

## **FRIENDS OF THE CO-CHAIRS HIGHLIGHTS: TUESDAY, 24 FEBRUARY 2009**

Delegates to the first meeting of the Friends of the Co-Chairs on Liability and Redress under the Cartagena Protocol on Biosafety met throughout the day and in the evening to continue deliberations on proposed operational texts on liability and redress. Delegates considered the primary compensation scheme, including response measures, obligations of the operator, the competent authority, definitions of “operator” and “damage,” and exemptions and mitigation.

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

**PRIMARY COMPENSATION SCHEME:** Co-Chair Lefebvre opened the discussion on the primary compensation scheme, by asking two questions: should the supplementary protocol follow the example of the Biosafety Protocol and allow states to implement it without requiring national legislation; and is there a need for a definition of “response measures.” The first question was linked to the operational text specifying that parties take response measures in accordance with domestic law or, in the absence thereof, in accordance with the procedures set out in the supplementary protocol. The EU said they could only work on this operational text if it was linked to other provisions of the supplementary protocol. BRAZIL reminded delegates that the intention of the provision was to accommodate alternative ways to implement the administrative approach, one based on the international provisions and the other where countries already have a national administrative approach. JAPAN agreed, and called for the supplementary protocol to have enough flexibility for domestic implementation.

NORWAY, NEW ZEALAND, SWITZERLAND and ETHIOPIA preferred to delete the operational text all together, since it was already included in the preamble of the Biosafety Protocol, and all countries are obliged to comply with their international law obligations, independent of the adoption of any new instrument. Conversely, BRAZIL, MALAYSIA and PARAGUAY favored retaining the operational text, considering it necessary, legally sound and flexible.

Following the proposal of two alternative texts by the EU and NEW ZEALAND, both requiring parties to provide for domestic measures in accordance with international obligations and domestic law, Co-Chair Lefebvre withdrew the original operational text and both proposals were kept for further consideration.

**Response Measures:** Delegates debated at length the definition of response measures. Following an EU proposal, the chapeau was shortened to read “for the purposes of these rules and procedures, response measures are reasonable actions” with “in the event of an incident” remaining in brackets.

Delegates debated a sub-paragraph on preventing, minimizing or containing damage, with many parties opposing a reference to prevention, while the EU and MALAYSIA said this term referred to cases of immediate risk. BRAZIL and SOUTH AFRICA, opposed by PANAMA, added that the text should contain the phrase “minimize or contain damage or, as appropriate, imminent threat of damage.” MALAYSIA suggested the threat of imminent damage be linked to an “activity,” with COLOMBIA proposing linking it to an “incident.”

MEXICO suggested an abbreviated text reading: “minimize or control damage and prevent further spread of damage, if necessary.” MALAYSIA, supported by BRAZIL, insisted on retaining the notion that response measures can be taken where there is an imminent threat of damage, noting that actions should be legitimized, not only to prevent further damage but also where there is an imminent threat.

Regarding a sub-paragraph on definition of response measures, ETHIOPIA, supported by the EU, ECUADOR and INDIA, proposed to delete a more specific reference setting out possible response measures. MEXICO, MALAYSIA and the PHILIPPINES proposed to keep a broad definition with a range of response measures. SWITZERLAND proposed to make the provision more general and to include a non-exhaustive list. The EU added additional text on restoration, with many delegates questioning the need for its second sentence providing a non-exhaustive list. NEW ZEALAND envisaged a situation in which a party would not want to take any remedial action, which was rejected by others. JAPAN called for the sub-paragraph to begin “if possible.”

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**Obligations of the Operator:** On the obligation of an operator to notify the competent authority in the event of damage or imminent threat of damage, delegates discussed two options: one addressing the operator directly, and one providing for parties to require the operator to notify the competent authority. The EU, MEXICO, BRAZIL and INDIA favored the first option. NORWAY and NEW ZEALAND proposed a new operational text stating that notification requirements be triggered by the “event” of damage or imminent threat of damage. Delegates agreed to build upon this text and reflect both options. MEXICO stressed the need to carefully define operator, since the operator will judge whether an imminent threat exists. COLOMBIA favored the second option but requested replacing reference to “accident” causing damage with “occurrence.” MALAYSIA suggested referring to “the incident causing damage” rather than to damage alone.

