

FRIENDS OF THE CO-CHAIRS HIGHLIGHTS: WEDNESDAY, 25 FEBRUARY 2009

Delegates to the first meeting of the Friends of the Co-Chairs on Liability and Redress met throughout the day and in the evening to continue deliberations on proposed operational texts on: the primary compensation scheme, including exemptions and mitigation, limitation and coverage; and a provision on civil liability, including elements for consideration in civil liability systems, enforcement of foreign judgments, and review with a view to elaborate a more comprehensive binding regime on civil liability.

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

PRIMARY COMPENSATION SCHEME: Exemptions or Mitigation: Delegates first debated whether domestic law “may,” “should” or “shall” provide for exemptions on an act of God, *force majeure*, and an act of war or civil unrest, and agreed on “may.”

Delegates turned to an operational text on the chapeau of the exemptions or mitigations on: intervention by a third party; compliance with compulsory measures imposed by a public authority; and an activity expressly authorized under domestic law. They debated whether the chapeau should refer to exemptions and mitigations, or just mitigations. JAPAN, opposed by many, preferred referring only to exemptions. The EU proposed stating that parties may provide for differentiated responsibility if the operator proves that the damage arose from any one or more of the circumstances on the exhaustive list. INDIA and MALAYSIA cautioned against using the phrase “differentiated responsibilities” because of its meaning in international law, and JAPAN and PANAMA expressed preference for the original chapeau text. The original text and the amended EU proposal remain as alternative texts.

Limitation: On a text allowing for domestic law to provide for time limits for recovering costs and expenses, parties agreed not to set out any specific cut-off times in the supplementary protocol.

On limitations in amount, ETHIOPIA, INDIA and BRAZIL saw no need for limiting the recovery of costs and expenses, thus favoring full recovery. Conversely, PANAMA, PARAGUAY, COLOMBIA, MEXICO and the PHILIPPINES preferred to allow flexibility for setting domestic limitations in amount.

Coverage: Mexico, on behalf of the LATIN AMERICA AND CARIBBEAN GROUP (GRULAC), and JAPAN opposed language providing that parties require the operator to establish and maintain financial security during the time limits, with GRULAC noting its potential repercussions on developing countries’ economies and food prices. The EU, NORWAY and SWITZERLAND preferred to keep the requirement, whereas NEW ZEALAND and MALAYSIA considered that it should, in any case, be placed in the protocol’s preambular section.

CIVIL LIABILITY: Co-Chair Lefebvre explained that the compromise reached at COP/MOP4 provides for the negotiation of a legally binding international instrument on the administrative approach, including one provision on civil liability. He opened the discussion on operational texts laying out options for a chapeau providing alternatives on parties applying their existing civil liability systems to damage from LMOs or on developing special systems. The texts also included different options linking civil liability to a list of conditions, including elements to take into account, a provision on the recognition and enforcement of foreign judgments and reciprocal enforcement of judgments. As delegates expressed their preference regarding which option should be the basis for further discussion, a debate ensued over the nature of these conditions and their impact on newly implemented civil liability systems. NEW ZEALAND asked whether the conditions would become binding; BRAZIL whether they would require parties to implement special systems for civil liability if their existing systems were not sufficient; while the EU, NEW ZEALAND and JAPAN said they should not require states to harmonize their laws. MALAYSIA clarified that the provision should: ensure that parties have a civil liability system in place; leave flexibility as to whether to address LMOs as part of a general system or through a specific system; and ensure that any such law include the generic common elements of any civil liability system. The EU asked to reflect that the conditions are non-binding and do not apply to existing systems.

Delegates then proceeded to draft a new chapeau for the clause on civil liability. NEW ZEALAND proposed stating that parties shall ensure that their domestic laws include effective rules and procedures that address liability and redress. The EU proposed adding language specifying that if parties chose to develop a special civil liability system, they should ensure that it provides for redress for damage, while MALAYSIA suggested adding “towards that end parties may develop a civil liability system or may apply their existing rules and

procedures for damage resulting from transboundary movements of LMOs." NEW ZEALAND proposed that this provision would be implemented either through general domestic law and administrative arrangements, through a special regime relating to LMOs, or through a combination of both.

SOUTH AFRICA, opposed by MALAYSIA, asked to specify that the provision applies to damage in relation to the sustainable use of biological diversity. A number of delegates commented that the definition of damage under the civil liability provision would be different from that under the administrative approach, and Co-Chair Lefeber said the issue would be addressed under the definition of damage. Delegates agreed to integrate the proposed provisions, and following extensive legal drafting, the entire chapeau read: "Parties shall provide in their domestic law for rules and procedures that address liability and redress in the event of damage resulting from the transboundary movement of LMOs. To implement this obligation, parties may apply or develop, as appropriate: their existing domestic laws, including, where applicable, general provisions on civil liability; or a specific civil liability regime; or a combination of both." The EU expressed concerns regarding the formulation "to implement this obligation" and asked to refer to "this end" and these alternative wordings remain bracketed.

