Earth Negotiations Bulletin
FCC-L&R-2 #3
A Reporting Service for Environment and Development Negotiations
Online at http://www.iisd.ca/biodiv/bs-gflr2/
Vol. 9 No. 492 Published by the International Institute for Sustainable Development (IISD) Wednesday, 10 February 2010

FRIENDS OF THE CO-CHAIRS HIGHLIGHTS: TUESDAY, 9 FEBRUARY 2010

Delegates continued negotiations on a supplementary protocol on liability and redress in the context of the Cartagena Protocol on Biosafety throughout the day, focusing on domestic response measures, exemptions and limitations and financial security. In the evening, the meeting considered a legally binding clause on civil liability in the field of damage resulting from transboundary movements of living modified organisms (LMOs).

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

Delegates continued negotiating a supplementary protocol on liability and redress based on a revised negotiating text.

PRIMARY COMPENSATION SCHEME: Domestic Response Measures: Delegates debated text stating that decisions of the competent authority should be reasoned and notified to the operator, as well as information about the remedies available, including opportunity for an independent review. CHINA requested bracketing reference to "independent" review. BRAZIL requested adding specific reference to courts as independent review bodies, but the proposal was not retained. INDIA opposed reference to "imposing" response measures. NEW ZEALAND suggested "implementing" response measures, but the EU disagreed as this would limit the role of the competent authority.

Delegates supported Japan's proposal that decisions must be reasoned and should be notified to the operator. INDIA, opposed by BRAZIL, stressed the need to inform foreign operators of available remedies. Upon requests by NAMIBIA and CHINA, Co-Chair Lefeber clarified that remedies could include civil, administrative and criminal law remedies.

BRAZIL requested deleting a reference stating that recourse to remedies should not impede the right of the competent authority to take response measures as may be necessary. ETHIOPIA preferred retaining it. MALAYSIA stressed its importance for addressing emergencies and situations of widespread damage to biodiversity. NEW ZEALAND said the state might have to take action in case of major emergencies. SWITZERLAND proposed to include a reference to emergency situations in the text as a compromise. After informal consultations, delegates agreed to state that the "competent authority will take response measures in appropriate circumstances unless otherwise provided by domestic law."

Delegates also discussed a paragraph stipulating that decisions taken by the competent authority shall be consistent with international law. BRAZIL asked to retain the reference, but NORWAY wanted to remove it, arguing this was already covered by other Articles of the CBD. Recalling protracted debates on the issue when negotiating the Biosafety Protocol, MALAYSIA proposed to instead refer to the provisions of the Biosafety Protocol in the preamble. NEW ZEALAND inquired whether there was a need to ensure that the actions of the competent authority do not result in trade barriers. MALAYSIA responded that the supplementary protocol deals with damage and not trade-related elements. Pointing to the issue of imminent threat of damage, BRAZIL asked to retain an operative paragraph on consistency with international law.

It was decided to retain in brackets an EU proposal stating that domestic legislation can be used to establish which components of biodiversity require response measures. INDIA expressed reservations on placing the reference under the article on response measures, and NORWAY preferred addressing the issues in the context of the definition of damage.

Exemptions and Limitations: Delegates discussed exemptions and mitigations with regard to the operator's liability, agreeing that the guidance provided shall neither be exhaustive nor binding as had been requested by PARAGUAY. MALAYSIA, supported by INDIA, the AFRICAN GROUP, NORWAY, MEXICO and ECUADOR, proposed deleting the entire article, opposed by NEW ZEALAND, JAPAN, PARAGUAY and BRAZIL raising concerns that this could signal that no exemptions and mitigations were allowed per se.

