

UNITED NATIONS ACTIVITIES

UN / 63rd GA

Delegates Examine Environment in a Finance-charged Atmosphere

by Rebecca Paveley*

The sixty-third session of the General Assembly of the United Nations (UN) opened on 16 September 2008 at the UN Headquarters in New York.¹ Following his election on 4 June by the sixty-second session, it was chaired by the new President, Father Miguel d'Escoto Brockmann of Nicaragua. The sixty-second session also designated the 21 member states whose representatives would serve as vice-presidents for the sixty-third session. They are: Afghanistan, Bolivia, Cameroon, China, Egypt, France, Jamaica, Kyrgyzstan, Republic of Moldova, Mongolia, Myanmar, Namibia, Niger, Portugal, Russian Federation, Rwanda, Solomon Islands, Spain, Togo, United Kingdom and the United States.

The session opened under the gathering clouds of the global financial collapse and this topic dominated discussions in the General Debate, and affected all issues under consideration by the six committees of the Assembly. Delegates had a heavy workload, with priorities including financing for development and the upcoming Doha meeting, climate change, the Millennium Development Goals (MDGs) and the democratisation of the UN itself. As M. d'Escoto said: "*Change – real, credible change – is the watchword of the day*".

This report will provide an overview of discussions on selected legal, environmental and development issues, as well as on the high-level meetings convened by the Secretary General Ban Ki-moon on 22–25 September, on Africa's Development Needs, and on the Millennium Development Goals. It will consider all such issues that were addressed, up to 5 November. A second, follow-up report will appear in the next issue looking at additional issues, and summarising all resolutions taken from that date to the close of the Assembly. Issues of relevance are grouped within the First Committee (Disarmament and International Security), Second Committee (Economic and Financial), Fourth Committee (Special Political and Decolonization), Sixth Committee (Legal) and plenary sessions of the Assembly.

High-level Meetings

The High-level Meeting of the General Assembly on Africa's development needs discussed: the impact of climate change; financing and debt relief; peace and security and implementing agreed development goals. M. d'Escoto noted that official development assistance (ODA) dropped

from 0.33% of GDP in 2005 to 0.28% in 2007, and said levels needed to increase to meet the commitments of the Monterrey Consensus. He urged G8 members to double ODA for Africa by 2010 as promised at the 2005 G8 Summit in Gleneagles, Scotland. French President Nicolas Sarkozy reiterated his country's commitment to provide 0.7% of GNP as ODA by 2015, as did Germany's minister for development.

During roundtable discussions, many developing country delegations acknowledged the progress that had been made on debt relief, but said this was no substitute for increasing ODA. The GA then adopted, without a vote, the resolution "Political Declaration on Africa's Development Needs" (A/RES/63/1) which pledged, amongst other commitments, to fulfil all ODA-related commitments and strengthen a global partnership to end poverty, hunger and underdevelopment in Africa.

A high-level event on MDGs followed, evaluating progress towards achieving the MDGs at the current halfway point of their road to the 2015 target.

UK President Gordon Brown said the current financial instability made meeting the MDGs even more important. Roundtables were held on health and education; the environment; poverty and hunger. Delegates stressed the interlinkages between poverty reduction and climate change. A review summit was called for in 2010.

The General Assembly

The General Assembly met in plenary for its General Debate, which opened on 23 September. Addressing the debate, UN Secretary General Ban Ki-Moon urged world leaders to rise to the "challenge of global leadership" at a time of financial turbulence and food and energy crises. He called on nations to act "wisely and responsibly" to "set the stage for a new era of global responsibility". Peace and security were under threat around the world, he said, drawing particular attention to conflicts in Georgia, Darfur and the Côte d'Ivoire.

The theme of responsible and collective action was taken up by world leaders in the subsequent debate. They reaffirmed the importance of, and their commitment to, the UN as the best forum for global dialogue.

Also during the general debate was a plea from Small Island Developing States (SIDS) for the GA to take action in the wake of soaring food and fuel prices. They called for financial help for the 51 SIDS spread around the globe.

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SIDS are already in the front line of the impacts from climate change and now they were being crippled by high fuel prices, said the Marshall Islands president, Litokwa Tomeing. He called on the UN to see the threat to the islands as “justification for an all-out war against climate change”.

At the conclusion of the general debate, Assembly president M. d’Escoto said appeals for a stronger UN had been heard. Leaders welcomed the Assembly’s decision to enter into serious negotiations about the make-up of the



Miguel d’Escoto Brockmann, President of the sixty-second session of the GA
Courtesy: UN

Security Council in coming months – a discussion that would be central to the organisation’s future, he said.

NEPAD

The General Assembly met in plenary on 15 October to debate the implementation of the New Partnership for Africa’s Development (NEPAD) as well as the implementation of the Secretary General’s report on conflict in Africa and the 2001–10 Decade to Roll Back Malaria in Developing Countries. Delegates welcomed the progress on malaria outlined in the Secretary General’s report, which showed a dramatic increase in funding for malaria control between 2006 and 2007.

Delegates called for the international community to give immediate attention to Africa, to stop recent gains in economic growth in that continent being eroded by the global financial crisis. They called for the developed world to meet their financial pledges. A report before the committee from the Secretary General said that the Group of Eight countries must scale up development aid to meet their pledge to increase it by \$50 billion by 2010.

They welcomed the recent adoption by the Assembly of the political declaration for Africa’s needs, seeing it as a commitment at the highest level. And countries queued up to pledge their support for NEPAD, which was founded seven years ago at a summit of African leaders. It was intended to develop a vision to bring about African renewal, and had at its heart the UN MDGs.

Ghana pointed out the challenges facing Africa, including one of “brain drain” particularly in the health care sector. Myanmar said the drop in official development

assistance (ODA) between 2006 and 2007, combined with food and fuel price hikes and the impact of climate change, could reverse recent economic progress if more was not done quickly by the international community. African countries called for the developed world to meet the financial pledges it had made to the continent.

But China stated that development and peace had to go hand in hand; one would be weak without the other. That statement called for the global community to work to eradicate poverty and remove the ‘root causes’ of conflict in Africa.

Election to Economic and Social Council (Agenda item 103 (b))

In plenary session on 22 October, the General Assembly elected Côte d’Ivoire, Guatemala, Guinea-Bissau, Estonia, France, Germany, Greece, India, Japan, Liechtenstein, Mauritius, Morocco, Namibia, Peru, Portugal, Saint Kitts and Nevis, Saudi Arabia and Venezuela to sit as the 18 members of the Economic and Social Council. The new members will serve three-year terms, beginning 1 January 2009.

First Committee

Marco Antonio Suazo (Honduras), was elected Chairman of the First Committee (Disarmament and International Security). Topics covered in the general debate of the committee – which began on 6 October – included nuclear disarmament, the prevention of an arms race in outer space, new types of weapons of mass destruction, and the arms trade. For a full list of reports before the committee see (1).

Prevention of an Arms Race in Outer Space (Agenda item 88)

The issue of the militarisation of space was hotly debated by delegates in the First Committee on October 20, with clashes between the United States on the one side and Russia and China on the other. While all delegates agreed that preventing an arms race in outer space is of paramount importance, they disagreed on how to do this, particularly on whether any resolution could be made to be binding, and how to define “military activity and weaponry in space”.

The Russian Federation said that to secure international security, weapons had to be banned from space. He called for countries to back a Russian-Chinese draft treaty which sought to prevent the use of force or threat of force in space. But the US described much of what is talked about in relation to a space arms race as “rhetoric” and said that for 30 years it had pointed out the impossibility of defining a space-based weapon. The US then attacked the Russo-Chinese draft for containing no reference to terrestrial-based anti-satellite weapons, noting it would not stop the development of military systems such as the direct-ascent terrestrial-based anti-satellite weapon, which China tested last year. According to the US, earlier attempts to work with China and Russia on a draft resolution exploring voluntary transparency and confidence-building measures had failed. ➔

China hit back, describing the US's statement as "unwarranted allegation" and said that its recent tests had made a significant contribution to the peaceful use of outer space by mankind. It said there was an urgent need to create a new legal instrument to deal with new developments, such as the possibility of missile defence systems in outer space. Russia maintained it was open to discussion with the US and other countries on aspects concerning disarmament.

A draft resolution on transparency and confidence-building measures in outer-space activities (A/C.1/63/L.44/Rev.1), which noted the Sino-Russian draft treaty, invited all member states to continue to submit to the Secretary-General concrete proposals on international outer-space transparency and confidence-building measures in the interest of maintaining international peace and security and preventing an arms race in outer space. The resolution was approved by a vote of 166 in favour to one against (United States) with one abstention (Israel).

The Committee also approved a resolution on the observance of environmental norms in the drafting and implementation of agreements on disarmament and arms control



GA Considers Security Council Reform

Courtesy: UN

(A/C.1/63/L.21). This asks the Assembly to reaffirm that international disarmament fora should take into account the relevant environmental norms in negotiating treaties and agreements on disarmament and arms limitation and that all States should contribute to ensuring compliance with relevant norms. It would also ask States to adopt measures to ensure the application of scientific and technological progress within the framework of international security and disarmament without detriment to the environment or its contribution to sustainable development. This was approved without a vote.

One other resolution on the relationship between disarmament and development (A/C.1/63/L.23) was adopted, requesting the Secretary General to further strengthen the role of the UN in disarmament and calling on the Assembly to urge the international community to devote part of the resources made available by disarmament and arms limitation agreements to economic and social development. It would also encourage the international community to achieve the MDGs and make greater efforts to integrate disarmament, humanitarian and development activities. It

was approved by a vote of 167 in favour with one abstention (France). The First Committee concluded its work for the sixty-third session on 31 October.

Second Committee

The Second Committee (Economic and Financial) convened on 29 September to approve its work for the session. It was led by chair Uche Joy Ogwu (Nigeria). Issues approved for the programme of work including poverty eradication, financing for development, and disaster reduction strategies. In general debate, speakers cited the challenges facing the world today, including the financial crisis, as a reason for introducing new pro-poor policies. For a full list of reports before the committee see (2).

Follow-up to and Implementation of the Outcome of the 2002 International Conference on Financing for Development and the Preparation of the 2008 Review Conference (Agenda item 8)

Discussions on this item took place on 16 October, in the full heat of the daily-evolving global financial crisis, which influenced all debates. A representative from the International Monetary Fund (IMF) provided delegates with a special briefing on the financial crisis as part of the discussions. He reported on the decision making leading up to world leaders' collective response to shore up the global financial and credit system. The Assistant Secretary General for Economic Development also provided a briefing, noting fears that developing countries would be hit hard in a second round of impacts. The World Bank estimates that the crisis has pushed 100 million more people into poverty, presenting a credible threat to the attainment of the MDGs. Meeting the MDGs in the light of the global economic downturn would be harder than ever, according to a report before the committee by Secretary General Ban Ki-Moon (A/63/179). He said the developed world needed to lock in recent advances in poverty reduction and find new ways to increase financing for development.

Delegates stressed the importance of the upcoming conference on Financing for Development (Doha, 29 November to 2 December), with most calling for widespread attendance by senior ministers. But the US sounded a more sceptical note, complaining about the lack of information on the substance and topics for roundtable discussions at that meeting. In response, the IMF representative later assured delegates that the role of the Doha Review Conference would be to form a deeper global partnership, and prevent the loss of development assistance. The US also noted the timing of the event fell on the country's biggest annual holiday and said a very varied programme was needed to attract senior participants.

Indonesia called for the Doha round of trade negotiations to be revived as soon as possible. Meeting finance needs to overcome such challenges as the current food, financial and fuel crises should form a crucial part of the outcomes of the review conference, it said. Bangladesh, representing the Least Developed Countries (LDCs), said that they were the most vulnerable group due to structural weaknesses. Financing for development was

critically important for LDCs. There were fears that the developed nations would have their attention distracted from financing for development to the current situation, and their priorities would shift. Guatemala also called for reactivation of the IMF to soften the crisis' impact on medium-sized economies.

Sustainable Development (Agenda item 49 A-G)

On 27 and 28 October, discussion focused on sustainable development, including Agenda 21, desertification and disaster reduction. One of the reports being considered was the Secretary General's report on the Implementation of the International Strategy for Disaster Reduction (A/63/351). This called for more action on disaster reduction, in the wake of recent major disasters in Asia. He called for more resources for the implementation of the Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters in order to reach the goal of a cut in losses in disasters.

In the last year, the number of people killed by natural disasters was 13 times higher than the previous year and the financial costs doubled. Between July 2007 and June 2008, 364 natural disasters of the like of Cyclone Nargis in Myanmar affected more than 212 million people.

France, speaking on behalf of the European Union, said the linkage of disaster risk reduction and climate change adaptation would have many benefits in terms of policy coherence and streamlining of integration efforts. Others stated that the global financial crisis, and soaring food and fuel bills, could also provide an opportunity to focus on long-term, sustainable growth. Mexico suggested that the crisis entailed investing in energy efficiency, promoting renewable energy and providing incentives to stimulate the global economy. But nations urged each other to keep their focus on the issues of sustainable development and climate change, and not be pushed off course by the financial crisis. Yvo De Boer, executive secretary of the United Nations Framework Convention on Climate Change said the current crisis was no justification for delaying action on climate change. The financial turmoil would allow a root-and-branch overhaul of some of the key issues which affected both the global financial world and the climate change crisis, he told delegates.

While the EU bemoaned the loss in biodiversity, developing countries repeated their calls for more funding to help them mitigate and adapt to climate change. Bangladesh, representing the Least Developed Countries, said there was a need to build on the momentum resulting from the Bali Climate Change Conference (2007) and translate that unity into concrete action. LDCs called for developed countries to provide 0.5–1% of GDP as new funds to combat climate change.

Many called for decisive action in upcoming summits, including a Rio plus 20 Summit, though the US questioned the need for such a summit, given what it described as the "real success story" of the Commission on Sustainable Development. Others called for binding targets for the reduction of emissions, and concrete agreements in the framework of negotiations for a new post-2012 climate agreement, with developed countries taking the lead in line

with the principle of common but differentiated responsibilities. Several speakers stressed the need to increase funding to implement Agenda 21 and the Johannesburg Plan of Implementation. Others called for special support for SIDS, which are being hit by more frequent floods, typhoons, hurricanes and other natural disasters as a result of climate change.

Groups of Countries in Special Situations (Agenda item 52 a-b)

Delegates heard of an urgent need to alleviate the impact of the financial crisis on the development agenda, particularly that of LDCs, which are not in a position to withstand further shocks to investment, capital or export. The Association of South-East Asian Nations (ASEAN) said that participation by and integration of LDCs and landlocked developing countries into the world trading system should be at the centre of global efforts.

Strategies to increase food security and food productivity in these nations were called for, after it was stated that the crisis would drive an estimated 100 million more people into poverty and hunger. Under-Secretary-General Cheick Sidi Diarra said failure to act would mean a failure to deliver on the promises of the MDGs.

Fourth Committee

Under the chairmanship of Jorge Argüello (Argentina), the Fourth Committee (Special Political and Decolonization) met to begin its work on 6 October. Before it were issues on decolonisation, atomic radiation, peaceful uses of outer space, Palestinian refugees and a review of the whole question of peacekeeping operations.

Peaceful Uses of Outer Space (Agenda item 28)

The Fourth Committee met on 13 and 14 October to consider the effects, both beneficial and harmful, of space technologies. The Committee considered the Report of the Committee on the Peaceful Uses of Outer Space (A/62/20) which discussed the ways and means of maintaining outer space for peaceful purposes; implementation of the recommendations of the Third United Nations Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE III); spin-off benefits of space technology; space and society; space and water; and international co-operation in promoting the use of space-derived geospatial data for sustainable development. Combining satellite data with land-based information could help planners in the developing world make decisions and provide assistance in the face of the current food crisis, reported the Food and Agriculture Organization.

Space technology could also provide early warning and disaster management tools, said the chair of the Outer Space Committee, Ciro Arévalo Yepes (Colombia). The United Nations Platform for Space-based Information for Disaster Management and Emergency Response (UN-SPIDER) was widely praised by delegates. The Committee added items on space and climate change to its agenda last year.

But Thailand's representative said space technology could be a double-edged sword that could be of great

service to the world but could also inflict devastating harm and called for the international community to share the benefits of space among nations not already in space as well as those who are. The Committee also said that, in order to achieve sustainability in space cooperation, building the capacity of developing countries to develop space technologies should be a priority and the limited resources of outer space, such as orbital positions, should be shared equitably among countries.

Several countries called for closer links between the Outer Space Committee and the Commission on Sustainable Development, saying space technology was critical to the future of developing nations. In this debate, as in that over Agenda item 88 in First Committee, disparate views emerged on the need for greater legal jurisdiction to prevent the militarisation of space.

Atomic Radiation (Agenda item 27)

Delegates began their annual consideration of the effects of atomic radiation, reviewing the work of the Scientific Committee and its latest report (A/62/46). This details delays in publication of reports on global exposure to different sources of radiation, due in part to inadequate staffing and funds. Fourth Committee delegates were united in calling for more funding and staffing for the Scientific Committee. The current chair of the Scientific Committee, Canada, said the committee's financial and secretarial resources had diminished over time, impacting on its vital work. He called for this to be corrected. Australia said that because of increasing interest in using nuclear power to reduce global warming, the Committee's work would be even more important in future years in providing scientific analysis of the radiological impacts of the nuclear fuel cycle.

Malcolm Crick, secretary of the Scientific Committee, said that once atomic testing had been the largest man-made source of radiation, but today medical exposure was dominant among artificial exposures, and that development needed careful monitoring. Six new member states had expressed a wish to become members of the Committee. India said while that was heartening, the committee's administrative and financial constraints needed to be sorted out first. But Ukraine and Pakistan – two of the six – both stressed that that they had expertise that could be useful to the Committee's work.

The draft resolution on effects of atomic radiation (document A/C.4/63/L.91), introduced by Canada and approved without a vote, would have the Assembly reaffirm the decision to maintain the present functions and independent role of the United Nations Scientific Committee on the Effects of Atomic Radiation. It would also request the Secretary-General, in formulating his proposed programme budget for the biennium 2010–2011, to consider all options, including the possibility of internal reallocation, to provide the Scientific Committee with the resources to discharge the mandate given it by the General Assembly. In that context, it would emphasise that those resources were needed in any case and before Member States could agree to a change in Committee membership. It would have the

Assembly direct the Scientific Committee to continue to reflect on how its current and potentially revised membership could best support its work.

Sixth Committee

The Sixth Committee (Legal) was chaired by Hamid Al Bayati (Iraq).

Rule of Law (Agenda Item 79)

Delegates considered the issue of the Rule of Law, with a report before them from the Secretary General on the rule of law at national and international levels (A/63/64). The report contains an inventory of the UN's current Rule of Law activities, and its ability to promote the Rule of Law at national and international levels in response to the specific needs of member states.

The Deputy Secretary General of the UN, Asha-Rose Migiro, told the Sixth Committee of the need for national authorities to buy into the Rule of Law process and support it. There was some discussion about the importance of ensuring that the Rule of Law should not become a tool of "power politics". Singapore said it should not be used to impose the cultural values of any group of countries on others and China said it was the right of each country to choose the Rule of Law model most suitable to its own domestic conditions. Cuba also stressed that the UN should only undertake Rule of Law activities at the request of recipient governments. A strong Rule of Law could also help promote fair and stable economic development, said the Observer of the Holy See, which has permanent observer status at the UN. In the developed world, just regulations could also ensure greater economic stability and fairness.

Oceans and Other Issues before the Assembly in November and December 2008

Several further issues are due to be considered by the Assembly, in plenary or in committee. Among these are items on Oceans and the Law of the Sea. Delegates will consider reports on sustainable fisheries – with more than 75% of world fish stocks believed to be fully or over exploited – and a report by the Secretary General on the available assistance to and measures that may be taken by developing States, in particular the LDCs and SIDS, as well as coastal African States, to realise the benefits of sustainable and effective development of marine resources and uses of the oceans within the limits of national jurisdiction. Also up for debate is the implementation of, and follow-up to, the outcomes of major UN conferences and summits in the economic, social and related fields. These agenda items and others, as well as the resolutions passed by the sixty-third session, will be reported on in the next issue of *EPL*.

