

WORKING GROUP HIGHLIGHTS: TUESDAY, 18 MARCH 2008

The Working Group convened for its sixth day of negotiations in Cartagena de Indias, Colombia, on Tuesday. Throughout the morning and afternoon, a Friends of the Chair group met to consider the core elements paper and completed a first reading of the document. In the evening the group convened in a closed session to negotiate the core elements.

FRIENDS OF THE CHAIR GROUP

The Friends of the Chair group convened throughout the morning, afternoon and evening.

CORE ELEMENTS PAPER: Co-Chair Lefebvre invited delegates to address the core elements paper. ETHIOPIA, opposed by BRAZIL, GRULAC, NEW ZEALAND, the PHILIPPINES and JAPAN, outlined its proposal to merge the elements on civil liability with those relating to complementary capacity building measures. BRAZIL, supported by CHINA, NEW ZEALAND, INDIA, NORWAY and the AFRICAN GROUP proposed deleting elements on legal status, to enable the discussion to move forward. Delegates agreed and then addressed the four “pieces” of the paper sequentially and exchanged views on elements.

Piece A: Primary Compensation Scheme (Administrative Approach): Under the administrative approach, many delegates supported a broad functional scope and a narrow geographical scope. NORWAY underlined that the geographical scope must take into account damage resulting from transboundary movement of LMOs by non-parties. The EC proposed additional text on: limitation to the authorization at the time of the import of LMOs; determination of the point of import and export of the LMOs in accordance with international law; and transboundary movement of LMOs by non-parties. Delegates also discussed inclusion of additional elements, sought clarification on the authorization at the time of import and on whether non-parties should be incorporated. Lefebvre confirmed that other elements, although not included in the core elements paper, could continue to form part of the negotiations.

On the definition of damage, delegates debated the inclusion of “risks to human health.” While JAPAN said its inclusion may “jeopardize the package,” INDIA, PERU, and the AFRICAN GROUP said the wording was taken from the Biosafety Protocol. BRAZIL and others said they could accept the current formulation if the definition remains subject to further negotiation, and NAMIBIA suggested replacing the wording with “definition of damage.” NEW ZEALAND added

that any future definition must make provision for diverse domestic approaches. Delegates also discussed whether the same definition should be used for the part on civil liability with PERU, NORWAY, JAPAN, INDIA and CHINA in favor, and the EC and NORWAY open to a different formulation.

On the obligation of operators to inform in the event of damage, and discretion of competent authorities to take measures, many underscored the importance of the elements to the administrative approach. BRAZIL called for their deletion, favoring instead “neutral” language specifying “standard of liability and channeling of liability,” with ETHIOPIA suggesting a similar formulation. Others underscored the need to define “operator” and “operational control.”

On exemptions and mitigation, Lefebvre explained that the respective operational text would include an exhaustive list from which states could choose, with SWITZERLAND and the EC adding that the list should be restrictive, and MALAYSIA and PERU underscoring that it must be agreed to internationally.

On limitations of time and amount, SWITZERLAND maintained that limits form an intrinsic part of a liability and redress regime, with BRAZIL and others initially rejecting this proposition, but altering their position once the optional nature of the minimum limits was clarified.

On coverage of liability, many delegates opposed the obligation to require evidence of financial security upon import of LMOs, including BRAZIL stating it could hinder South-South trade, the AFRICAN GROUP arguing for national implementation, and NEW ZEALAND adding that it may be contrary to WTO obligations. These objections were countered by SWITZERLAND and MALAYSIA who explained how the provision could be applied in a non-discriminatory manner, and NORWAY stating that while all provisions can be implemented domestically, the Working Group would only establish international standards. JAPAN supported the element’s inclusion.

On causation, the EC, the PHILIPPINES, JAPAN and NORWAY supported the domestic law approach, and the AFRICAN GROUP supported the international approach.

Piece B: Primary Compensation Scheme (Civil Liability): Regarding functional scope, exemptions, limitations and coverage of liability, the Co-Chairs noted the discussion under the administrative approach and delegates agreed not to revisit these issues.

On damage resulting from transboundary movement of LMOs, PERU, supported by MALAYSIA, suggested that injured parties first seek redress under the administrative approach,

before turning to the civil liability regime. BRAZIL characterized these steps as “reinstatement then compensation” and NEW ZEALAND registered its concern with the broad definition.

On standard of liability, BRAZIL and PANAMA wanted to see all options: fault-based, strict and mitigated strict liability, reflected in the paper. INDIA and NORWAY insisted on strict liability. Stating that they do not consider LMOs inherently dangerous, the PHILIPPINES supported fault-based liability, along with JAPAN who expressed readiness to support the option set out by the Co-Chairs with fault-based liability as the default standard unless approval of import has been made subject to strict liability. The AFRICAN GROUP insisted on a strict liability standard, and with CHINA suggested making it the default standard if necessary with an exception for fault-based liability. MALAYSIA agreed and pointed to the Biosafety Protocol’s precautionary approach as recognition of the inherent risk of LMOs. SWITZERLAND suggested the use of guidelines allowing parties to choose the appropriate liability standard.

