have a civil liability system in place, while leaving flexibility as to whether to address LMOs as part of a general system or through a specific system; and ensure that any such law include the generic common elements of any civil liability system.

Delegates discussed proposals for new chapeau language, eventually agreeing to a proposal made by New Zealand and amended by several others stating that this provision would be implemented either through their existing domestic laws, including, where applicable, general provisions on civil liability; or a specific civil liability regime; or a combination of both. A number of delegates commented that the definition of damage under the civil liability provision would be different from that under the administrative approach, and decided to address this issue under the definition of damage.

Elements: On a list of elements to be considered in a civil liability regime, delegates agreed to retain elements on damage and standard of liability that may include strict, fault-based or mitigated liability, and on channeling liability, adding a specification that it be "strict" liability. Delegates amended elements on financial security, deleting reference to "compensation schemes," and introducing a bracketed alternative reference to "redress or compensation" instead of "financial security."

India and Malaysia supported an element on access to justice or right to bring claims, which was opposed by the EU and others, arguing it was incompatible with civil law systems. Delegates agreed to delete "access to justice" and retain "right to bring claims" in brackets. Delegates also decided to include a separate paragraph stating that parties may also take into account the guidelines on civil liability, which will be annexed to the COP/MOP decision adopting the supplementary protocol, when developing legislation or policy on civil liability.

Enforcement of Judgments: Brazil, India, Mexico, the African Group and Malaysia supported an option providing for parties to enforce foreign judgments arising from the implementation of the provisions on civil liability, and for parties who do not have legislation concerning enforcement of foreign judgments to endeavor to enact such laws. The EU, New Zealand and Japan preferred an operational text providing only for the enforcement of foreign judgments in accordance with domestic law, rejecting language that would require developing or changing domestic laws on enforcement of foreign judgments.

Assessment and Review: On an operational text providing for the review of the guidelines for working towards a non-legally binding approach on civil liability, delegates debated whether this provision should be part of the supplementary protocol, or moved into the COP/MOP decision adopting the protocol, or into the guidelines themselves. Some proposed separate review clauses for the supplementary protocol's effectiveness and for the guidelines. A lengthy debate ensued over language stating that the guidelines be revised "with a view to elaborating a more comprehensive binding regime on civil liability," during which the African Group and Malaysia recalled that the option to further elaborate the civil liability regime had been a key condition for their approval of the compromise achieved during COP/MOP4. Delegates eventually agreed to work on the basis of new text proposed by Malaysia envisioning a three-year period for reviewing the guidelines on civil liability. Co-Chair Lefeber suggested integrating the review of the supplementary protocol with the Biosafety Protocol's five-year review cycle.

***Outcome*:** Article 13 on civil liability contains two options. The first states that parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with LMOs.

The second, more elaborate, option contains five paragraphs with the last three paragraphs bracketed in their entirety. The first paragraph states that parties shall provide in their domestic law for rules and procedures that address civil liability and redress in the event of damage from transboundary movements of LMOs, stating also that parties may apply, or develop, as appropriate: (i) their existing domestic laws, including, where applicable, general

provisions on civil liability; (ii) a specific civil liability regime; or (iii) a combination of both. Text specifying that parties may do so "to implement this obligation" or "to this end" remains in brackets. The second paragraph states that any specific liability regime shall address, *inter alia*: damage; standard of liability, which may include strict, fault or mitigated liability; channeling of liability, where appropriate; and the right to bring claims. A further element on financial security and redress or compensation remains bracketed. Language stating that such liability regimes "shall" or "may, as appropriate" address these elements is also bracketed.

The third paragraph states that parties shall recognize and enforce foreign judgments with respect to matters within the scope of the supplementary protocol. The paragraph contains several alternative references to accordance with "domestic law" or "the applicable rules of procedures of the domestic courts;" and bracketed language stating that parties who do not have legislation concerning recognition of foreign judgments should endeavor to enact such laws.

The fourth paragraph contains bracketed alternative wording on requiring parties whose domestic law requires bilateral reciprocity agreements for recognition of foreign judgments to extend such agreements or laws to other parties not presently covered.

A bracketed alternative option for paragraphs three and four states that parties may, in accordance with domestic law, recognize and enforce foreign judgments arising from the implementation of the above guidelines.

