Liability and Redress for Damage Resulting from GMOs

The Negotiations under the Cartagena Protocol on Biosafety

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Third World Network

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Introduction

IN the early hours of the morning of 11 October 2010, a negotiating group under the Cartagena Protocol on Biosafety completed the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety. The negotiations had been extended by more than two days, marking the culmination of difficult, and at times acrimonious, discussions.

The text of this international treaty on liability and redress for damage caused by living modified organisms (LMOs)[1] was eventually adopted on 15 October 2010 by the fifth Conference of the Parties serving as the Meeting of the Parties (COP-MOP 5) to the Cartagena Protocol, which was meeting in Nagoya, Japan.

For years, developing countries and civil society groups had called for an international legally binding regime on liability and redress for damage caused by LMOs. This is because LMOs carry potential environmental, health and socio-economic risks, and any damage caused by these LMOs should be addressed by the person or entity responsible, through the provision of compensation or taking of redress measures.

Developing countries had already wanted to have substantive rules on international liability and redress to prevent and remedy damage resulting from LMOs included in the Cartagena Protocol itself, but this proved too contentious for consensus at the time. The compromise, an enabling clause contained in Article 27 of the Cartagena Protocol, was to negotiate liability and redress rules at a later stage, after the entry into force of the Protocol. The negotiating mandate was set in 2004, and negotiations began in earnest in 2005.

The negotiations of the Supplementary Protocol were difficult and were opposed by those with an interest in the production and export of LMOs. Developing countries and some developed countries, on the other hand, maintained that an international regime to deal with damage caused by LMOs was necessary because of the unique risks of LMOs and their transboundary nature, and in order to ensure that those responsible would be held liable.

Most developing countries wanted a binding international regime that would establish substantive and procedural rules on civil liability, whereby victims of damage from LMOs can turn to national courts for redress. Instead, because of compromises made in the negotiations, the Supplementary Protocol largely takes an "administrative approach", whereby response measures are required of the operator (person or entity in control of the LMO) or the competent authority, if the operator is unable to take response measures.

The provision of response measures in the event of damage, or a sufficient likelihood of damage, resulting from LMOs is the central obligation of Parties to the Supplementary Protocol. Therefore, the Supplementary Protocol has elaborate and comprehensive provisions implementing the administrative approach. However, there could be important implementation challenges for developing countries, in terms of both resources and capacity.

On the other hand, the Supplementary Protocol incorporates only a single article on civil liability, which does little more than exhort Parties to continue to apply their existing domestic law on the subject or establish rules to deal specifically with the matter. The Supplementary Protocol thus fails to provide for an effective international civil liability regime for LMOs, as originally demanded by many developing countries.

Nonetheless, the existence of this international binding provision that deals with civil liability is a milestone in international liability law. There is an implicit obligation for Parties to review their domestic laws to assess whether or not they have in place adequate rules and procedures on civil liability. This entrenches civil liability as an obligatory requirement in the national law of Parties.

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[1] The Cartagena Protocol on Biosafety uses the term "living modified organisms" to refer to what are commonly known as genetically modified organisms or GMOs.

Moreover, the first review of the Supplementary Protocol (five years after its entry into force) will assess the effectiveness of its provision on civil liability. This could trigger further work on an international civil liability regime (and could be viewed as necessary to correct the current imbalance in the Supplementary Protocol in how its provisions elaborate on the administrative approach, as opposed to civil liability).

A paper[2] published by Professor Gurdial Singh Nijar, Director of the Centre of Excellence for Biodiversity Law (Faculty of Law, University of Malaya, Malaysia) and one of the lead negotiators of developing countries, concluded:

"Further, the imbalance between the rules on the administrative approach and those on civil liability reflects that this is as far as the negotiations could have realistically and pragmatically gone, given the diametrically opposing views of the protagonists in the negotiations. It is hoped that with experience and in the ripeness of time, aided by the review process, the framework established by the [Nagoya-Kuala Lumpur Supplementary] Protocol will lead to the establishment of a mature regime incorporating substantive and comprehensive international rules on civil liability and redress for damage caused by LMOs."

While the Supplementary Protocol sets the minimum international standards on liability and redress for damage resulting from LMOs, much has actually been left to Parties to determine and implement at the national level. Parties to the Supplementary Protocol are required to provide, in their domestic law, for rules and procedures that address damage. Thus, it would be important for national legislation on liability and redress to implement, complement and augment the Supplementary Protocol, taking into consideration both the administrative approach and civil liability.

Third World Network followed the liability and redress negotiations over the long years as an observer. We are pleased to present this compilation of the articles and reports that we published as part of the informal record of the negotiations from February 2004, when the mandate was adopted in Kuala Lumpur, Malaysia, to October 2010 in Nagoya.

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2 Nijar, Gurdial Singh (2012). The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety: An analysis and implementation challenges. *Int Environ Agreements*, DOI 10.1007/s10784-012-9187-9.

