

## FRIENDS OF THE CO-CHAIRS HIGHLIGHTS: THURSDAY, 26 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 consider a draft supplementary protocol compiled by the Co-Chairs based on comments made during the first reading of proposed operational texts. Delegates discussed the supplementary protocol's scope, including functional and geographical scope and limitations in time, and the definitions of damage, response measures, restoration, imminent threat, and significant adverse effects. Informal consultations were held in the evening to reach agreement on the definitions of response measures and imminent threat of damage.

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

The Secretariat announced that a revised version of the industry compact, a mutually binding contract to cover actual damage to biodiversity which had been proposed by six agricultural biotechnology companies, was made available by the industry group, noting that the participating companies invite delegates to provide comments on the new draft.

Co-Chair Lefeber presented the draft supplementary protocol, noting that articles on the definition of incident, and clauses on institutional and procedural matters would be discussed at a later stage.

**DEFINITIONS: Damage:** On the definition of damage to the conservation and sustainable use of biological diversity, delegates agreed to refer only to "adverse" and not "negative" effects on biodiversity. The AFRICAN GROUP and MALAYSIA preferred referencing damage to human health.

**Response Measures:** BRAZIL called for flexibility to allow for national discretion, suggesting to define response measures as "reasonable actions identified under domestic law." On measures to minimize or contain damage, ECUADOR reported that an informal group had agreed to language stating they are actions to "minimize or contain damage or as appropriate control imminent threat of damage or prevent further spread of damage," explaining that "imminent threat of damage" remained

bracketed. NEW ZEALAND called for the inclusion of measures that "mitigate" and "avoid" damage. Co-Chair Lefeber deferred the issues to informal consultations.

The majority preferred the more detailed of two options on restoration measures on the basis that it provided more clarity by stating that restoration could include replacing loss of biological diversity with other components of biodiversity.

Noting the absence of such provisions in its national law, BRAZIL called for either deleting the paragraph or, supported by the AFRICAN GROUP, adding the words "if possible under domestic law." On a restoration measure providing for replacing the loss of components of biodiversity with other components for the same use, COLOMBIA requested adding "another type of use," and JAPAN, opposed by MEXICO, insisted on retaining a bracketed reference stating that such restoration measures be taken under "appropriate circumstances."

MALAYSIA argued that the obligations of parties will be set out under the primary compensation scheme, thus reducing the need to qualify this sub-paragraph. Underlining the need for flexibility to accommodate national circumstances, NEW ZEALAND suggested adding "practicable" restoration measures, but the proposal was not adopted. Mexico suggested stating restoration should only occur if "technically and economically feasible."

A contentious debate ensued on whether to include "imminent threat of damage" and, if so, whether a definition was needed. Wording was put forward by: SOUTH AFRICA, linking imminent threat to scientific evidence of damage caused by the same LMOs in similar environments; the PHILIPPINES linking it to science-based risk assessment; and INDIA, linking it to the probability that significant adverse effects are likely to occur if immediate response measures are not taken. The issue was referred to an informal group for further discussion.

**Significant Adverse Effects:** On a list of factors for determining the significance of adverse effects, BRAZIL, opposed by MEXICO, suggested stating that the list is exhaustive. The issue was deferred for discussion after consideration of the list of factors. On a factor addressing reduction of the ability of components of biodiversity to provide goods and services, JAPAN expressed concerns about the

reference to goods and services, and COLOMBIA, opposed by SOUTH AFRICA, proposed to refer to goods and “ecosystem services” instead. Following informal consultations, JAPAN agreed to retain the original term.

BRAZIL and COLOMBIA opposed a factor considering any locally or regionally important components of biological diversity identified in accordance with CBD Article 7(a) (identification and monitoring of components of biodiversity important for its conservation), arguing that there is an overall obligation to protect biodiversity and no specific aspects should be singled out. SWITZERLAND and the EU clarified that such a factor was not a limiting provision, but meant to help national authorities determine significant adverse effects, and suggested removing reference to CBD Article 7(a) for simplification. NEW ZEALAND proposed reference to the extent of effects on locally or regionally important biodiversity, and this wording remains in brackets as a basis for further discussion.

