

WORKING GROUP HIGHLIGHTS: FRIDAY, 14 MARCH 2008

The Working Group convened for its third day of negotiations in Cartagena de Indias, Colombia, on Friday. During the morning and afternoon, delegates met in sub-working groups on settlement of claims and damage, and on the primary compensation scheme. In the afternoon delegates met briefly in plenary to consider capacity building measures, scope and supplementary compensation scheme.

ELABORATION OF OPTIONS FOR ELEMENTS OF RULES AND PROCEDURES REFERRED TO IN ARTICLE 27 OF THE PROTOCOL

SCOPE: Regarding scope, Co-Chair Lefeber noted that this had been discussed during WGLR 4 in Montreal, and asked for a show of hands to ascertain if any of the operational texts could be deleted, but the majority were retained.

SUPPLEMENTARY COMPENSATION SCHEME:

Regarding the subsection on supplementary collective compensation arrangements, SWITZERLAND tabled a proposal setting out that: an affected party may request the COP/MOP to allocate financial resources to redress damage that has not been redressed by the primary compensation scheme; and the COP/MOP may forward the request to the responsible committee and establish a voluntary trust fund to which states, private organizations and institutions are invited to contribute. Delegates agreed to consider this later in the meeting.

CAPACITY BUILDING: Delegates discussed the two complementary sections on capacity building, one with and one without an institutional arrangement. Many delegates supported strong capacity building measures. ETHIOPIA said capacity building should not only focus on developing, but also enforcing regulatory systems. CANADA recommended clearer references to capacity building measures under the Biosafety Protocol. INDIA and JAPAN supported the operational text on strengthening efforts to implement COP/MOP decisions on capacity building. Zambia for the AFRICAN GROUP supported the operational text referencing the Updated Action Plan for Capacity Building for the effective implementation of the Protocol. The EC preferred combining this operational text with another referring to a committee on the implementation of a future COP/MOP decision on this issue. BRAZIL and SENEGAL welcomed the development of an institutional

arrangement, but BRAZIL did not support the proposed committee arrangement. Co-Chair Lefeber confirmed that the provisions on capacity building would form part of a COP/MOP decision on liability and redress.

CORE ELEMENTS PAPER: Noting divergent opinions on a number of key issues, Co-Chair Lefeber commented that these issues are unlikely to be resolved in plenary or the sub-working groups. He announced that the co-chairs will table a core elements paper on Saturday to assist delegations in making important choices.

SUB-WORKING GROUPS

SETTLEMENT OF CLAIMS AND DAMAGE:

Settlement of claims: Jürg Bally (Switzerland) and Reynaldo Eborá (the Philippines) co-chaired the sub-working group which convened in the morning and the late afternoon. Delegates first addressed civil procedures, specifically the option on special provisions on private international law. On jurisdiction of courts, delegates accepted a formulation initially proposed by BANGLADESH, stating that a claim for compensation of damage shall be brought in the court of the party where damage is suffered, the incident occurred, the plaintiff has habitual residence, or the defendant has habitual residence or a principle place of business.

Regarding applicable law, delegates agreed to retain only the operational text that all matters before the competent court shall be governed by the law of that court.

On recognition and enforcement of judgments, delegates agreed to delete some explanatory provisions. CHINA cautioned against taking on additional obligations on private international law, other than under existing conventions, and the entire paragraph was bracketed.

On other rights of persons who have suffered damage, delegates agreed to retain the operational text setting out that the rules and procedures are without prejudice to rights under domestic law for victims, or to reinstatement of the environment.

Regarding the second option under civil procedures, namely an enabling clause on private international law, BRAZIL, supported by COLOMBIA and INDIA, preferred the operational text setting out the general rules of private international law, adding that alternative grounds of jurisdiction may be provided for, "according to national legislation." Delegates agreed to use the neutral terms "plaintiff" and "defendant" in the paragraph. JAPAN supported operational text stating that all matters before

the competent court, not regulated in the rules and procedures, shall be governed by the law of that court, including conflict of law rules. Both operational texts remained.

Regarding the special tribunal, delegates agreed to retain three operational texts, on: resorting to special tribunals such as the Permanent Court of Arbitration (PCA); availing dispute settlement through civil and administrative procedures; and submitting a dispute to final and binding arbitration in accordance with the PCA optional rules for arbitration of disputes relating to natural resources and/or the environment, with an addition by the US, on specific cases where there are large numbers of people affected.

On standing/right to bring claims, delegates agreed to a merged operational text encapsulating: the principle of access to justice; a caveat that nothing in the rules and procedures shall be construed as limiting the protection or reinstatement of the environment as provided under domestic law; and the entitlement of individuals or organizations to bring a claim in respect of the breach or threatened breach of these rules or procedures.