Delegates discussed at length whether to include an indicative list of specific exemptions. MEXICO, BRAZIL and NEW ZEALAND supported an exemption in the case of intervention by third parties, which MALAYSIA sought to qualify as to prevent disproportionate costs being incurred by developing countries. The EU and SWITZERLAND advocated an exemption where a specific order has been imposed by a public authority. LIBERIA and ETHIOPIA opposed, expressing concerns that the activity of other branches of government could be used as an excuse to breach international obligations. The EU and NEW ZEALAND, opposed by MALAYSIA, INDIA and SWITZERLAND, supported an exemption referring to activities

This issue of the *Earth Negotiations Bulletin* © <enb@iisd.org> is written and edited by Johannes Gnann, Stefan Jungcurt, Ph.D., Laura Russo, Nicole Schabus, and Liz Willetts. The Digital Editor is Leila Mead. The Editor is Pamela S. Chasek, Ph.D. <pam@iisd.org>. The Director of IISD Reporting Services is Langston James "Kimo" Goree VI <kimo@iisd.org>. The Sustaining Donors of the *Bulletin* are the United Kingdom (through the Department for International Development – DFID), the Government of the United States of America (through the Department of State Bureau of Oceans and International Environmental and Scientific Affairs), the Government of Canada (through CIDA), the Danish Ministry of Foreign Affairs, the German Federal Ministry for Economic Cooperation and Development (BMZ), the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), the Netherlands Ministry of Foreign Affairs, the European Commission (DG-ENV), and the Italian Ministry for the Environment, Land and Sea. General Support for the *Bulletin* during 2010 is provided by the Government of Australia, the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management, the Ministry of Environment of Sweden, the New Zealand Ministry of Foreign Affairs and Trade, SWAN International, Swiss Federal Office for the Environment (FOEN), the Finnish Ministry for Foreign Affairs, the Japanese Ministry of Environment (through the Institute for Global Environmental Strategies - IGES), the Japanese Ministry of Economy, Trade and Industry (through the Global Industrial and Social Progress Research Institute - GISPRI), the Government of Iceland, the United Nations Environment Programme (UNEP), and the World Bank. Funding for translation of the *Bulletin* into French has been provided by the Government of France, the Belgium Walloon Region, the Province of Québec, and the International Organization of the Francophone (OIF and IEPF). The opinions expressed in the *Bulletin* are those of the authors and do not necessarily reflect the views of IISD or other donors. Excerpts from the *Bulletin* may be used in non-commercial publications with appropriate academic citation. For information on the *Bulletin*, including requests to provide reporting services, contact the Director of IISD Reporting Services at <kimo@iisd.org>, +1-646-536-7556 or 300 East 56th St., 11A, New York, New York 10022, USA. The ENB Team at the Second Meeting of the Group of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety can be contacted by e-mail at <stefan@iisd.org>.

expressly authorized under domestic law. MALAYSIA urged that parties should retain discretion, which was generally supported. NEW ZEALAND, supported by PARAGUAY and the EU, proposed including "mitigations" in addition to "exemptions."

After lengthy debate, delegates agreed to retain references to act of God or force majeure and war or civil unrest, while deleting a reference to national security exceptions. They further agreed to replace the controversial list of specific exemptions with a concise paragraph allowing for other exemptions and mitigations under national law, which was adopted.

Delegates then adopted an article stating that the supplementary protocol shall not limit or restrict any right of recourse or indemnity that an operator may have.

Delegates engaged in an extensive debate on the appropriateness of time limits for the recovery of costs and expenses. Some said time limits are unrealistic for resolving biodiversity issues, arguing that damage is often complex and cannot always be addressed with current science. Others raised concerns that without time limits litigation could continue indefinitely, which would be unfair to both the operator and the injured party. Delegates eventually adopted a short and flexible text that includes time limits for response measures and the commencement period.