On requiring the operator to investigate, assess and evaluate the damage and take appropriate response measures, subject to the requirements of the competent authority, the AFRICAN GROUP, BRAZIL, NORWAY and NEW ZEALAND supported also referring to “imminent threat of damage” rather than damage alone. CHINA opposed, while COLOMBIA reserved its position pending decisions on other issues. NORWAY, opposed by PARAGUAY and BRAZIL, suggested deleting “subject to the requirements of the competent authority.” The EU suggested stating that the operator must notify the competent authority “whenever the threat is not dispelled by response measures by the operator.”

Delegates agreed to delete an alternative operational text stating that parties should require any legal or natural person who caused damage to undertake reasonable response measures; as well as language on monetary compensation in cases where no response measures can be implemented. Delegates then decided to draft a consolidated single paragraph on obligations of the operator for further discussion.

**The Competent Authority:** Consensus was reached on keeping operational text stating that the competent authority shall identify the operator who has caused the damage and assess the significance of such damage and determine the response measures to be taken by the operator, including general references to undertake such activities in accordance with domestic law.

**Definition of Operator:** JAPAN, BRAZIL, CUBA, ECUADOR, INDIA, PARAGUAY and COLOMBIA supported an operational text defining operator as any person in operational control of the activity at the time of the incident and causing damage. The EU, supported by NEW ZEALAND, proposed to refer to persons in “command or control.” The AFRICAN GROUP opposed this and, with NORWAY, supported operational text that defines the operator as the “developer, producer, notifier, exporter, importer, carrier or supplier of LMOs.”

Stressing the need for flexibility, SWITZERLAND supported an operational text defining operator as any person in control of the activity at the time of the incident of the LMO at the time that the condition that gave rise to the damage arose, and as provided by domestic law. MEXICO also supported this operational text but, with NEW ZEALAND and the EU, asked to remove the reference to provisions of domestic law. SOUTH AFRICA welcomed a definition that identifies the operator responsible for the damage.

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

**Exemptions or Mitigation:** Delegates agreed that acts of God or *force majeure* and acts of war or civil unrest were acceptable exemptions. Regarding an exemption for intervention by a third party, delegates were unsure of the ramifications of a qualifying sentence adding that it should only relate to instances where the damage was caused despite the fact that appropriate safety measures were in place. The EU pointed out that an agreed definition of operator will provide clarity on this issue.

An exemption for compliance with compulsory measures imposed by a public authority was rejected in favor of a similar provision qualifying that the implementation of the order caused the damage. Most parties opposed an exemption for an activity expressly authorized by and fully in conformity with an authorization given under domestic law, arguing that any additional exemptions or mitigations would potentially undermine the supplementary protocol. Those in favor, including the EU, called on delegates to allow flexibility for jurisdictions wanting to provide certain exemptions or mitigations.

An exemption for an activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out was rejected by the majority of delegates. The EU, JAPAN and SWITZERLAND wanted to retain it stressing that the list is not mandatory, and parties need not use any exemption or mitigation, and called for flexibility to be shown to provide options for parties.

On an exemption related to national or international security, many parties questioned the circumstances in which it might arise, with the EU explaining that it is a standard clause in international instruments.

Looking at the section as a whole, SOUTH AFRICA and the EU suggested that delegates make a distinction between exemptions and mitigating factors. Based on that concept, Co-Chair Lefebvre suggested that an act of God or *force majeure* and an act of war or civil unrest be exemptions, with the other provisions constituting an exhaustive list of mitigating factors. He suggested the national security exemptions may be moved to scope section.

### IN THE CORRIDORS

Despite shortening the lunch break and extending the afternoon session into the evening, Tuesday’s meeting did not move beyond the primary compensation scheme, as delegates’ diverging views led to protracted discussions. While some of the discussion related to minor textual considerations, others had serious ramifications for the scope of the protocol, the definition of operator and references to international obligations. The day highlighted the intricate nature of negotiations, where the resolution of one issue is contingent on the resolution of another, “like a game of chopsticks” in one delegate’s words. The day was well summed up by a participant, saying: “the delegates were unanimous in their agreement that they continue to disagree on the key issues.”