



# CONVENTION ON BIOLOGICAL DIVERSITY

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CONFERENCE OF THE PARTIES TO THE CONVENTION  
ON BIOLOGICAL DIVERSITY SERVING AS THE  
MEETING OF THE PARTIES TO THE CARTAGENA  
PROTOCOL ON BIOSAFETY

Second meeting

Montreal, 30 May-3 June 2005

Item 13 of the provisional agenda\*

**REPORT OF THE OPEN-ENDED AD HOC WORKING GROUP OF LEGAL AND  
TECHNICAL EXPERTS ON LIABILITY AND REDRESS UNDER THE CARTAGENA  
PROTOCOL ON BIOSAFETY**

## INTRODUCTION

### *A. Background*

1. Article 27 of the Cartagena Protocol on Biosafety required the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP/MOP) to adopt, at its first meeting, a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from the transboundary movements of living modified organisms (LMOs). Accordingly, at its first meeting the Conference of the Parties serving as the meeting of the Parties to the Protocol established, in its decision BS-I/8, an Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress to carry out the process pursuant to Article 27 of the Protocol. The first meeting of the Ad Hoc Working Group was held at the headquarters of the International Civil Aviation Organization, in Montreal, from 25 to 27 May 2005.

### *B. Attendance*

2. The meeting was attended by representatives of the following Parties to the Protocol: Algeria, Antigua and Barbuda, Armenia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, Benin, Bhutan, Bolivia, Botswana, Brazil, Bulgaria, Cameroon, Colombia, Cuba, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, European Community, France, Gambia, Germany, Ghana, Grenada, Guatemala, India, Indonesia, Iran (Islamic Republic of), Italy, Jordan, Kenya, Kiribati, Lao People's Democratic Republic, Liberia, Madagascar, Malaysia, Maldives, Mali, Mexico, Mozambique, Namibia, Netherlands, New Zealand, Norway, Paraguay, Republic of Moldova, Romania, Rwanda, Saint Kitts and Nevis, Samoa, Senegal, South Africa, Sri Lanka, Switzerland, Syrian Arab Republic, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Venezuela, Zambia, Zimbabwe.

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\* UNEP/CBD/BS/COP-MOP/2/1.

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3. The meeting was also attended by representatives of the following non-Parties: Argentina, Australia, Canada, China, Côte d'Ivoire, Gabon, Guinea, Morocco, Philippines, Thailand, United States of America.

4. Observers from the following United Nations bodies also attended the meeting: UNEP-GEF Biosafety Clearing House Project, United Nations Environment Programme.

5. Observers from the following intergovernmental and non-governmental organizations and other stakeholders also participated in the meeting: African Centre for Biosafety, AGBIOS Inc., AS-PTA Brazil, BASF Corporation, Black Sea Biotechnology Association, CropLife International, ECOROPA, Edmonds Institute, Environment Rural Development International, EUROPABIO, Federation of German Scientists, Forsyth Consulting Essentials, Friends of the Earth Canada, Global Industry Coalition, Greenpeace International, IDEC, Institute for Agriculture and Trade Policy, International Grain Trade Coalition, Norwegian Institute of Gene Ecology, Organic Agriculture Protection Fund, Public Research and Regulation Foundation, Southeast Asia Regional Initiatives for Community Empowerment, Third World Network, Université du Québec à Montréal (UQAM), University of Bern, University of Minnesota, Washington Biotechnology Action Council / 49th Parallel Biotechnology Consortium.

### **ITEM 1. OPENING OF THE MEETING**

6. The meeting was opened at 10 a.m. on 25 May 2005 by Mr. Hamdallah Zedan, Executive Secretary of the Convention on Biological Diversity. He welcomed the participants to the Working Group and thanked the Governments of Austria, France, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom and the European Community for their contributions to enable the participation of representatives from developing countries and countries with economies in transition. He said that the issue of liability and redress for damage resulting from transboundary movements of living modified organisms had been the subject of long discussions during the negotiations which had led to the adoption of Article 27 of the Biosafety Protocol. The Executive Secretary stressed that the purpose of the Ad Hoc Working Group was to analyse relevant issues and elaborate options for elements of international rules and procedures on liability and redress with a view to building understanding and consensus on the nature and contents of those rules and procedures.

### **ITEM 2. ORGANIZATIONAL MATTERS**

#### ***2.1. Election of officers***

7. At the opening session, on 25 May 2005, the Working Group elected Mr. René Lefebvre (Netherlands) and Ms. Jimena Nieto Carrasco (Colombia) as Co-Chairs and Ms. Maria Mbengashe (South Africa) as Rapporteur.

8. Ms. Jimena Nieto Carrasco stated that as she was the only expert from Colombia present, she would prefer that Mr. Lefebvre chair the meetings of the Working Group. She said however that she would assist him when needed and as appropriate to ensure the successful outcome of the meeting.

