

3<sup>rd</sup> Meeting of the Group of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety  
15-19 June 2010, Kuala Lumpur, Malaysia

## Negotiations on liability and redress for LMO damage inch forward: International treaty in sight

*Report of the 2<sup>nd</sup> Meeting of the Group of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety*

By *Lim Li Lin and Lim Li Ching, Third World Network*

Kuala Lumpur, 19 February 2010 – The text of an international law on liability and redress for damage caused by living modified organisms (LMOs) will be on the agenda for adoption at the fifth Meeting of the Parties to the Cartagena Protocol on Biosafety in October 2010 in Nagoya, Japan.

(The Cartagena Protocol uses the term living modified organisms for what is commonly known as genetically modified organisms. The Protocol is a treaty under the Convention on Biological Diversity.)

A negotiating group (known as the Group of the Friends of the Co-Chairs on liability and redress in the context of the Cartagena Protocol on Biosafety) which met in Kuala Lumpur on 8-12 February 2010 requested the Executive Secretary of the Convention on Biological Diversity to communicate to the Protocol Parties the text for a Supplementary Protocol on liability and redress for damage resulting from transboundary movements of LMOs.

The text of any proposed protocol has to be communicated to the Parties by the Secretariat at least six months before its adoption. The meeting of the Friends of the Co-Chairs in Kuala Lumpur was the last negotiation session scheduled at least six months before the Meeting of the Parties in Nagoya. The proposed text still contains many square

brackets (indicating areas of disagreement).

Further negotiations are scheduled to take place in Montreal on 17-19 June 2010<sup>1</sup>. There is talk of the possibility of an additional three to five days' meeting prior to the Meeting of the Parties in Nagoya, subject to agreement by the host government, Japan.

### **Background to the negotiations**

The Kuala Lumpur meeting was the second such Friends of the Co-Chairs meeting mandated by the fourth Meeting of the Parties (held in Bonn in May 2008) to further negotiate international rules and procedures on liability and redress in the context of the Cartagena Protocol. The first meeting was held in Mexico City in March 2009. The Co-Chairs are Rene Lefeber from the Netherlands and Jimena Nieto from Colombia.

The liability and redress negotiations have been underway since 2005, with a working group under the Cartagena Protocol having met five times to elaborate international rules and procedures on liability and redress. Its last meeting was held in March 2008, in an endeavour to complete the process within four years as specified in the Cartagena Protocol.

<sup>1</sup> The meeting was subsequently scheduled for 15-19 June 2010 in Kuala Lumpur.

However, the negotiations have been dogged by deep divisions among Parties, making progress extremely slow.

Despite an extra small group meeting of the Friends of the Co-Chairs in Bonn before and during the 2008 Meeting of the Parties, the negotiations still could not be concluded as mandated. As such, another two meetings of the Friends of the Co-Chairs were mandated by a decision in Bonn.

The Friends of the Co-Chairs group comprises six representatives each from Asia Pacific, Africa, and Latin America and the Caribbean, two representatives each from the European Union and Central and Eastern Europe, and one each from New Zealand, Norway, Switzerland and Japan. The six representatives from the Asia Pacific region are Bangladesh, China, India, Malaysia, Palau and the Philippines.

Other Parties to the Cartagena Protocol may also attend the Friends of the Co-Chairs meeting as advisors. The limitation in numbers applies to the Parties that are allowed to sit at the negotiating table. Regional groupings with more than the specified number in attendance may take turns at the negotiating table, so long as no more than the specified number are sitting around the table. Observers (non-Parties and other observers) are allowed, at the discretion of the Co-Chairs, to be present to observe the negotiations.

The composition of the group at the next meeting in June 2010 will be the same, except that the number of advisors will be limited to six for the African Group, seven for the Latin America and the Caribbean group (the number was increased by one at the insistence of Paraguay that asserted it needed two advisors), four for the European Union, and one each from India, Malaysia, Philippines, New Zealand, Norway and Switzerland. China and Japan requested for two advisors each. This limitation applies to the number of Party advisors that are allowed in the negotiating room. Observers are not invited to attend the June meeting. The Friends of the Co-Chairs from Palau and Bangladesh did not attend the meetings in Mexico City and Kuala Lumpur, and will be replaced by South Korea and Iran, who will also have one advisor each<sup>2</sup>.

