

FRIENDS OF THE CO-CHAIRS HIGHLIGHTS:

MONDAY, 8 FEBRUARY 2010

Delegates to the second meeting of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety met throughout the day and in the evening to continue negotiations on a supplementary protocol on liability and redress, including title, objective, definitions, scope, limitations, the primary compensation scheme, institutional provisions and preamble.

Opening of the meeting

Co-Chair Jimena Nieto (Colombia) opened the meeting calling for intensive negotiations to complete a draft supplementary protocol by the end of the meeting. Recalling the long-winded negotiations to date, Charles Gbedemah, speaking on behalf of CBD Executive Secretary Ahmed Djoghlaif, urged delegates to finalize the negotiating text. Delegates then adopted the agenda and organization of work (UNEP/CBD/BS/GF-L&R/2/1 and Add.1).

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

Co-Chair René Lefeber (the Netherlands) invited comments on the draft protocol text contained in UNEP/CBD/BS/GF-L&R/2/2.

TITLE: Mexico for the GROUP OF LATIN AMERICA AND CARIBBEAN COUNTRIES (GRULAC) proposed to refer to the "supplementary protocol on liability and redress for damage resulting from the transboundary movement of living modified organisms (LMOs)." JAPAN noted that the title should be consistent with the objective and that the draft supplementary protocol should refer to operational control and to linking operators and damage, but opposed reference to financial security or civil liability guidelines.

OBJECTIVE: BRAZIL suggested alternative text which includes reference to human health. MEXICO proposed adding compensation mechanisms in case of damage. PARAGUAY preferred removing reference to "imminent threat of damage." PERU, supported by the AFRICAN GROUP and INDIA, suggested referring to risks to human health and referring to transit, handling, and use of LMOs, rather than transboundary movement only. MALAYSIA proposed adding reference to "issues of liability and redress." The EU supported retaining the original text.

DEFINITIONS: Incident: BRAZIL said this definition could be removed once agreement on other issues such as imminent threat of damage has been achieved, whereas MEXICO supported retaining it.

Response Measures: Delegates discussed limiting restoration of biodiversity "to the extent it is technically and economically feasible." NEW ZEALAND and JAPAN insisted on retaining the reference, whereas the AFRICAN GROUP, MALAYSIA and MEXICO supported removing it, arguing it would weaken the obligation to conduct restoration measures. The EU, opposed by MEXICO and NAMIBIA, suggested referring to restoration to the condition that "would have existed had the damage not occurred."

Significant Adverse Effect: MEXICO, supported by the AFRICAN GROUP, suggested qualifying a list of factors determining significant adverse effect as indicative, whereas CHINA said it should be exhaustive. LIBERIA, opposed by CHINA and NORWAY, asked to remove the brackets around a factor referring to the extent of adverse effects on locally and regionally important components of biological diversity. The EU proposed to instead: either introduce a reference in the definition of damage allowing parties to use domestic criteria to establish liability for damage falling within the supplementary protocol's scope; or include in the operative paragraph on domestic response measures a reference allowing parties to establish in their domestic legislation which components of biodiversity are covered by the obligation to undertake domestic response measures. LIBERIA opposed, noting that this would weaken the supplementary protocol, and with MEXICO preferred keeping the factor for determining significant adverse effects.

Imminent Threat of Damage: GRULAC and the AFRICAN GROUP wanted to retain the definition, opposed by CHINA stressing that it goes beyond the scope of the Biosafety Protocol.

When discussing a paragraph containing a reference to imminent threat of damage under the primary compensation scheme, BRAZIL, opposed by ECUADOR and the PHILIPPINES, suggested including as sources of best available scientific knowledge the World Organization for Animal Health, the International Plant Protection Convention and the Codex Alimentarius Commission. MALAYSIA suggested finding language to make this list non-exclusive.

Operator: Delegates discussed an option for a more detailed definition and agreed to delete a reference to domestic law. After discussion, MEXICO also agreed to delete reference to "direct or indirect" control. The AFRICAN GROUP supported an

option listing a number of possible operators. BRAZIL, CHINA, INDIA and SOUTH AFRICA supported an option referring to any person in operational control of the activity at the time of the incident causing damage.

In the afternoon, Co-Chair Lefeber tabled a consolidated proposal for the definition of operator. Several commented that the now integrated options were meant to be alternatives rather than different parts of one definition. PARAGUAY, opposed by the EU, COLOMBIA and ETHIOPIA, proposed to introduce an additional qualifier referring to any person to whom intentional commission of the act or reckless negligence can be attributed. MALAYSIA further explained that the administrative approach is based on strict liability and that the definition of operator for the administrative approach might differ from the one used for civil liability.