Note

1 The UN initial prss release and documents presented to the meeting is found at www.un.org/News/Press/docs/2008/gadis3361.doc.htm, and see www.un.org/News/Press/docs/2008/gaef3223.doc.htm.

UNFCCC / COP-13

Negotiations on Referral of an Issue to a Subsidiary Body – Multilateralism in Action –

by Bagher Asadi*

Introduction

In the course of the first plenary meeting of the thirteenth Session of the Conference of the Parties of the United Nations Framework Convention on Climate Change (UNFCCC COP 13), Monday, 3 December 2007 (Bali, Indonesia), it was decided that the question of “development and transfer of technologies” – discussed for a number of years under the Subsidiary Body for Scientific and Technological Advice (SBSTA)¹ – be also referred to the Subsidiary Body for Implementation (SBI) for consideration. The COP decision, made on the basis of a proposal by the Group of 77 (G-77)² during consideration of the organisation of work of the COP – Agenda item 2 (f) on allocation of agenda items to subsidiary bodies – proved contentious once the matter was subsequently raised and pursued at the SBI. The SBI debated the matter in its first and second plenary meetings. Following a long, heated debate in the second meeting and subsequent to the advice sought by the Chair of the SBI and provided by the Legal Adviser of the UNFCCC Secretariat, the SBI finally decided on the inclusion of a new item entitled “Development and Transfer of Technologies” in its agenda. The SBI further debated the matter in its third plenary meeting and decided to establish a contact group, to be co-chaired by one representative of Annex I Parties and one representative of Non-Annex I Parties – as has been the established practice in the work of the Climate Change Convention – to discuss the scope and substance of the aspects – implementation aspects – to be considered under the SBI.

The present essay, written by the Chair of the SBI (2007–8), tries to reveal and analyse the process of the intergovernmental deliberations – including informal exchanges and consultations – spanning almost two days at the COP. In light of the legal advice that ultimately resolved the matter in the second SBI plenary, examination of the consideration of the proposal in the COP plenary – first immediately after the adoption of the agenda and subsequently under Agenda item 2 (f) – makes it clear that a simple and timely measure by the COP such as notifying the SBI/SBI Chair immediately of its decision on the new agenda item or re-issuing the SBI 27 Provisional agenda would have clarified the situation and prevented the state

of confusion that followed as well as the lengthy heated discussions in two successive SBI plenary meetings with regard to the nature of the COP decision and its practical implications for the work of the SBI. The SBI plenary debates on the matter referred by the COP unfolded in a manner that pitted the Chair of the SBI (himself from a developing country and active member of G-77) against the G-77 – an unfortunate, yet inevitable situation that should not have arisen in the first place.

It goes without saying that certain aspects of the matter under discussion, *e.g.*, the internal discussions within the G-77 leading to the decision to make the proposal at the opening plenary meeting of COP 13,³ remain beyond the scope of the essay, as they are not public knowledge. However, the statement made by the Chairman of the G-77 (Pakistan) in the opening COP plenary when making the proposal and in the course of the exchange with the President of the COP on the nature of the proposal, as well as the G-77 statements (Chairman and other members) made during the general debate in the SBI plenary meetings on the matter, shed light on the *raison d'être* and political reasoning in support of the proposal. While the author – a G-77 activist/Chair (2001) – was, on a personal level, sympathetic to the content of the G-77 proposal and the political decision to pursue it, he nevertheless conducted the informal exchanges and deliberations in a fully transparent and matter-of-fact manner, and from a purely professional, objective position. The Chair's impartiality, as seen and supported by some Parties dissatisfied with the COP decision, seemed not to have sat well with – much less been appreciated by – some other colleagues!

The author, a career multilateral diplomat who, as Chair of the SBI (2007) became directly involved in the process a few hours after the COP decision for referral had been made, considers the process as it unfolded to be quite interesting and educational in so far as multilateral work and negotiations are concerned. The essay, therefore, is an attempt to describe one specific multilateral decision-making process from start to finish, to illustrate how many multilateral decisions are reached. In other words, it tries to show how countries and groups of countries engaged in these processes pursue what they consider to be in their respective national/group interests; and how the proposals and moves by countries (and groups of countries) are dealt with within the framework of established practices and procedures; and also how they are perceived and responded to by other countries (or groups of countries). This deconstructed version of a multilateral process – which as indicated earlier is limited and cannot claim to present a

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detailed view of the whole process but just the parts that were visible – also tries to shed some light, as far as is morally and politically permissible and/or advisable, on the diplomatic conduct of the national delegates and group representatives involved in the process.

Action at the COP Plenary

According to the verbatim record of the COP plenary,⁴ immediately after the COP President adopted the agenda under Agenda item 2 (c), the representative of Pakistan (Chairman of G-77 for 2007) asks for the floor and indicates that he had requested the floor before, but this had gone unnoticed because of the difficulties with the electronic spotting system. He then goes on to draw the attention of the President to Agenda item 6 (c) – “development and transfer of technologies” – and argues that, on the basis of previous COP decisions, the subject should also be considered and discussed under the SBI. He then goes on to state:

Mr President, in light of the decisions I have just quoted, the COP will have to decide by authorising the SBI to consider the issue of development and transfer of technologies. As you see, Mr President, the SBSTA only deals with the technical matters, and when it comes to the implementation of commitments of this important subject, it comes under the responsibility of the SBI. The COP will not be complying with its decisions if the SBI does not consider the matter.

The President of the COP (after listening to another statement by another delegate on a different matter) states:

I have been advised that in terms of Pakistan, we have taken note of your statement. And actually we come to the allocation of agenda items under 2 (f). We will come to that in a few minutes. So we have pending matters for later.

While dealing with Agenda item 2 (f) on the allocation of agenda items to subsidiary bodies,⁵ the Secretary of the COP refers to the Buenos Aires Programme of Work and Decision 1/CP.10 and adds:

Then it was in this context that I believe the delegate of Pakistan made its statement earlier on the development and transfer of technologies.

Pakistan asks for the floor and while saying that “I am not clear as to what was said”, he goes on to repeat part of his earlier statement on the background of the matter and the rationale for the SBI to consider the subject. Then the following exchange takes place:

Pakistan [Chairman, G-77]: What we want from you Mr President is that this subject be considered as a substantive issue by the SBI. SBSTA can provide input under 13/CP.1 and 13/CP.13 – Paragraph 3 of 13/CP.3 clearly outlines the respective responsibilities of the subsidiary bodies. SBSTA can continue discussing this issue under its own mandate on technical issues.

President: Note that Pakistan (G-77) requested to move this item to SBI. Can I take it that the Convention agrees that the agenda item is moved to the SBI?

Pakistan: Chairman, sorry for your indulgence. We didn't ask for moving it from SBSTA to the SBI. We requested that SBSTA can continue to discuss this in the context of the EGTT,⁶ but when it comes to the review of

the commitments on the subject then SBI can take over and discuss it and consider it. Thank you.

President: I think we have all heard what the honourable delegate from Pakistan has proposed. It is enhancing what we are discussing. So I would ask other delegates whether we can agree to it. Can we agree with that? I see no objection to it. Then, it is adopted. [Gavel] Thank you Pakistan.

Post-decision Confusion

A few minutes before the first plenary meeting of the twenty-seventh session of the SBI was scheduled to begin (3pm, Monday, 3 December), a number of representatives from Annex I Parties came to the office of the SBI Chair and expressed their dissatisfaction with the COP decision and sought advice/clarification on the situation and how the SBI would deal with the matter.⁷ The SBI Chair, totally unaware of the decision up to that point and unclear about its possible implications, expressed the view “let's wait and see how it is raised in the plenary and then we would decide how to deal with it”. Furthermore, in response to the persistent query of an Annex I Party delegate, he also expressed the impression that since the matter is new to the SBI and given the lack of documentation for it, and also because of time limitations, the matter would most probably be forwarded to the next SBI session (SBI 28) – an impression/observation which, in retrospect, cannot but be considered simply wrong and out of sync with the seriousness of the matter as it later unfolded.

The matter was raised in the SBI first plenary meeting as soon as Agenda item 2 (a) – Organizational matters: adoption of the agenda⁸ – came up for consideration. Once the SBI Chair asked the plenary whether the agenda could be adopted, the G-77 Chairman (Pakistan) asked for the floor and made the following statement:

Pakistan: ...On the agenda, we had raised a point in the COP plenary this morning. It is our understanding that it should have been corrected in the agenda of the SBI for this meeting. We would like to be guided by your advice on this.

This statement led to the following exchange of views – which took almost half an hour before it could be brought to a closure.

Chair: ...As of this moment, I have not been informed by the President of the COP or the COP Secretariat, in any form, orally or otherwise, of any decision that had been made by the COP earlier today. So I suppose, as per practice, I stand to be informed, by written notification, of the decision made by the COP. Then, myself and the SBI would be in a position to deal with it. But, at the moment, I am totally unaware of the content of the decision earlier today. With that understanding, we can go ahead and proceed to adopt the agenda, as I had indicated earlier.

Pakistan: I have full sympathies for you, Mr Chairman. However, I am surprised that a decision that was arrived at this morning at the COP plenary meeting is still to be conveyed to this body. You know well, Mr Chairman, being a G-77 representative, my hands are tied and I am afraid I would not be in a position to proceed to adopt the agenda without that item in the agenda.

Chair: Well, now I suppose I have to have a bigger sympathy with you – and perhaps with myself – simply because I might have heard – orally – in the corridors about what transpired in the COP earlier today. But, that would not put me in a position to decide on the matter. If, with the concurrence of the distinguished Chair of G-77 and the full community of the G-77, we could adopt the



Yvo de Boer, Executive Secretary

Courtesy: UNFCCC

agenda, with the understanding that if, by the end of our plenary meetings, that is by the end of Tuesday, proper notification or instruction by the President of the COP is received – President of the COP is my boss and can send me his instructions – if I am informed in writing of the decision, then we can deal with it in the next two plenary meetings. And the understanding can be that there is one pending matter, depending on the notification from the President of the COP, which we can deal with, once it is received, and as I said, before the end of Tuesday, and obviously, in due time. With this understanding I hope the G-77 can go along with the ruling of the Chair and we adopt the agenda and we proceed as we should.

Colleagues, the reason I proposed that was not to open the floor to general discussion on the nature of a decision, which, even as Chair of the SBI, I do not have any clues of. There might be delegations on the floor who might be clear about it. And I suppose others might be as unclear about it as the Chair. So, you can go ahead and inform the Chair and the Body of the exact nature of the suggestion. And I really hope – I really hope – that it would not lead to a lengthy discussion here, because if it were a matter of a procedural decision it would have been one thing. But, because it is a decision of the President of the COP and a COP decision, then it is binding on the subsidiary

body to deal with. But, as of this moment, I am unaware of it. And I give the floor [to G-77] to pronounce exactly what the suggestion had been with the hope that it would not lead to a lengthy discussion, whether on procedural aspects or substantive aspects.

Pakistan: I am afraid I am going to disappoint you on this count. We made a rationale for it in the COP meeting, to which the Chair and the Parties listened, and agreed that it would now be on the SBI agenda. So, I don't see any need for us to explain once again here why we want it and why we want to have it reflected on the agenda. Instead, to help you out of your predicament, Mr Chairman, I think it would be appropriate if you can consider a short adjournment and use your resources in the Secretariat to get a copy of the notification, or whatever form of communication the Secretariat may wish to resort to at this time, to convey to you the nature of the decision which was made this morning.

Right after this rather clear statement by the G-77 making the adoption of the agenda contingent upon the inclusion of the new agenda item, and before the Chair proceeded to consider how to further continue the work of the plenary, the USA delegation – the only Annex I Party to intervene in the discussion in the first plenary meeting – made the following statement:

USA: Just an observation I guess, at this point, in the proceedings. We too heard a proposal in the COP this morning. But, it seems to us the proper procedure for a decision in this Body to include an item is for a proposal to come before the SBI to include an item on the agenda. Now, something can be referred from the COP to this Body for consideration, but the decision about whether to include an item on the agenda of this Body belongs in this Body, based on a proposal to this Body from a Party or group of Parties. At least this is our understanding. I don't know whether this is helpful to you or not.

Chair: Well, I just tried to argue with my G-77 colleague that in the absence of the referral, it may be difficult for the Chair to rule on whether to consider or not to consider. But, in light of the statement just made – and I suppose the legal officer should be in the room – let me invite the legal officer to the podium to come and help us on various options for a matter to be discussed in the SBI plenary. I tried to appeal to the colleagues, but it appears that I am not successful – or at least I have not been so far. So, let me give the floor to the legal officer here to enlighten us, perhaps we could get out of it as early as we can.

Legal Adviser: Two issues. First, SBI is a subsidiary body of the COP. Therefore, the Conference of the Parties can refer a matter to the SBI. But, a referral should take a formal form. But, as the Chair has stated, so far he has not received an official notification to that effect. And secondly, I would say that, in accordance with rule 13 of the rules of procedure being applied, a Body – the COP or the SBI – could, in adopting the agenda, add to, delete or defer consideration of an item as it deems fit. But, of course, in adding an item to the agenda, there has to be a proposal from the Parties. Therefore, it is within the rules of procedure for the Parties in this forum to propose and

add an item to the agenda. Of course, whether or not that item gets added to the agenda depends whether there is consensus within the room that that item be added to the agenda.

Chair: Thank you very much for the legal advice. I hope, in light of the legal advice we just received, the distinguished Chair of G-77 (Pakistan) would go along with the Chair's ruling that we go ahead and adopt the agenda, with the understanding that between 4:30 today and tomorrow – let's say, 10am – necessary measures would be taken by the President of the COP to refer the matter to the SBI and then we take it up as is referred. Because I do not know the subject, I do not know the wording, and I do not know whether it is a matter of substance or procedure, I leave that to the President of the COP to bring it to the attention of the SBI 27 and we act according to that. I really appeal to the colleagues to adopt the agenda, with the understanding that, as soon as the instruction or communication comes, we deal with it and we raise it. I read the communication and debate it. Can I seek the concurrence from the distinguished Chairman of G-77 so we can proceed with our work?

Having listened to the legal advice and the Chair's appeal, the Chair of G-77 made the following statement, which seemed to have opened a window of opportunity for the work to proceed:

I don't know how it will be going to work. You may have heard, as you said, that something was decided this morning in the COP. Now you want to proceed on an understanding that if a communication is received by tomorrow evening. What will be the nature of this understanding? How will it be reflected? Will it be reflected in the same manner as the decision we heard? ... We need to be sure; we need to be categorical about whatever is decided. Either we can adopt the agenda provisionally – that is one option – and the final gavel you give when you receive the communication from the President.

The Chair responded to the G-77 query in the following words:

Well, the Chair's word is the Chair's word, and I suppose you rely on that. What I say is that we adopt the agenda with the understanding that there is still one pending issue – the issue that is supposed to be communicated from the President of the COP. And I am sure that as of this very moment the President is already apprised of the discussion that is taking place here. So with that understanding that there is still one pending issue, if it is within the practice, and you want to consider it "provisional" adoption, I would not be averse to it. But, I would like to be able to proceed with our work and then come back and revisit that particular one pending issue tomorrow morning or, if the President sends it at 12 o'clock, then we deal with it at 3 o'clock. But, when I tell you it's the Chair's word and ruling, I hope that suffices. I really would like to get this done and get it over.

Before the Chair could proceed to propose to adopt the agenda "provisionally" as suggested by the G-77 Chairman, three other members of the G-77 – Philippines, China and Ghana – made the following statements in support of the G-77 position:

Philippines: *...And I am sure with your able and capable handling of the situation you are going to lead us to a successful conclusion of the work we have before us. Mr Chairman, as Pakistan said, as Chairman of G-77, we also like to see that the decision of the Conference of the Parties at its first session be followed; that the matters relating to commitments and implementation of the Convention, in particular its Article 4.5 – this was taken by decision 13/CP.1, as you very well know, you were with us during that time – that this matter should be given to the subsidiary body that has the overall responsibility for the development and transfer of technologies; that is, the Subsidiary Body for Implementation. The President kindly, of course, proposed it and the Conference of the Parties as a Body accepted it. And my understanding from you, Mr Chairman, is that you are going to have this item on the agenda and it will be handled as other items of the agenda, hoping that there will be discussions on the implementation of Article 4.5, with the necessary input, if required, from the other subsidiary bodies. This is in accordance with the decision taken by the Conference of the Parties, including on the division of labour between the subsidiary bodies. And, Mr Chairman, on this understanding, I am sure – and I will follow and support the decision made by the Chairman of G-77 and China – that this very important item and a very important building block of the Convention will be taken up under your able chairmanship.*

Chair: *Before I give the floor to China, I hope I can bring the matter to a close, and as I look at my watch, it is 3.55p.m. and we are still at the beginning of our work.*

China: *...I think everybody knows that the President made the decision; and I think it is the COP that made the decision. The COP made the decision to include this important agenda item into the agenda of the SBI. There was no objection with regard to the proposal from the Chairman of the G-77, delegation of Pakistan. It was adopted unanimously, there was no doubt about that. Of course, you just said that we could adopt the agenda here with the understanding that this will be included in the agenda of the SBI after you hear direction from the President. Maybe, in addition to what you have already said, I think you need not wait for the directions of the President passively. Perhaps you can also ask the President to give you direction actively, otherwise the President may forget this matter. He is very busy. I think you should do that; it is also your responsibility. There are divergent views in the room. With this understanding, I am not sure whether it will be acceptable by the G-77, which is represented by the colleague of Pakistan.*

Chair: *Yes, I believe the President of the COP is very engaged, I know that. But, his Cabinet, his people, know what to do. And as soon as I leave the podium here, I will rush to his office to remind him perhaps why he has forgotten to send me the communication. I will do that, of course, with due courtesy for the distinguished Minister, President of the COP. But, colleagues, what I say is that let's proceed to adopt the agenda, with the understanding that there is one pending matter; the matter to be referred to the SBI which has been made earlier today by the COP.*

With that understanding, that's the word of the Chair, let's adopt the agenda. May I go ahead?

Before the gavel could be exercised in adopting the agenda – as suggested earlier – “provisionally”, Ghana asked for the floor. The Chair, in giving the floor to Ghana, said in a clearly hortatory tone that he expected “a real big YES”!

Ghana: I am afraid I am going to disappoint you, Mr Chairman. My delegation working on this agenda item on behalf of the G-77 and China, cannot stand against the decision of the Group. We want to see that issue addressed on the agenda before we can adopt the agenda.

The Chair, having heard the last intervention, feeling exasperated by the apparent impasse, had the following to say:

Well, that's a quite difficult bind in which we have successfully managed to put ourselves. If colleagues insist that they will not settle for the adoption of the agenda with the understanding – with the proviso – that the Chair provided, then I suppose it could be a quite difficult situation. We have half an hour left and we could sit here for half an hour and perhaps if there is somebody who can tell nice, clean jokes, he could do that. But, you know that we cannot proceed without adopting the agenda. If we really cannot do that, then we might just close the meeting, and between 4 o'clock now and 10a.m. tomorrow morning see what the President of the COP does and we come back and pick up the work as of tomorrow morning, and ask Chair of the SBSTA⁹ to start his work a little earlier.

Right after this rather poignant statement by the Chair, the G-77 Chair asked for the floor and said:

Mr Chairman, I am always amazed by the wisdom of our Chinese colleagues. Given the constraints of time, and taking the risk of inviting the wrath of my group – as we just heard one member – I think we trust you, as we have always done, to proceed as you have proposed.

The Chair, elated at this positive change of tone, said:

Thank you very much. With that understanding, as I said, once I leave the podium here I will rush to the office of the President and seek clear instruction on what transpired earlier in the COP and then act on it. And I give my word that, depending on the communication or the instruction I receive from the President of the COP, I will deal with the matter as of tomorrow.

With that understanding, may I, then, adopt the agenda, as I said, with 4 (b) in abeyance, provisionally – with that understanding as I said and wouldn't repeat? [Adopted/gavel]. Thank you very much for your cooperation my dear brother.¹⁰

The Chair then resumed consideration of Agenda item 2 (a), under which general statements were made by Pakistan (G-77), Australia (Umbrella Group), Grenada (Alliance of Small Island States – AOSIS) and Portugal (European Community and its member States). Following the general statements, the meeting was adjourned.

