

FRIENDS OF THE CO-CHAIRS HIGHLIGHTS: WEDNESDAY, 10 FEBRUARY 2010

In the morning, delegates discussed a clause on review of the supplementary protocol on liability and redress, and elements of a draft COP/MOP decision, including guidelines on civil liability approaches and the supplementary compensation scheme. In the afternoon and evening, delegates engaged in a second reading of the draft supplementary protocol starting with definitions, scope and limitations.

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

CIVIL LIABILITY: Co-Chair Lefebvre presented options on civil liability which were developed following Tuesday's discussions. He noted that the text, which reflects the view of many delegations, includes one paragraph addressing damage to biological diversity as defined in the supplementary protocol, and two mutually exclusive options regarding damage other than that to biological diversity: option one states that nothing in the supplementary protocol shall derogate from the right of parties to provide in their domestic law for rules and procedures that address damage other than that defined in the supplementary protocol, by applying or developing their existing domestic laws on civil liability; and option two states that parties shall provide for such rules and that they may or may not apply or develop a civil liability approach.

REVIEW: PARAGUAY suggested the first review of the supplementary protocol's effectiveness take place five years after its entry into force. The EU suggested the review be triggered once sufficient experience has been gained, rather than be based on a fixed time line. INDIA and MALAYSIA opposed, as it would leave the decision to the discretion of parties. BRAZIL said the review should be conducted in the context of the review of the Biosafety Protocol. Noting that the supplementary protocol only addresses damage whereas the Biosafety Protocol has a much broader scope, the EU questioned whether aligning the review processes would be appropriate. MALAYSIA suggested that if circumstances require, there may be an earlier review. NAMIBIA noted the need for flexibility in case nothing happens in the time frame specified for the review.

Regarding the content of future reviews of the supplementary protocol, the EU proposed text which references the "consideration of specific instances of damage and related response measures" but eliminates reference to "effective civil liability." INDIA and MALAYSIA opposed, noting that this would omit part of the supplementary protocol's substance. INDIA, MALAYSIA, BRAZIL and SOUTH AFRICA said that consideration of "specific instances" is one element of a review and should, if anything, be additional. MALAYSIA also noted that the reference did not relate to the intent that the review address the effectiveness of civil liability approaches. SOUTH AFRICA specified that a review of effectiveness should include review of implementation as well as "specific instances of damage." Co-Chair Lefebvre proposed new text summarizing elements of the debate, but this was rejected in favor of continuing work on the basis of the original text.

DRAFT DECISION: Guidelines for Civil Liability: JAPAN requested bracketing the section on the guidelines on civil liability, as they have not been discussed yet. Delegates debated how to proceed with future work on the draft civil liability guidelines. Many underscored their commitment to adopt the guidelines at COP/MOP5. Pointing to the requirement for circulating legally binding instruments at least six months prior to their adoption, they preferred to focus on resolving outstanding issues in the supplementary protocol. The EU recalled that the Bonn compromise entails the drafting of non-legally binding provisions on civil liability only. MALAYSIA disagreed, stressing that it also stipulates working towards one legally-binding provision on civil liability. Delegates discussed different ways forward, including electronic consultations on the guidelines or convening an additional meeting of the Friends of the Co-Chairs directly prior to COP/MOP5, but left the decision pending. SWITZERLAND proposed revising the guidelines on liability and redress in light of the UNEP draft guidelines for the development of national legislation on liability, response action and compensation for damage from activities dangerous to the environment.

Preamble: Delegates decided to reference Biosafety Protocol Article 27 (liability and redress) rather than restate it; and to "note" rather than "welcome" the industry Compact, debating whether any such reference should be included only after it has

been signed. The Co-Chairs announced they would present two additional preambular paragraphs to account for the complete history of negotiations.

Supplementary Compensation Scheme: Delegates considered operational texts on the supplementary compensation scheme annexed to Decision BS-IV/12. The majority of delegates favored deletion of the paragraphs on residual state liability, but the AFRICAN GROUP requested to retain them. BRAZIL, JAPAN, MEXICO, NORWAY and ECUADOR favored not to have a provision on supplementary collective compensation arrangements, while MALAYSIA supported inclusion, and proposed stating that parties shall consider who should contribute to them. Delegates agreed to introduce the text on supplementary compensation schemes into the draft COP/MOP decision for further consideration.

DEFINITIONS: Damage: The EU proposed text stating that parties may use criteria set out in their domestic law to establish liability for any damage that falls within the scope of the supplementary protocol. MALAYSIA noted that this is an operative provision, and delegates agreed to consider it under the article on damage within the limits of national jurisdiction.