#### ***2.2. Adoption of the agenda***

9. At the opening session, on 25 May 2005, the Working Group adopted the following agenda on the basis of the provisional agenda (UNEP/CBD/BS/WG-L&R/1/1):

1. Opening of the meeting.
2. Organizational matters:
  - 2.1. Election of officers;

- 2.2. Adoption of the agenda;
- 2.3. Organization of work.
3. Review of information relating to liability and redress for damage resulting from transboundary movements of living modified organisms.
4. Consideration of issues on liability and redress pursuant to Article 27 of the Protocol:
  - 4.1. Analysis of general issues relating to:
    - (a) The potential and/or actual damage scenarios of concern that may be covered under the Protocol in order to identify the situations for which international rules and procedures referred to in Article 27 of the Protocol may be needed;
    - (b) The application of international rules and procedures on liability and redress to the damage scenarios of concern that may be covered under Article 27 of the Protocol;
  - 4.2. Elaboration of options for elements of rules and procedures referred to in Article 27 of the Protocol.
5. Other matters.
6. Adoption of the report.
7. Closure of the meeting.

### **2.3. Organization of work**

10. At the opening session, on 25 May 2005, the Working Group also adopted the organization of work proposed by the Executive Secretary in annex I to the annotated provisional agenda (UNEP/CBD/BS/WG-L&R/1/1/Add.1).

### **ITEM 3: REVIEW OF INFORMATION RELATING TO LIABILITY AND REDRESS FOR DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS**

11. Agenda item 3 was taken up at the 1st session of the meeting, on 25 May 2005.
12. Mr. René Lefeber, Co-Chair of the Working Group asked Ms. Jimena Nieto to give a brief report of the meeting of the Technical Group of Experts on Liability and Redress, held in Montreal from 18 to 20 October 2004.
13. Ms. Nieto said the experts had reviewed information relating to liability and redress for damage resulting from the transboundary movements of living modified organisms and had identified several areas where additional information would be of benefit to the Ad Hoc Working Group. The Secretariat had been requested to provide that information, in the form of presentations where possible, to the Ad Hoc Working Group. Ms. Nieto said that the Technical Group of Experts had also discussed the issue of damage scenarios, the application of international rules on liability and redress to damage scenarios and had discussed the elements identified in the terms of reference of the Ad Hoc Working Group. She also indicated that the views expressed by the experts of the meeting had been consolidated and incorporated into the report of that meeting (UNEP/CBD/BS/WG-L&R/1/2).

14. Mr. Lefeber, Co-Chair of the Working Group, thanked Ms. Nieto for her presentation and stressed that the Technical Group of Experts had identified a number of areas where additional information would be of benefit to the Ad Hoc Working Group. He invited the Secretariat to introduce the documents that had been circulated to provide that information.

15. The representative of the Secretariat introduced a compilation of the views submitted on the matter covered by Article 27 of the Protocol pursuant to the recommendation of the meeting of the Technical Expert Group on Liability and Redress (UNEP/CBD/BS/WG-L&R/1/INF/1 and UNEP/CBD/BS/WG-L&R/1/INF/1/Add.1), documents containing information on the definition of biodiversity loss and work on indicators for assessing progress towards the 2010 Biodiversity Target (UNEP/CBD/BS/WG-L&R/1/INF/2), the status of third-party liability treaties and analysis of difficulties facing their entry into force (UNEP/CBD/BS/WG-L&R/1/INF/3), and recent developments in international law relating to liability and redress (UNEP/CBD/BS/WG-L&R/1/INF/4). In addition she drew the attention of the Working Group to notes by the Executive Secretary on risk assessment and risk management (UNEP/CBD/BS/COP-MOP/2/9) and on socio-economic considerations: cooperation on research and information exchange (UNEP/CBD/BS/COP-MOP/2/12), prepared for the second meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol.

16. The representative of the Secretariat also said that several insurance corporations had been contacted about the availability of financial security to cover liability resulting from the transboundary movement of living modified organisms and the prices at which such financial security would be available. She said that the Secretariat had received information from the Swiss Reinsurance Company and Royal Sun Alliance and that the copies had been made available to the Working Group.

17. The representative of Switzerland said his Government had prepared a draft document for illustration of a possible International instrument on liability and redress for damage resulting from transboundary movements of living modified organisms based on elements of text existing International liability regimes under other multilateral environmental agreements. He requested that the document be made available to the Working Group.

18. The representative of Mali requested that it be reflected in the report that Mali had been present at the meeting of the Technical Expert Group on Liability and Redress held at Montreal, from 18 to 20 October 2004.