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<sup>2</sup> The decision to limit advisors and close the meeting to observers was later reversed, as the offer by Malaysia to host the June 2010 meeting did not necessitate limiting participation, as would have been the case had the meeting been held in Montreal as originally planned, due to space constraints at the Secretariat building.

This slow pace of the negotiations and the delay in concluding an agreement were expected. During the negotiations on the Cartagena Protocol itself, the issue of liability and redress was so contentious that it could not be included substantively in the Cartagena Protocol text, despite this being supported by nearly all developing countries at that time, who were LMO importers or subject to possible illegal or unintentional LMO transfers. Instead, a provision was included in the Cartagena Protocol that mandated further negotiations on liability and redress, setting a four-year time frame for this work that has since expired.

The negotiations have dragged on and the outcome may now only be adopted in October 2010 in Nagoya, marking a ten-year delay in having international rules and procedures for liability and redress for LMO damage (the Cartagena Protocol was adopted in 2000, and came into force in 2003).

#### **Agreement in Bonn on the basis for negotiations**

The Friends of the Co-Chairs meetings in Mexico City and Kuala Lumpur came after the very difficult negotiations in Bonn in 2008 when the negotiations nearly collapsed and a group of Like Minded Friends emerged "representing those countries whose position is that an international instrument on liability and redress should have binding elements on civil liability".

Because there have been strenuous objections from several Parties to having international substantive rules for civil liability whereby victims of damage from LMOs can turn to national courts for redress, the Like Minded Friends grouping, led by Malaysia, had put forward a proposal in Bonn, saving those negotiations from collapsing. The Like Minded Friends grouping comprised around 80 developing countries (including all of the African Group) and Norway.

The agreement reached in Bonn was based on the proposal by the Like Minded Friends group. It essentially said that the international liability and redress regime would be legally binding and would comprise administrative approaches, whereby liability would be a matter to be resolved between the liable entity and the executive arm of a government, via "response measures" that address damage.

("Response measures" are defined in the text and can be summarized as actions to avoid, minimize, contain or mitigate damage, as well as to restore

biological diversity. If the concept of “imminent threat of damage” is included in the Supplementary Protocol, response measures would also entail taking the necessary preventive measures.)

The regime would also contain one provision on civil liability that would:

- (1) preserve the right of Parties to put in place domestic laws and policies on civil liability and redress which should include elements as stipulated in guidelines to be negotiated;
- (2) provide for reciprocal recognition and enforcement of foreign judgments; and
- (3) provide for a review of the guidelines after the entry into force of the instrument with a view to consider making them binding or elaborating a more comprehensive binding regime on civil liability.

It was agreed that this would be the basis for further negotiations.

The proposal by the Like Minded Friends was itself a heavily compromised proposal, given that most developing countries and Norway have been firmly behind a comprehensive binding civil liability regime, and had argued for this throughout the years of negotiations.

In Mexico City, it was agreed that the form of the legally binding instrument would be a Supplementary Protocol to the Cartagena Protocol. Additionally, there is text on civil liability guidelines, additional and supplementary compensation measures and complementary capacity building measures.

Throughout the negotiations since Bonn, this agreement to have a legally binding instrument on administrative approaches with one provision on civil liability has been continually undermined by Parties that still resist such an instrument.

### **Difficult negotiations on civil liability**

The clauses on civil liability to be included in the legally binding Supplementary Protocol proved to be the most contentious during the Kuala Lumpur meeting. The disagreements had to be thrashed out in closed sessions of the Friends of the Co-Chairs group (with no advisors or observers allowed in), with sessions running well into the night and early hours of the morning.

During the first reading of the relevant article (Article 13) on Tuesday (9 February), the

divergence of opinions was thrown into sharp focus in the discussion over the right of Parties to develop a domestic civil liability regime. There were two options in the text, and only the EU, Japan and Paraguay stated that they preferred Option 1, which had been first included by Japan in Bonn, and which simply stated 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 living modified organisms”.

