

WORKING GROUP HIGHLIGHTS: SATURDAY, 15 MARCH 2008

The Working Group convened for its fourth day of negotiations in Cartagena de Indias, Colombia, on Saturday. During the morning, delegates convened in sub-working groups on settlement of claims and damage, and on the primary and supplementary compensation scheme. In the afternoon delegates met in plenary to consider the core elements paper. In the evening delegates attended a reception hosted by the Government of Colombia.

SUB-WORKING GROUPS

SETTLEMENT OF CLAIMS AND DAMAGE: **Damage:**

Delegates continued to address the definition of damage, working from a text reflecting Friday's discussion. Regarding the broader definition of damage, previously proposed by Ethiopia, containing a list of elements of damage, MALAYSIA proposed adding "damage to the environment." NORWAY supported the Ethiopian formulation with modifications, while the EC stated that the list of general definitions was not appropriate. CANADA suggested, and delegates agreed, to delete references to valuation of damage. Following informal consultations delegates agreed to a revised consolidated text.

Delegates considered the Brazilian proposal, on operational text focusing on adverse effects on biological diversity on the chapeau, the EC and JAPAN suggested using the wording of the Biosafety Protocol on taking into account "risks" to human health. In the remainder of the operational text delegates made additions and bracketed references to: transboundary movements of LMOs; direct or indirect results of human activities; and that the mere presence of an LMO in the environment not constituting damage. JAPAN, CANADA and COLOMBIA expressed willingness to consider this definition with some of the above proposed additions, but maintained their preference for the option containing a more concise definition of damage, if it was retained.

On special measures in case of damage to centers of origin and genetic diversity, Brazil, on behalf of GRULAC, suggested deleting this subsection, instead including a reference that the unique value of these centers should be considered, in the following subsection on valuation of damage.

Regarding valuation of damage, JAPAN insisted on retaining the concise operational text that damage to conservation of biological diversity shall only be valued on the cost of

restoration. INDIA proposed alternative wording focusing on costs of restoration, reinstatement, rehabilitation, clean-up and preventive measures. Brazil, on behalf of GRULAC, suggested working on the basis of the most comprehensive operational text, proposed a number of deletions and added, opposed by NORWAY and the EC, other costs to be covered, including loss of income. MALAYSIA suggested adding a list setting out the elements that liability shall extend to from the remaining operational text.

On the issue of causation, under the option on burden of proof being on the respondent, delegates agreed to a narrower operational text with an addition by BRAZIL on establishing the causal link between the damage and the activity in question in accordance with domestic rules.

PRIMARY AND SUPPLEMENTARY COMPENSATION SCHEME: Primary Compensation Scheme: The sub-working group continued to address elements of the administrative approach based on allocation of costs of response and restoration measures. On standard of liability and channeling of liability, delegates discussed the definition of "operator." INDIA and the EC, opposed by BRAZIL, argued for the inclusion of a list of potential operators and the two options were retained in brackets.

Delegates then discussed the subsection on civil liability, beginning with standard of liability and channeling of liability which contained two options, strict and mitigated strict liability. JAPAN added a chapeau clarifying that the subsection relates to a compensation scheme to deal with damage in accordance with domestic regulations, which remains bracketed. BRAZIL called for the inclusion of text specifying that where damage has not been satisfied, the plaintiff can claim against another contributing party, and that text remains bracketed. On mitigated strict liability, delegates agreed on text specifying instances leading to a fault-based standard of liability, including any acts or omissions in violation of national law, with JAPAN adding that the list should comprise options, not alternatives.

Regarding the provision of interim relief, delegates discussed two operational texts and agreed to merge components of both, including the condition that the defendant's costs and losses be paid by the claimant in cases where interim relief is granted but liability is not established. The text remains bracketed.

On additional elements of an administrative approach and/or civil liability and on exemptions to, or mitigation of strict liability, delegates considered exemptions to strict

liability and agreed to retain alternative formulations on when exemptions apply. LIBERIA and FRIENDS OF THE EARTH INTERNATIONAL opposed any exemption, and CANADA highlighted that exemption from liability does not mean exemption from fault.

On recourse against third parties by the person who is liable on the basis of strict liability, delegates agreed to retain only the broad operational text.

Regarding joint and several liability or apportionment of liability, delegates agreed to work on the basis of only one operational text. Delegates questioned whether domestic provisions should be overridden and agreed they should not.

Supplementary Compensation Scheme: On residual state liability, delegates disagreed whether residual liability should rest with the state which suffers damage, or with the state in which the operator is registered, and no agreement was reached. Delegates exchanged preliminary views on a proposal tabled by Switzerland on the supplementary collective compensation arrangement and its reference to a voluntary trust fund, on which a number of delegates expressed reservations.