19. The representative of Egypt, supported by other representatives, expressed his concern that Dr. Tewolde of Ethiopia, and spokesman for the African Group, had not been granted a visa by the Canadian Government in a timely way and was unable to attend the opening session of the Ad Hoc Working Group. He said that the failure to grant a visa to Dr. Tewolde was in contravention of both the Memorandum of Agreement with the Canadian Government and the procedures of the United Nations and he asked the Executive Secretary to take the issue up with the host country to ensure that such a similar incident would not be repeated.

20. The Co-Chair also expressed, on behalf of his Co-Chair and the other members of the Working Group, his concerns over the refusal of the grant of a visa to Dr. Tewolde and other participants.. He said that it was essential for the conduct of international meetings that participants be free to attend them. He agreed that it was important for the Executive Secretary to take up the issue with the host State.

21. The Executive Secretary explained that when the Secretariat had received information from Dr. Tewolde that he had not yet been granted a visa, the matter was brought to the attention of the Canadian Government. They had spared no effort in facilitating the issuance of a visa to him. He added that he had been informed by Dr. Tewolde that he had been granted a visa and would be arriving the following day. He explained that because Monday, 23 May 2005 had been a national holiday in Canada, the visa had not been issued until 24 May 2005.

22. Mr. René Lefeber, Co-Chair of the Working Group, then invited Ms. Muffy Koch and Mr. Piet van der Meer, experts on risk analysis and assessment of living modified organisms, to make a

presentation on scientific analysis and the assessment of risks involved in the transboundary movement of living modified organisms.

23. In opening their presentations Mr. van der Meer and Mrs Koch noted that the objectives, general principles and methodology of risk assessment have been consistent since the publication of the 1986 OECD rDNA recommendations, and that they have been further developed in a systematic way in annex III of the Cartagena Protocol on Biosafety. Risk assessment, and reviews of risk assessment, are typically applied by either the user who intends to carry out activities with living modified organisms and/or by competent authorities and governments in order to make informed decisions about activities involving living modified organisms. In outlining the general principles of annex III, they emphasized that risk assessment needed to be: (i) scientifically sound and transparent, (ii) case by case, depending on the host, inserted genes, type of application, and receiving environment involved, (iii) comparative in the sense that risks associated with living modified organisms should be considered in the context of the risks posed by the non-modified recipients or parental organisms in the likely potential receiving environment, and (iv) the need to deal with uncertainty. Mrs. Koch and Mr. van der Meer explained that the methodology of risk assessment started with an identification of potential adverse effects, followed by an estimation of the likelihood of their occurrence. Once the likelihood has been established, it was then necessary to evaluate the consequences of such an occurrence. It was only once these preliminary evaluations had been made that it was possible to make an evaluation of the overall risk, if any, after which followed the step in which an assessment was made as to whether or not the risks were acceptable or manageable.

24. Interventions were made by the representatives of Cameroon, Colombia, Egypt, India, the Islamic Republic of Iran, Jordan, Mali, and the Philippines.

25. A statement was also made by the Federation of German Scientists.

26. The Co-Chair then invited Mr. Dan Ogolla from the Secretariat of the Convention on Biological Diversity to make a presentation on State responsibility and State liability.

27. In his presentation Mr. Ogolla said that while the request by the Technical Expert Group referred to State responsibility and State liability, it was better to distinguish between State responsibility and International liability. State liability was part of the latter concept. As a general principle a State which had breached an international obligation had a duty to right the wrong committed. State responsibility was based on internationally wrongful acts. He explained that in the case of State responsibility, the International Law Commission had adopted draft articles regarding the basic rules of international law concerning the responsibility of States. International liability, on the other hand, focused on reparation for the harm arising from acts not prohibited by international law. In that area, the International Law Commission had both adopted draft articles on the prevention of transboundary damage from hazardous activities and had proposed draft principles on the allocation of loss in the case of transboundary harm arising from hazardous activities.

28. Interventions were made by the representatives of Colombia, France, Grenada, India and the United Kingdom (on behalf of the European Union).

29. In his summary of the discussion, the Co-Chair said that both the presentations and the documents prepared by the Secretariat had been very informative. He said that the Working Group looked forward to being informed of the deliberations of the Conference of the Parties serving as the meeting of the Parties to the Protocol on issues relating to risk assessment and risk management, and socio-economic considerations. He also indicated that further information was required on biodiversity law in respect of which he made reference to the Expert Meeting on Liability and Redress under Article 14.2 of the Convention on Biological Diversity, to be held in October 2005. It would also be useful to have a presentation on the availability of financial security to cover liability resulting from the transboundary movement of living modified organisms. The Co-Chair also requested the Secretariat to update information on developments in international law relating to liability and redress including the status of international-related liability instruments for future meetings of the Working Group.

