

FRIENDS OF THE CO-CHAIRS HIGHLIGHTS: MONDAY, 23 FEBRUARY 2009

The First Meeting of the Friends of the Co-Chairs on Liability and Redress under the Cartagena Protocol on Biosafety opened Monday 23 February, 2009 at the Ministry of Foreign Affairs in Mexico City, Mexico. The meeting will further negotiate international rules and procedures on liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs) in the context of the Protocol, based on the proposed operational texts on liability and redress, annexed to decision BS-IV/12 (Liability and Redress) adopted at the fourth meeting of the Conference of the Parties serving as Meeting of the Parties to the Cartagena Protocol on Biosafety (COP/MOP4).

Delegates addressed organizational matters, discussed the nature of the international regime on liability and redress, and considered operational text for a legally binding administrative approach, including scope, limitations and the definition of damage.

OPENING OF THE MEETING

Ambassador Juan Manuel Gómez Robledo, Mexican Foreign Affairs Ministry, welcomed delegates to Mexico and stressed the importance of adopting an international regime on liability and redress given the relevance of LMOs and their potential impact on the environment and human health. Charles Gbedemah, CBD Secretariat, stressed the importance of achieving consensus during this meeting, since a second meeting would be subject to voluntary contributions. Co-Chair Jimena Nieto (Colombia) noted that the high level of participation at the meeting showed the commitment towards finalizing the task mandated by COP/MOP4. Sandra Herrera, Undersecretary of the Mexican Ministry of the Environment and Natural Resources, stressed the importance of obtaining clear results during this meeting, both for parties and non-parties to the Biosafety Protocol.

ORGANIZATIONAL MATTERS: Delegates adopted the provisional agenda and organization of work (UNEP/CBD/BS/GF-L&R/1/1/ and 1/Add.1) without amendment. Co-Chair Nieto outlined the composition of the Group of the Friends of the Co-Chairs: six representatives for the Asia-Pacific region, namely Bangladesh, China, India, Malaysia, Palau and the Philippines; six representatives for the African region, namely Burkina Faso, Namibia, Ethiopia, Liberia, Zambia and South

Africa; six representatives for the Latin American and Caribbean region, namely Mexico, Paraguay, Cuba, Colombia, Brazil and Panama; two representatives for the Central and Eastern European region, including Moldova; two representatives for the EU, namely the Czech Republic and the European Commission; New Zealand; Norway; Switzerland; and Japan.

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

The Secretariat introduced COP/MOP4 Decision BS-IV/12 (UNEP/CBD/BS/GF-L&R/1/2) and the outline of a draft decision for consideration by COP/MOP5 (UNEP/CBD/BS/GF-L&R/1/3).

NATURE: Co-Chair René Lefebvre (the Netherlands) asked delegates to express their preference regarding the form in which a legally binding instrument would be adopted. He explained that the draft decision proposes that the instrument be a supplementary protocol to the Biosafety Protocol, and that it would not amend the latter but be a self-standing treaty. All delegates supported working towards a legally binding approach in the form of a supplementary protocol. PARAGUAY recalled that a final decision on the instrument's nature has not yet been taken. JAPAN called on delegates not to undermine progress achieved to date, noting that his country will fund the next meeting, if one is needed. MALAYSIA underscored that the legally binding instrument should be based on the administrative approach with one provision on civil liability.

Co-Chair Lefebvre proposed that the Co-Chairs circulate draft final and institutional clauses for a supplementary protocol in the afternoon for further consideration on Wednesday. Regarding the supplementary protocol's relation with the Biosafety Protocol and the CBD, JAPAN, supported by PARAGUAY, proposed including provisions that: the supplementary protocol shall neither modify nor amend the Biosafety Protocol; nothing shall derogate from rights and obligations of parties under the CBD or the Biosafety Protocol; and unless otherwise provided the provisions of the CBD and Biosafety Protocol shall apply to the supplementary protocol. Regarding whether the COP/MOP's mandate allowed for adoption of a supplementary protocol, PANAMA pointed to CBD Article 19.3 (need for a Biosafety Protocol) which does not foresee a supplementary protocol; while Co-Chair Lefebvre pointed to Biosafety Protocol Article

29.4(f) mandating the COP/MOP to exercise the functions that may be required for the Biosafety Protocol's implementation which could include the adoption of a supplementary protocol.

ADMINISTRATIVE APPROACH: Co-Chair Lefebvre invited comments on proposed operational texts for a legally binding regime starting with elements for an administrative approach. Regarding state responsibility, delegates discussed whether a provision that the rules and procedures shall not affect the rights and obligations of states under the rules of general international law should be addressed in a preambular paragraph or included as an operational text. JAPAN asked if there was any precedent to include such a provision in the operational text and, when presented with examples, expressed flexibility. The AFRICAN GROUP, supported by INDIA and CUBA, preferred an operational text since preambular paragraphs do not carry the same weight. NEW ZEALAND and the EU expressed no preference but asked for changes to the preambular text, if selected.