A flurry of informal bilateral exchanges and consultations among interested Parties followed the closure of the SBI's first plenary meeting. Once the verbatim text of the exchange at the COP plenary had been received

by the SBI Chair,¹¹ various communications followed, directly by the Chair as well as through Secretariat colleagues, to arrange for an informal consultation meeting mid-evening with a view to clarifying the situation. While there was clearly visible interest – even enthusiasm – on the part of Annex I Parties for such an exchange, the G-77 Chair did not appear to be interested or enthusiastic to engage in further consultations.¹² Nonetheless, the G-77 Chairman (accompanied by a number of other delegates from the Pakistani delegation) participated in the informal consultation, which was also attended by representatives of a number of Annex I Parties – including the European Community and its member States (EC) and the Umbrella Group – and a number of Secretariat officers and experts. The almost hour-long exchange failed to make things any clearer than had been stated previously by the G-77 at the SBI plenary. Queried insistently by the Annex I delegates, one thing was emphasised by the G-77 Chairman – repeatedly – that they were not asking for a new, separate agenda item. Apart from this, no further clarification was provided on how the Group would like to see the matter dealt with in the SBI plenary the next day. And in response to the SBI Chair's insistence, the G-77 Chairman stated that they would rather wait for the COP President to pronounce himself on the matter – in the COP 13 Bureau meeting scheduled for 9a.m. on Tuesday and before the next SBI plenary scheduled to begin at 10a.m.

COP 13 Bureau Meeting

At the Bureau meeting on Tuesday morning, the COP President referred to the outstanding issue under Agenda item 3 – Issues arising from the opening plenary meetings of the COP, CMP, SBs and AWG – and asked the Chair of SBI to report on the matter. The Chair in his report, while drawing attention to the state of discussions in the first plenary meeting and the subsequent confusion, also reported on the informal consultations and emphasised that the “G-77 is not asking for a new, additional item on the agenda”. In the course of the discussion that followed, it was underlined by a Bureau member that [what happened at the COP plenary yesterday] “was not the intergovernmental [process] at its best. No alert was given to the podium, so they would know what to expect”.¹³ Another member of the Bureau, representing a geographical area, stated that “as one possibility, the matter could be referred to SBI 27 by the COP 13, and to be taken up by SBI 28”. The SBI Chair found this a good practical proposal to resolve the matter at the forthcoming plenary. The COP President, having listened to various interventions, said the matter should be left to the discretion of the SBI Chair and the SBI to see how to deal with the matter most appropriately.¹⁴ The Chair of the SBI also asked for a written communication from the President on the COP decision and his discretion on the matter.¹⁵

Discussions at the Second SBI Plenary Meeting

Once the second plenary meeting was called to order, the Chair announced that he intended to take up consideration of the agenda items as contained in the “Daily

Programme/Journal”, but he would first report on the Bureau meeting discussion on the COP decision:

The President of the COP in his report of the first plenary yesterday morning, referred to the decision to refer to the SBI the discussion of the implementing aspects of technology transfer, and asked the Chair of the SBI to report on the discussion in the first plenary. I informed him of how it transpired here and also the informal consultations we undertook later in the evening with concerned Parties. The President's impression was that the matter is referred to the SBI and its consideration falls under the discretion of the SBI and the Chair of the SBI. One of the options raised is for that to be briefly considered in SBI 27 and then referred to SBI 28 for further, detailed discussion. And, as you remember, yesterday I promised to undertake this question today, before the end of our plenary meeting – one in the morning and one in the afternoon. And I will remain faithful to my promise. And that was the understanding we reached. In the course of the discussion in the Bureau meeting one possibility was raised and that was the possibility of referring the discussion of the matter to SBI 28. That seems to be quite a good possibility, which I will come to later when we take up the matter. With this understanding yesterday and also the informal consultations, let me now turn to agenda sub-item 2 (b) – Organizational matters.

Having made these remarks, the Chair resumed consideration of Agenda item 2 (b) of the agenda, only to be informed a few minutes later by the Secretariat that China was shaking its name plate and asking for the floor.

China: I am very sorry, Mr Chairman. I pressed the button long before, but it was not noticed. I am sorry for that. It seems to me that it is unclear for me as regards the unresolved issue of yesterday about the agenda item of technology transfer. I think the Bureau cannot override the decision of the COP. So, if it is convenient for you, maybe it is better for you to explain [to] us in more detail how we are going to proceed with this important agenda item before you go to any other issue.

Chair: Thank you very much, distinguished colleague from China. Already, I informed colleagues here on what transpired in the Bureau. The Bureau did not intend, nor did I imply, that it intended to supersede the work of the SBI. I said in very clear terms, my dear colleague, that I will take up that issue when we conclude the work of the plenaries that we have. And as you recall, my dear colleague, yesterday I said that I take it upon myself – and it's the word of the Chair – that we address that still unresolved issue before we complete our work today. It was on that clear understanding that I proceeded to take up consideration of Agenda sub-items 2 (b), 2 (c) and then with the continuation of agenda items as you see in the Journal. So, it was my understanding that colleagues would bear with me until we finish consideration of the agenda items as indicated in the Journal, as indicated yesterday and also as I indicated in my report on how we intend to deal with the outstanding issue. I hope you would find this convincing and adequate so we could proceed.

Pakistan: I am taking the floor on behalf of the G-77 and China. You refer to the Journal, but I cannot find this reference to the agenda item you are referring to. If you could kindly explain to me which item of the agenda you are referring to. And then you said that the Bureau, or the President of the COP, informed you or advised you to take up this item in SBI, for which you mentioned one option. And you also mentioned another option, which you will give at another time. These time frames are very important in our meetings. If you can specify what is that option and when you are going to share that with us.

Chair: As I indicated I intend to take up the unresolved issue before we complete our work today. But, I made it clear that I take up the agenda items as inscribed in the Journal and also the unresolved issue. With your concurrence, then we could proceed and complete consideration of the agenda items, the existing agenda items, as we adopted it provisionally yesterday. With the understanding, and I underline, with the understanding, which I made yesterday, that we would take up the unresolved issue before the end of our work today. The reason, the very reason, my dear friend, I start with the agenda items as provisionally agreed yesterday is because the contact groups need to be established in order to be able to start negotiations as of tomorrow morning. Assume that we take up the unresolved issue, just assume that it takes one hour or two hours, then how to proceed with the work of the contact groups, including on adaptation, including on 1/CP.10, including on the CGE, including on the LEG, and including all issues that we have before us. That's why I said let me complete consideration of these agenda items first, and then before the end of the day – the end of today may be 12 midnight. And I have indicated to the President that if I need to go beyond 6 o'clock, we need to continue the plenary in order to take care of the outstanding issue today before we complete our work. That's exactly what I have informed the President and also exactly what I have informed colleagues here. If you bear with me, dear colleagues, once we have completed consideration of the agenda items as provisionally agreed yesterday, then we come to the unresolved issue. And if, in the meantime, informal consultations come to a certain fruition and result, much the better. And if not, in any case, once the agenda items are considered, then I open the floor on that particular outstanding issue and we will not leave this room until we deal with it. I hope that is good enough.

Saudi Arabia: We fully support what Pakistan, on behalf of the G-77 and China, is saying. I think we are setting a bad precedent here by postponing and delaying a COP decision. Mr Chairman, you told us yesterday that you will check the records to see if it is true that this issue has been transferred to SBI as well. I think this is very easy. I don't think it takes one hour or two hours as you are saying. We were thinking that you will serve it today at the beginning of this session and not to postpone it until later today. This is a very important issue to developing countries. I don't think there is any reason for any delay. There is a COP decision that this has been moved to SBI, and we have to abide by it. Any ruling by the Bureau is irrelevant here as long as we have a COP decision. So, let's not set a prec-

edent here as far as our decisions within the COP. It is now in your hands, you have the ruling of the COP on this issue and should immediately establish a contact group on technology transfer in order to enhance this issue, which is very important to developing countries.

Chair: Before giving the floor to Pakistan and China, may I read the memo I have received just now from ... Secretary of the COP, addressed to the SBI Chair?¹⁶ I read it:

"The item on the COP agenda "development and transfer of technologies" (item 6) was referred to the SBI, in regards to its implementation aspects, for consideration and the submission of appropriate draft decisions and conclusions (for the scientific and technical aspects, the item was referred to the SBSTA).

It is for the SBI to determine how best to consider and take action on this referred item (e.g., to consider the substance under an existing item of its agenda, to add a new item to the agenda, to develop a timetable for how to consider the matter at this and/or future sessions, etc.).

The President relies on the Chair of the SBI, in consultation with the Parties, to determine the most appropriate course of action in the SBI within this general framework".

And I suppose the comments I made in the beginning on the report from what transpired in the Bureau, and also in the course of the exchange we are having now, is fully consistent with the memo coming to me from the Secretary of the COP, reflecting the views of the President of the COP. And, as colleagues made it clear to me, the G-77 is not asking for a new, additional item to be placed on the agenda. That is quite clear. What has not been clear, what is still to be debated, is how to consider it, and that's exactly what we have been dealing with. I only asked you to allow consideration of other agenda items and then come to this one. But, if you want to insist that "no" we have to take this unresolved issue at this very moment and then come to the consideration of the provisionally agreed agenda, of course, if the house agrees, the Chair is in the hands of the intergovernmental body.

Now, I see the requests for the floor increasing; Pakistan, China, Malta, Angola and Saudi Arabia.

Pakistan: We have no intention of holding you back. As we agreed last evening to allow you to proceed with the adoption of the agenda, with the understanding that as soon as you receive the communication from the Secretariat on the decision of the COP conveying to you the agreement reached yesterday morning that this issue also be reflected on the agenda of the SBI for consideration. A while ago it seemed to us that you are going back on that understanding when you began consideration of other agenda items. What we would like to make clear here is that you have referred to it as the unresolved issue. According to us, it is not an unresolved matter, technically or procedurally. It was resolved the time the COP made the decision. It was only a matter of communication, the time that it took to be communicated from the COP Presidency to the Chairmanship of the SBI, which is over now. So, it

should now be taken up along with other matters you are taking up for consideration. I hope I am clear and brief.

Chair: Before giving the floor to China, let me seek clarification from the Chair of G-77. As I indicated, I received the memo just right now and read it to you. Fine. Do you want it to be considered at this moment or you allow the Chair to continue consideration of the agenda items as indicated in the Journal – the outstanding items – or you would agree to take it up later. The Chair of G-77 is in a position to make that decision.

Pakistan: The Chair of G-77 is not in a position to take that decision. We will go by the understanding that you gave us yesterday that you will consider it as soon as you receive the communication from the Presidency. Now that you have received the communication, either you go by that understanding, which we will be happy to accept. If you propose now to delay the consideration of the item until you cover all other matters on the agenda, for that, I have to seek advice from my colleagues.

China: Actually, I was going to answer your question before you asked the G-77 Chair. China would like to have the plenary of this SBI discuss this matter right now and not at the completion of our work today – at the start of today. With regard to the memo you just read to us, perhaps due to a misunderstanding of the English language – which is not a mother tongue of mine – we believe it is a little bit in contradiction with the decision of the COP yesterday. Perhaps the Secretariat can help us and type out the relevant interventions and the decision of the COP. We had the proposal of the Pakistan delegation on behalf of the G-77 to have this item on the COP agenda and the SBI agenda, and there was no intervention to oppose that. That is to say there is a very clear decision on this. It is now a COP agenda item and also a SBI agenda item, and we have to discuss it now and not at the conclusion of today's work. I hope I have made myself clear.

Chair: Yes, you have made yourself absolutely clear. I give the floor to Saudi Arabia and then try to see what we can do.

Saudi Arabia: I strongly support our Chair of G-77 and what China is saying. English is not my mother tongue either, as the Chinese colleague said. But, this is not our understanding of the decision yesterday. I think the Secretariat has somehow misinterpreted. That is why I fully support what China is saying, that is to pull the records and see what exactly has been deliberated. It was very clear and it was not contested. At that time there was a request from the G-77 and China to have it as a separate agenda item under SBI. And there was no objection to it. The decision was to agree to that decision. And we need to see the records to verify, and I fully support that we immediately go into this and withholding everything until we resolve this issue.

Chair: Well, when I said the question of request for no new, additional agenda item is out of question, that was based on the exchange with the distinguished Chair of G-77, unless there is a change in the position, which I would not know. I seek clarification from the Chair of G-77 on that particular item, issue; whether the G-77 is requesting a new, additional item on the agenda of the SBI

27 on the basis of the COP decision yesterday morning or not. And then we will proceed.

Pakistan: Much as we hate to take the floor again and again, for the sake of clarity, let me submit that this is not the first time that the SBI will be doing something that it has not done earlier. The first part of the communication you read out to us a while earlier and I tried to capture as much as I could, asks the SBI Chair that in addition to its consideration by the SBSTA, it is also to be considered by the SBI. SBSTA is considering this issue as a separate agenda item. When it is to be considered by the SBI, it should be, procedurally, legally, in the same manner. You cannot give unequal treatment to one subject in two different bodies at the same time. Our request was clear, simple and very straightforward; that, yes, both bodies should consider it. Now to give it a twist by giving it to the SBI with the explanation that it is left to the SBI to see how best it can deal with it; whether to consider it in a contact group or whether to deal with it in the corridors of the Bali Conference Center, that is not something that we wanted. If you want me to be more clear, we want it to be considered in an equal manner with the SBSTA. So, that's up to you as the Chair, an experienced Chair. I am sure you will not put it under any other matter, that's not what we wanted. You will not subsume it – as you have been using this word very often in the past negotiations – under any other subject. It is very clear that we want it to be considered as an independent item, a stand-alone item, a single item, under the SBI agenda. English is also not my mother tongue. But, I think I am sufficiently clear.

Chair: [Laughter] English is not my mother tongue, or father tongue, either [laughter in the hall]. But, I suppose all of us understand each other perfectly well, my dear brother. My understanding on the basis of your clear, unmistakable words in plain English – and good, plain English, I have to admit that – was that the request was not for a new, additional agenda item. If you say that it has to be a new, additional item, as everybody in the hall knows, there is a procedure for the SBI to deal with the proposal for a new, additional item.¹⁷ Then we act accordingly. It was my understanding that it is not a request for a new, additional item. Putting that aside, then the question was how to consider it. The question of how to consider it has two aspects; procedure and substance. As you recall from our informal consultations last night, you stated that you would await the outcome of the discussions in the Bureau, which I reported as it happened and the memo which I received. Still, if the G-77 would like to start consideration of the matter at this moment, I would discontinue the consideration of sub-item 2 (d) – Election of replacement officers, where I was cut off by a point of order. I would discontinue that and immediately turn to what I consider to be an unresolved issue, and you corrected me and said that in your view it was not unresolved. Fine, still a matter to be decided, whether we call it unresolved or not. So, if the house wants to consider that particular matter referred by the COP to the SBI, the Chair is in the hands of the house.

Saudi Arabia: I think our understanding is that we requested yesterday to have a separate agenda item. There is

no change of the position of the Group. As being correctly said by our able Chair of the G-77 and China; he made it very clear in plain English – even though English is not his father language, as he said, or you said – that we would like to see this item as a separate agenda item. So, having said that, I think not only on the basis of the memo that you received, but we need to see the record of yesterday's deliberations, and we would like to immediately discuss this issue and not any other issues.

Philippines: Philippines supports the position of the G-77, China and Saudi Arabia on the discussion of the issue of technology transfer. This is consistent with decision 13/CP.3 stating that “the Subsidiary Body for Implementation will, with input from the Subsidiary Body for Scientific and Technological Advice as appropriate, have responsibilities for assisting the Conference of the Parties in the assessment and review of the effective implementation of the Convention with respect to the development and transfer of technology”.¹⁸

Chair: Let me put the question very squarely to the Chair of G-77, and then we have to proceed. Does the G-77 like to propose the matter referred to us by the COP as a new, separate agenda item?

Pakistan: I thank you for giving me the floor. But, I must admit that I am increasingly being discomforted by you putting words in my mouth. Why would we explain the rationale of a decision of the COP? We explained what we want from the COP. It surprises me that the Chair is now asking the G-77 once again to explain. Obviously, for all reasons, if I say, yes, that we want a new agenda item, it will become a point of discussion. And then you will say that, well, the new agenda item requires this; it has to be tabled, proposed and endorsed. No, we want you to follow the COP decision. The COP decision is very clear. It's even reflected in today's Earth [Negotiations] Bulletin, which we all read before coming to this room. It says very clearly what the COP decided, and it says very clearly what the SBI should do. So, I am reluctant to use the words you want to put in my mouth, with due respect for your experience.

Chair: I am not trying to put words in anybody's mouth at all. But, I have to be absolutely clear, because the state of discussions yesterday evening – everybody remembers – gave me the clear indication that there was no request for a new, additional item. But, as we are listening now, it is a different ball game. Fine. Is the house in agreement with the introduction by the Chair of adding a new item: “development and transfer of technologies”? This is the Chair's proposal – in light of the discussion that has taken place; in light of the COP decision yesterday; and in light of everything that has transpired in the meantime; there is a proposal by the Chair for a new item, “development and transfer of technologies”, to be added to our agenda of SBI 27.¹⁹ [Pause] Sometimes I feel the urge of being gavel-happy. But, it seems that there are a number of names asking for the floor – negating, in fact, preventing the Chair from being gavel-happy. I have Egypt, Ghana, Japan and the United States.

Egypt: Egypt supports strongly what has been asked by Pakistan on behalf of the G-77 and China, Saudi Ara-

bia and other Parties to consider the issue of technology transfer as a new, separate item on the SBI agenda, before proceeding to the discussion of any other items.

Chair: [addressed to Ghana] I suppose you asked for the floor to support the proposal by the Chair; that is, the new agenda item proposed by the Chair – “development and transfer of technologies”. I hope other colleagues who ask for the floor would pronounce themselves on that particular proposal by the Chair.

Ghana: Precisely, Mr Chair, that is what we are looking for, and what you have said, I think, is in line with the COP decision. And I think we have got to make it clear. We say it is not a new agenda item because it is already on the COP agenda and the question we had yesterday was of attribution; which of the bodies under the COP is dealing with that agenda item, and the COP decided yesterday that the SBI as well as the SBSTA should consider this item. Therefore, it is incumbent upon you as the Chair of the SBI to ensure that this agenda item is reflected on the SBI agenda; that is what you are doing precisely and Ghana supports you on that.

Japan: I always have the greatest respect for how you lead the negotiations and also even the discussions among us. But since my mother language is not English, I also have to ask for clarification again. What is it exactly that you are proposing? As the Chair’s proposal, you want to put an official agenda item under the SBI – a single standing one – on this “development and transfer of technologies”? And if so, since yesterday, as you recall, we’ve been coming back and forth on this. Parties keep stating the same opinion, and somehow the contents of the negotiation, discussions among the Parties, has changed. Instead of having the gavel here, I would like to have informal discussions, and even a decision, here. Japan would like to propose to take some kind of a recess, even convene informally, to discuss this specific issue. Otherwise, at this moment, at least Japan cannot agree to this specific proposal coming from you at this specific moment. So, again, let me just repeat, Japan would like to see some kind of a recess at this moment, in order to discuss informally, to have consultations on this specific proposal.

United States: I thought that the groundwork that you laid yesterday would be continued. But, obviously we have gone in a slightly different direction. Given the state where we are now, I would like to make a statement

on behalf of the Umbrella Group of countries (Australia, Canada, Japan, the United States, New Zealand, the Russian Federation, Kazakhstan and Ukraine). Before considering how to proceed with the procedure, we need to seek clarification on your proposal that was generated from the request by the G-77 in terms of what would be considered under this agenda item. The Umbrella Group has put much time and effort into the issue of technology transfer under the SBSTA, as we all know, where it is being handled. And all Parties have put considerable time this year to resolve differences and come to a potential COP decision at this meeting. The issue of technology transfer has, and continues to be, appropriately addressed under the SBSTA agenda and we would be concerned about the replication of agenda items under both Subsidiary Bodies. We are uncertain about the context and substantive interpretation of the proposal the G-77 put forth earlier. In order to allow clarity on how to proceed, we propose the SBI Chair to consider undertaking informal consultations among Parties on this issue. The Umbrella Group would like to see the issue of technology transfer dealt with efficiently and practically. We anticipate the swift resolution of this matter with the cooperation of all Parties present.