On channeling of strict liability, CHINA suggested channeling liability to the “operator” with BRAZIL and the AFRICAN GROUP adding that the term had to be defined.

On causation, GRULAC reiterated their opposition to the domestic law approach, noting that they could accept a more flexible definition under the administrative approach, and with the AFRICAN GROUP insisted on a strong international regulation of causation under the civil liability regime. JAPAN and NEW ZEALAND supported the domestic law approach. MALAYSIA suggested an opt-out clause from the international approach if necessary for some parties.

On enforcement of foreign judgments, MALAYSIA, the AFRICAN GROUP and NORWAY called for strong provisions on the recognition and enforcement of judgments. GRULAC, INDIA and CHINA opposed making enforcement subject to assessing whether domestic law is compatible with international guidelines.

Piece C: Supplementary Compensation Scheme: On supplementary compensation schemes for the reimbursement of costs of response and restoration measures to redress damage, GRULAC stressed the scheme required extensive discussion regarding mechanisms, and BRAZIL added that the proposed approach is new and required further examination. The EC noted the readiness of industry to partake in the scheme and invited participants to respond positively to this. Citing the International Oil Pollution Fund as precedent, MALAYSIA said private industry should contribute to a binding fund.

MALAYSIA, supported by SOUTH AFRICA, also said that supplementary compensation, should be supplementary to both forms of primary compensation. The EC cautioned this was not the most constructive approach to pursuing a relationship with industry. JAPAN preferred it to be supplementary to the administrative approach only. NORWAY stated that its support was contingent on the scheme being in accordance with the polluter pays principle. Regarding residual state liability, ETHIOPIA, INDIA, NORWAY and the PHILIPPINES supported retention of this element, but the EC disagreed. Lefeber clarified that residual state liability, would require a state by law to provide compensation.

Piece D: Complementary Capacity-Building Measures: Regarding review of the action plan for building capacities for effective implementation of the Biosafety Protocol, NEW ZEALAND suggested adding reference to strengthening linkages between capacity building in liability and redress and capacity building in risk assessment and risk management.

BRAZIL supported the establishment of an institutional arrangement with its terms of reference in the main body or annex to a COP/MOP decision, while JAPAN expressed

reservations. Lefeber explained that some functions could not be adequately carried out within the existing regulatory framework.

Delegates then debated the functions of the institutional arrangement. The EC supported an institutional arrangement, adding that parties were at liberty to disregard advice, and it would not be binding. BRAZIL, supported by JAPAN and CHINA, cautioned that the proposal was moving away from the purpose of capacity building measures and appeared more like a compliance mechanism. He preferred, opposed by the EC, to draw on the existing roster of experts and also pointed out that there is clear guidance from COP/MOP on separating liability and redress issues from compliance issues. SOUTH AFRICA suggested also focusing on the technical aspects of risk assessment and limitation of risk. JAPAN expressed reservations on mandating a compliance committee to render judgment on whether or not domestic law is in conformity with a supplementary protocol and guidelines.

Moving forward: Lefeber observed the meeting was at a “critical juncture” and faced the choice of either making progress by negotiating the core elements and agreeing on a package, or reverting to the revised working draft and sending this to COP/MOP. Delegates agreed to negotiate the core elements paper in a small Friends of the Chair group. Several delegates questioned whether following negotiations the core elements paper would be integrated with the revised working draft, to constitute the document that would be transmitted to COP/MOP. The Co-Chairs clarified that once choices were made under the core elements, the corresponding operational text would be integrated into a new working document and the operational texts relating to other options would be deleted.

Small Friends of the Chair group: A small Friends of the Chair group convened to negotiate the core elements. The group was closed to observers and of 9:51 pm, was still negotiating the core elements.

IN THE CORRIDORS

Discussion in the corridors on Tuesday centered on the headquarters of the Friends of the Chair group, who convened in the early morning. Many commented that the atmosphere was convivial and observers were well represented in the daytime session. Some delegates expressed concern that the first reading of the core elements paper took up most of the daylight hours and therefore much of the increasingly scarce time for negotiations. Others remarked that delegates seemed to be moving to the “core of the elements,” a necessary precondition to meaningful negotiations. One seasoned delegate cautioned that they were avoiding the choice of instrument issue, once again taking it off the table to make headway on the remaining core elements, in an effort not to prejudge the outcome. Despite this, another felt that the time had come when delegates would finally shed their legal and technical cloaks, and engage fully in the political negotiations. Whether they were moving towards consensus remained uncertain, as key negotiators reconvened in a close[d] Friends of the Chair group to hammer out the core elements for a future liability and redress instrument. As the sun was setting in Cartagena, negotiators were seen stocking up on provisions and bracing themselves for a long night ahead, seemingly agreeing on one thing, that they wanted to be in the room during the critical 11th hour.

ENB SUMMARY AND ANALYSIS: The *Earth Negotiations Bulletin* summary and analysis of WGLR 5 will be available on Saturday, 22 March 2008, online at: <http://www.iisd.ca/biodiv/wglr5>