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**ITEM 4. CONSIDERATION OF ISSUES ON LIABILITY AND REDRESS  
PURSUANT TO ARTICLE 27 OF THE PROTOCOL**

30. The Working Group took up agenda item 4 at the 2nd session of the meeting, on 25 May 2005. In his introduction, the Co-Chair said that the scenarios, options, approaches and issues to be considered by the Working Group had been discussed by the Technical Expert Group and identified in the annex of the report of that meeting (UNEP/CBD/BS/WG-L&R/1/2). The annex covered all the issues for discussion under the agenda item except the application of international rules and procedures on liability and redress to the damage scenarios of concern that may be covered under Article 27 of the Protocol. At his suggestion the Working Group agreed to use the annex as a basis for the discussion under this agenda item.

31. The Co-Chair recalled that at the meeting of the Technical Expert Group, most of the experts had agreed that no international instruments at the international or regional level dealt specifically with liability and redress for damage resulting from transboundary movements of living modified organisms. He said that general rules on liability and redress might, however, apply at the global level and the report of the Technical Expert Group had identified a number of instruments that might be relevant.

32. The Co-Chair then invited the Working Group to consider the issues that had been identified in the annex to the report of the Technical Expert Group (UNEP/CBD/BS/WG-L&R/1/2).

33. Interventions were made by the representatives of Algeria, Antigua and Barbuda, Argentina, Australia, Brazil, Bulgaria, Cameroon, Canada, China, Colombia, Cuba, El Salvador, Grenada, India, the Islamic Republic of Iran, Italy, Jordan, Kenya, Liberia, Malaysia, Mexico, Morocco, New Zealand, Paraguay, the Philippines, Senegal, South Africa, Switzerland, Trinidad and Tobago, Uganda, Ukraine, the United Kingdom (on behalf of the European Union), the United Republic of Tanzania, the United States of America, Venezuela, Zambia, and Zimbabwe

34. The observers from Ecoropa, the Edmonds Institute, the Global Industry Coalition, Greenpeace, the University of Minnesota, and the Washington Biotechnology Action Council also made interventions.

35. The Working Group continued its discussion of this agenda item at the 3rd session of the meeting on 26 May 2005.

36. Interventions were made by the representatives of Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Bolivia, Botswana, Brazil, Canada, Colombia, Côte d'Ivoire, Cuba, Egypt, El Salvador, Estonia, Gabon, Ghana, Grenada, India, the Islamic Republic of Iran, Jordan, Kenya, Liberia, Madagascar, Malaysia, Mali, Mexico, Morocco, Norway, Peru, Senegal, Syrian Arab Republic, South Africa, Switzerland, Thailand, Tunisia, Uganda, Ukraine, the United Kingdom (on behalf of the European Union), the United Republic of Tanzania, the United States of America, Venezuela, Zambia and Zimbabwe.

37. Statements were also made by observers from Ecoropa, the Edmonds Institute, the Federation of German Scientists, the Global Industry Coalition, Greenpeace, the International Grain Trade Coalition, the University of Bern and the Washington Biotechnology Action Council.

38. The Working Group continued its discussion of this agenda item at its 4th session on 26 May 2005.

39. Interventions were made by the representatives of Argentina, Armenia, Australia, Botswana, Brazil, Canada, Colombia, Côte d'Ivoire, Cuba, Denmark, Egypt, El Salvador, Ghana, India, the Islamic Republic of Iran, Kenya, Liberia, Malaysia, Morocco, Namibia, New Zealand, Norway, Senegal, Switzerland, Trinidad and Tobago, Uganda, the United Kingdom (on behalf of the European Union), the United States of America, Venezuela and Zambia.

40. Statements were also made by observers from Ecoropa, the Global Industry Coalition, Greenpeace, the International Grain Trade Coalition, the University of Bern and the Washington Biotechnology Action Council.

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41. The Working Group completed its discussion of this agenda item at its 5th session on 27 May 2005.
42. Interventions were made by the representatives of Algeria, Armenia, Australia, Brazil, Canada, Cameroon, Colombia, Cuba, Egypt, El Salvador, Ghana, India, the Islamic Republic of Iran, Jordan, Malaysia, Mali, Mexico, Morocco, New Zealand, Norway, Senegal, South Africa, Syrian Arab Republic, Tunisia, Uganda, the United Kingdom (on behalf of the European Union), the United Republic of Tanzania, and the United States of America.
43. A statement was also made by the observer from Greenpeace.