Chair: I have China and Portugal on the list. Let me, with your concurrence, close the list after Portugal, and try to come to some sort of decision on this matter.

China: If possible, I would like to intervene after Portugal.

Portugal (EC): Thanks to our Chinese colleague for allowing us to go first on this one. And the EC is more than eager to proceed with other important issues like the Adaptation Fund and I/CP.10, as we explained in the beginning. But, of course, this discussion is also very relevant and important. Our understanding from yesterday from the COP decision is that it was decided that the SBI has to consider the issue of technology transfer. And we abide by that decision. We believe it is a very good idea; it is an important one. But, as we explained, there are several ways

Courtesy: UNFCCC of taking on board that consideration. You suggested one. There are other alternatives. Two other alternatives have already been suggested today. I believe this body probably is not ready yet to take a full decision on that one. I am ready to take part in any setting or format that you decide, in order to allow us to move in a fast and more efficient way. ➔



China: *First, I would like to maybe make some proposal with regard to your proposal on this agenda item. I think it is not your proposal to add agenda items to our agenda. It is your [responsibility] to execute, to exercise the instructions of the COP decision. So, it is not your proposal, Mr Chairman, I should say. Second, I think it is very disappointing that some developed countries, or Annex I Parties, negotiate in bad faith. If my memory serves me right, and if I understand the English language well, there was not one single statement which opposed the proposal by the distinguished delegate of Pakistan on behalf of the G-77 and China to have a separate discussion of technology development and transfer in SBSTA and SBI. I am not sure why those countries, Parties, raise objections here in this room. Is it because there is no press before us? Is it because there are journalists in the plenary of the COP, so they keep silent? So, I think, if they are going to oppose this agenda item, please raise it and speak openly in the plenary of the COP, not here. We [are], here, just to exercise the decisions of the COP. We are not negotiating here whether to have or not to have such an agenda item. It is for sure that there is such an agenda item in the SBI. We are not going to discuss it any more to have the agenda item and to have a contact group in this regard. We discuss it within the contact group.*

Chair: *Dear colleagues, I suppose all of us should be clear that, it is my understanding, nobody in the hall questions the validity of the COP decision and the referral of the matter to the SBI. What I have heard, on and off the floor, from different Parties and major groups, has been questions and ambiguities on procedure and substance and not opposition to the discussion of the matter as such. It is a valid matter. It has been raised by the G-77 on a valid basis and has been decided on by the President of the COP accordingly. So, what we have been discussing since yesterday afternoon is exactly how to deal with it under the SBI. So, the question of legitimacy is not at question at all. The question is how to do it, and the proposal I made, was my personal proposal simply because the COP President has just referred the matter to the SBI, without indicating that it has to be discussed as a separate, independent, standing agenda item. I wish the communication from the President of the COP were that explicit. Nor was it that explicit in the course of the exchange in the Bureau meeting today. But, nevertheless, we are seized of the matter and we are dealing with it. In light of the discussions and the suggestion made for further consultations, may I propose to colleagues – everybody – that we engage in informal consultations between 1 and 2 in the afternoon and take up the matter at 3 o'clock so I continue with the consideration of the agenda items. It is a very practical suggestion to engage in ad hoc open-ended informal consultations, between 1 and 2, myself personally involved in the matter, in order to come to some understanding and start discussing the matter at 3 o'clock when we reconvene in the plenary. And I give the floor to the G-77 – Pakistan.*

Pakistan: *We have heard a number of interventions now. And none of them, it appears, have opposed the COP decision. All of them have shown the inclination to discuss the issue, although some asked for explanation, which we*

will be able to provide in a moment. We are encouraged by this thinking that this is an important issue which needs to be discussed here. As you have heard from some of our Group members, we are very sensitive when it comes to the consideration of this subject, and the deliberation of this subject, by the UNFCCC, whether it is in the SBSTA or whether it is in the SBI. SBSTA is a technical body, which is considering the subject in the context of the EGTT. When we explained our proposal yesterday morning we put down the rationale that there are COP decisions – CP.1 – which lay down the basic framework for the SBI to consider this item in a certain manner. I can assure colleagues that we will not discuss the design of postage stamps under this item. We will only discuss what comes under technology development and transfer. We thank them for their expectation that they look forward to an efficient and practical manner to discuss this item under the SBI. While we are ready for your proposal to go into informals, we do not see any need for that, given the interventions that have just been made. All of them have shown readiness to have this item on the SBI agenda. If you want me to explain further, we will take up this item and discuss it in the context of the previous COP and CMP decisions for the SBI to consider, in light of the developments that have been taking place on this item when it is considered. We cannot prejudge, at this stage, what we will bring under this item to the table when we open for discussion. All of us will contribute to those deliberations.

Chair: *I have three more requests from the floor. Let me give them the floor and try to see if we could proceed with our work. But, even if we fail to proceed with our work, it's alright. The house, the intergovernmental body, is in charge. The Chair is in the hands of the intergovernmental body.*

China: *China is, of course, very supportive of the statement made by the distinguished delegate of Pakistan on behalf of the G-77 and China. Mr Chairman, as you may recall, the G-77 and China were very cooperative yesterday. Actually, we would like to have [had] this issue solved first yesterday. But, in a very cooperative spirit as you had not yet received instructions from the President, we agreed to go along with the rest of the agenda items. But, now, Mr Chairman, you have seen the instructions from the President and, I think, you know how to go along with this agenda item. I think, as the Chair of the G-77 and China has already pointed out, it is unnecessary to have any informal discussion of this agenda item. I think what you should do, I repeat, is to have this as a formal agenda item of the SBI and to form a contact group under this agenda item to discuss the details of this agenda item. I hope this is clear to you, Mr Chairman.*

Chair: *My dear Chinese colleague, I suppose I have alluded to the procedure for inclusion of a new agenda item to the agenda previously. So, if we were to decide on a new agenda item, there is an established procedure for it. We might follow that. But, I am sure you concur with me that the President of the COP has not referred the matter to the SBI with a clear instruction that it be discussed under a separate, independent agenda item. I wish the instructions were that clear; it would have made it easier*

for everybody, particularly for the Chair. Before giving – again – the floor to China, who wants to have the floor, I have the United States, Saudi Arabia and Ghana.

United States: Based upon the last clarification you made, I will make my comments very brief. I was going to draw attention to the procedure you referred to. Also I would question that adding, subtracting or moving items around within the agenda of subsidiary bodies obviously has implications. So, to protect us from falling into contradictory positions, we retain our request for informal consultations to better flesh out and understand where this item should be, how it should be treated, and what exact treatment we would give it, if, in fact, an agenda item were to be added at some point.

Saudi Arabia: I think, in the absence of strong objection, your proposal is still valid, and I think we need not waste time and try to have a ruling to have a separate agenda item. As our colleague from China and our able Chair of the G-77 and China said, we could not have had the whole SBI plenary yesterday until this issue be resolved. But, for the sake of cooperation, we thought that our partners would also be cooperative and that this matter be immediately solved this morning. And we see that there is willingness to postpone that to the afternoon. Definitely we cannot accept that. We started the discussion and we should finish it now. As far as the record [is concerned], we requested – Saudi Arabia requested – to have a written script of the deliberations of the COP in order to truly reflect what has been exactly decided upon. We are of the opinion that the President of the COP has instructed the SBI to discuss this item as a separate agenda item, but we remain to be corrected when we look at the record. So, our suggestion is that if the record is not available, we can recess for five minutes, look at the record and come back and discuss the issue. Otherwise, we cannot proceed with any other agenda items, as you suggested. We cannot postpone it to the lunch hour. We need to immediately solve this issue. This is not a good sign for our good intentions and good spirit to begin our discussion and session here. How can we look at the Roadmap for the future, if we start now to trick each other and try not to solve or proceed with the issue of developing countries. I think this is very serious.

Ghana: Mr Chairman, I think you have received clear instructions from the COP President relating to the COP decision made yesterday. And I am just wondering how you want to treat that instruction from the COP; whether you want to take it under the Adaptation Fund, or you want to take it under capacity building. I suspect that you will take it up under “development and transfer of technologies”, which obviously should be a separate agenda item. And I don’t see the need, Mr Chairman, to postpone making a decision within the SBI immediately and proceed with our work. I would urge you, Mr Chairman, from your experience, to consider this issue and let us get a resolution immediately.

Chair: I have a number of colleagues. Let me give the floor, first, to those who haven’t had it before.

Gambia: And Gambia really supports what the G-77 and China Coordinator has reiterated, and China, Ghana

and Saudi Arabia. Mr Chairman, this was brought up yesterday and as our colleagues have indicated earlier, there was no objection from the other groups. Probably they have been thinking of something else and not what was tabled. If that was the case, I think we should put it on the table and discuss it and move further. Because I don’t think this is an advantage to any of the groups, and we need to move further. Because yesterday there was no objection and today there seems to be some sort of misunderstanding, or the impression of misunderstanding, of what happened yesterday. So, Mr Chairman, I am in support of what the G-77 and China have indicated. We need to move. And if we need to take a recess, I believe, it has to be for five minutes, to clarify, as Saudi Arabia has said, because this was tabled yesterday.

Chair: I am informed that the verbatim record of the discussion that transpired yesterday at the COP is, hopefully, on its way here. I hope it will be received within the next few minutes and then I will read it in toto. I see Australia has asked for the floor.

Australia: Thank you, Mr Chair. At this point, we withdraw.

Chair: Thanks. I have China, United Republic of Tanzania, Japan and Egypt. Tanzania, Please.

Tanzania: We wish to support the G-77 and China on this issue. We also support what Ghana and other colleagues have just said that the instruction of the COP is to have this agenda item here in Bali and within the SBI. The issue of development and transfer of technologies can no longer be a SBSTA issue. We need to see the implementation of the available technologies. Implementation of adaptation technologies are [is] of particular importance to my delegation. And I sincerely hope; we wish to agree to have serious discussion on adaptation as an important agenda item of the SBI.

Chair: I have China, Japan, Egypt and Bangladesh. Let me give the floor first to Bangladesh, and then go back to the list.

Bangladesh: Actually, we know that this work, this proceeding, should have been guided by the COP decision. But, unfortunately, it took a long time. So, we support the COP decision and what the G-77 and China President [Chair] said, also what has been said by Saudi Arabia and others. We support that view.

China: As the distinguished delegate of Ghana has already pointed out that you have clear instructions, or you should have, clear instructions from the President of the COP. Otherwise, it will be impossible for you to proceed with your work today, because we said yesterday that we will resolve this issue first and not after the completion of the work today, of course. Mr Chairman, really we are humiliated by the negotiations. Our ancestors from the developing countries were bullied by those countries. We do not want this repeat [repeated] again, now. So, Mr Chairman, we should keep to what we have said, and we should mean what we have said. And we cannot agree on one occasion and withdraw our agreement on another occasion. I do not think that’s a way of negotiations. Mr Chairman, the international community has high expectation from the Bali Conference, and I think we should meet

that expectation. As many delegates pointed out, the issue of technology development and transfer is very dear to their heart. And I think it is also the consensus of yesterday's COP. I think we should abide by the decisions of the COP and go along with our work as agreed yesterday and keep this as a separate agenda item under our SBI agenda items. Mr Chairman, if you do not have clear instructions from the President, I would like to give you a humble suggestion to adjourn our meeting and to resume the COP immediately to resolve this issue, but not the informal group or informal consultations – in a very formal way. I think, of course, maybe after my intervention, you will have the records of yesterday. That would help.

Chair: In fact, my dear colleague from the Secretariat just left the podium to go and expedite the matter, so the verbatim of the discussion of the COP yesterday morning would be brought here as early and expeditiously as possible. I have Japan, Egypt, Mali and Cameroon. I start with Mali and Cameroon and then go back to Japan and Egypt.

Mali: I think perhaps by changing the language we understand each other better. We've been speaking in English up to now. Now, I am going to speak in French. I was at the COP meeting yesterday, right from the beginning to the end. It was clearly said that this agenda item on "development and transfer of technologies" must be addressed by the SBI, as in the SBSTA, given the particular importance of this issue, which, I think, is right at the heart of combating global warming, particularly for developing countries. Those are the ones polluting our atmosphere, but, on the other hand, there are others most affected by the consequences of global warming. So, I think it is not useful for us to be still here and discussing how to organize informal consultations just in order to put an agenda item in the agenda, which everybody agrees is essential, particularly to those with least capacity to deal with climate change. I think it was very clear and if we listen to the recording of this meeting yesterday, we'll hear that. But, it is a waste of time not to address a subject which is of concern to everyone. And there is no doubt that climate change affects people, and it affected Bangladesh just recently. So, I think it is unbelievable that one should come more than 10,000 kilometres and travel more than 24 hours and then have to spend so much time whether to put an agenda item on the agenda. People will ask us whether we are really determined to do something so the developing countries can deal with and address climate change. I hope that by speaking French I have made things clearer.

Chair: Thank you very much. Indeed you have. *Merci beaucoup, mon cher ami.* Then, we go to another, two other, French speakers; Cameroon and Benin. Cameroon please.

Canada: That was Canada, Mr Chairman.

Chair: It is alright if Canada would like to take the floor instead of Cameroon. Up here [on the monitor] it appears as Cameroon. But, you might speak in French! [Laughter in the hall]

Canada: I certainly listened with interest to the dialogue this morning. If it shows something, it shows that all Par-

ties are interested in the issue of technology development and transfer, and certainly this issue needs to be discussed and we need to bear with each other. However, as I understand, when you referred to the letter, the communication, the matter has been referred to the SBI for consideration, and the discretion rests with the SBI. I would note that we have been part of the UG [Umbrella Group] statement earlier this morning that sought increased clarity from the G-77 and China on this proposal. We are interested to understand better how they would like to approach this in terms of the subject matter that they would like to discuss. Not having been provided, perhaps, with early warning on the discussion that transpired yesterday, we were unable to respond. But, I would hope that perhaps your offer to hold informal consultations between 1 and 2 today could be taken up by Parties, so we could seek some understanding and come back and use our time very productively to not only advance this discussion in this Body but also advance the other agenda items.

Chair: While, as I said, there are other colleagues who have already requested the floor, I received the text at this very moment. Do you want me to read it without giving the floor to Japan, Egypt, Benin and Ghana? [Pause] If so, I will read out the text I have received from the Office of the President. I quote (It is four paragraphs only):

Pakistan: What we want from you Mr President is that this subject be considered as a substantive issue by the SBI. SBSTA can provide input under 13/CP.1, 13/CP.3, paragraph 3 of 13/CP. 3 clearly outlines ...SBSTA can continue discussing this issue under its own mandate on technical matters.

President: Note that Pakistan (G77) requested to move this item to the SBI. Can I take it that the Convention [Conference] agrees? So that the agenda item is moved to the SBI?

Pakistan: Chairman [President], sorry for your indulgence. We didn't ask for moving it from SBSTA to the SBI. We requested that SBSTA can continue to discuss this in the context of the EGTT, but when it comes to the review of commitments on the subject, then SBI can take over and discuss it and consider it. Thank you.

President: I think we have all heard what the honourable delegate from Pakistan has proposed. So I ask delegates whether we can agree to that. Can we agree with that? I see no objection to this effect. Then it is adopted.

Chair: End of quotation. End of the verbatim from the Office of the President. So [Pause]. Pakistan please.

Pakistan: I am grateful to you for this clarification. I am also thankful to our partners, whether from the G-77 or from others who have been engaging with us in this dialogue this morning on this important issue. We do understand that the objective is to have a deeper view and deeper understanding of what we desired when we wanted this issue to be considered by the SBI. And we reported to the President of the COP the verbatim remarks, we said that G-77 want this agenda item be moved. So that ambiguity also stands cleared. We also made it clear that we did not want it moved but that we wanted it to be considered by the SBI as well. So, your task perhaps becomes rather

easier now after reading this, which also explains to our partners, to the United States and Canada, what exactly we would like to consider when this item is taken up by the SBI. That was there in my submission to the Chair [President] of the COP. So, with these exchanges that we've had this morning and the latest verbatim record of the COP decision, I don't think we can wait any longer for you to approve the agenda with this item, as has been very clearly mentioned in the text record of the COP decision and as we have heard very clearly you read that decision to us. I am hopeful, Mr Chairman, given the sometimes very sentimental observations of colleagues from the G-77 on this issue. We want to send very positive signals to the world, and the eyes of the world are focused on Bali. If you read any newspapers this morning, they say that the negotiators in Bali have gathered to take important decisions on the Bali Roadmap. We don't want that our efforts should be blocked by creation of early humps, speed-breakers to this Roadmap. We want to move and to proceed along to achieve the objectives we have gathered here for, coming from far-off places and long distances, still recovering from jet lags – in addition to my bad throat. We are still optimistic, Mr Chairman, we are optimistic, that our partners will no longer, will not any more raise more further questions – sorry for my jumbled vocabulary this morning. But, now we are hopeful that in view of this clarification, there is no further need for our colleagues to ask, to seek, explanation on what we intend to discuss under this issue. Once you adopt this agenda, we can go out and have a cup of coffee with our friends and discuss what exactly would be there. If they feel that there is something they would not like to discuss under this item, we can also hear that. But, to round it up, Mr Chairman, and to conclude, it is our hope as the largest group of developing countries, representing more than 130 developing states, who are most vulnerable to climate change, who need technology to face this challenge; who need help and assistance in technology transfer and adaptation and financing, for this important issue. We leave it to you, Mr Chairman, and to our partners, to help us and to proceed with us in making this Conference a success. We are ready, we are engaging in a positive spirit. We hope that our partners' spirit will be reciprocating in equal terms and in equal degree. [Applause in the hall]

Chair: I suppose the verbatim record, as I read, is quite clear. And I have been trying to draw the attention of the colleagues here to that. I had the communication from the Office of the President previously, which I read, and now the verbatim. I proposed to have, to engage in informal consultations between 1 and 2 and come back here at 3 o'clock. It was rejected. So, I am not going to repeat that again, simply because the colleagues do not seem – part of the intergovernmental body – do not seem interested in informal consultations. Therefore, if you agree – I look at my watch and it is five to 12; that is one hour left of the morning session – we can proceed with dealing with this item, with the matter referred to the SBI by the COP, at this moment. If the Chair of the G-77 agrees, I give him the floor as the first speaker on the matter referred to the SBI so that other colleagues would have the opportunity to listen

to the substance of what the originator of the proposal – G-77 yesterday in the COP plenary – had in mind, has in mind, for the discussion of the matter here, and then we continue. Do you agree with this suggestion?

Pakistan: We have no objection to discuss this issue on the presumption that it is now taken on the agenda. Did you gavel it? I did not hear that.

Chair: We are considering it.

Pakistan: You have to adopt it, to consider it.

Chair: I said it a while earlier. I proposed a new agenda item – “development and transfer of technologies” – and I asked everybody to lend your support to that proposal by the Chair so we do not have to go through the established procedure. It was a proposal by the Chair, it still remains the case. It is still on the table. The proposal by the Chair, a new item – “development and transfer of technologies”.

Pakistan: Mr Chairman, we have clarified and my colleague from China was very clear. Submitting that what we are doing here, under your able command, is implementing and executing a decision of the COP, so, if you are putting a COP decision again to the house, for endorsement, you have done that and we have not heard any objection. So, if that is taken and if you confirm that endorsement by the house, those who have opted to remain silent and nobody objected to the words which you said about the COP decision, we are happy to proceed.

Chair: I suppose, as I read from the earlier communication and the colleagues who are here, members of the Bureau who were present in the Bureau meeting, the President of the COP made it very clear that he leaves it to the discretion of the SBI Chair and the SBI to find the most appropriate format to discuss the matter. On that basis, I made the suggestion; the new agenda item – “development and transfer of technology”. It is a proposal by the Chair to the house. If you agree, I exercise the gavel and give the floor to the Chair of the G-77 to tell us what exactly they have in mind for the substance of the agenda item, of the discussion of the matter referred to the SBI by the COP. If I see no objection, I am going to exercise the gavel. [Pause] I see Japan asking for the floor, not necessarily nodding in the wrong direction! [Laughter in the hall]. Japan has the floor.