SCOPE: On functional scope, discussion centred on a reference stating that the rules and procedures also apply to products of LMOs. While MALAYSIA and the AFRICAN GROUP preferred retaining the reference, JAPAN, the EU, the PHILIPPINES, PARAGUAY, MEXICO, INDIA, COLOMBIA, CUBA, BRAZIL, PANAMA, NORWAY, CHINA and SWITZERLAND preferred to delete it. NORWAY raised concerns about including damage caused by products that are non-living materials, whereas MALAYSIA suggested replicating language from Biosafety Protocol Annex III (Risk Assessment), stating that rules and procedures apply to "products of LMOs, namely processed materials that are of LMO-origin." Pointing to recent scientific proof of horizontal gene transfer among higher organisms, the AFRICAN GROUP, supported reference to products containing LMOs. The text remains bracketed.

On geographical scope, delegates debated whether to include reference to exclusive economic zones (EEZs). The EU suggested rewording the reference to bring it in line with the UN Convention on the Law of the Sea (UNCLOS) to read "areas under the control or within the limits of national jurisdiction of parties as well as, where relevant, to the EEZs of parties in accordance with UNCLOS." COLOMBIA opposed, noting that some countries are not signatories to UNCLOS. BRAZIL, INDIA, JAPAN, MALAYSIA, MEXICO, NEW ZEALAND, NORWAY, PANAMA, the PHILIPPINES and SWITZERLAND supported the reference's removal, and it was deleted. BRAZIL, COLOMBIA, CUBA, INDIA and NEW ZEALAND further opposed a reference to areas under control of parties because of its political nature, and it was deleted. The agreed text reads: "these rules and procedures apply to areas within the limits of national jurisdiction of the parties to the supplementary protocol."

LIMITATIONS: Regarding limitation in time, delegates preferred an option stating that the rules and procedures apply to damage resulting from a transboundary movement of LMOs that started after the entry into force of the supplementary protocol. INDIA expressed concern about the formulation "started after" and COLOMBIA proposed to use the term "occurred" instead. The EU and NEW ZEALAND opposed, noting that the starting point should be the transboundary movement of LMOs, not the occurrence of damage. Raising concerns about difficulties in proving whether an LMO came into the country before or after

the supplementary protocol's entry into force, SOUTH AFRICA proposed referring to the event when damage occurred rather than the time of import.

The EU proposed clarifying that the rules and procedures would refer to the entry into force for the party into which the transboundary movement took place. INDIA questioned whether such a specification is needed. SWITZERLAND and NEW ZEALAND clarified their understanding that the supplementary protocol must have entered into force for both parties. MALAYSIA suggested developing a consolidated text. Co-Chair Lefebvre invited the EU, Colombia, New Zealand and South Africa to draft text for further discussion.

Delegates agreed that text on limitation to the authorization at the time of the import of LMOs, will most likely be removed, once provisions requested by the EU are included in other sections.

DAMAGE: Regarding the definition of damage, most delegates agreed that damage to human health should be considered along with damage to sustainable use of biological diversity at a later stage. JAPAN highlighted that the proposed definition applies only to the legally binding administrative approach, but a different definition would have to be developed for a legally binding provision on civil liability.

On a paragraph on how damage is determined, delegates debated whether to combine sub-paragraphs on the extent of qualitative or quantitative changes that affect biodiversity, and on reduction of the ability or components of biodiversity, to provide goods and services. Most preferred separate paragraphs.

On a paragraph listing factors for determining "significant" adverse or negative effects on the conservation and sustainable use of biodiversity, delegates debated alternative sub-paragraphs on the extent of such effects on human health. ETHIOPIA preferred referencing the adverse or negative effects on human health, whereas INDIA, MEXICO and PARAGUAY preferred making effects on human health contingent on adverse or negative effects to the conservation and sustainable use of biodiversity.

On a paragraph providing for parties to take into account local and regional conditions to ensure the workability of domestic liability rules and procedures, the EU explained that it provides countries with flexibility about how to apply the supplementary protocol. NEW ZEALAND suggested this issue could be dealt with under the primary compensation scheme. Many considered the paragraph ambiguous, and delegates decided to keep the reference bracketed in its original place in the text.

IN THE CORRIDORS

Delegates arrived in sunny Mexico City ready to resume negotiations where they had left off at COP/MOP4. The meeting quickly entered into working mode, with the Co-Chairs securing unanimous support for the proposal that the legally binding provisions on liability and redress should be adopted by way of a supplementary protocol to the Biosafety Protocol. Many countries made it clear that any language included would have to be clear and legally-sound, which some delegates argued indicated that countries are negotiating in good faith and are committed to finalizing the regime. This seemed to allay some delegates' concerns about the "fragility of the COP/MOP4 consensus" and the fear that some countries could attempt to roll back what had been achieved thus far, "throwing us back to zero" as one delegate put it. One visibly relieved participant said "yesterday I was afraid we would enter a whole new level of intractability, today I think we might get close to wrapping up the regime this week".