Delegates discussed whether a factor on adverse effects on human health should be freestanding or contingent on damage to conservation and sustainable use of biodiversity. BRAZIL, the AFRICAN GROUP, INDIA, MALAYSIA and the EU preferred to refer only to adverse effects on human health. NEW ZEALAND, supported by COLOMBIA, PARAGUAY, JAPAN and the PHILIPPINES, provided wording for a factor referencing the extent to which adverse effects on the conservation and sustainable use of biodiversity have adverse effects on human health. Following informal consultations, delegates agreed to refer to adverse effects on human health in the context of the Biosafety Protocol.

**SCOPE:** On functional scope, delegates were unable to reach consensus to apply the supplementary protocol to either damage, risks or adverse effects on human health, despite earlier agreement on damage to human health as a factor for determining significant adverse effects. PANAMA, COLOMBIA, the AFRICAN GROUP, MEXICO and PARAGUAY expressed willingness to align language with that used in the Biosafety Protocol, whereas NEW ZEALAND preferred to defer the discussion.

A lively discussion arose on whether to apply the rules and procedures also to products of LMOs, mirroring the discussion during the first reading. Unable to reach consensus, the group decided to leave the reference to “products thereof” bracketed.

Recalling language used in the draft UNEP guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment, the EU proposed an additional paragraph stating that the supplementary protocol should not apply to activities related to national defense, international security or natural disaster management. Many opposed, questioning the need or appropriateness of such a reference. Upon request by MALAYSIA and the AFRICAN GROUP, SOUTH AFRICA and the EU provided examples of cases in which LMOs could be used for purposes of national defense, such as the use of genetically modified plants to identify land mines, in order to clean old military bases. BRAZIL highlighted that the guidelines had neither been discussed nor negotiated under the auspices of UNEP, and were misapplied in this context. The EU

acknowledged the concerns, but asked to retain the reference in brackets and move it to the section on exemptions, for later consideration.

Regarding the article on geographical scope, JAPAN asked, and delegates agreed, to specify that it applies to damage that occurred in areas within the limits of national jurisdiction of parties and resulted from activities referred to in the article on the supplementary protocol’s functional scope.

Regarding the article on limitations in time, there were two options differing only in that the first specifies that the supplementary protocol must have been in force for the party into whose jurisdiction the transboundary movement of the LMO was made, whereas the more general did not. NEW ZEALAND suggested amending the specific provision to refer to the occurrence rather than the start of the movement. MEXICO preferred the option with the specification, with BRAZIL proposing to further streamline it. The AFRICAN GROUP and INDIA supported the more general option. MALAYSIA suggested merging the options and adding a provision that would cover cases where the transboundary movement started before the entry into force of the supplementary protocol and damage occurred after, to allow parties to impose limited obligations on the operator, such as notification. NEW ZEALAND warned against extending the scope of the supplementary protocol so late in the negotiations. The different options were referred to a small group for consideration.

Closing the session, Co-Chair Lefeber set up two small groups, one chaired by the Philippines, with the assistance of Mexico and Ecuador, on definitions of response measures, and one chaired by Switzerland on limitations in time.

### IN THE CORRIDORS

Seasoned negotiators agree that Thursday always feels like the longest day. Beginning the second reading of the operational texts which had morphed into a draft supplementary protocol clearly seemed like a daunting task to some delegates. Inevitably the time had come to systematically address these issues. Robust negotiations ensued on key issues, including the protocol’s scope and definitions of key terms. At times cooperative, comical and adversarial, delegates worked hard to accommodate each other’s positions. The amount of new text submitted led one delegate to joke that there had been an excess of “white water drafting,” meaning that much text had been developed in an *ad hoc* manner.

As delegates prepared to work into the night in the two drafting groups established to elaborate the definitions of imminent threat of damage and response measures and come to agreement on limitations in time, one delegate suggested that the day should be judged less on proceedings than on the eventual outcome. Most delegates agreed however that another meeting will be required to hammer out the protocol’s details; some were even overheard consulting with the Secretariat about possible dates for the next meeting to be held in Malaysia.

**ENB SUMMARY AND ANALYSIS:** The *Earth Negotiations Bulletin* summary and analysis of the Friends of the Co-Chairs meeting will be available on Monday, 2 March 2009, online at: <http://www.iisd.ca/biodiv/bs-gflr/>