The AFRICAN GROUP opposed the qualifier “operational” control, noting that the operator may exert indirect forms of control. SWITZERLAND and EGYPT called for a flexible definition to accommodate different situations. In response, MALAYSIA proposed integrating the generic definition with a specific list of potential operators, which was supported by the AFRICAN GROUP and SWITZERLAND, but opposed by the EU and JAPAN.

SCOPE: Delegates decided to delete reference to damage to human health, but could not agree whether to refer to “risks” or “adverse effects” to human health instead. Delegates also discussed reference to LMO products, with MALAYSIA suggesting to insert text from Biosafety Protocol Article 20 (Information Sharing and the Biosafety Clearing House) to qualify LMO products, implying, that LMO products contain detectable novel combinations of replicable genetic material obtained through the use of modern biotechnology. BRAZIL, ECUADOR, the PHILIPPINES, PARAGUAY, and SOUTH AFRICA preferred deleting the reference to LMO products.

LIMITATIONS: On domestic law applying to damage resulting from the transboundary movement of LMOs from non-parties, CHINA requested keeping the brackets for the options “should” and “shall.” Delegates rejected the Co-Chairs’ proposal to replace “non-parties” with “a State that is a non-party.” On not restricting the right of parties to require domestic measures to address damage, LIBERIA favored keeping the text, while the majority of delegates favored its deletion.

Delegates agreed to delete a reference stating that the supplementary protocol would not cover a different use of the same LMO under a new authorization.

PRIMARY COMPENSATION SCHEME: Obligations of the Operator: BRAZIL proposed adding that the burden of proof of damage should rest with the national competent authority, but later withdrew the proposal following opposition.

CHINA opposed removing brackets around “imminent threat of damage,” while ETHIOPIA supported it. MALAYSIA, supported by MEXICO, the EU, EGYPT and INDIA stressed the importance of including imminent threat of damage because it relates to preventive measures. A decision was postponed.

Delegates discussed at length the role of the operator in resolving issues relating to damage prior to informing the competent authority. The EU proposed allowing the operator to only inform the authority “where necessary.” However, several delegates expressed concern noting that damage to biodiversity is not easily resolved, and that this burden is not appropriate for the operator. They also stated that reporting cases of damage assists future prevention efforts and facilitates monitoring. The original text mandating a duty to inform the competent authority was retained.

The Competent Authority: JAPAN proposed additional language specifying the competent authority “shall be entitled to” act. Delegates preferred “shall” rather than “should,” and agreed to delete the word “significance” in reference to evaluating damage.

Delegates agreed to simplify a paragraph stating that the competent national authority may implement response measures in accordance with domestic law, including when the operator has failed to do so. Delegates deleted a paragraph on defining response measures under domestic law.

Regarding a provision on review of the decision of the competent authority, delegates agreed to simply refer to remedies available under domestic law. MALAYSIA asked to include a provision that recourse to such remedies shall not impede the right of the competent authority to take response measures, as necessary. SWITZERLAND proposed to instead set out that parties shall establish remedies which shall not impede the right of the competent authority to take response measures.

INSTITUTIONAL PROVISIONS: During the evening session, delegates considered institutional provisions. They agreed that non-parties to the supplementary protocol could participate as observers. They accepted Japan’s suggestion that the COP/MOP serve as “meeting of the parties” of the supplementary protocol instead of as “governing body.”

Regarding the relationship of a potential supplementary protocol with related instruments, delegates agreed on an article specifying that it would neither modify nor amend the Biosafety Protocol, nor derogate Parties’ rights and obligations under the CBD while being subject to both unless explicitly stated otherwise. It was decided that the supplementary protocol shall enter into force after the fortieth ratification.

Delegates adopted the institutional provisions with three exceptions: a provision stating that no reservations may be made to the supplementary protocol, which was bracketed by the EU; and text relating to signatures, which remained also in brackets; and text relating to amendments, which was deleted.

PREAMBLE: Ethiopia for the AFRICAN GROUP submitted text on basic principles during the evening session, which will be discussed at a later stage.

IN THE CORRIDORS

Aware that this meeting is the last chance to complete the negotiations on rules and procedures for liability and redress, many delegates expressed their commitment to “do what it takes,” and braced themselves for evening and late night sessions throughout the week. While discussions about the legal title of the supplementary protocol were underway in the conference room, the real question in the corridors was which host would become the supplementary protocol’s namesake. On the one hand, there is Malaysia hosting the current meeting and, on the other, there is Japan which will host the COP/MOP where the formal adoption is expected to take place. Some commented the title should acknowledge the protocol as the brain child of the developing world, while others acknowledged it as a product of cooperation with the developed world. The question of the name seemed minor in comparison to rumors that some parties may insist on removing any reference to legally-binding aspects of the envisaged supplementary protocol. Some participants worried that reopening the discussion on the legally binding nature would constitute an “imminent threat of damage” to the negotiations themselves. Others, however, dismissed the issue as a necessary but harmless clarification that the final decision on the supplementary protocol will be taken by the COP/MOP.