Japan: Thank you, Mr Chair. Well, since I asked for the floor, it's a long time. Actually, last year in Nairobi, I lost my memory stick and it looks as if I keep losing my memory. But, fortunately, still I know what I want to say. Actually, thank you for delivering the clarification, I mean, reading out the sub-script of yesterday's discussion at the COP. Because when it was delivered, probably not only me, but actually I was quite shocked and couldn't understand anything and what actually happened. And after the evening informal session with us, the remaining Parties, who remained in the room, had a chance to watch a nice movie show on my small TV of the Webcast. Even afterwards, I do not understand the content and the intent of the contact group on the matter referred to the SBI. That's why the first time I took the floor here today this morning, Japan suggested to have informal consultations to discuss this matter and you just said between 1 and 2, to be informally chaired by yourself. I think we can

support that idea, because we still need to discuss how to proceed in the best way on this agenda item. I repeat, I need to understand, we need to understand, correctly and perfectly clear, crystally clear, what could be the substance of this specific agenda item, separate item or immersed with something that already exists under the SBI. Let me say one thing. The technology issue is very, very important. And this feeling is shared by all countries in the room, whether they are the Annex I or non-Annex I countries. So, technology is important, but it is not the only issue we are talking about under the SBI, as you know very, very well. As you mentioned at the beginning of this day, we still have to discuss whether [to have] contact groups or informal consultations on other important issues under the SBI. So, that's why I suggested first to have an informal one, try to understand clearly what the substance could be under this agenda item or not, or how we could proceed in the best way. So, again, I can support the proposal to have informal or whatever form of consultations on this specific issue. But, Japan, at least Japan, cannot support the idea of your proposal to adopt the agenda officially or formally under the SBI, at this specific moment.

Chair: Well, I was under the impression, perhaps prematurely, that we could bring the matter to a happy closure, and then decide on the title of the new item and then start its substantive discussion. But, it appears that it may not be the case and I see that the list is getting longer and longer, with new colleagues asking for the floor and some of those who have already exercised their right to ask for the floor again. I have Yemen, Ghana, United States, Canada, Australia, China and South Africa. And China on a point of order. China on a point of order, please.

China: As I have already pointed out, it is not your position to make any new proposal to this SBI plenary. It is your function to execute the decision of the COP. So, if there is no consensus in this room, are we going to override a COP decision by the SBI? I would like to seek clarification from the Secretariat. Is this possible? I think, according to my common sense, it is not. This is a subsidiary body of the COP, and has to execute the decision of the COP. There is no bargaining on that. I hope you should [would] withdraw your proposal.

Chair: Thank you very much my dear Chinese colleague. The question is not for the SBI Chair to go against the decision of the COP. The decision of the COP, as read [out] in the two memos, has been to refer consideration of the implementation aspects of the question of tech transfer to the SBI. But, how the matter is going to be discussed under the SBI is left to the SBI; that is, the intergovernmental body, inclusive of the Chair. My suggestion for the proposal was in fact an attempt to formalise, if acceptable to the body, the referral of the matter by the COP. So, and you have noted in both memos – the verbatim and the memo from the Office of the President – neither of them are clear enough in saying that this matter is to be considered under a separate agenda item. It is not clear. It is left to the discretion of the Chair and the body. And the Chair is in the hands of the body. And for the past hour and a half, I have sat here and listened to you. I have made a number of suggestions. It has not been agreed by everybody. Then,

I have continued the discussion until we come to some common understanding on how to proceed. It seems that Pakistan, again, on a point of order. Pakistan please.

Pakistan: We are becoming increasingly frustrated with this exercise. I think we have made it clear three times, from this podium here – the Chair of G-77 – and our Chinese colleague has explained it at least three times, also. The verbatim record of the President of the COP very clearly says – you can read it again and again to us – that the agenda item is moved to the SBI. Our understanding cannot be different from what he has just said. We cannot interpret it in different angles and in different positions. We should adopt the agenda in compliance with the COP decision. Then, you have the right and the prerogative, as the Chair of the SBI, to ask the house to deliberate upon the manner in which it wishes to consider it. First, our request on the procedural matter is that you should follow the order of the COP by adopting the agenda, having moved it as well to SBSTA and the SBI together, and consider it once the agenda is adopted. Then, we are in your hands to discuss, to any length, the various dimensions, aspects and manners in which we can discuss this issue to 12 o'clock this evening.

Chair: Thank you very much. Just a moment [consultation with the Secretariat]. My dear colleague, the suggestion I made on the title of the agenda which I proposed to be adopted by the body was “development and transfer of technologies”. It is exactly the same title under Agenda item 6 (c) of the Conference of the Parties at its thirteenth session. “Development and transfer of technologies”, so, I put that to the body to be adopted, and then, I suppose, nothing has been said in variance with the decision as referred to us by the COP President.

Pakistan: To help you move forward, I request my G-77 colleagues not to take the floor on any other matter and let you have – adopt – the agenda now.

Chair: [Pause, looking around the hall]. Well, I wish I were in a position to adopt the agenda item with a simple exercise of the gavel. I see some colleagues shaking their head in the wrong direction. I wish everybody shook their head in the right direction. That would mean, I raise this [gavel] and let it drop. But, I see some people who say no. And that's why, my dear colleague, I asked for informal consultations in order to discuss these matters between 1 and 2 and come to the plenary at 3 o'clock, all of us in a position for the Chair to exercise the gavel at the first moment and then continue.

Pakistan: I was shaking my head because I have a severe headache [Laughter in the hall]. So, unless the people use their energies to push the button, you may be seeing the wrong nods. I have asked my G-77 colleagues to concentrate on what we will be doing when this subject is adopted. So, with this request, we are ready to go into informals once the agenda is adopted, and we will be there, in full strength, with my colleagues, who will explain the rationale for this decision. We are in your hands now to adopt the agenda right now before we go for lunch.

Chair: Thank you very much. I suppose, sitting up here, my dear colleagues, I can see everybody in a panoramic view. I can just pan from right to the left, then I see some

people shaking their head in the wrong direction. I could say: am I in a position to adopt the new agenda item “development and transfer of technologies”? If I hear no objection, I am going to exercise the gavel, unless delegates raise their plates, not shake their head. If I see colleagues raise their...yes, I see a couple in that wing [looking to the left side of the hall] and then a number...So, I am afraid, my dear colleague, that I am not in a position to exercise the gavel, simply because a number of other colleagues have raised their flags in protest against the exercise of the gavel by the Chair in order to adopt the new agenda item as proposed from the COP agenda – “development and transfer of technologies”. So, it was in that light, I did not want to push anybody to the position of shaking the name plate in the air indicating their nay answer. But, now it seems that I am in that position and some colleagues have said no. Not to the substance, as I understand. No to the particular decision at this very moment, pending further consultations. China please.

China: Mr Chairman, I think it is really unnecessary for you to gavel again. Because the President has already gavelled. So, it is unnecessary for you to gavel again. And we just move on with the agenda item which has been referred by the COP decision, by the COP President. So, please use your discretion, to be the executor of the COP decision, not as the decision maker, Mr Chairman.

Chair: Thank you very much my dear Chinese colleague. I suppose there is a subtle difference here. The matter has been referred to the SBI for consideration by the COP. The COP has not decided that the SBI will consider this matter under agenda item entitled “development and transfer of technologies”. I am afraid that’s my clear understanding of my exchange with the President. The President said: “It is up to you and the SBI to decide how to deal with the matter”. I am sorry. It is a very clear instruction from the President – the matter to be referred to the SBI. He does not say that this particular agenda item will – or shall – be considered by the SBI. That is why we are sitting here to discuss the matter. If the instruction were clear, you might, my dear colleague, or one of your distinguished colleagues, go to the Office of the President and have him send me a clear instruction “that this particular agenda item will be discussed by the SBI” in so many words, and I will act on it accordingly. But, the two memos I read [out] do not give me that clear instruction. It leaves it to the SBI to find the best, proper – the most appropriate – way of discussing the matter. I cannot assume, my dear colleague, that the sub-item or the new item “development and transfer of technologies” is already part of the agenda here in the SBI 27, just because of the decision that was made by the COP yesterday. It was a matter of referral, not sending a very clear instruction that this subject will be discussed under this title. So, that is the situation. China, again. I suppose on a point of order. I have quite a long list of requests. I consider your intervention a point of order.

China: It is a pity that it is not able for us [that we are not able to] translate a COP decision into our action, which actually the decision has already been reached yesterday. And I think in this way our action to address

climate change will be postponed even further. I think the transcript you have already read [out] is very clear. The proposal is from the Chairman of the G-77, which is represented by the distinguished delegate of Pakistan, to move a part of the agenda item – “development and transfer of technologies” – to the SBI and there was no objection in the room yesterday. So, that is to say that this agenda item, part of this agenda item, has been already moved to the SBI, without any further action, without any further agreement – needed. So, that is the issue. I think we just proceed with what the COP has already decided. I think it is very clear. The President need not to say that. As the SBI Chair, you just carry out the agenda item in the SBI. It is unnecessary, because the Chairman of the G-77 has already asked and the COP has already agreed upon that. So, there is no question about that. And we [should] just go on.

Chair: Thank you very much. Let me give the floor to other colleagues who might bring us some further discretion. And I am sure all of us are enjoying this exchange in a rather peculiar manner, because it is educational. It is educational; how we read the decision of the COP. I suppose, ...point of order, EU please, and there is another point of order, if I see further down. Portugal please.

Portugal (EC): Well, congratulations to everybody for the big efforts people are putting into trying to solve this one. But, I don’t think that there is any doubt that there is consensus that we should discuss this under the SBI. But, apparently, there is some disagreement towards the format and the form this discussion will have. What I would like to ask is if you could suspend the meeting for ten minutes, and just go to have some consultations among some Parties.

Chair: Thank you very much. Are the colleagues in the mood to suspend for ten minutes, and ten minutes only, not the UN time [laughter in the hall]. The UN time, ten-minute suspension could turn into two hours, three hours suspension. If you really mean ten minutes, I also need to get away from the podium for a few minutes, by the way [Laughter in the hall]. But, other than that, if you keep me here, I’ll stay here. But, if you want to engage in ten minutes suspension, if you agree, then the meeting is adjourned at 12.20. We will resume at 12.30. [Gavel]

[The plenary was resumed at 12.30.]

Chair: May I resume the second plenary after ten minutes of break, which, I suppose, served all of us well – we flexed some muscles and held some informal consultations. Hopefully, we should be in a position to come to a closure, a happy closure, of the outstanding matter. The colleagues on the floor have had a difference of opinion on the exact nature of the decision by the COP yesterday morning on the referral of consideration of certain aspects of tech transfer – implementation aspects – to the SBI, and I suppose because of that difference in opinion, perhaps, we may have to rely on legal advice.²⁰ The Chair was unable to come to a definitive conclusion on the basis of the verbatim of the discussion yesterday in the COP plenary nor the memo from the Office of the President. Because I failed to come to a conclusion on what exactly to do, and everybody listened to everybody else on what to do, then I

seek legal advice. May I give the floor to the Legal Adviser to guide us on this matter? You have the floor, Sir.

Legal Adviser: I think the issue arose during the discussion on the Organization of Work of the Session of the COP, and during that discussion, from the transcripts, it appears that the COP decided that this agenda item – “development and transfer of technologies” – would be referred to both the SBSTA and the SBI in accordance with their respective mandates. In my view – and of course, under the rules of procedure – the COP has the authority to allocate matters to the Subsidiary Bodies. In my view, once the COP decided that this issue would be reflected, or once it referred this matter to the SBI, I think, there is no longer any scope for the SBI to determine whether or not it would deal with the item. The item is automatically on the agenda of the SBI. The only thing that then remains for the SBI to discuss is, one, the scope of its discussion on that agenda item which has just been reflected in the agenda items of the SBI, and two, whether or not the SBI wants to discuss that agenda item at this particular session or at another session. In my view, the discretion of the SBI is only with regard to the scope and with regard to whether or not it wants to consider the issue at this session or at a subsequent session. Because of the volume of work, the SBI might not have the time to discuss that issue at a particular session at which it has been referred by the COP. Thank you.²¹

Chair: Thank you very much for your legal advice. I suppose, now it is a clear situation. Then, I have two [three] requests from the floor on the parameters of the discussions as alluded to by the Legal Adviser. I have Japan, UK and Nigeria.

Japan: Thank you, Mr Chair. Sorry to come back, again and again, and again. First of all, I would like to say thank you to the Legal Adviser of the Secretariat to clarify some of the questions we had, and I just have another – just one more – question for clarification. If you could clear the cloud in my mind, I'd appreciate it. The question is: So, based on the COP decision adopted yesterday, the SBI has a separate item on technology development and transfer or it is still under discussion? It will be on the agenda, not necessarily a separate, stand-alone agenda item; just the only one point I would like to know.

Chair: As I indicated, I have UK and Nigeria. I take UK and Nigeria and then give the floor to the Legal Adviser.

UK: It's a mistake. We do not need the floor.

Nigeria: Mr Chairman, thank you very much, and I thank the Legal Adviser for the advice he has given. Mr Chairman, we do not have anything to discuss further. The issue has been clarified and the matter is closed. There is no need for us to continue the discussion whether we are going to have a discussion in this session or next session. The point at issue is that this issue is part of the agenda and that is the clarification that has been sought, and the Legal Adviser has clarified it. And since that is so, the

next action for us to do, Mr Chairman, is for you to close the matter as a point whether it will be on the agenda or not on the agenda. The matter of how you deal with this in substance will come forth subsequently in whatever way you deem it. But, not now. Because the issue we were asking for was whether the issue is on the agenda or not, and it has been clarified that it would be on the agenda. So, we have nothing further to discuss.

Chair: Thank you very much, dear Osita. Well, I intended to give the floor to the Legal Adviser on the further query from Japan. I could wait and give the floor to Portugal – on behalf of the EU – and then that would be the last speaker. Then I seek legal advice and rule on the matter.

Portugal: Thank you very much, Mr Chairman, and thank you for providing us with the legal advice, which was very useful. And I believe, for myself and the colleagues sitting with me, the legal advice is very clear. The item is on our agenda. So, we can proceed with our work.

Chair: Thank you very much. I give the floor to the Legal Adviser. You have the floor, Sir.

Legal Adviser: To respond to Japan's question, yes, this is a separate agenda item. It will be included – or rather it should be included – with the title “development and transfer of technologies”, as it appears under the COP agenda. Thank you.

Chair: Thank you. With that clarification, I suppose, it is everybody's understanding, we are on the same wavelength, that the agenda item “development and transfer of technologies” is on the agenda of the SBI 27. As I see no objection, it is so decided. [Applause in the hall. Gavel.]



Courtesy: UNFCCC

Thank you very much. Well, as like everything else in life, we always get it the hard way. But, as I said, it's life. Multilateral, intergovernmental business is also part of life. We tend to disagree, we may have ambiguities, we may not be convinced, but at the end – thanks to the legal advice and everybody's common sense – we come to terms and we come to an agreement. And that I find educational, for myself and, I suppose, for others as well, to different degrees though. With this, I suppose we can go back to 2 (a) and then adopt the agenda, which we adopted yesterday provisionally. And at this moment the house should be in a position to adopt the agenda with the new addition as

was decided just a moment ago. I see no objection. It is so decided [gavel]. Thank you very much.

[Resumption of the consideration of Agenda item 2 (a) – Organization of work.]

The new agenda item (development and transfer of technologies) was taken up for consideration towards the end of the third plenary meeting, around 9p.m. and without the benefit of interpretation.²² The general discussion, as might have been expected, again took rather a long time and also proved contentious and, as it unfolded, appeared to be pitting the Chair against the G-77. The numerous statements by the Group's Spokesperson – Tanzania on behalf of the Group on this particular issue – delved into the substance of the issue and considered the establishment of a contact group to further discuss the matter a foregone conclusion – *a fait accompli*. The Chair, aware that opinions in the meeting were divided on this matter, tried to continue the discussion and invited other Parties – Annex I Parties – to join the discussion and help enrich it. The few interventions from Annex I Parties did not address substantive aspects of the agenda item, but instead called for informal consultations to further discuss the matter before a formal contact group would/could be established. Through a mixture of coaxing and exhortation, the Chair finally managed to encourage both sides to nominate co-chairs for the proposed contact group. Once the G-77 candidate was announced, the Chair urged the Annex I Parties to follow suit and come up with a name from their side. Following a brief suspension of the meeting during which Annex I Parties caucused among themselves, their co-chair candidate was announced, which allowed the Chair and the SBI to formally decide on the establishment of the contact group.²³ Thus the “bumpy”²⁴ start of the SBI 27 on the consideration in the plenary of the question of technology transfer came to a conclusion. The contact group started its work as of 7 December and held a number of meetings until the early hours of 12 December, when it reported to the SBI closing plenary on the lack of consensus on the text under negotiation. The work and the outcome of the contact group are beyond the scope of the present essay.²⁵

Some Reflections

As indicated in the introduction, the author, who was directly involved in the process of negotiations on the referral of a new issue by the COP to the SBI for its consideration, considers the process to be quite interesting, and even unique in certain respects, and hence of educational significance and value. It is exactly from this vantage point that he has undertaken to prepare the present essay in order to be able to reflect, as a multilateral diplomat, on the contours of negotiations and conduct of negotiators in action and produce a piece that could be read – and hopefully – used by those engaged in multilateral work, both national diplomats and international civil servants.

As alluded to by a member of the COP 13 Bureau, the way the matter was dealt with in the COP opening plenary “was not the intergovernmental [process] at its best”. This applies equally to the G-77 for resorting to

a surprise tactic which, as claimed later, had taken some Parties by “surprise”²⁶ as well as to the podium for taking a decision in a rather rushed manner without seeking advice or articulation of the matter under discussion – as befits situations where new or even seemingly unfamiliar proposals are raised from the floor. The author is unaware of any possible indication – whether implicit or otherwise – having been provided to or received by the presidency team of the proposal the G-77 intended to make at the opening COP plenary.²⁷

As evidenced by the state of discussions in the Bureau meeting of 4 December, it appears that an appropriate appreciation of the nature of the decision and its implications had not been fully grasped even at that stage – particularly in light of the rather faulty picture and perception of how the matter would be further pursued by the G-77 in the SBI second plenary meeting. The substantial difference between the content of the legal advice provided in the course of the first plenary meeting (allusion to Rules 9, 10 and 13 of the Rules of Procedure) and the advice provided in the second meeting (allusion to paragraph 7 of Rule 27 of the Rules of Procedure) also points in the same direction. Had the COP Secretariat properly grasped the concrete implications of the G-77 proposal in the first place, as well as the implications of the subsequent COP decision for the work of the SBI, they would have notified the SBI/SBI Chair immediately of the decision and/or re-issued the SBI 27 Provisional agenda, which would have clarified the situation and prevented the confusion that followed. This would certainly have prevented the long, drawn-out, contentious and even circuitous discussion that transpired in the second plenary meeting, only to be resolved through recourse to the provisions of Rule 27, which could – and should – have been made in the first place. The allusion of the G-77 Chair at the very beginning of the first plenary meeting, seeking clarification as to the revision in the SBI Provisional agenda in light of the COP decision contained, when viewed in retrospect, the necessary element for the proper institutional response. It failed to be heeded as it should have, including by the Chair of the SBI. Moreover, had the G-77 Chair or members of the Group (most prominently China) made reference to the provisions of Rule 27 in support of their argument – which was confirmed to be right by the legal advice provided in the second plenary meeting – the outstanding problem would have been resolved much earlier and more easily and effectively.