The fifth paragraph states that parties may also take into account the guidelines contained in an annex to the COP/MOP decision that will adopt the supplementary protocol.

Article 14 contains two paragraphs, bracketed in their entirety. The first paragraph provides for a review of the supplementary protocol's effectiveness three years after its entry into force. The second paragraph relates to the consideration of further steps to provide for an effective civil liability regime on liability and redress. Bracketed text includes alternative wording specifying the consideration of "further and necessary" steps or consideration of "whether further steps are necessary."

INSTITUTIONAL PROVISIONS: Delegates discussed institutional and procedural provisions in plenary on Wednesday. New Zealand asked to clarify the relationship between the supplementary protocol, the Biosafety Protocol and the CBD. Noting the need to revise numerous provisions, GRULAC requested not to engage in a substantive debate of the institutional provisions to allow time for work on operational texts. The African Group and Malaysia preferred engaging in a first reading of the provisions, considering it a necessary step to finalize the supplementary protocol. Delegates then suggested that the Co-Chairs include the institutional provisions in their current form in the draft supplementary protocol along with the revised operational texts.

***Outcome*:** Institutional provisions are addressed in Articles 16 to 24 of the draft supplementary protocol text, relating to the Secretariat, relationship of the supplementary protocol to the Biosafety Protocol, amendments, signature, entry into force, reservations, withdrawal, and authenticity in different UN languages.

CLOSURE OF THE MEETING

On Friday afternoon, Co-Chair Nieto introduced the meeting's draft report (UNEP/CBD/BS/GF-L&R/1/4), noting that a reference to the need for a second meeting of the Friends of the Co-Chairs should be added. Malaysia offered to host the meeting in early 2010, and Japan offered to contribute to funding the meeting. Paraguay requested reflecting that the final decision regarding the supplementary protocol's nature will be taken at COP/MOP5, and Brazil noted that guidelines for working towards non-legally binding provisions on civil liability and the supplementary scheme contained in the report's appendices had been neither discussed nor negotiated at this meeting. The report was adopted with these and other amendments.

Mexico commended delegates for the progress made while underlining the need to develop a comprehensive system for liability and redress that goes beyond requesting the implementation of national legislation. Co-Chair Lefeber asked delegates to prepare for the next meeting to allow conclusion of the negotiations, and Co-Chair Nieto closed the meeting at 6:06 pm.

A BRIEF ANALYSIS OF THE FRIENDS OF THE CO-CHAIRS MEETING

The first Meeting of the Friends of the Co-Chairs held Mexico City elevated the negotiations of international rules and procedures on biosafety liability and redress to the next level, resulting in the first draft text for a supplementary protocol on liability and redress. The draft supplementary protocol operationalizes the compromise reached at COP/MOP4 by setting out legally binding provisions on the administrative approach as well as one legally binding provision on civil liability and a review clause. While most delegates hailed this result as a great step forward towards the completion of the negotiations, a number of stumbling blocks remain.

This brief analysis explores the progress made towards finalizing the supplementary protocol and details the major hurdles that have yet to be overcome. It also provides an outlook for the next meeting to be held in Malaysia, at which parties will have to consider all outstanding issues, including the guidelines on civil liability, in order to present a complete package for adoption at COP/MOP5 in October 2010.

AN EMERGING PROTOCOL

This meeting constituted a direct continuation of the negotiations at COP/MOP4 in Bonn, Germany, in May 2008, building on the political compromise that envisages a legally binding instrument on an administrative approach, including one binding provision on civil liability. The compromise in Bonn was driven by the group of "Like-Minded Friends of a legally binding regime on civil liability," which formed during COP/MOP4. At its height, the group consisted of 82 members, mostly developing countries from the African, Asian, and Latin American and Caribbean regions. The group achieved, as a

minimum concession from those countries that opposed a legally binding approach on civil liability, the inclusion of one legally binding provision on civil liability, allowing countries to develop national civil liability regimes and leaving the door open for "the elaboration of a more comprehensive binding regime on civil liability" at a later stage. As the Bonn Compromise remained unchallenged, the Like-Minded Friends did not reemerge at this meeting. While being united around a strong political demand, the opinions within the group differed on a number of key provisions of the supplementary protocol. It was suggested by members of the coalition that the group would only have been reconstituted had key elements of the Bonn Compromise been challenged. Instead, regional groups, in particular the Latin American and Caribbean Group, reconstituted to present joint positions on a number of substantive provisions, such as definitions or the primary compensation scheme.