The African Group, Brazil, Cuba, Colombia, Ecuador, India, Malaysia, Mexico and Norway all voiced their support for Option 2. Option 2 was actually part of the compromise proposal put forward in Bonn by the group of Like Minded Friends.

Option 2 spelt out the right of Parties to have a domestic civil liability regime, and specified the elements that this could include. It also incorporated provisions on the recognition and enforcement of foreign judgments and allows for Parties to take into account the guidelines on civil liability when developing their domestic legislation or policy.

Malaysia reacted unhappily to the proposal by some Parties to discuss Option 1, saying that this was “bad faith”, as some Parties were apparently attempting to roll back the Bonn agreement. It reminded others of the historical context, that the Like Minded Friends group had accepted, as a compromise, a weak provision on civil liability (i.e. Option 2), with a review clause. Option 1 was actually formulated to clarify Option 2, because one Party had not been clear as to what Option 2 provided for; Option 1 could therefore be incorporated within Option 2, and the negotiations should proceed on the basis of Option 2.

Co-Chair Rene Lefebvre also reminded delegates that the previous meeting of the Friends of the Co-Chairs in Mexico City had already spent time working on paragraph one of Option 2, and highlighted that Option 1 was essentially covered by Option 2. He thus proposed that the meeting work on the basis of Option 2. (At the meeting in Mexico City, Parties had worked on Option 2 as the basis for the legally binding civil liability provision. However, due to a disagreement over the review clause, Option 2 was reinstated by the EU when it had in fact been proposed for deletion by the Co-Chair.)

The EU requested for time to reflect on this, as it had “clear instructions on this issue”. It later agreed

to Lefeber's proposal, with the inclusion of a footnote stating that the meeting agreed to work on Option 2 on a "provisional basis". The Friends of the Co-Chairs group thus proceeded to work on the basis of Option 2.

After further heated discussions, Co-Chair Lefeber produced compromise text which stated that Parties to the Supplementary Protocol 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 (i.e. take response measures) and may or may not, according to their needs, apply or develop civil liability procedures.

By Wednesday (10 February) morning, the text of Article 13 had developed further, with a separation between how to address damage, as defined in the Supplementary Protocol (i.e. damage to the conservation and sustainable use of biodiversity, taking into account risks to human health), and how to address damage other than that as defined in the Supplementary Protocol (i.e. traditional damage).

The Group of the Friends spent Wednesday night and the early hours of Thursday (11 February) morning (till 3.30 am), exchanging views on Article 13, in a closed session. No advisors or observers were allowed into the room. The rest of the meeting continued in this mode, and on the contentious issue of this one provision on civil liability to be included in the Supplementary Protocol.

While there was general agreement over language implementing the Supplementary Protocol and addressing damage to biodiversity, including through civil liability approaches, similar language dealing with traditional damage proved more controversial.

The negotiations essentially turned on whether such civil liability approaches, as relating to damage other than that as defined in the Supplementary Protocol, and their application, should be mandatory or not.

Unable to resolve the deadlock, a smaller group was tasked with further negotiating the text on traditional damage. The small group comprised two representatives each from the EU and Japan, as well as Malaysia and three others (two from Africa and one from Latin America and Caribbean). The small group met from 10.30 pm on Thursday night to 12.30 am on Friday (12 February) morning.

The small group produced text that called for Parties to assess whether domestic law provides for adequate rules and procedures for traditional damage, and to consider several options for applying civil liability approaches.

When the small group presented their negotiated text to the Group of the Friends later on Friday morning, the EU reportedly attempted to further water down the text. The African Group objected strongly and proceeded to hold its ground, calling for stronger provisions on the issue. To try and resolve the dispute, a "trilateral" consultation was held, among the EU, Japan and the African Group.

The resulting text, now contained in Article 13.2, remains bracketed, and reads as follows:

*[2. Parties [should][shall][may] assess whether their domestic law provides for adequate rules and procedures on civil liability for material or personal damage incidental to the damage as defined in Article 2.2(c) and consider:*

*(i) applying their existing domestic laws, including where applicable general rules and procedures on civil liability;*

*(ii) applying or developing civil liability rules and procedures specifically for this purpose; or*

*(iii) applying or developing a combination of both.]*

The African Group reserved the right to re-visit the wording of this paragraph. The reservation is included in a footnote of the text.