In the author's view, the apparent equivocation of the G-77 Chair following the first plenary meeting – as best reflected in the earlier reluctance to attend the informal consultations proposed by the SBI Chair and subsequent general and vague pronouncements in the course of those consultations – could point to a number of factors; such as deliberately sounding ambiguous or non-committal in order to buy time and hedge one's bets better in the uncertain circumstances: a lack of agreement within the Group on the kind and level of expectations from the SBI; or a possible difference of opinion on the tactics to follow. It goes without saying that these are quite familiar tactics to those with experience in multilateral processes and negotiations

and are not peculiar to the case at hand, much less to the G-77 – whose extremely large and deeply heterogeneous composition makes decision making or articulation of group positions a Herculean job, and sometimes almost impossible. The author's long experience with the Group – including its Chairmanship in 2001 – also points to the rather unfortunate situation that the ever-present complex and complicating dynamics of pull and push from within and particularly from outside the Group makes things all the more difficult for the Group and its Chair to arrive at agreed positions, and even more so to pursue the agreed position and tactics effectively and without being torpedoed along the way from the wings (whether due to internal dynamics or external pull and push).

From the point of view of the fundamental requirements of diplomatic conduct – best reflected in the language and wording used to express one's likes and dislikes (or preferences) and to argue in support of one's interests and concerns – the author cannot resist the temptation of expressing his disappointment with some of the language used in a number of statements from the floor in the course of the wrangling between the Chair and the floor. Lack of due regard in this respect, in the author's view, has more to do with attitude as well as diplomatic nuance and finesse than with one's mother tongue.

Delegates resorting to surprise tactics by making new or unfamiliar/unclear proposals – whether wearing their national or group hats, and even if understandable from a political point of view – is not, in the author's considered view, advisable conduct. Accepted practice requires – from a political as well as a moral point of view – that national delegations (major group representatives) inform the Chair/President – if not the Secretariat – of any intended proposals to be made in the opening plenary meetings; that is, to be specific, proposals with implications for the agenda or programme of work of the session. As described in the present essay, the G-77 proposal – albeit legitimate in its substance (even from the vantage point of Annex I Parties, as expressed officially on the floor and unofficially in private, bilateral exchanges) – seems to have caught the President and the Parties on the floor (needless to say, Annex I Parties) by surprise, leading to initial misunderstanding by the President and lack of proper appreciation by almost everybody else, including the Secretariat, in particular in so far as the legal implications of the COP decision for the work of SBI was concerned. Even if resorting to surprise tactics might, under certain circumstances, lead to short-term gains, it creates procedural and process-related difficulties in the first place, leads to problems of a legal nature for the relevant multilateral process, and causes political difficulties amongst Parties within the intergovernmental body. In retrospect, having gone through the quite difficult and even nerve-racking lengthy discussions on the nature of the COP decision in the SBI plenary meetings and considering the final outcome, the author fully understands the rationale for the G-77 resorting to the element of surprise in making its proposal – fearing (reasonably) that the other side might try to kill the proposal in the COP plenary through resort to and reliance on procedural discussions and well-known

filibustering tactics, particularly given the long background of the discussions on this specific issue. While being sympathetic to the content of the proposal and its pursuit by the G-77 – from a purely personal point of view, it has to be underlined – the author does not to condone such initiatives as a matter of principle. Well prepared proposals, combined with proper diplomatic and political lobbying, can be pursued effectively and successfully and with full transparency.

Finally, as indicated a couple of times in the course of the SBI plenary deliberations, the author finds the process as it unfolded and reached its final resolution extremely educational. The author – as SBI Chair as well as a multilateral diplomat – has learnt a number of good lessons in the process and in dealing with the wide range of stakeholders involved, which he considers valuable and helpful in his future multilateral engagements. The experience has been equally educational for the UNFCCC Secretariat, for as the author gathered, the Secretariat had never faced such a situation before. And as a result, the possible course of action suggested by the present author had never been contemplated. Perhaps, in retrospect, the COP Secretariat might have acted differently and thus prevented unnecessary and lengthy wrangling on the floor. While retrospection is purely hypothetical, consideration of what can and should be done, in a timely manner, in the future should a similar situation arise is very much plausible and practical. The *ex-post facto* discretion on the imperative of reviewing certain procedures in light of the experience is indeed a valuable lesson for multilateral processes in general and for the institutions on the ground in particular.

Notes

1 The statement on behalf of the G-77 at the opening COP plenary, made by Ambassador Attiya Mahmood (Pakistan), referred to the question of “fulfilment of commitments” – implementation – in the following terms (Paragraph 10):

The most formidable challenge before us in addressing climate change and its adverse effects include: lack of fulfilment of commitments during the first commitment period of the Kyoto protocol by Annex I countries in reducing GHG emission; provision of financial resources and technology transfer to developing countries; inadequacy of financial resources for adaptation and mitigation efforts; insufficient national institutional capacity in the developing countries for participation in carbon market mechanisms.

In Paragraph 25 of the statement, she went on to add:

Transfer of technology remains an enormous challenge to efforts for adaptation and mitigation, keeping in view the issue of incremental costs and capacity building. Addressing current and future changes in the climate system depends on early and effective development, deployment, transfer and diffusion of environmentally-friendly technologies to developing countries. A key question is also the treatment of intellectual property rights (IPRs) over climate-friendly technologies. Developing countries must also be helped, on affordable preferential and concessional terms, through technology transfer, directed R&D and other assistance, to acquire and build capacity for the application of technologies to meet sustainable development targets and goals. The G-77 and China would like to express its disappointment about the progress made on this agenda item. Development of performance indicators to monitor if commitments have been honoured in this area will be a useful tool.

The statement did not address the background to the proposal the Group had in mind to make under the item on the “adoption of the agenda”, nor did it contain any reference to the relevant COP decisions on the matter.

2 While the official name and emblem of the G-77 (currently with a membership of over 130 developing countries) solely refers to “77”, G-77 representatives usually make their official pronouncements/statements in various multilateral forums and meetings in the name of the “G-77 and China”. China – People's Republic of China – also considers itself a member of the Group, hence G-77 and China. However, the author, an old G-77 activist and also its Chairman in 2001, remains committed to the use of the Group's original – and official – name (G-77).

3 As intimated to the author in a recent private communication by an experienced G-77 delegate/negotiator, the rationale for the proposal at the opening COP 13 plenary lay in the Group's disillusionment with how the matter had been addressed (or practically not addressed) in previous COPs. As detailed in this communication, discussions at COP 12 in Nairobi (November 2006) on the renewal and content of the mandate of the EGTT (under the SBSTA) and the provisions proposed by the G-77 had reached an impasse. As a compromise, the Group had agreed to extend the mandate of the EGTT for one year and to postpone a decision on technology transfer to COP 13. Discussions at the time had been on whether the matter (item) could be transferred to the SBI or, at least, the two subsidiary bodies could consider it in joint sessions. Further discussions on the matter during two consecutive workshops (March 2007 in Tokyo and May 2007 in London) seem to have failed to bring the contending viewpoints to an agreed course of action. In light of the state of discussions and while preparing for COP 13, G-77 delegates with experience and institutional memory of the previous discussions on the matter [Decision 3/CP.3 on the division of labour between the SBI and the SBSTA, provisions of 13/CP.1 and COP 12 discussions] start looking into the idea of both the SBI and the SBSTA considering the item on technology transfer. They reach the conclusion then that the mandate of the EGTT should address the concrete implementation of the provisions of Article 4.5 of the Convention, hence, the imperative of consideration of the item in the SBI as the competent body for the overall responsibility for development and transfer of technology under the Convention (in accordance with the provisions of the decision 3/CP.3). In the wake of the outcome of the Vienna and Bogor meetings which emphasised technology as one of the four building blocks of the expected Bali Roadmap, these G-77 experts resolved to pursue the proposal in earnest; the first step being to convince the G-77 Chairmanship of the proposal and how to make the move. Once discussed and agreed upon with the Chairman and interested members, the proposal is put to the Group's plenary and receives the seal of approval.

The report in the Earth Negotiations Bulletin (ENB) the day after the COP opening plenary is prescient: "After a year of informal debate within the G-77/China on how to achieve a breakthrough on technology transfer, some G-77 negotiators commented that one more morning was deemed to be well worth the effort to get a result". Vol. 12, No. 345, 5 December 2007.

4 As became apparent soon after the closure of the plenary meeting, Annex I Parties seem to have reached the conclusion that they had failed to understand and appreciate the exact nature of the G-77 proposal and the subsequent COP decision. It was only then that the precise nature and exact wording of the exchange between the G-77 representative and the COP President – and the decision made immediately afterwards – became a matter of interest and concern across the board, inclusive of delegates, the SBI Chair and the Secretariat. Recourse to the verbatim record, as will be seen later, constituted part of the discussions in the COP 13 Bureau meeting on 4 December 2007 (9–10a.m.) and subsequently at the second SBI plenary later the same morning.

5 Agenda item 6 – Review of implementation of commitments and other provisions of the Convention, 6 (c) – development and transfer of technologies, document FCCC/CP/2007/1, dated 7 September 2007 – Provisional agenda and annotations.

6 Expert Group on Technology Transfer.

7 It is worth noting that in the course of the informal demarche to the office of the SBI Chair, a delegate representing an Umbrella Group country/member with strong positions on climate change matters – and also personally experienced and well versed in various COP/SBI issues – confided in the Chair that the G-77 proposal at the COP plenary was "technically right". This was practically the only clear indication on the substance of the matter that the SBI Chair received from the Annex I delegates before the first SBI plenary meeting a while later the same afternoon. Coming from an Annex I delegate – known to the Chair for his penchant for polemics – the observation proved extremely helpful to the Chair in forming his initial impression of the content of the matter at hand before the plenary meeting and before seeking a briefing from the Secretariat later in the day, and also from an old-hand G-77 delegate involved with the matter since the late 1990s.

8 FCCC/SBI/2007/16, 23 August 2007, Provisional agenda and annotations.

9 Kishan Kumarsingh, Chair of the Subsidiary Body for Scientific and Technological Advice (SBSTA), 2006–2007.

10 In retrospect and considering the nature of the prolonged discussion at the second plenary meeting on the matter, the author believes that the G-77 Chairman's concurrence with the provisional adoption of the agenda should be considered a very positive gesture by the Group towards the SBI Chair under the circumstances – so that the Group would not be seen as blocking the process – which, as gathered later through informal channels as well as subsequent private communication with an influential G-77 delegate, had been criticised by some members of the Group as the wrong tactic. As communicated in writing to the author, "G-77 Chairman consented to the 'provisional adoption' of the agenda, but I got flak for this in the G-77". And furthermore, as it happened, the Pakistani colleague who served as the G-77 Chairman/Spokesman for the first and the second SBI plenary meetings, reportedly left town a day later "for another mission" and was succeeded by another member of the Pakistani delegation. The author, like many others, was surprised by this rather unexpected and precipitous "change of horses in midstream". How-

ever, in a subsequent private communication with the author, he informed that his departure from Bali had been pre-planned and the G-77 colleagues already knew that he would be representing the Group for part of the process only.

11 The verbatim record in question reflects the exchange of views between the G-77 Chairman and the President of the COP during consideration of Agenda item 2 (f), which led to the adoption of the proposal. Needless to say, it does not contain the exchanges which took place earlier in the meeting under Agenda item 2 (c) – adoption of the agenda.

12 See notes 4 and 7 above. Visible lack of interest at that stage could be seen and analysed in light of the on-going discussions within the G-77 – unknown to the author/Chair of SBI then – which came up in the course of the discussions in the second plenary meeting the next morning.

13 Name withheld due to the fact that the remark was made in a closed meeting and without a verbatim record.

14 According to the Summary Notes of the Bureau (4 December 2007), "The President thereafter focused on discussion in the Bureau on the agenda item of the COP on 'Development and Transfer of Technologies', which had been referred for deliberations to both the SBI and the SBSTA by the COP at its first plenary meeting.

The Chair of SBI reported on informal consultations held the previous evening on the matter, informed the Bureau of the G-77 position not requesting a new agenda item and sought clarification on the nature and content of the COP decision. The Secretariat explained that under the consideration of the organization of work of the COP, many items are referred to the SBI for consideration and preparation of conclusions/decisions to be recommended to the COP. It was noted that, at the request of the G-77, the item on 'Development and Transfer of Technologies' which had already been referred to the SBSTA, should also be considered by the SBI, as it relates to its implementation aspects. The COP would then take it up again on the basis of the outcome of the discussion of the SBI. The decision on how the issue should be dealt with was left to the SBI which has to decide how and when it wants to take up the item for consideration".

15 Following the Bureau meeting, the COP President, in a brief bilateral exchange, asked the SBI Chair to resolve the issue as best and as smoothly as he could, so that it would not become a big issue. He was assured to that effect.

16 Memo from Secretary of the COP, dated 4 December 2007, addressed to the SBI Chair, and also copied to the Executive Secretary and the SBI Coordinator.

17 See document FCCC/CP/1996/2, 22 May 1996 – Organizational Matters – Adoption of the Rules of Procedure, in particular Section VI. Agenda, Rules 9, 10, 12 and 13. The Rules of Procedure being applied require that, for a new item to be added to the [already agreed and distributed] provisional agenda of a subsidiary body (in this case, SBI), the item has to be proposed by a Party (or group of Parties) before the provisional agenda is adopted by the relevant body at the opening plenary meeting of the session. In any event, the new item would be adopted only if agreed by the house by consensus. The body may then decide to include the item in its agenda in accordance with Rule 13 of the Rules of Procedure.

18 According to Article 4.5 of the Convention: "developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally-sound technologies and know-how to the Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention". As communicated to the author in writing by an experienced developing country delegate, the provisions of the Article, even if considered by developing countries to be suffused with all kinds of caveats, constitutes the crux of the argument of these countries since COP 1 in support of the question of technology transfer. Operative paragraph 4 (a) of the decision 13/CP.1 provided (among other things) "for the review at COP 2, and at each session of the COP, of the implementation of Articles 4.5 and 4.1 (c), as a separate agenda item related to the review of the implementation of the Convention".

19 The original suggestion for the Chair to propose the new agenda item came from a Secretariat colleague.

20 In the course of the break, the Chair approached the Chair of G-77 and, given the state of impasse on the outstanding matter, sought his view on the possibility of him asking for legal advice. The G-77 Chair made it clear in unambiguous terms that it would be out of the question for him to do so. In his words, "that would be simply unthinkable and absolutely unacceptable to the Group" – casting doubt on and compromising the Group's position and argument up to that point in the deliberations. The SBI Chair informed him, in response, that he would personally undertake to seek legal advice on the matter and act accordingly.

21 Paragraph 7 of Rule 27 of the Rules of Procedure (Section IX. Subsidiary Organs) reads: "Subject to Articles 9 and 10 of the Convention, the Conference of the Parties shall determine the matters to be considered by each subsidiary body and...".

22 While the new agenda item should have been inscribed in the plenary's work programme before the last agenda item – Other matters, the Chair decided to take it up earlier in order to dispel any possible suspicion that might arise as to its late discussion and to prevent any further possible political speculation and gossip. Originally, a total of three plenary meetings had been scheduled for the SBI; a short (90-minute) session on Monday afternoon, and two full (three-hour) sessions on

Tuesday. As it turned out, lengthy discussions on this issue at the first, second and third meetings of the SBI plenary took so much time that consideration of all the agenda items could not be completed even though the third meeting was prolonged for almost four hours (up to around 10p.m.). The remaining items on the agenda were considered at a fourth plenary meeting on Wednesday, 5 December, in a slot borrowed from CMP as their work finished earlier than expected.

23 Philip Gwage (Uganda, Non-Annex I) and Jukka Uosukainen (Finland, Annex I) were nominated to co-chair the new contact group.

24 Summary of the SBI meeting on 4.12 (internal Secretariat report/document).

25 Following the conclusion of the work of the Subsidiary Bodies on 12 December, the Chairs of the SBI and the SBSTA were requested by the Chairman of the Ministerial Roundtable (Minister of Foreign Affairs of Indonesia) "to review consensus on technology transfer". Their further informal consultations and resumption of negotiation on the outstanding SBI text finally produced consensus on that text, and also led to the adoption of the text under the SBSTA which had been made contingent upon agreement on the SBI text.

26 According to the Earth Negotiations Bulletin (ENB), Vol. 12, No. 344, "While this new item had apparently been agreed by the COP earlier in the day, others [other delegates] were suggesting that it had been agreed largely 'because some Parties were not paying attention in the plenary' or were confused about the proposal". On this specific note, an Annex I Party delegate attending the informal consultations organised by the SBI Chair on the matter on Monday evening said that "I was still busy enjoying the music when the decision was made"! (Name withheld). The private communication of the G-77 negotiator to the author (cited in note 3 above) also reflects on the same matter, though with a sense of pointed sarcasm: "There was, surprisingly, no objection – I guess Annex I countries, led by their heads of delegations and not by their working-level experts, did not realise the full impact of the suggestion. Perhaps their negotiators could not just take over

the microphone from their heads of delegations, and ask to talk without having consulted". Also intimated in the same communication – as a sign of the significance of sheer "concoirs des circonstances" – while the COP decision was being made, Annex I negotiators in charge of technology transfer had been discussing how to deal with it under the SBSTA in an office away from the COP plenary.

27 According to the private communication cited in note 3 above, the G-77's intended proposal for technology transfer had somehow – through informal exchanges [emails] – been brought to the attention of the Indonesian team at the expert level before the Bali meeting. The communication does not imply, however, that the President had been informed of the matter, or if so, how, when and how seriously. In a further private exchange, a senior Indonesian colleague informed the author that based on his personal follow-up inquiry (following reading the essay) the national team had not received a message to that effect prior to the Bali meeting. And also as underlined by the same colleague, coordination meetings with major groups – undertaken as a matter of course and practice in the days ahead of such meetings – had not provided any practical clues in that direction. Further private exchanges with the relevant Secretariat colleagues have also served to inform the author that the matter had not been discussed in the COP Secretariat either. Taking all the accounts that relate to the episode into consideration, the author has come to the conclusion that the element of surprise; that is, "being caught by surprise" – as alluded to earlier in the essay – seems to have been corroborated by the author's deconstructive effort. While presuming the intimations/assertions made to the author (in private communications) by all the involved actors to be authentic, even accurate, the author still tends to leave (some) room for the possible effect of other factors, including such perennial bureaucratic problems as lack of or inadequate coordination, which could legitimately be considered as bedevilling almost all bureaucracies – whether national or international. And this predicament, needless to say, can hardly be considered unusual on either side of the development divide.



UNEP / Montevideo IV

Future Plans for International Environmental Law

by Donald Kaniaru*

Introduction

The international interest in the rule of law takes on a special importance when considering the environment, given that both environmental benefits and environmental harms know no boundaries. Since the late 1970s, international efforts to create a cohesive programme for the development and promotion of international law have been ongoing through the Montevideo Programmes. Over the past year, discussions have been held concerning the Fourth Programme for the Development and Periodic Review of Environmental Law, also known as Montevideo IV – the next ten-year programme for the second decade of the twenty-first century (2010–2020) – to be presented to the twenty-fifth session of the UNEP Governing Council for consideration and approval in February 2009. To this end, senior government officials expert in environmental law met in UNEP headquarters, Nairobi, 29 September–3 October 2008, to prepare the basis of that document.

There have been three earlier Montevideo Programmes: Montevideo I (for the 1980s); II (for the 1990s); and III, for the first decade of the twenty-first century. As with the previous two, the draft fourth programme builds solidly

on past programmes. The draft of Montevideo IV (Annex 1 of the document UNEP/Env.Law/MTV4/IG/2/L.1) is reproduced on page XXX of this issue.

In 2007, the UNEP Secretariat, with the help of senior advisers, prepared working documents which were submitted to the first meeting of experts on the development of Montevideo IV, which was held in November 2007. Their report (document UNEP/Env.Law/MTV4/IG/1/4), to which was annexed the draft Montevideo Programme IV, was the basis for the work of the most recent Nairobi meeting. This 2008 meeting was well attended, with representatives of 94 governments; several MEA secretariats; UNIDO and the World Bank; and two NGOs: the Centre for International Environmental Law (CIEL) and the International Council for Environmental Law (ICEL). It was chaired by Canada while Ghana provided the Rapporteur. The meeting worked through the draft outline, section by section, and each was adopted after a vigorous exchange of views and intense deliberations.