It was incumbent on this meeting to enshrine the Bonn Compromise in a draft protocol text. While some feared that the compromise might unravel, it actually held. Evidence of this was provided as early as on Monday morning when delegates unanimously agreed that the meeting's outcome should take the form of a supplementary protocol on liability and redress, and a number of countries who had only reluctantly accepted the Bonn Compromise resolved to work constructively towards this endeavor. The statements revealed that some countries, like Japan, New Zealand and Brazil, that had actively opposed a legally binding approach on civil liability had conducted national consultations and obtained the mandates to negotiate a legally binding regime on liability and redress that included a provision on civil liability.

THE CHALLENGES HINDERING A LASTING FRIENDSHIP

As delegates embarked on the laborious task of working out the substantive details, it became clear that significant differences remain, especially on the scope of the supplementary protocol. The debate highlighted the inherent difficulty in simultaneously negotiating definitions, which will ultimately determine the supplementary protocol's scope, and substance, which will determine its effectiveness. While some countries made their agreement to substantive clauses subject to agreement on definitions, others followed an inverse strategy, expressing reservations on definitions contingent on the outcomes of substantive debates. According to some, this resulted in a "minefield of reservations," which may slow down progress at the next round of negotiations.

The debate also revealed new fault lines within and across regional groups. For example, some provisions, such as a provision on civil liability or detailed provisions on the activities of a competent authority, are more in the interest of countries that do not yet have domestic legislation in place. But at the same time these provisions could create problems for those countries that already have domestic laws, since they could be required to change their existing systems. These countries have an interest in keeping the international framework as flexible as possible in order to, as one delegate put it, "ensure that the international regime is consistent with our existing laws." Yet this approach can easily lead to the famous race towards the bottom, resulting in a situation in which the regime will offer little guidance for those countries, especially in Africa, who need it most. The dilemma in that regard is that to ensure a quick entry into force the final text will have to be sufficiently flexible to enable countries who already have existing laws on liability and redress for damage from LMOs, such as EU member states, to ratify the supplementary protocol.

The negotiations at this meeting focused on the administrative approach, since it constitutes the core of the legally binding instrument. This approach foresees that a competent national authority will impose obligations on the operator and oversee response measures regarding damage from transboundary movement of LMOs. Inherent to any administrative approach is the discretion it provides to national authorities; however, it does not allow national authorities to take action extra-territorially.

Given that the administrative approach is very complex, requiring a competent national authority to apply a set of technical rules, it will make it very difficult to implement for a number of developing countries that have neither employed such an approach nor set up such competent national authorities. Arguably the administrative approach imposes a greater burden than benefit on some developing countries. This is why many developing countries attached such great importance to the legally binding provision on civil liability. Many had, therefore, expected developing countries to push for a more detailed discussion on the guidelines for the development of civil liability systems.

Despite its brevity, the provision on civil liability generated the most heated discussion. The mood of the room changed dramatically for the worse when some delegates expressed different interpretations of the review clause, which provides for the elaboration of a more comprehensive binding regime on civil liability in the future. At this point the patience of those, such as members of the African and Asian Groups, that felt that they had compromised enough on their long-standing demand for a legally binding civil liability regime finally wore thin. To them the review clause is a key provision, since it is the open door to a future legally binding regime on civil liability, and they made it clear that they would rather walk away from the negotiations than not have a review clause. The current formulation of the review clause, albeit bracketed, is very permissive, in that it merely provides for a consideration whether further steps are necessary to develop a comprehensive international civil liability regime.

While the further development of the civil liability regime is not off the table, many indicated that there is little political will to develop such a regime since the number of countries calling for such has been ever-decreasing.

OUTLOOK

Overall the first Meeting of the Friends of the Co-Chairs in Mexico City was seen as an important step by the majority of delegates, since it was the first time that all delegations had full mandates to negotiate a legally binding liability and redress

regime in the form of a supplementary protocol. Yet a number of critical issues remain to be tackled at the next meeting to be held in the first quarter of 2010 in Malaysia.