Damage: Delegates discussed the definition of damage, and JAPAN supported the option, containing a narrow definition of damage, along with CANADA adding that this definition was best suited for an administrative approach. COLOMBIA also supported this option, asking to delete the reference to “cost of response measures,” to which JAPAN agreed, but was opposed by JAPAN in regard to the deletion of the reference to a “baseline established by a competent national authority,” and that provision remained bracketed. JAPAN also agreed with COLOMBIA’s suggestion to add a paragraph stating that the mere presence of an LMO in the environment does not constitute damage.

On the other option containing broader definitions of damage, ETHIOPIA, supported by BURKINA FASO, proposed replacing two operational texts on damage to conservation and sustainable use of biological diversity and human health; and on the parameters of damage; with a formulation acknowledging that damage covers, but is not limited to, biological diversity, conservation and sustainable use of biological diversity, human health and socioeconomic conditions during the development, handling, transport, use, transfer and release of LMOs.

PANAMA and MEXICO preferred to retain the operational text on damage to conservation and sustainable use of biodiversity and human health. BRAZIL proposed merging the chapeau text on damage to conservation and sustainable use of biodiversity; with a modified operational text on damage to the conservation of biological diversity as defined in CBD Article 2. Discussions on this issue will continue Saturday.

PRIMARY COMPENSATION SCHEME: Jane Bulmer (UK) and Dire Tladi (South Africa) co-chaired this sub-working group which met in the morning and late afternoon. The group continued to address elements of the administrative approach based on allocation of costs of response and restoration measures. On standard of liability and channeling of liability, delegates resumed their rationalization of the operative texts under the subparagraph dealing with the obligation imposed by national law on the operator to inform competent authorities of the occurrence of damage. After some discussion, the previously merged text was rejected in favor of alternative texts, the first stating that in case of damage or imminent threat of damage, an operator shall immediately inform the competent authority, and a second less prescriptive formulation.

On the obligation imposed by national law on the operator to take response and restoration measures to address such damage, discussion centered on the balance of responsibility between the competent authority and the operator, with many countries favoring a proactive role for the competent authority.

Regarding the chapeau, the EU, supported by INDIA, NORWAY and MALAYSIA, preferred “imminent threat of damage,” with BRAZIL requesting that it remain bracketed. Referring to the list of measures, NORWAY and MEXICO suggested qualifying the requirement to remedy the effects of the damage, with JAPAN prefacing it with “if possible.” This was opposed by INDIA, EGYPT, BRAZIL, and others, and the qualifier remained bracketed. MEXICO suggested that the list should not be presented as alternatives, and delegates agreed. BRAZIL suggested a paragraph referring to “measures to avoid adverse impacts” and it remains bracketed. CHINA proposed alternative text and it was retained in brackets for reference.

On the element of discretion of the state to take response and restoration measures, sub-working group Co-Chair Bulmer noted broad support for operational text on the competent authority taking measures, or directing the operator to take measures to remediate the situation. Delegates agreed to use this as a basis for negotiation. The EC proposed a revised formulation that expanded and restructured the operational text. Many delegates supported the proposal, but BRAZIL suggested the activities assigned to the competent authority should instead be undertaken by the judiciary. The EC explained that an administrative approach was meant to empower competent authorities to prevent damage, as an alternative to the judicial process and without the intervention of a court. CANADA pointed out that the administrative approach is supposed to be a form of strict liability for the benefit of government. INDIA urged delegates not to prescribe the activities of the competent authority. Co-Chair Bulmer noted divergent views on the operational text and the EC proposal. Delegates agreed to delete all other iterations of operational text and to bracket the remaining options.

Delegates also discussed the term “operator.” A number of countries including EGYPT and NAMIBIA preferred a broader definition, and MALAYSIA adding that it preferred a list of possible examples of operators. The EC, the US and PRRI preferred the International Law Commission’s definition, and worked to incorporate its elements into the operational text. INDIA’s suggestion to use the term “transboundary damage” was opposed by many. The sub-working group will continue discussions on Saturday.

IN THE CORRIDORS

As progress in the sub-working group continued incrementally, many delegates expressed hope that the core elements paper to be tabled Saturday would “kick-start” negotiations. While many acknowledged the need to begin “forging consensus,” especially on issues like damage where opinions remain divergent, others cautioned that if the paper is to “fly” and be used as the basis for further negotiations, it would have to be seen as neutral, without favor to certain positions. A number of delegates wondered how the paper would relate to the revised working draft and substantive provisions currently under negotiation. When asked what he thought the core issues paper would entail and if it would provide a way forward on key issues, one delegate just commented: “let’s wait and see.”