

FRIENDS OF THE CO-CHAIRS HIGHLIGHTS THURSDAY, 11 FEBRUARY 2010

The Friends of the Co-Chairs met behind closed doors throughout the day and into the night to negotiate a provision on civil liability in the supplementary protocol on liability and redress.

CLOSED DOOR NEGOTIATIONS ON CIVIL LIABILITY

Behind closed doors, delegates sought to find a solution for the impasse on the one provision on civil liability to be included in the supplementary protocol. While the first paragraph on implementing the supplementary protocol and addressing damage to biodiversity including through civil liability approaches found broad agreement, contentious discussions continued over a similar provision covering traditional damage.

The group initially considered two options based on Wednesday night's deliberations. The first option contained a non-derogation clause which clarifies that parties retain the right to provide in their domestic law for civil liability approaches to traditional damage, followed by a paragraph proposing how traditional damage can be addressed through civil liability. The second option contained only the latter paragraph reflecting the view of some countries that it was important to impose a positive obligation.

Delegates agreed to merge the two options for the purpose of further negotiations towards a political compromise on civil liability. A regional group proposed to simply add wording that parties may exercise their right by using civil liability approaches at the end of the non-derogation clause. The longer paragraph imposing positive obligations was bracketed as a whole. Many developing countries insisted that it was more important to spell out positive obligations, which could be followed by a non-derogation clause.

Negotiations continued into the night.

IN THE CORRIDORS

In front of the closed doors, other delegates and observers patiently awaited news on progress in the small group discussions. When asked about the vibe inside the room, delegates expressed diverging views: One described the talks as "straight-jacketed," and anticipated a long night ahead saying the meeting was only now getting to the point where real opinions were on the table. Some expected that delegates would continue

trying to wear each other out "until they practically fall over." Another delegate saw this as a positive indication that delegates would "do what it takes" to come to an agreement.

The closed door negotiations were mostly described as moving in a circle between the advocates of a legally-binding civil liability provision, who reiterated demands embodied in previous political compromises, and those favoring domestic law by including a non-derogation clause.

While most agreed that the reference to civil liability when dealing with damage to biodiversity should be legally binding, several pointed out that the provision now states that parties "may as appropriate" use civil liability approaches, which is clearly a departure from the earlier formulation which had stipulated that parties "shall" also implement civil liability approaches.

Regarding the reference to civil liability when dealing with traditional damage, one delegate signaled readiness to accommodate national circumstances, as long as the provision imposed positive obligations, rather than constituting only a non-derogation clause. In turn, another delegate warned that a supplementary protocol cannot include an unspecified provision imposing positive obligations on civil liability that covers "all kinds of damage but doesn't say how." He further questioned the value of such a provision and of getting bogged down in ongoing discussions on this "side issue" when the "real issues," such as the definitions of damage and operator, financial security and references to imminent threat of damage in the supplementary protocol remain unresolved.

As the day advanced, more and more delegates and observers expressed concern that the slow progress on civil liability would run down the clock. While most had expected that the meeting would leave some issues to be addressed at COP/MOP5, a number of delegates are now worried that "we are overloading the Nagoya agenda" which increases the risk of failure.

Late in the evening, one participant expressed a glimmer of hope by citing a famous proverb from her country that "the night is darkest just before the sun begins to rise." Another quipped: "If all else fails, we can always adopt a politically-binding provision on civil liability," using a term that seems to be en vogue since the climate change negotiations in Copenhagen failed to produce a legally-binding outcome.



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- ▶ **Expert Panel on Ocean Acidification**, 3 September 2009, UN Headquarters, New York, US
- ▶ **World Climate Conference-3**, 31 August - 4 September 2009, Geneva, Switzerland
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- ▶ **5th World Water Forum**, 16-22 March 2009, Istanbul, Turkey
- ▶ **Third International Workshop on Community-Based Adaptation to Climate Change**, 18-24 February 2009, Dhaka, Bangladesh
- ▶ **Meeting of the Pew Commission on Whale Conservation in the 21st Century**, 9-10 February 2009, Lisbon, Portugal