### ***Conclusions***

44. The Working Group:

1. *Requests* the Secretariat to make the following documents available for its second meeting:

(a) United Nations General Assembly resolution 56/83 on the responsibility of States for internationally wrongful acts (A/RES/56/83);

(b) International Law Commission draft articles on prevention of transboundary harm arising from hazardous activities (A/56/10);

(c) International Law Commission draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission on first reading (A/59/10);

(d) Report of the Expert Meeting on Liability and Redress under Article 14, paragraph 2, of the Convention scheduled to be held from 12 to 14 October 2005;

(e) Any decision by the Conference of the Parties serving as the meeting of the Parties to the Protocol under the item relating to risk assessment and risk management;

(f) Any decision by the Conference of the Parties serving as the meeting of the Parties to the Protocol under the item relating to socio-economic considerations;

2. *Requests* the Secretariat to gather, for its second meeting, information on:

(a) The determination of damage to the conservation and sustainable use of biological diversity, including case studies;

(b) Financial security to cover liability resulting from transboundary movements of living modified organisms, including information from Parties and other Governments on national experiences in this respect; and to arrange, if possible, for an expert presentation on this matter at its second meeting;

(c) Transnational procedures including the work of the Hague Conference on Private International Law in this field, including case studies;

(d) Recent developments in international law relating to liability and redress, including the status of international environment-related liability instruments;

3. *Invites* Parties, other Governments, relevant international organizations and stakeholders to share experiences and submit views on criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Protocol no later than three months before the second meeting of the Working Group, and *requests* the Secretariat to make the submissions available for its second meeting;

4. *Invites* Parties, other Governments, relevant international organizations and stakeholders to submit further views on the matter covered by Article 27 of the Protocol, in particular with respect to approaches, options and issues identified in the annex to the present report, preferably in the form of proposals for text, no later than three months before the second meeting of the Working Group, and *requests* the Secretariat to make the submissions available for its second meeting;

5. *Requests* the Co-Chairs, with the assistance of the Secretariat, to synthesize the proposed texts submitted pursuant to paragraph 4 above, and produce a working draft for consideration at its second meeting;

6. *Calls upon* Parties, other Governments and other stakeholders in a position to do so to provide financial resources for the organization of the meetings of the Working Group envisaged in the indicative work plan contained in decision BS-I/8;

7. *Recommends* to the second meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol to make financial resources available in order to allow the convening of the second meeting of the Working Group before the third meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol.

#### **ITEM 5. OTHER MATTERS**

45. The Co-Chair took up the issue of the date and venue of the second meeting of the Working Group and invited the Secretariat to address the participants on that issue.

46. Mr. Hamdallah Zedan, Executive Secretary of the Convention on Biological Diversity explained that although decision BS-I/8 of the Conference of the Parties serving as the meeting of the Parties to the Protocol had provided for two meetings of the Working Group during 2005, one meeting in 2006 and two meetings in 2007, the budget adopted in decision BS-I/10 allocated funds only for one meeting in 2006. He had sought authorization from the Bureau to use the funds allocated for the 2006 meeting to organize a meeting in 2005. However, with the generous financial support of Austria and Sweden, and the fact that the meeting was organized back-to-back with the second meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol, it had been possible to proceed with the current meeting without drawing on 2006 allocation. He also explained that due to the heavy agenda of meetings during 2005, it would be difficult to host another meeting of the Working Group in that year. He therefore proposed that the next meeting should be held in February 2006, which was the only available time before the third meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol. He stressed, however, that some \$270,000 would need to be made available to support the participation of developing countries and countries with economies in transition and appealed to donor countries to be forthcoming with the necessary funds.

47. The representative of Colombia, supported by the representative of the Islamic Republic of Iran, thanked those countries that had contributed to hosting the first meeting of the Working Group and urged others to contribute in hosting a second meeting of the Working Group before the third meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol.



48. The representative of Mexico thanked the Global Environment Facility for its contributions in support of the regional workshop on liability and redress held in February 2005.

49. The representatives of Senegal and Morocco thanked the Government of France for its contributions to enable the participation of representatives from French-speaking countries.

50. The representative of the Islamic Republic of Iran also expressed the hope that the Executive Secretary would raise the issue of visas with the host country and said that members of his delegation had difficulty in obtaining visas to attend the meeting of the Working Group.

#### **ITEM 6. ADOPTION OF THE REPORT**

51. The present report was adopted at the 6th session of the meeting, on 27 May 2005, on the basis of the draft report (UNEP/CBD/BS/WG-L&R/1/L.1 and Add.1) that had been prepared by the Rapporteur, as orally amended. The meeting authorized the Rapporteur, with the assistance of the Secretariat and in consultation with the Co-Chairs to finalize the report of the meeting to reflect the proceedings of the final day of the meeting.

52. Several representatives stated that option 6 in section XII, on choice of instrument, in the annex should not have been included.

#### **ITEM 7. CLOSURE OF THE MEETING**

53. The Co-Chair, Mr. René Lefebvre, on behalf of the two Co-Chairs, thanked the participants for their contributions and very productive discussion. He also thanked the Secretariat for the good preparation for the meeting and the support provided to the Co-Chairs and the Rapporteur in the conduct of the meeting. The Executive Secretary addressed the participants and complimented them on their productive work during the meeting.