Settlement of claims: Delegates agreed to move two operational paragraphs on administrative procedures to the section on elements of administrative approach.

Complementary capacity-building measures: Numerous delegates maintained that capacity-building measures related to liability and redress should build on and link to the respective provisions in Article 22 of the Biosafety Protocol, and suggested revising the operational text accordingly.

PLENARY

CORE ELEMENTS PAPER: During the afternoon, Co-Chairs Nieto and Lefeber introduced the core elements paper, intended to be used as a tool to assist delegations in making decisions on key issues. Nieto outlined three scenarios, namely: delegates reject the paper and continue negotiating based on the working draft; delegates accept the paper with minor amendments; or delegates accept the paper with no amendments. She explained that if the paper was accepted, the Co-Chairs would integrate the paper into the working draft.

Lefeber introduced the four “pieces” of the core elements paper for delegates’ consideration, namely: primary compensation scheme (administrative approach); primary compensation scheme (civil liability); supplementary compensation scheme; and capacity-building measures. On the issue of choice of instrument he said that given the lack of consensus, the paper attempted to strike a balance, and therefore the legally binding component would be limited to the administrative approach, albeit with an “escape clause,” should the content not justify a legally binding instrument. He explained that the administrative approach would include: a broad functional and narrow geographical scope; damage to the conservation and the sustainable use of biological diversity; obligations incumbent on persons in operational control of LMOs to inform competent authorities in the event of damage or imminent threat of damage, and to take response and restoration measures; discretion of competent authorities to take such measures and recover the costs; exemptions and mitigation; limitation in time, including relative and absolute time limits; limitation in amount; coverage, involving domestic discretion to require evidence of financial security; and a domestic law approach to causation. Similar elements are contained in the piece on civil liability to be developed as guidelines for

implementation in domestic law. These are to be included in an annex to a COP/MOP decision along with other annexes on the supplementary compensation scheme and capacity building.

Delegates reviewed the paper and Nieto invited questions and clarifications. In response to the AFRICAN GROUP, Lefeber explained that the four “pieces” of the core elements paper would be complementary and all form part of the rules and procedures on liability and redress. In response to BRAZIL, Lefeber confirmed that a small group could work on the core elements paper, if provided with a clear mandate in plenary.

On the administrative approach, responding to MEXICO, Lefeber explained that the definition of damage, and whether it would address risks to human health, remained subject to negotiation. In response to JAPAN, Lefeber underscored that the administrative approach would form a supplementary protocol to the Cartagena Protocol, and would qualify to be adopted in a COP/MOP decision. BRAZIL enquired about the extent of exemptions and mitigation and Lefeber explained that the list would not be exhaustive.

On civil liability, reacting to CHINA, Lefeber clarified that the suggested default standard of liability was fault-based, and only if approval was granted subject to strict liability would the following provisions on channeling of strict liability, and exemptions and limitations, come into play.

On the supplementary compensation scheme, responding to the EC, Lefeber clarified that damage provided for in domestic legislation would be satisfied by the primary compensation scheme, and damage excluded would be met by the supplementary compensation scheme, likewise for claims falling outside time limits under national legislation. Regarding the threshold amount for damage, he explained that parties could also choose a higher cap under national law. The PRRI suggested that the geographical scope of the supplementary compensation scheme be broader than the administrative approach, and Lefeber responded that it was intended to follow the primary compensation scheme. In response to BRAZIL and MALAYSIA, Lefeber explained that the supplementary contractual compensation mechanism by the private sector is based on a proposal by Switzerland, and requires further elaboration.

On the capacity-building mechanism, in response to COLOMBIA, Lefeber explained that the compliance committee could provide assistance.

IN THE CORRIDORS

Saturday was marked by the long-awaited tabling of the core elements paper, constituting another twist in the dynamics of the meeting. Numerous delegates welcomed the paper, claiming it set out a realistic option for a way forward for the Working Group. Others expressed concern that the “elements” were overly prescriptive, and may serve to deflate negotiations at a point when parties had finally started to position themselves to engage in the usual “give and take.” Similarly, others felt more could have been achieved and wondered if they were being short-changed. One delegate questioned why the supplementary compensation scheme should be voluntary, when there is precedent for compulsory schemes in other conventions. After a long week, another delegate pondered whether connecting with biodiversity on their day off, might prompt delegates to reflect on whether the core elements proposed can lead to an effective liability and redress regime for biodiversity-rich countries such as Colombia.