The Meat of the Programme

The content of the evolving Montevideo IV is broad in theme, topic and scope and contains obvious inter-linkages which, at every stage, will enable different stakeholders to be partners, and to draw synergies from each other.

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Without such dedicated commitment, unnecessary duplication and competition would result, seriously undermining the instruments expected to emerge from forthcoming negotiations.

Each element will be fulfilled through both soft instruments (declarations, principles, guidelines, policy tools) and binding instruments (formal agreements, conventions, protocols at international level), and their application in legislation at national level. At the end of the day, the meat of Montevideo IV will be the implementation of its four sections:

- (I) *Effectiveness of environmental law*: comprising many concrete actions to analyse and address concerns regarding implementation, compliance and enforcement, including capacity building, environmental damage (compensation, prevention and mitigation), dispute settlement, public participation, access to information, information technology, harmonisation and general principles of governance, and strengthening of international environmental law;
- (II) *Conservation, management and sustainable use of natural resources*: specifically focusing on fresh, coastal and marine ecosystems, aquatic/marine living resources, soils, forests, biological diversity and sustainable development/consumption;
- (III) *Challenges for environmental law*: identifying the primary of these as climate change, poverty, drinking water/sanitation, ecosystem conservation and protection, environmental/natural disasters, pollution and new technologies;
- (IV) *Relationships with other fields*: specifically, human rights, trade, security and military activities.

In each of these areas, fairly comprehensive outlines endeavoured to ensure that no player is left out, and most have a role to play over the forthcoming ten years.

Some Observations

The following observations are by no means exhaustive. The meeting was skilfully managed: no mean task given the variety of comments and emphasis by numerous delegations. It was impressive that finally only one delegation (Brazil) entered a reservation on the overall consensus without blocking the outcome. They felt that the two meetings held were not adequate and one more meeting would have been desirable.

From the Secretariat, the Director (Bakary Kante) who opened the meeting, and the Executive Director (Achim Steiner) who addressed the meeting on the third day, gave full opportunity to Iwona Rummel Bulska (the veteran officer who was there at Montevideo I) to participate and Masa Nagai ably assisted the Chair by promptly responding to questions and issues raised. In the long run, the Executive Director (ED) will no doubt determine how the mid-term review and future Montevideos will be prepared. This is particularly important, given that, following reorganisations in UNEP, the Law Programme is no longer as visible as it has been up to now.

There was a considerable mix among delegates in terms of expertise. There were lawyers; policy officials;

diplomats and scientists. Terms and concepts that lawyers would take for granted had to be explained, and this necessarily took time. This educational aspect seemed, however, quite useful.

It was not always clear that the Montevideo programme is not, while orchestrated by UNEP, solely a UNEP programme. It has ownership well beyond UNEP both globally, but also in governments, singly and severally, regionally and subregionally. Within the UN and UN-related organs and agencies; in non-UN intergovernmental and non-governmental organisations; universities and law schools; research institutions and so on, the Montevideo Programme is and should be a critical tool of international legal development. As demonstrated through the past decades, the leadership of UNEP is no doubt critical and must at all times be enhanced.

Over time, however, the torch of Montevideo has been passed to a new generation. The number of familiar faces from earlier meetings was far fewer than previously, from the Secretariat (virtually none), few or none from governments, but two from NGOs (represented by Dan Magraw and the author). While this may be inevitable, the opportunity offered to ensure a continuing and vibrant environmental law programme cannot be overemphasised!

Several aspects of the 27 sections of Montevideo IV were controversial, and the Governing Council can expect no less controversy when the programme comes before them. For example, how would Montevideo IV be implemented within UNEP and beyond it? What should its relationship with other programmatic documents be? What programme budget and medium-term plans should be assigned, and what financial resources availed? Another critical concern was coherence in the mode of national and other reporting and monitoring of implementation. Those from the Committee of Permanent Representatives like Japan were eloquent on some aspects, and it was clear that the last word has not yet been heard. Based on the hard work encompassed in addressing all of these concerns in a whole week in Nairobi, it is clear that the Governing Council will be hard-pressed to address any of these matters in three or so days and a much broader agenda.

Conclusion

My last observation relates to the valuable investment that UNEP has made in capacity building in training officials from developing countries and countries whose economies are in transition. In the global training programme initiated in 1993 and several others thereafter, for example, in Geneva and with Finland at Joensuu University, active participation was explicit in several government representatives that I recognised. Clearly the investment is paying off handsomely in diplomacy and environmental law.

Ultimately, the goal of this short note is simple: to put those who may attend the next Governing Council in February 2009 on notice. It will be important for them to prepare for this session as well as taking account of all the other environmental issues that are on the global and regional agendas.



UN / CLCS-IMO**Marine Environment: Review of Recent Developments**

by Elsa Tsioumani*

This report reviews a number of recent developments related to the marine environment, held in the framework of the Commission on the Limits of the Continental Shelf, the International Maritime Organization (IMO) and the UN Food and Agriculture Organization (FAO).

Commission on the Limits of the Continental Shelf

The Commission on the Limits of the Continental Shelf held its twenty-second session in New York, from 11 August–12 September 2008. The plenary session was held from 18–29 August, while the periods from 11–15 August and from 2–12 September were used for the technical examination of submissions at the Geographic Information System laboratories and other technical facilities of the Division for Ocean Affairs and the Law of the Sea.¹

The Commission on the Limits of the Continental Shelf was established at the sixth meeting of the States Parties to the UN Convention on the Law of the Sea (UNCLOS), held in March 1997. Its functions are: to examine submissions made by coastal States to delimit the outer limits of their extended continental shelves and make recommendations thereupon; and to provide scientific and technical advice, if requested by the coastal States concerned during the preparation of a submission. The Commission's recommendations and actions are without prejudice to the delimitation of boundaries between States with opposite or adjacent coasts. The limits of the continental shelf established by a coastal State on the basis of the Commission's recommendations are final and binding.

UNCLOS gives coastal States sovereign rights to explore and exploit the natural resources of the continental shelf.² The outer limits of the continental shelf divide the area of seabed that falls under the jurisdiction of the respective coastal States and the international area of seabed which constitutes common heritage of mankind.³ The resources of the seabed beyond the limits of national jurisdiction are to be managed jointly by the States Parties through the International Seabed Authority.⁴

During its twenty-second session, the Commission continued the examination of data and other materials submitted by States Parties to UNCLOS concerning the outer limits of their continental shelf in areas where those limits extend beyond 200 nautical miles: the submission made by New Zealand; the joint submission by France, Ireland, Spain and the UK; and the submissions made by Norway, France and Mexico. The Commission also considered two new submissions: a submission made by Barbados, which was presented on 26 August; and a

partial submission by the UK relating to the continental shelf of Ascension Island, presented on 27 August.⁵ Both submissions will be addressed through subcommissions established at a later session.

With regard to the joint submission by France, Ireland, Spain and the UK, and the submissions made by Norway, France and Mexico, the respective subcommissions continued their work during the session and reported to the Commissions on the work carried out intersessionally.

With regard to the submission by New Zealand, the Commission adopted the recommendations prepared by the subcommission, including a summary of them, by 13 votes to three, with three abstentions.⁶ The Commission also adopted summaries of the recommendations in relation to the submissions made by Australia on 15 November 2005 and by Ireland on 25 May 2005.

The twenty-second session will resume from 1–12 December 2008, during which the subcommission established to examine the submission made by Norway will meet. The Commission's twenty-third session will be held from 2 March–9 April 2009, with plenary meetings from 23 March–3 April and technical examination of submissions from 2–20 March and from 6–9 April. The twenty-fourth session will be held from 10 August–11 September 2009, with plenary meetings from 24 August–4 September, and technical examination of submissions from 10–21 August and from 8–11 September.

**International Maritime Organization
Marine Environment Protection Committee**

The IMO's Marine Environment Protection Committee held its fifty-eighth session from 6–10 October 2008, in London, UK. During the meeting, the Committee made good progress on harmful emissions from ships; environmentally-friendly recycling of ships; ballast water management; and greenhouse gas (GHG) emissions from ships.

The Committee unanimously adopted amendments to the International Convention for the Prevention of Pollution from Ships (MARPOL) Annex VI regulations to progressively reduce emissions of sulphur oxide, nitrogen oxide and particulate matter from ships. The global sulphur cap is to be reduced initially to 3.5% (from the current 4.5%), effective from 1 January 2012; then progressively to 0.5%, effective from 1 January 2020, subject to a feasibility review to be completed no later than 2018. The limits applicable in Sulphur Emission Control Areas will be reduced to 1%, beginning on 1 July 2010 (from the current 1.5%); being further reduced to 0.1%, effective from 1 January 2015. Progressive reductions in nitrogen oxide emissions from marine engines were also agreed, with the

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FAO

International Guidelines: Management of Deep-sea Fisheries in the High Seas

by Blaise Kuemlangan and Jessica Sanders*

On 29 August 2008, an FAO Technical Consultation on International Guidelines for the Management of Deep-sea Fisheries in the High Seas (Technical Consultation), comprising representatives of 69 countries, the European Community, the Faroe Islands, and 14 inter-governmental organisations (IGOs) and non-governmental associations (NGOs), unanimously adopted the much-awaited International Guidelines for the Management of Deep-sea Fisheries in the High Seas (the Guidelines). These Guidelines are thought of as a breakthrough, in integrating both environmental and fisheries management concerns in one instrument.¹

Their adoption was a culmination of events initiated in response to requests of the FAO Committee on Fisheries (COFI) and the invitation by the United Nations General Assembly (UNGA) in Resolution 61/105, which called on FAO to undertake further work on the management of deep-sea fisheries in the high seas. The work was initially launched in 2005 and further promoted through a continued call for such work, by the COFI in March 2007. The process was to include *inter alia*:

*standards and criteria for identifying vulnerable marine ecosystems beyond areas under national jurisdiction and the impacts of fishing activities on such ecosystems, in order to facilitate the adoption and the implementation of conservation and management measures by [regional fisheries management organizations and arrangements] and flag States, pursuant to paragraphs 83 and 86 of the UNGA Resolution A/RES/61/105.*²

The UNGA acknowledged FAO's initiative in a subsequent resolution – A/RES/62/77 – as an important commitment towards responsible fisheries in the marine ecosystem.

The FAO International Guidelines evolved over two years through a participatory process that included:

- an Expert Consultation on Deep-sea Fisheries in the High Seas (Bangkok, 21–23 November 2006), which provided an initial review of issues on the topic and identified gaps in knowledge and capacity;
- a Workshop on Vulnerable Ecosystems and Destructive Fishing in Deep-sea Fisheries (Rome, 26–29 June 2007), to clarify issues of vulnerability, destructive fishing and adverse impacts;
- an Expert Consultation on International Guidelines for the Management of Deep-sea Fisheries in the High Seas (Bangkok, 11–14 September 2007), where an initial draft of the guidelines was amended, revised and adopted;
- a Workshop on Knowledge and Data on Deep-sea Fisheries in the High Seas (Rome, 5–8 November 2007), where the Guidelines were discussed in relation to improving data issues and the Worldwide review of bottom fisheries in the high seas was reviewed;
- a Skippers and Fleet Managers Workshop on the International Guidelines (25–29 May 2008), which discussed the trawl industry perspective on the international guidelines; and,
- two sessions of the Technical Consultation (Rome, 4–8 February and 25–29 August 2008), where the Guidelines were reviewed and adopted.

Although directed primarily at regional fisheries management organisations and arrangements (RFMO/As), this focus should not be thought of as a limitation of the guidelines, which call on countries to consider their application to other fisheries in areas beyond national jurisdiction, including those targeting medium-productivity species.

The Guidelines state the goals of “provid(ing) tools, including guidance on their application, to facilitat(ing) and encourag(ing) the efforts of States and RFMO/As towards sustainable use of marine living resources exploited by deep-sea fisheries, prevent(ing) significant adverse impacts on deep-sea VMEs and protect(ing) marine biodiversity that these ecosystems contain”. In addition, they describe the primary objective of the management of deep-sea fisheries in the high seas as the promotion of “responsible fisheries that provide economic opportunities while ensuring the conservation of marine living resources and the protection of marine biodiversity”. They



Courtesy: DFID

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seek to address fisheries beyond national jurisdiction that meet either of two criteria: “(i) the total catch (everything brought up by the gear) includes species that can only sustain low exploitation rates; and (ii) the fishing gear is likely to contact the seafloor during the normal course of fishing operations”. (Guidelines, at paragraph 8.)

Key concepts under the guidelines include the characteristics of species exploited by deep-sea fisheries, vulnerable marine ecosystems (VMEs), and what constitutes significant adverse impacts on these ecosystems. Key management considerations include:

- i) adoption by States and RFMO/As of conservation measures to protect target and non-target species (including a list of examples of potentially vulnerable species groups, communities and habitats, and the features that may support them);
- ii) identification of areas or features containing or affecting VMEs;
- iii) management of deep-sea fisheries in areas where no competent RFMO/A exists; and
- iv) recognition of the importance of an effective governance framework.

The Guidelines also describe management and conservation steps that need to be taken, components of a good data collection and reporting regime (including the need for reliable data for stock assessment), identification criteria for VMEs, criteria for the assessment of significant adverse impacts, and monitoring/compliance/surveillance needs.

The Guidelines emphasise the importance of assistance for developing countries and other key overarching principles, as outlined in the 1995 FAO Code of Conduct for Responsible Fisheries. They are to be interpreted and applied in conformity with the relevant rules of international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 without prejudice to the rights, jurisdiction and duties of States under international law as reflected in the Convention.

Notes

1 Ichiro Nomura, Assistant Director General, FAO Department of Fisheries and Aquaculture, Rome, 3 September 2008 (<http://www.fao.org/newsroom/en/news/2008/index.html>). An advance copy of the Guidelines (in English only) is currently available on a temporary basis at ftp://ftp.fao.org/FILE/DOCUMENT/tc-dsf/2008_2nd/2_1e.pdf, and will later be formally included on FAO's internet site, along with translations into UN languages.

2 FAO, 2007, FAO Fisheries Report, No. 830, Report of the twenty-seventh session of the Committee on Fisheries, Rome, 5–9 March 2007.



most stringent controls on so-called “Tier III” engines, *i.e.*, those installed on ships constructed on or after 1 January 2016, operating in Emission Control Areas.

MARPOL Annex VI Regulations for the Prevention of Air Pollution from Ships entered into force in May 2005 and has, so far, been ratified by 53 countries, representing approximately 81.88% of the gross tonnage of the world's merchant shipping fleet. The revised Annex VI will enter into force on 1 July 2010, under the tacit acceptance amendment procedure.⁷ Its adoption was hailed by IMO Secretary-General Efthimios Mitropoulos as a “monumental decision in IMO's history, a decision that proves that the Organization ... sets global standards in a global environment”. According to an IMO press briefing, “the revised measures are expected to have a significant beneficial impact on the atmospheric environment and on human health, particularly that of people living in port cities and coastal communities”.⁸

Furthermore, following an article-by-article and regulation-by-regulation review of the text, the Committee approved the draft ship recycling convention, which will be circulated for consideration and adoption by a diplomatic conference to be held from 11–15 May 2009, in Hong Kong, China. The new convention will provide regulations for the design, construction, operation and preparation of ships so as to facilitate safe and environmentally sound recycling without compromising the safety and operational efficiency of ships; the operation of ship recycling facilities in a safe and environmentally sound manner; and the establishment of an appropriate enforcement mechanism

for ship recycling, incorporating certification and reporting requirements. Ships to be sent for recycling will be required to carry an inventory of hazardous materials, specific to each ship, while an appendix to the convention will provide a list of hazardous materials whose installation or use in ships is prohibited or restricted. Ships will need to have an initial survey to verify the inventory of hazardous materials, surveys during the life of the ship, and a final survey prior to recycling. Ship recycling yards will be required to provide a “Ship Recycling Plan”, to specify the manner in which each ship will be recycled, depending on its particulars and its inventory. Parties will be required to take effective measures to ensure that ship recycling facilities under their jurisdiction comply with the convention. A series of guidelines are also being developed to assist in the implementation of the new convention.

The Committee adopted guidelines for ballast water sampling and revised guidelines for approval of ballast water management systems, aimed to assist in the effective implementation of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.⁹ The Committee also approved a guidance document on arrangements for responding to emergency situations involving ballast water, and gave final approval to two ballast water management systems that make use of active substances.

Finally, in the light of the mandate given to IMO in the Kyoto Protocol to address the limitation and reduction of GHG emissions from ships, the Committee made substantive progress in developing technical and operational

measures to address such emissions, including the development of an energy efficiency design index for new ships and an energy efficiency operational index, with associated guidelines for both; an efficiency management plan suitable for all ships; and a voluntary code on best practice in energy-efficient ship operations. The Committee's work on this issue was based on the outcome of an intersessional meeting of the IMO Working Group on GHG emissions from ships, held in June 2008, in Oslo, Norway.

Debate focused on whether the application of IMO measures should be mandatory or voluntary for all States: several delegations spoke in favour of the principle of common but differentiated responsibilities under the UNFCCC and said that any mandatory regime aiming at



Courtesy: MSNBC

reducing GHG emissions from ships should be applicable to the countries listed in Annex I to the UNFCCC only. Other delegations however noted that, given the global mandate of IMO, its regulatory framework on the GHG issue should be applicable to all ships, and stressed that, as three-quarters of the world's merchant fleet fly the flag of countries not listed in Annex I to the UNFCCC, any regulatory regime would be ineffective, if it were made applicable only to Annex I countries.

Further work on the limitation and reduction of GHG emissions from ships will continue at an intersessional meeting early in 2009, for presentation to the next session of the Committee to be held in July 2009. The outcome of deliberations will be presented to the UN Conference on Climate Change to be held in Copenhagen, Denmark, in December 2009.

UN Food and Agriculture Organization

Following two years of deliberations, a set of International Guidelines for the Management of Deep-sea Fisheries in the High Seas¹⁰ was adopted in the framework of a Technical Consultation organised under the auspices of the FAO. The second and final session of the consultation took place in Rome, Italy, from 25–29 August 2008. It is described in this issue at page 309.

Notes

1 For more information, see The Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, twenty-second session (CLCS/60), available at: http://www.un.org/Depts/los/clcs_new/commission_documents.htm.

2 UNCLOS, Article 77.

3 *Ibid.*, Article 136.

4 *Ibid.*, Article 157.

5 The submissions to the Commission are made pursuant to UNCLOS Article 76.8, which provides that, if a coastal State intends to establish the outer limits of its continental shelf beyond 200 nautical miles, information on such limits "shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf. [...] The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding."

6 See: http://www.un.org/Depts/los/clcs_new/submissions_files/nzl06/nzl_summary_of_recommendations.pdf.

7 According to the tacit amendment procedure, the amendments enter into force six months after the deemed acceptance date, unless within the acceptance period an objection is communicated to the Organization by not less than one third of the Parties or by the Parties the combined merchant fleets of which constitute not less than 50% of the gross tonnage of the world's merchant fleet.

8 See IMO Briefing 46, 10 October 2008, available at: http://www.imo.org/Newsroom/mainframe.asp?topic_id=1709&doc_id=10262.

9 Adopted in February 2004, not yet in force.

10 The Guidelines are available at: ftp://ftp.fao.org/Fl/DOCUMENT/tc-dsf/2008_2nd/2_1e.pdf.



UN Annual Treaty Event Concludes

Further to our notice (EPL 38/3, p. 125), the "UN Treaty Event" which focused on a goal of promoting universal participation in more than 500 multilateral global pacts closed on October 1. During the event, a total of 44 States signed or ratified 84 separate conventions, agreements, treaties and optional protocols including treaty actions from six heads of State and 21 foreign ministers. Although its most significant focus was on weapons treaties and other matters, there were a large number of national ratifications of environmental treaties both in the course of the event itself and other processes during the past few months, including the following:

- o Bosnia and Herzegovina became the 42nd party to ratify or accede to the Aarhus Convention (October);
- o Brunei-Darrusalam (one of the last hold-outs) became CBD Party in July – leaving only Andorra, Iraq, Somalia and the US;
- o Myanmar, Turkmenistan, Burundi, Kazakhstan and Georgia have all ratified the Cartagena Protocol, which now has 148 parties;
- o Yemen became the 158th party to the Ramsar Convention;
- o Congo and Liberia became respectively the 156th and 157th parties to UNCLOS, with Capo Verde, Congo, Liberia and Guyana all ratifying the Part XI Agreement, and Korea, Palau, Oman, Hungary and Slovakia bringing the total number of parties to the UN Fish Stocks Agreement to 72;
- o Guinea Bissau, Cuba, Lesotho, Nicaragua and Uganda ratified the PIC (Rotterdam) Convention (126 Parties);
- o Central African Republic, Columbia, El Salvador, Guatemala, Guinea Bissau, Hungary, Pakistan, Poland, Seychelles all ratified the Stockholm (POPs) Convention (161 parties);
- o The Czech Republic, the Philippines, Romania and Spain have all signed the International Tropical Timber Agreement, and Australia has ratified it.