54. Several participants expressed their appreciation to the Co-Chairs, and the Rapporteur for the excellent conduct of the meeting. They also thanked the Secretariat for the preparation and facilitation of the meeting.

55. After the customary exchange of courtesies, the Co-Chair declared the meeting of the Ad Hoc Working Group closed at 7.30 p.m. on Friday 27 May 2005.

*Annex*

This annex includes options, approaches, issues, as well as an appendix containing scenarios, for further consideration. It is not meant to be exhaustive nor does it reflect a preference for any of the options or approaches listed. The choice of instrument and possible elements for international rules and procedures on liability and redress are closely interlinked and changes to one element could impact on other elements.

**I. SCOPE OF “DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LMOs”**

**A. Functional scope**

*Option 1*

Damage resulting from transport of LMOs, including transit

*Option 2*

Damage resulting from transport, transit, handling and/or use of LMOs that finds its origin in transboundary movements of LMOs, as well as unintentional transboundary movements of LMOs

**B. Optional components for geographical scope**

- (a) Damage caused in areas within the limits of national jurisdiction or control of Parties;
- (b) Damage caused in areas within the limits of national jurisdiction or control of non-Parties;
- (c) Damage caused in areas beyond the limits of national jurisdiction or control of States.

**C. Issues for further consideration**

- (a) Limitation on the basis of geographical scope, i.e. protected areas or centres of origin;
- (b) Limitation in time (related to section V on limitation of liability);
- (c) Limitation to the authorization at the time of the import of the LMOs;
- (d) Determination of the point of the import and export of the LMOs.

**II. DAMAGE**

**A. Optional components for the definition of damage**

- (a) Damage to conservation and sustainable use of biological diversity or its components;
- (b) Damage to environment;
  - (i) Damage to conservation and sustainable use of biological diversity or its components;
  - (ii) Impairment of soil quality;
  - (iii) Impairment of water quality;

- (iv) Impairment of air quality;
- (c) Damage to human health;
  - (i) Loss of life or personal injury;
  - (ii) Loss of income;
  - (iii) Public health measures;
  - (iv) Impairment of health;
- (d) Socio-economic damage, especially in relation to indigenous and local communities;
  - (i) Loss of income;
  - (ii) Loss of cultural, social and spiritual values;
  - (iii) Loss of food security;
  - (iv) Loss of competitiveness;
- (e) Traditional damage:
  - (i) Loss of life or personal injury;
  - (ii) Loss of or damage to property;
  - (iii) Economic loss;
- (f) Costs of response measures.

**B. *Possible approaches to valuation of damage to conservation of biological diversity***

- (a) Costs of reasonable measures taken or to be taken to restore the damaged components of the environment/biological diversity:
  - (i) Introduction of original components;
  - (ii) Introduction of equivalent components that could be on the same location, for the same use, or on another location for other types of use;
- (b) Monetary compensation to be determined on the basis of criteria to be developed.

**C. *Issues for further consideration with respect to valuation of damage***

- (a) Determination of biodiversity loss (baseline conditions or other means to measure the loss, taking into account natural variations and human-induced variations other than those caused by LMOs);
- (b) Obligations to take response and restoration measures;
- (c) Special measures in case of damage to centres of origin and centres of genetic diversity to be determined;
- (d) Formulation of qualitative threshold of damage to conservation and sustainable use of biological diversity;
- (e) Valuation of damage to the environment, sustainable use of biological diversity, human health, socio-economic damage and traditional damage.

### III. CAUSATION

#### *Issues for further consideration:*

- (a) Level of regulation (international/or domestic level);
- (b) Establishment of the causal link between the damage and the activity:
  - (i) Test (e.g. foreseeability, direct/indirect damage, proximate cause, vulnerability clause);
  - (ii) Cumulative effects;
  - (iii) Complexity of interaction of LMOs with the receiving environment and time scales involved;
- (c) Burden of proof in relation to establishing the causal link:
  - (i) Relaxation of burden of proof;
  - (ii) Reversal of burden of proof;
  - (iii) Burden of proof on exporter and importer.

### IV. CHANNELLING OF LIABILITY, ROLE OF PARTIES OF IMPORT AND EXPORT, STANDARD OF LIABILITY

#### *A. Possible approaches to channelling of liability*

- (a) State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol);
- (b) State liability (for acts that are not prohibited by international law, including cases where a State Party is in full compliance with its obligations of the Protocol).

#### *Option 1*

Primary State liability

#### *Option 2*

Residual State liability in combination with primary liability of operator

#### *Option 3*

No State liability

- (c) Civil liability (harmonization of rules and procedures);
- (d) Administrative approaches based on allocation of costs of response measures and restoration measures.