That meeting will be held very close to the six-month deadline before which a legally binding instrument has to be circulated to allow its adoption at COP/MOP5. Although the circulated document does not have to be the final version, it will be important to overcome the last political hurdles that stand in the way of the adoption of a supplementary protocol. Progress could be further hampered if work on the civil liability guidelines is slow. Several expressed their concern that the Mexico meeting had not even touched on the civil liability guidelines and they might be left behind altogether in Malaysia due to lack of time for their consideration.

The next meeting of the Friends of the Co-Chairs will play a pivotal role in shaping the final package so that it is ready for adoption by COP/MOP5 and, even more importantly, to ensure that the supplementary protocol is drafted in a manner that will allow for the requisite number of countries to ratify it as quickly as possible. If the outcome strikes the right balance, the supplementary protocol on liability and redress for damage resulting from the transboundary movement of LMOs could become the first international legally-binding instrument on liability and redress to enter into force.

UPCOMING MEETINGS

BIOSAFETY CAPACITY-BUILDING MEETING: The 5th Coordination Meeting for Governments and Organizations Implementing or Funding Biosafety Capacity-Building Activities will take place from 9-11 March 2009 in San José, Costa Rica. 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/doc/?meeting=BSCMCB-05

18TH MEETING OF THE PLANTS COMMITTEE OF THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES (CITES): CITES PC18 will be held from 17-21 March 2009 in Buenos Aires, Argentina. For more information, contact: CITES Secretariat; tel: +41-22-917-8139/40; fax: +41-22-797-3417; e-mail: info@cites.org; internet: http://www.cites.org/eng/com/PC/index.shtml

SEVENTH MEETING OF THE CBD WORKING GROUP ON ACCESS AND BENEFIT-SHARING (ABS): ABS7 will be held from 2-8 April 2009 in Paris, France. The meeting will continue negotiations on an international regime on access and benefit-sharing. 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/doc/?meeting=ABSWG-07

SECOND MEETING OF THE CBD *AD HOC* TECHNICAL EXPERT GROUP ON BIODIVERSITY AND CLIMATE CHANGE: This meeting will be held from 18-22 April 2009 in Helsinki, Finland. 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/doc/?meeting=AHTEG-BDCC-02-02

24TH MEETING OF THE CITES ANIMALS COMMITTEE: CITES AC24 will be held from 20-24 April 2009 in Geneva, Switzerland. For more information, contact: CITES Secretariat; tel: +41-22-917-8139/40; fax: +41-22-797-3417; e-mail: info@cites.org; internet: http://www.cites.org/eng/com/AC/index.shtml

THIRD SESSION OF THE GOVERNING BODY OF THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE (ITPGR): ITPGR GB3 will be held from 1-5 June 2009 in Tunis, Tunisia. For more information, contact: ITPGR Secretariat; tel: +39-06-570-53441; fax: +39-06-570-56347; e-mail: pgrfa-treaty@fao.org; internet: http://www.planttreaty.org/meetings/gb3_en.htm

58TH MEETING OF THE CITES STANDING COMMITTEE: This meeting is scheduled to be held from 6-10 July 2009, in Geneva, Switzerland. For more information, contact: CITES Secretariat; tel: +41-22-917-8139/40; fax: +41-22-797-3417; e-mail: info@cites.org; internet: http://www.cites.org/

TWELFTH REGULAR SESSION OF THE FAO COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE (CGRFA): CGRFA-12 will be held 19-23 October 2009, at FAO headquarters in Rome, Italy. For more information, contact: CGRFA Secretariat; tel: +39-06-570-55480; fax: +39-06-570-53057; e-mail: cgrfa@fao.org; internet: http://www.fao.org/ag/cgrfa/

SIXTH MEETING OF THE CBD WORKING GROUP ON ARTICLE 8(J) AND RELATED PROVISIONS: This meeting is scheduled to be held from 2-6 November 2009, in Kuala Lumpur, Malaysia. 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/doc/?meeting=WG8J-06

EIGHTH MEETING OF THE CBD WORKING GROUP ON ACCESS AND BENEFIT-SHARING: ABS8 is scheduled to be held from 9-15 November 2009, in Kuala Lumpur, Malaysia. 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/meetings/

SECOND MEETING OF THE GROUP OF FRIENDS OF THE CO-CHAIRS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY: This meeting will be held in the first quarter of 2010 in Kuala Lumpur, Malaysia. 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/meetings/