Financial Security: Delegates debated at length a provision by which parties may require operators to establish and maintain financial security, with GRULAC requesting its deletion. BRAZIL said, among other things, that the provision would: be difficult to operationalize; send a negative signal to the biotechnology industry; and hamper entry of small and medium-sized national enterprises into the sector. Pointing out that the provision does not mandate financial security but enables countries to decide whether it is required, the AFRICAN GROUP urged delegates to retain the provision since it is in the national interest of certain countries. The PHILIPPINES said investment in biotechnology programmes is a national priority and requested more time to consider the issue. MALAYSIA pointed out that this provision would not hamper biotechnology, and that industry has been actively seeking financial security. EGYPT stressed that states have the right to seek assurance as to who will pay to restore a devastated environment in the event of damage.

CIVIL LIABILITY: Delegates considered two options on civil liability: one setting out that parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with LMOs; and one obliging countries to provide in their domestic law for rules and procedures that address liability and redress, and stating that to implement these states may apply or develop their existing laws, a specific liability regime, or a combination of both. The EU, JAPAN and PARAGUAY supported the first option, whereas the AFRICAN GROUP, INDIA, BRAZIL, COLOMBIA, CUBA, ECUADOR, MEXICO and NORWAY supported the second option. MALAYSIA added that the first option was introduced as a clarification rather than as a separate option. The EU and JAPAN insisted that they constituted two separate options. Co-Chair Lefeber proposed to work on the basis of the second option, while bracketing everything but the first paragraph. Following internal consultations, the EU agreed to Lefeber's proposal with the inclusion of a footnote noting that delegates agreed to work on the basis of the second option on a provisional basis.

Delegates then started discussing the first paragraph stipulating that parties shall provide in their domestic law for rules and procedures for liability and redress. PARAGUAY requested to insert an option that parties "may or may not," rather than "shall" provide such rules in "accordance with the need to deal with" damage. The EU suggested alternative language to the effect that if a party identifies a need for measures additional to the administrative approach, it may address this need by applying civil liability approaches. MALAYSIA and ETHIOPIA opposed, arguing the text constituted a rollback from the earlier agreement.

Lefeber produced a compromise, stating: that parties shall provide in their domestic law for rules and procedures that address liability and redress; and that to implement this obligation, parties shall implement the supplementary protocol and may or may not apply civil liability approaches.

The majority of delegates agreed to work on the basis of the compromise language. JAPAN said it could not accept it because of references to "liability and redress," since in Japan damage to the environment cannot be covered under a civil liability approach. Co-Chair Lefeber proposed and delegates agreed to bracket the reference to liability and redress.

Delegates then included a separate provision stating that nothing in the supplementary protocol shall derogate from parties' rights to provide in their domestic law for rules and procedures that address damage other than defined under the supplementary protocol. MALAYSIA stressed the need to also work towards a legally binding civil liability regime covering all kinds of damage, starting with a binding civil liability provision. He proposed an exemption for cases where a party's legal system does not allow for such civil liability and redress. Negotiations continued into the night.

IN THE CORRIDORS

Perched on a hill and oval-shaped, the Putrajaya International Convention Centre reminded some delegates of a spaceship ready to take off on an epic journey. However, instead of going boldly where no one has ever gone before, the friends of the Co-Chairs spent the day (and a good part of the night) huddled in a small conference room deep inside the center's belly where most of their adventurous spirits dissipated over the course of the day. This was, as one delegate put it, because only the hard nuts are left to crack, such as the definition of operator, domestic response measures, limitations to liability, financial security and the biggest nut of all – civil liability.

Shadows were cast over the latter as uncertainty grew about the future of the civil liability provision. The previously eliminated and then strategically reintroduced option stating that parties "may or may not" develop a civil liability approach came to haunt the negotiations. While some commented that this was a bargaining chip, others considered it a time bomb which could disrupt the entire negotiations. Some delegates commented that no substance is left in the compromise language which stipulates that parties "shall" implement the supplementary protocol and "may or may not" use a civil liability system in that regard. This unprecedented integration of binding and non-binding language in one sentence led one delegate to comment: "The negotiations shall continue but they may or may not lead anywhere."