Operator: ETHIOPIA inquired about the meaning of “operational” control. JAPAN responded that operational control differs from legal, financial or physical control. NORWAY asked that all those aspects be covered and “operational” remained bracketed. INDIA said the unqualified reference to control would be too broad, and the qualifier “operational” was necessary to channel liability. BURKINA FASO asked to retain both the more descriptive definition referring to any person in control of an activity and the list of possible operators. SWITZERLAND asked to retain the reference to the permit holder and to include a provision that domestic law will determine who the operator is.

MALAYSIA proposed to begin the definition with the more descriptive provision, and then set out that “this could include, as appropriate,” followed by the list of possible operators and the permit holder as examples. The EU welcomed the proposal and suggested to move the reference “as determined by domestic law” before the list. INDIA asked to explicitly exclude farmers from the list of operators. NEW ZEALAND said that in some cases it could be necessary to attach liability to large-scale farmers. BRAZIL questioned whether the integrated definition captured the need for a causal link between activity and damage, with COLOMBIA stressing the need to pinpoint the person to whom responsibility will be channeled.

Response Measures: Delegates decided to delete the limitation “to the extent it is technically and economically feasible,” in regard to primary measures for restoring biodiversity to its prior condition. BRAZIL and NEW ZEALAND raised concerns about overly burdensome obligations. MEXICO, JAPAN, COLOMBIA, LIBERIA and UGANDA noted that secondary response measures to restore biodiversity loss by replacing it with other components of biodiversity serve as backup when the primary measure cannot be implemented. Delegates agreed to MALAYSIA’s proposal to leave the determination of feasibility of these measures to the competent authority. Following concerns raised by LIBERIA and BURKINA FASO regarding the capacity of the competent authorities, delegates agreed that authorities should “assess” and determine feasibility. Noting that in his country compensation

for restorative measures can only be pursued through civil courts, BRAZIL proposed that response measures be defined by domestic law.

On a list of factors for determining “significant” adverse effects on biodiversity, LIBERIA supported retaining a clause on adverse effects to local and regional biodiversity, since it is in accordance with the ecosystem approach. NORWAY stated that Liberia’s concerns were taken into account by another paragraph on qualitative and quantitative changes. Several delegates inquired whether the list of factors was indicative or exhaustive, ultimately deciding to retain an indicative list. The EU stated this would strengthen measures to address damage by allowing parties to use the latest science.

SCOPE: Delegates agreed to refer to “risks to,” rather than “adverse effects on” human health in order to maintain consistency with other articles of the supplementary protocol.

On limiting the scope to damage arising out of transboundary movements of LMOs, MALAYSIA, NEW ZEALAND, and SWITZERLAND wanted to retain language consistent with the Biosafety Protocol referring to “the transboundary movement, transit, handling and use of all LMOs.”

Delegates then debated at length whether the scope should cover products of LMOs and whether these should be qualified as “containing detectable novel combinations of replicable genetic material obtained through the use of modern biotechnology.”

SWITZERLAND reported back from a small group discussion on the risks arising from products of LMOs containing replicable genetic material. He explained that, legally, this scientific disagreement is reflected in the different scope of Article 4 and Annex 3 of the Biosafety Protocol. MEXICO, PARAGUAY, JAPAN, the EU and BRAZIL maintained that any reference to products would be redundant and could be potentially misinterpreted, while MALAYSIA, INDIA, BURKINA FASO, NAMIBIA, UGANDA and ETHIOPIA considered their inclusion in the scope of the supplementary protocol to be necessary and logical. Co-Chair Lefebvre tabled compromise language, referring to LMOs “including products thereof containing LMOs,” which delegates agreed to integrate in the negotiating text within brackets.

IN THE CORRIDORS

After Tuesday evening’s gridlock over civil liability, delegates’ evaluations of progress at the meetings’ half-way mark were mixed. Several expressed a déjà vu-like sentiment saying they were stuck in the exact same place as last year, leading one to wonder whether all countries actually wanted to come away with an agreement.

Looking at the state of his favorite issue – financial security – one observer characterized the liability and redress regime as a “butterfly without wings.” Others however highlighted areas of progress such as the adoption of articles on exemptions and limitations. Yet another group of delegates dismissed these advances as a mere courting stage, paving the way to let the “real work” begin. Looking at the afternoon’s battle between scientists and lawyers over whether the scope includes LMOs and their products, one participant joked “If real work means letting lawyers try to define the relationship between replicable genetic material and living modified organisms, perhaps we all have a reason to be concerned.”