The Final Report on the UN Treaty event can be viewed online at: http://treaties.un.org/doc/source/events/2008/report_final-eng.pdf. (TRY)



IMO

Developments in Oil Pollution Liability

by Reinhard H. Ganten*

The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 18 December 1971, entered into force on 16 October 1978, and the International Oil Pollution Compensation Fund (IOPC Fund) came into existence. Today, we celebrate the 30th anniversary of this organisation.

The work of the IOPC Fund and, in general, the functioning of the system of compensation for oil pollution damage caused by tanker incidents, established in 1969 and 1971, has been regarded as “the success story of the eighties”.¹ But success can quickly turn to failure for even such a well functioning system, if it is not constantly monitored and adapted to the needs of changing times, economic developments and political demands. “An international regime must continue to develop if it is to continue to be effective”.² This article describes the post-1971 changes to the original system of compensation for oil pollution damage and explains the current situation, dealing with problems encountered by the administration of the system, and referring to some of the “prominent” cases compensated under the system.³

The Conventions

Both the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 Civil Liability Convention, CLC) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention) created the framework for, in those days, an entirely new system of compensation for oil pollution damage caused by tanker incidents, to which both the owner of a ship and the cargo interests contributed. The first tier of compensation was paid by the owner of the ship involved in the incident; it depended on the size of the ship, with an overall limit to the amount. The second tier of compensation was provided by the IOPC Fund which was financed by receivers of “contributing oil” after sea transport in States Parties to the Convention (see below).

In 1992, both conventions were radically revised resulting in a considerably increased and widened liability.⁴ These conventions are known as the 1992 Civil Liability Convention and the 1992 Fund Convention; they entered into force in 1996. In 2005, the International Oil Pollution Compensation Supplementary Fund (Supplementary Fund) entered into force, providing a third tier of compensation financed by cargo interests. This Supplementary Fund is a separate legal entity⁵ and is intended to supplement compensation provided under the 1992 Fund Convention, if it was not considered sufficient.⁶

Since the idea of the 1992 Civil Liability and Fund Conventions was to replace the 1969 and 1971 conventions, States becoming Party to the new conventions denounced the former conventions. So the 1971 Fund Convention ceased to be in force in May 2002; the 1969 CLC still remains in force for 38 States. However, incidents falling under the scope of the 1971 Fund Convention that occurred before May 2002 still have to be settled according to the provisions of the 1971 convention. The administration of the 1992 IOPC Fund which is also in charge of dealing with outstanding claims under the 1971 Convention hopes that by the end of 2008, the numbers of these claims will have decreased significantly.⁷

The Scope of Application

The 1992 Conventions extend the geographical scope of application. Their provisions cover not only damage that occurs within the territory of a Contracting State (as it was in the 1969 and 1971 conventions) but also damage caused in the Exclusive Economic Zone (EEZ) or the equivalent area of a State party. While the earlier treaties applied to laden tankers only, the new conventions also apply to unladen tankers on ballast voyages, provided they carry residues of persistent cargo on board. In such cases, spills of bunker oil are covered by the conventions. However, if in the case of a tanker incident, preventive measures are so successful that a spill is prevented altogether, the new conventions cover the expenditure for such preventive measures if there had actually been a grave and imminent threat of pollution damage. Under the old conventions, claimants had to prove that there was actually a spill of persistent oil, however small this might have been.⁸

An important change is in the definition of the term “pollution damage”. The 1969 and the 1971 conventions define “pollution damage” as “loss or damage caused ... by contamination ...”.⁹ The application of this extremely broad definition created many problems in the settlement of claims since, on the one hand, the different national laws of States Parties applied different philosophies regarding the compensation of damage, but, on the other hand, a compensation scheme which was financed by contributors from all States Parties, with different legal systems, had to be based on a generally agreed definition of the notion “damage”. Participants at the 1992 Diplomatic Conference, although aware of this problem, realised that they could not really solve it. So they just added a clarifying phrase to the original definition: “compensation for impairment of the environment, other than loss of profit from such impairment, shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken”.¹⁰ This new element of compensation for reinstatement of impaired environment had already been

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developed and applied in the very early days of the IOPC Fund's activities before 1992, so it cannot be regarded as an amendment to the earlier convention but rather as a clarification. This issue of compensation for environmental damage has been a major issue ever since.¹¹

The shipowner's liability is strict. Claims for pollution damage under the CLC can be made only against the registered owner of the ship concerned (channelling of liability). The 1992 CLC prohibits claims against the servants and agents of the owner, against members of the crew, the pilot, the charterer, manager or operator of the ship and any person carrying out salvage operations or taking preventive measures.¹²

Limits of Liability

The shipowner is entitled to limit his liability to an amount determined by the size of the ship. The amount of compensation available to victims under the CLC has been considerably increased during the period from 1969 to today. The figures of the 1969 CLC were increased in the 1992 Convention and, according to a "tacit amendment procedure" foreseen in the 1992 CLC, again in 2003. The limits are as follows (quoted in Special Drawing Rights – SDR):¹³

The 1969 CLC:

- 133 SDR per ton of the ship's tonnage up to a maximum of 14 million SDR.

The 1992 CLC:

- a minimum of 3 million SDR for ships up to 5000 units of gross tonnage;
- for ships between 5000 and 140 000 units of gross tonnage, 3 million SDR plus 420 SDR for each additional unit of gross tonnage;
- a maximum amount of 59 700 000 SDR.

The 2003 amendment (to the 1992 CLC):

- 4 510 000 SDR for ships up to 5000 units of gross tonnage;
- for ships between 5000 and 140 000 units of gross tonnage, 4 510 000 SDR plus 631 SDR for each additional unit of gross tonnage;
- a maximum amount of 89 770 000 SDR.

The shipowner is obliged to maintain insurance to cover his liability under the CLC.¹⁴

If the victim cannot obtain full compensation from the shipowner or his insurer the IOPC Funds will pay compensation if:

- the damage exceeds the owner's liability under the applicable CLC;
- the shipowner is exempt from liability because the damage was caused by a natural disaster, by an act done with intent by a third party or by negligence of public authorities in maintaining navigational aids; or
- the shipowner and his insurer are incapable of meeting their obligations.

The limits of compensation payable under the Fund Convention and the Supplementary Fund, including the

shipowner's liability, are, irrespective of the size of the ship, as follows:

1971 Fund Convention:	60 million SDR
1992 Fund Convention:	135 million SDR
1992 Fund Convention, after the 2003 increase:	203 million SDR
Supplementary Fund (since 2005):	750 million SDR

This means that the total compensation available to victims of oil pollution damage has increased more than twelvefold.¹⁵

Contributions to the IOPC Fund

Members of the IOPC Fund are the States that have ratified the Fund Convention. Contributions, however, have to be paid by the persons receiving "contributing oil" after sea transport in the Member States.¹⁶ These are normally private oil (or storage) companies. Only in States where the oil import and oil handling is done by the States themselves, is the State itself liable to pay contributions.¹⁷ The term "contributing oil" is defined in the convention.¹⁸ "Receiver" of oil is not necessarily the owner or importer; in many terminal installations it is a storage company distributing the oil to different countries and owners.

The fact that private companies (and not States) are contributors to the IOPC Fund has been an important factor in the successful functioning of the IOPC Fund. Generally, by far the largest part of the contributions due is paid by the due date. So the IOPC Fund has never been in a situation whereby payments agreed with claimants could not be made because of lack of funds.

A problem that, in the initial phases of the IOPC Fund, gave rise to major concern was the fact that the contributors of just one Member State were liable to pay a very high percentage of the total contributions. When the IOPC Fund first began its work, Japanese contributors had to pay approximately 50% of the total contributions.¹⁹ To avoid this imbalance, the Supplementary Fund Protocol has introduced a cap,²⁰ according to which contributions of any single Member never exceed 20% of the total.²¹

The Administration of the IOPC Funds

The 1971 Fund Convention entered into force in October 1978.²² The IOPC Fund's first Assembly decided that the Fund should have its headquarters in London. The secretariat of the IOPC Fund also administers, in addition to the 1992 Fund Convention and the Supplementary Fund, outstanding issues from the 1971 Fund Convention.²³ The Fund has an Assembly (comprising all Member States) and an Executive Committee with 15 Members, elected by the Assembly.²⁴ The main function of the Executive Committee is to take policy decisions concerning the admissibility of claims.

By the end of 2008, the 1992 IOPC Fund will have 102 Members. The Supplementary Fund has 21 Members.

The IOPC Funds' secretariat is headed by a Director. The present Director is Willem Oosterveen from The Netherlands who succeeded Mans Jacobsson from Sweden

in 2006. Mans Jacobsson was the Director of the Funds from 1985 when he took over this function from Dr Reinhard Ganten, the founding Director of the IOPC Fund. The Fund's secretariat has less than 30 staff. In spite of the many incidents the IOPC Fund has to deal with at one time and its many other functions, it is possible to carry out the work with such a small staff because from the very beginning it has been the Fund's policy to work as much as possible with external experts and advisors. This practice has proven to be of considerable advantage because it allows the Fund to employ consultants according to the specific needs of a particular incident (specialised clean-up monitoring personnel or specialised lawyers, *etc.*).

Handling of Claims

In the process of dealing with the settlement of claims arising out of the Miya Maru No. 8 case,²⁶ the then Director of the IOPC Fund negotiated with the relevant P&I Club,²⁷ the shipowner's insurer, an agreement which facilitated considerably the claims settlement. The principles of this agreement still form the basis of claims settlements in which both the owner's insurer and the IOPC Fund are involved. It is the basis for the Funds' endeavour to make payments as promptly as possible.

This procedure is based on the understanding that the owner and the IOPC Fund are both involved in settling the claims arising out of one specific incident, deal with the same claimants and have to judge and eventually to decide upon the same factual and legal questions. To avoid different, or possibly even conflicting, decisions on the same question, it has been agreed that it would be in the interest of everyone concerned if the owner's insurer and the IOPC Fund have a joint and agreed approach to a specific case. And this is what happens. They normally employ jointly a firm monitoring the clean-up operations: in cases of major spills they establish local claims offices to facilitate the claims handling and to jointly advise claimants. The technical assistance required by the Fund is usually provided by the International Tanker Owners Pollution Federation Limited (ITOPF), supported by a worldwide network of technical experts. Since ITOPF has now given technical advice to the IOPC Fund for nearly 30 years it is very familiar with the Fund's claims settlement procedure and policy.

The IOPC Fund has a reputation for rapid settlement of claims.²⁸ This is possible, *inter alia*, because the Assembly and the Executive Committee have given extensive authority to the Director to approve and pay claims. The long-standing cooperation with ITOPF and other experts familiar with the Fund has also contributed to this good reputation.

The handling of claims, the procedure to be followed and, in particular, the question of which classes of damage may be compensated are constant controversial issues. The major issue is the compensation of "pure" environmental damage, *i.e.*, an impairment to the environment that has not led to economic loss of any sort. On this matter, the IOPC Fund very early on took a clear position. In 1980 the Assembly adopted Resolution No. 3 stating "that the assessment of compensation to be paid ... is not to be

made on the basis of an abstract quantification of damage calculated in accordance with theoretical models". This means that claims for compensation must be made on the basis of evidence that there was economic damage. It is in line with this decision, which was later endorsed by the 1992 Fund Assembly, that the definition of "pollution damage" in the 1992 CLC (and accordingly Fund Convention) clarifies that "compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement ...". This is clearly reconfirmed in the IOPC Fund's Claims Manual.²⁹

Private Industry Schemes – STOPIA and TOPIA 2006

When the 1969 CLC and the 1971 Fund Convention were negotiated, before they entered into force, the tanker and oil industries had agreed to set up private industry schemes providing liability and compensation cover comparable to that of the 1969 CLC and the 1971 Fund Convention, up to the time that these conventions entered into force and had a substantial membership. These schemes were called "TOVALOP" (equivalent to CLC) and CRISTAL (equivalent to the Fund Convention). With the increased membership in the conventions these schemes were given up.

At present there is a new scheme (STOPIA 2006³⁰) which provides on the basis of a voluntary agreement between insurers of small tankers, in States Parties to the 1992 CLC, compensation to a maximum amount of 20 million SDR in respect of tankers up to 29 548 gross tonnage. If in such cases the IOPC Fund has been held liable according to the provisions of the Fund Convention, the Fund may claim indemnification from STOPIA.

TOPIA 2006³¹ is also an agreement between tanker owners providing indemnification when the Supplementary Fund has paid compensation. In such cases, TOPIA 2006 indemnifies the Supplementary Fund of 50% of the compensation paid.³²

Claims

From 1979 up to the end of 2007 there have been 140 incidents in which the Funds are or have been involved. For the 1971 Fund there were 107 incidents with a total payment of compensation amounting to 329 million pounds sterling (£). The 1992 Fund was/is involved in 33 incidents in respect of which so far payments amounting to £231.5 million have been made. Up to now there has been no incident in respect of which the Supplementary Fund was called upon.

The most spectacular incidents of recent years receiving the widest public attention are the "Erika" incident (France) of December 1999 and the "Prestige" incident (Spain) of November 2002. Both incidents are intensively dealt with in the Funds' *Annual Report 2007*.³³ In both cases the damage suffered by different claimants greatly surpassed the maximum amount of 135 million SDR. With respect to both cases there are a number of legal proceedings still pending. For details, refer to the Funds' *Annual Report 2007*.

Concluding Remarks

Efforts have been made to revise the 1992 Compensation Regime which, in substance, originates from 1984. The IOPC Fund has set up a Working Group with the mandate to “consider whether the 1992 Civil Liability Convention and the 1992 Fund Convention should be revised and, if so, which issues should be addressed in any such revision”.³⁴ In this Working Group, many issues were



Courtesy: Israel Environment Bulletin

discussed but in the end there was no general agreement on whether there should be any revision at all and, if so, on the issues to be dealt with in any such revision.³⁵

There is another very controversial issue with which the Fund has been dealing for a number of years although it is not really an issue for which the IOPC Fund has any responsibility. This is the question of promoting the entry into force of the so called “HNS Convention”.

The “International Convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea” of 3 May 1996 (HNS Convention) provides compensation for damage caused by hazardous and noxious substances. It follows systematically the model and pattern of the CLC and Fund Convention. However, in spite of a generally felt need to establish an international scheme for the compensation of such damage there is a great reluctance by States to ratify this convention. The conditions for the entry into force³⁶ are far from being fulfilled; so far only ten States have acceded to the convention.

The Assembly of the Fund has established the “HNS Focus Group” with the aim of facilitating the entry into force of the HNS Convention. Results of the work of this Group are not yet known.³⁷

Notes

- 1 Statement of the UK delegation at the departure of the first Director of the IOPC Fund, 1984.
- 2 J. Rysanek, Chairman of the 1992 IOPC Fund Assembly, *Annual Report 2007 of the International Oil Pollution Compensation Funds* (quoted as: AR 2007), p. 9.
- 3 General reference is made to AR 2007.
- 4 The contents of the 1992 conventions were largely identical to the 1984 Protocols to the CLC and the Fund Convention. It appeared, however, after only a few years that these Protocols had little chance of entering into force because

the entry into force provisions demanded too many ratifications. These conditions were lowered by the 1992 Conventions which, therefore, entered into force soon after their adoption.

- 5 Article 2 of the Protocol of 16 May, 2003.
- 6 The need for such additional compensation became apparent after the “Erika” and “Prestige” incidents of 1999 and 2002.
- 7 For details regarding the winding up of the 1971 Fund see AR 2007, Section 6, p. 29.
- 8 This issue became relevant in the Tarpenbek case of 1979 which occurred off the British coast. The British administration proudly claimed in their official report that they had successfully prevented any spill from the tanker but when it came to claiming compensation from the owner under the 1969 CLC and from the IOPC Fund under the 1971 Fund Convention for the preventive measures taken, they succeeded in proving that there had actually been a small spill of persistent oil. The particulars of this case convinced the conference in 1992 of the need to amend the conventions in this regard.
- 9 This wording means: pollution damage = damage caused by pollution; it is not very helpful in the settlement of difficult cases.
- 10 Article I, No 6. (a).
- 11 In 1969 and 1971 when the original conventions were discussed and agreed, the issue of environmental damage had not yet really become an issue of major public concern.
- 12 This prohibition does not apply if the damage resulted from the personal act or omission of the person concerned, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.
- 13 The “Special Drawing Right” (SDR) is an artificial currency developed by the International Monetary Fund; it is based on a basket of internationally important currencies. On 15 August 2008, the value of 1 SDR is (rounded figures) € 0.934 or \$ 0.6371.
- 14 For a summary of further details of the owner’s liability see AR 2007, Section 2, pp. 15–18.
- 15 The amount actually available to victims depends, of course, on the legal instruments to which the relevant State is party.
- 16 Article 10 of the Fund Convention; contributions are due only if the total amount of oil received by one person in a specific calendar year is 150 000 tons or more.
- 17 This is the case mainly in developing countries which generally have a rather small “receipt” of oil. Therefore, by far the largest contributions are payable by private companies. Under the Supplementary Fund scheme (Article 14), States are liable to pay contributions based on an oil receipt of 1 million tons if the total amount of oil received by contributing persons is less than 1 million tons.
- 18 Article 1, para. 3.
- 19 Now the Japanese share stands at c. 17%.
- 20 Article 18.
- 21 The percentage of contributions payable with respect to major Member States is listed in AR 2007, p. 37.
- 22 That is after the famous Amoco Cadiz tanker incident off the French coast in March 1978. In fact the aftermath of this incident accelerated considerably the ratification of the 1971 Fund Convention by France and led to its entry into force only seven months later.
- 23 This is why it is the secretariat of the “Funds” (plural).
- 24 The establishment of an Executive Committee was obligatory under the 1971 Fund Convention; under the 1992 Convention it is discretionary. The Assembly has, however, decided to establish such a Committee.
- 25 W. Oosterveen was born in 1956. Like both his predecessors he has a law degree, majoring in private law. He worked as a Judge and as an advisor to the Netherlands Minister of Justice in the fields of transport law, environmental law and insurance law. He served the IOPC Funds as Chairman of the Executive Committee and of the Assembly.
- 26 This was not the Fund’s first case in chronological order but the first case in respect of which claim settlement procedures had to be developed.
- 27 Shipowners insure their third-party liability with Protection and Indemnity Associations (P&I Clubs) which are mutual organisations.
- 28 See Ganten, 1980, “IOPC Fund Starts with World Record”, *Viewpoint in Marine Pollution Bulletin* October: 278.
- 29 *Claims Manual*, April 2005 Edition, p. 11 (available at: www.iopcfund.org).
- 30 Small Tankers Oil Pollution Indemnification Agreement.
- 31 Tanker Oil Pollution Indemnification Agreement.
- 32 For more details see AR 2007, pp. 42–44.
- 33 AR 2007, pp. 77–90 (Erika) and 93–104 (Prestige).
- 34 Fund document 92FUND/A.10/7 of 10 May 2005.
- 35 Report of the Working Group submitted to the Assembly, document 92FUND/WGR.3/26.
- 36 Ratification (or accession) by 12 States of which four must have ships with a total of at least 2 million units of gross tonnage and the States having ratified must at least have notified a receipt of at least 40 million tons of hazardous and noxious substances.
- 37 The mandate of the Focus Group is given in AR 2007, pp. 46, 47.