The clauses on recognition and enforcement of foreign judgments, and the right of Parties to take into account the guidelines on civil liability when developing their domestic legislation or policy were also deleted.

The Co-Chairs will prepare draft guidelines on civil liability based on Appendix II of the report of the meeting which contains proposed operational text in the context of working towards non-legally binding provisions on civil liability, and circulate them to the Friends of the Co-Chairs group prior to their next meeting.

## **Review**

Closely related to the clause on civil liability are the provisions that deal with review (Article 14). The Like Minded Friends had proposed a review clause as part of the compromise language in Bonn,

essentially to ensure that the guidelines on civil liability be reviewed, with a view to consider making them binding or elaborating a more comprehensive binding regime on civil liability.

At the Mexico City meeting in February 2009, the EU had been insistent that the review clause in the text should be about enabling an evaluation of the effectiveness of the Supplementary Protocol, and not be a review of the civil liability guidelines, as the latter are not part of the Supplementary Protocol.

As a result of the disagreement, compromise text was worked out, in which Article 14 comprised two parts: (1) a review of the effectiveness of the Supplementary Protocol, and (2) the inclusion in the review, of a consideration of further and necessary steps or whether further steps are necessary, to provide for an effective civil liability regime on liability and redress. This was the text, still bracketed, that was before the Kuala Lumpur meeting.

During the Kuala Lumpur meeting, discussions on the first paragraph of Article 14, dealing with the review of the effectiveness of the Supplementary Protocol, were not controversial. With respect to the second paragraph however, which brought in the necessity of a civil liability regime, the EU tried to subvert this concept by introducing language that called for a consideration of specific instances of damage and related response measures.

While not objecting to that proposal per se, countries like India and Malaysia stated that the second paragraph of Article 14 must relate to civil liability in the Supplementary Protocol, in that the review must assess whether, and if so, how, Parties deal with civil liability in the future.

Malaysia reminded the EU that the current Article 14 text was a compromise that was introduced in Mexico City after an impasse, and that the review remained an important component - for the countries that had wanted a binding civil liability regime - of agreement to a "watered down" civil liability regime and the guidelines.

Further discussions on Article 14 took place during the closed sessions of the Friends of the Co-Chairs group. The text was eventually adopted, and reads as follows:

*"The Conference of the Parties serving as the*

*meeting of the Parties to the Protocol shall undertake a review of the effectiveness of this Supplementary Protocol five years after its entry into force and every five years thereafter, provided information requiring such a review has been made available by Parties. The review shall be undertaken in the context of the assessment and review of the Protocol as specified in Article 35 of the Protocol, unless otherwise decided by the Parties to this Supplementary Protocol. The first review shall include a review of the effectiveness of Article 13."*

### **The road ahead**

By the end of the meeting, 15 out of 25 of the Articles of the draft Supplementary Protocol had been adopted by the Friends of the Co-Chairs group. This amounts to over 60% of the Articles in the draft Supplementary Protocol.

However, a number of contentious issues still remain outstanding including the inclusion of "imminent threat of damage"; the definition of "operator"; the inclusion of "products thereof" in the scope of the Supplementary Protocol; the provision of financial security; and the issue of consistency of the Supplementary Protocol with other international obligations and laws.

These still remain unresolved because of the strongly held positions of Parties on these issues and may well prove to be deal breakers.

In addition, the text on civil liability, as relating to damage incidental to that defined in the Supplementary Protocol, which consumed the Kuala Lumpur meeting, is still bracketed. The next meeting in June 2010 will be under pressure to resolve these difficult issues before Nagoya.

The road to Nagoya, now coming to an end, remains long and difficult. The adoption of a legally binding international law on liability and redress for damage caused by LMOs would be historic.

Unfortunately, the years of negotiations have taken their toll and the regime has been watered down beyond what the overwhelming majority of developing countries first envisioned. On the other hand, the Supplementary Protocol would be a first step towards practically addressing damage from LMOs and the door is still being kept open for addressing civil liability more comprehensively in the future. In the meantime, countries can and should enact strong liability and redress provisions in their national laws.