#### *B. Issues relating to civil liability*

#### **1. Possible factors to determine the standard of liability and the identification of the liable person**

- (a) Type of damage;
- (b) Places where damage occurs (e.g. centres of origin and centres of genetic diversity);

- (c) Degree of risk involved in a specific type of LMO as identified in risk assessment
- (d) Unexpected adverse effects;
- (e) Operational control of LMOs (stage of transaction involving LMOs).

**2. Standard of liability and channelling of liability**

- (a) Fault-based liability:
  - (i) Any person who is in the best position to control the risk and prevent the damage;
  - (ii) Any person who has operational control;
  - (iii) Any person who does not comply with the provisions implementing the Biosafety Protocol;
  - (iv) Any entity who has the responsibility to put in place the provisions for implementing the Protocol;
  - (v) Any person to whom intentional, reckless or negligent acts or omissions can be attributed;
- (b) Strict liability:

*Option 1*

Liability to be channelled to one or more of the following persons, including persons acting on his or her behalf, on the basis of prior identification:

- o The developer
- o The producer
- o The notifier
- o The exporter
- o The importer
- o The carrier
- o The supplier

*Option 2*

Liability to be channelled on the basis of establishment of a causal link.

**3. Exemptions to or mitigation of strict liability**

*Option 1*

No exemptions.

*Option 2*

Possible exemptions to or mitigations of strict liability

- (a) Act of God/force majeure;
- (b) Act of war or civil unrest;
- (c) Intervention by a third party (including intentional wrongful acts or omissions of the third party);

- (d) Compliance with compulsory measures imposed by a competent national authority;
- (e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator;
- (f) The “state-of-the-art” in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

**4. Additional tiers of liability in situation where:**

- (a) The primary liable person cannot be identified;
- (b) The primary liable person escape liability on the basis of a defence;
- (c) A time limit has expired;
- (d) A financial limit has been reached;
- (e) Financial securities of the primary liable person are not sufficient to cover liabilities; and
- (f) The provision of interim relief is required.

**5. Issues for further consideration**

- (a) Combination of fault liability and strict liability;
- (b) Recourse against third party by the person who is liable on the basis of strict liability;
- (c) Joint and several liability or apportionment of liability
- (d) Vicarious liability.

**V. LIMITATION OF LIABILITY**

***A. Issues for further consideration***

- (a) Limitation in time (relative time-limit and absolute time-limit);
- (b) Limitation in amount including caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined, and to be considered in conjunction with section VI on mechanisms of financial security .

**VI. MECHANISMS OF FINANCIAL SECURITY**

***A. Coverage of liability***

*Option 1*

Compulsory financial security.

*Option 2*

Voluntary financial security.

***B. Supplementary collective compensation arrangements***

*Option 1*

Fund financed by contributions from biotechnology industry to be made in advance on the basis of criteria to be determined.

*Option 2*

Fund financed by contributions from biotechnology industry to be made after the occurrence of the damage on the basis of criteria to be determined.

*Option 3*

Public fund.

*Option 4*

Combination of public and private funds.

**C. Issues for further consideration**

- (a) Modes of financial security (insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees).
- (b) Institutional modalities for the operation of a fund.

**VII. SETTLEMENT OF CLAIMS**

**A. Optional procedures**

- (a) Inter-State procedures (including settlement of disputes under Article 27 of the Convention on Biological Diversity);
- (b) Civil procedures:
  - (i) Jurisdiction of courts or arbitral tribunals;
  - (ii) Determination of the applicable law;
  - (iii) Recognition and enforcement of judgments or arbitral awards.
- (c) Administrative procedures;
- (d) Special tribunal (e.g. Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment).

**VIII. STANDING/RIGHT TO BRING CLAIMS**

**A. Issues for further consideration**

- (a) Level of regulation (international and/or domestic level);
- (b) Distinction between inter-State procedures and civil procedures;
- (c) Level of involvement in the transboundary movement of living modified organisms as a requirement of standing/right to bring claims;
- (d) Type of damage:
  - (i) Traditional damage: affected person, dependents, or any other person acting on behalf or in the interest of that person;
  - (ii) Costs of response measures: person or entity incurring the costs;
  - (iii) Damage to environment/conservation and sustainable use of biodiversity:
    - o Affected State
    - o Groups acting in vindication of common interests;

- Person or entity incurring the costs of restoration measures.
- (iv) Damage to human health:
  - Affected State;
  - Affected person or any other person entitled to act on behalf of that person;
- (v) Socio-economic damage:
  - Affected State;
  - Groups acting in vindication of common interests or communities.

## **IX. NON-PARTIES**

### ***A. Issues for further consideration***

- (a) Possible special rules and procedures in the field of liability and redress in relation to LMOs imported from non-Parties (e.g. bilateral agreements requiring minimum standards).