Elements: On a paragraph setting out a number of elements to be considered in a civil liability regime, most delegates preferred stating that a civil liability regime should "address," rather than "include" these elements. The EU questioned whether the elements "shall" be addressed, suggesting that this wording can only be agreed upon once the elements are decided and proposed "may, as appropriate" as alternative text. NORWAY called for reference to the guidelines on working towards a non-legally binding regime on civil liability, which will be annexed to the COP/MOP decision adopting the supplementary protocol. Several delegates opposed referencing the guidelines in the paragraph on elements, and NORWAY subsequently suggested a separate paragraph stating that parties may also take the guidelines into account when developing legislation or policy on civil liability.

Delegates agreed to retain elements on damage and standard of liability that may include strict, fault-based or mitigated liability. Delegates also agreed to retain an element on channeling liability, but not to specify that it be "strict" liability. On an element that contained alternative text on financial security and compensation schemes, delegates agreed to delete "compensation schemes." BRAZIL proposed to refer to "redress or compensation" instead of "financial security" and both alternatives remain bracketed.

On the draft element on access to justice or right to bring claims, INDIA and MALAYSIA argued that they related to the standing of the potential claimants and constituted a critical consideration by parties establishing civil liability regimes. The EU and others opposed the reference, arguing that it was incompatible with civil law systems. Delegates agreed to delete "access to justice" and retain "right to bring claims" in brackets.

The final element on procedural rules that provide for due process was deleted.

Enforcement of Judgments: BRAZIL, INDIA, MEXICO, the AFRICAN GROUP and MALAYSIA supported an option providing for parties to enforce foreign judgments arising from the implementation of the provisions on civil liability, and for parties who do not have legislation concerning enforcement of foreign judgments to endeavor to enact such laws. The EU,

NEW ZEALAND and JAPAN preferred an operational text providing only for the enforcement of foreign judgments in accordance with domestic law, rejecting language that would require developing or changing domestic laws on enforcement of foreign judgments. Pointing to the provision's voluntary nature, MALAYSIA suggested developing alternative language.

Review: On an operational text providing for the review of the guidelines for working towards a non-legally binding approach on civil liability, NEW ZEALAND stated that this provision should be part of the guidelines rather than the supplementary protocol. MEXICO and BRAZIL proposed that the paragraph be part of the COP/MOP decision that will adopt the supplementary protocol. The EU and JAPAN opposed reference to the guidelines and proposed a general review clause for the supplementary protocol. SWITZERLAND and the EU proposed two review clauses, one for the supplementary protocol and one for the guidelines on civil liability. A lengthy debate ensued over language stating that the guidelines be revised "with a view to elaborating a more comprehensive binding regime on civil liability," during which the AFRICAN GROUP and MALAYSIA recalled that the option to further elaborate the civil liability regime had been a key condition for their approval of the compromise achieved during COP/MOP4.

After contentious discussions, Co-Chair Lefeber suggested integrating the review of the supplementary protocol with the Biosafety Protocol's five-year review cycle. Regarding the review of the guidelines, delegates agreed to work on the basis of a new text proposed by MALAYSIA envisioning a three-year period for reviewing the guidelines on civil liability.

INSTITUTIONAL PROVISIONS: Delegates discussed institutional and procedural provisions contained in a document tabled by the Co-Chairs on Monday. NEW ZEALAND asked to clarify the relationship between the supplementary protocol, the Biosafety Protocol and the CBD. Noting the need to revise numerous provisions, GRULAC requested not to engage in a substantive debate of the institutional provisions to allow time for work on operational texts. The AFRICAN GROUP and MALAYSIA preferred engaging in a first reading of the provisions, considering it a necessary step to finalize the supplementary protocol. Delegates then suggested that the Co-Chairs prepare a compilation including revised operational texts and the original institutional provisions.

IN THE CORRIDORS

Many were apprehensive on Tuesday morning as the Friends of the Co-Chairs began addressing civil liability, which some had described as the Sword of Damocles of the negotiations. The initial quick progress on the civil liability provision and its elements had many pleasantly surprised. But as the afternoon wore on, the fault lines began to show between those who want to keep the door open to develop a more elaborate regime on civil liability and those who are less keen, leading to a highly confrontational atmosphere that one delegate described as a "melt-down."

The mood calmed after the dinner break, but the underlying issues remained unsolved. When delegates decided to postpone discussion of the institutional provisions for adopting a supplementary protocol until after a further reading of operational texts, even a normally optimistic delegate resigned herself to the fact that negotiations won't be completed at this meeting.