## **X USE OF TERMS**

### ***A. Issues for further consideration***

- (a) Definition of terms for the purpose of international rules and procedures on liability and redress under Article 27 of the Biosafety Protocol, e.g. use, response measures, restoration measures and reasonable.

## **XI COMPLEMENTARY CAPACITY-BUILDING MEASURES**

### ***A. Possible approaches***

- (a) Use of measures adopted under Article 22 of the Protocol, including use of roster of experts and the Action Plan for Building Capacities for Effective Implementation of the Protocol, e.g. exchange of best practices in the design and implementation of national rules and procedures on liability and redress, cooperation at the regional level in the use of available expertise, and training in all relevant fields;
- (b) Development of specific complementary capacity building measures, based on national needs and priorities, for the design and implementation of national rules and procedures on liability and redress, e.g. establishment of baseline conditions and monitoring of changes in the baseline conditions.

## **XII. CHOICE OF INSTRUMENT**

### *Option 1*

One or more legally binding instruments.

- A liability Protocol to the Biosafety Protocol;
- Amendment of the Biosafety Protocol;
- Annex to the Biosafety Protocol
- A liability Protocol to the Convention on Biological Diversity.

### *Option 2*

One or more legally binding instruments in combination with interim measures pending the development and entry into force of the instrument(s).



*Option 3*

One or more non-binding instruments:

- (a) Guidelines;
- (b) Model law or model contract clauses.

*Option 4*

Two-stage approach (initially to develop one or more non-binding instruments, evaluate the effects of the instrument(s), and then consider to develop one or more legally binding instruments)

*Option 5*

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).

*Option 6*

No instrument.

*Appendix***SCENARIOS**

The following scenarios have been elaborated with a view to identifying the situations for which international rules and procedures referred to in Article 27 of the Protocol may be needed. They are non-exhaustive.

***A. LMO plants/animals/micro-organisms – field trial or commercial growing or breeding***

(a) An intentional transboundary movement takes place from Party A to Party B with the consent of Party B for the purpose of a field trial or for commercial growing or breeding of LMO plants/animals/micro-organisms in Party B, including field trials or commercial growing or breeding as part of development assistance. This is an intentional introduction into the environment of LMOs under the Protocol.

- (i) The presence of an LMO causes damage (e.g. contamination of organic crops or loss of wild relatives) in Party B;
- (ii) The presence of an LMO leads to an unintentional transboundary movement to Party C and causes damage in Party C.

(b) Field trial or commercial growing of LMO plants/animals/micro-organisms in Party A leads to an unintentional transboundary movement (the presence of an LMO) that causes damage in Party B;

(c) Transboundary movement from Party A to Party B is illegal and causes damage in Party B or Party C;

(d) An intentional or unintentional transboundary movement takes place from non-Party A to Party B and causes damage in Party B (or from Party B to non-Party A and causes damage in non-Party A).

***B. LMO virus – laboratory test***

(a) An intentional transboundary movement takes place from Party A to Party B with the consent of Party B for the purpose of testing a LMO virus in a laboratory. This is a contained use of LMOs under the Protocol;

- (i) There is an accidental release during the test that causes damage in Party B;
- (ii) The accidental release in Party B leads to an unintentional transboundary movement to Party C and causes damage in Party C.

(b) Laboratory test with LMO virus in Party A leads to an unintentional transboundary movement that causes damage in Party B or Party C;

(c) Transboundary movement from Party A to Party B is illegal and causes damage in Party B;

(d) An intentional or unintentional transboundary movement takes place from non-Party A to Party B and causes damage in Party B (or from Party B to non-Party A and causes damage in non-Party A).

**C. *Placing on the market of products containing LMOs***

(a) An intentional transboundary movement takes place from Party A to Party B with the consent of Party B for the purpose of placing products on the market (e.g. LMO seeds and LMO-FFPs that enter into the food chain) or for the purpose of food aid and causes damage in Party B;

(b) Transboundary movement from Party A to Party B is illegal and causes damage in Party B;

(c) An intentional or unintentional transboundary movement takes place from non-Party A to Party B and causes damage in Party B (or from Party B to non-Party A and causes damage in non-Party A)..

**D. *Transport of LMOs***

There is an accidental release of LMOs while they are passing through a transit Party (T) in connection with a transboundary movement from Party A to Party B for the purpose of contained use, introduction into the environment or placing on the market. Following the accidental release, there is damage in Party T. Due to an unintentional transboundary movement from Party T to Party C, there is damage in Party C.

**E. *Repatriation of LMOs***

There is an accidental release of LMOs while they are being repatriated to the State of origin that causes damage in the Party from which it is being repatriated or in a transit Party.

**F. *Transboundary movement of LMOs that causes damage to global commons***

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