First Conference of the Parties serving as the Meeting of the Parties (COP-MOP 1) to the Cartagena Protocol on Biosafety

Kuala Lumpur, Malaysia
23-27 February 2004

Biosafety Protocol takes bold moves

Martin Khor and Lim Li Lin

This article was published in Third World Resurgence*, No. 163-164, Mar/Apr 2004.*

THE first Conference of the Parties serving as the Meeting of the Parties (COP-MOP 1) to the Cartagena Protocol on Biosafety ended on 27 February with the adoption of 10 decisions on issues ranging from information-sharing and finance to the handling of living modified organisms (LMOs). ("LMOs" is the term used in the Protocol for what are commonly known as genetically modified organisms or genetically engineered organisms.)

When Malaysian Minister of Science, Technology and the Environment, Datuk Law Hieng Ding, who chaired the meeting, used the gavel for the last time after three weeks of negotiations on biodiversity and biosafety, there was some satisfaction that progress, however modest, had been made to implement the Protocol.

These gains were largely due to the fact that none of the Miami Group (a negotiating group of some of the major exporters and producers of genetically engineered organisms) are currently Parties to the Protocol. During COP-MOP 1, although the views of the non-Parties were considered, priority was given to Parties to the Protocol in drafting proposals and in the negotiations on the text of decisions for adoption.

For many years now there has been growing concern about the potential health, environmental and socio-economic risks posed by genetically engineered crops and food. Whilst the biotech industry claims that the process and products from genetic engineering are safe, many governments and environmental and consumer groups have asked for more information about genetically engineered products and for action to regulate them.

After years of hard negotiations, the Biosafety Protocol came into force last September, and Malaysia hosted the first formal meeting of the 87 countries that have joined it.

Three of the most important decisions adopted by COP-MOP 1 were on:

- Measures for handling, transporting, packaging and identifying LMOs, in line with Article 18 of the Protocol;
- Establishing compliance procedures and mechanisms for the Protocol; and
- Establishing an expert working group on liability and redress in the context of the Protocol.

Identification documents

Under Article 18 of the Protocol, countries shall take measures to require that LMOs that move across borders are handled, packaged and transported safely. The aim is to avoid adverse effects on biodiversity and risks to human health.

For the first time, the COP-MOP has decided on the documentation that should accompany three categories of LMOs: firstly, those that are used as food or feed or for processing; secondly, those that are for "contained use" (mainly in laboratories); and thirdly, those for introduction into the environment (such as genetically modified seeds for planting).

For the first category, documents should clearly identify that the shipment may contain LMOs for direct use as food, feed or for processing and not intended for introduction into the environment. The documents should include the common, scientific and commercial names of the LMOs, the transformation event code or its unique identifier code to establish clearly the identity of the LMOs and any unique identification.

An expert group was set up to elaborate detailed requirements of identification of the LMOs under the first category, and report to the next COP-MOP in 2005. The above measures are thus interim, and countries are requested or urged to take them now.

An important step forward was that the decision recognised that national legislation can require that the LMOs for food, feed or for processing are identified as such in the accompanying documentation with no ambiguity, when they are shipped from one country to another under the procedures of the Protocol.

For the second category of LMOs, documents accompanying them should clearly identify the LMOs by specifying their common and scientific names, and that they are destined for contained use. Additionally their commercial names and new and modified traits and characteristics may be included. Significantly, this information includes the transformation event(s), risk class, how they are to be used, and their unique identification.

For the third category, the documents should clearly identify them as LMOs by describing their names and traits (including transgenic traits such as transformation events or unique identification). Additionally their commercial name, risk class and the required approval permit for import under the Protocol may be included.

The documentation of LMOs under categories two and three must also specify any requirements for safe handling, storage, transport and use under existing international instruments, as well as domestic regulations and any agreement between the exporter and importer.

The names and addresses of the exporters and importers and the contact point for more information (including in case of emergencies) should also be provided in the documents in all three categories.

Compliance regime

On the compliance issue, COP-MOP 1 had an intense week-long debate on how to deal with countries that do not comply with their obligations under the Protocol. The European countries were especially keen to get a strong compliance regime so that countries would take their obligations seriously.

The COP-MOP eventually established some compliance procedures and mechanisms.

A Compliance Committee was set up comprising 15 persons, three from each of five regional groupings. Committee members shall serve objectively and in a personal capacity. COP-MOP 1 confirmed the members from Iran, Malaysia, Tonga, Mexico, Colombia, Barbados, Ethiopia, Cameroon, Mali, Hungary, Denmark, Norway and Switzerland, among the 15 countries.

The Committee, which will meet twice a year, will receive cases submitted to it of non-compliance. It will identify circumstances and causes of these cases, provide advice to the concerned Party to assist it to comply, review general compliance issues, take measures or make recommendations to the COP-MOP.

A Party complained against has three to six months to respond, and the Committee will consider the views of both the Parties making and receiving the submission. The Committee can then take measures including giving advice or assistance to the Party and to develop a compliance action plan with a timeframe, ask the Party to submit progress reports, and make reports on efforts made by the Party to the COP-MOP.

In turn, the COP-MOP can decide on taking the following measures: provide assistance, technology transfer, training and capacity-building measures; issue a caution; have the cases on non-compliance published; or take other measures (to be decided at the Protocol Parties' third meeting) in the case of repeated non-compliance.

Liability and redress

The issue of liability and redress was perhaps the most important for developing countries, with these countries (especially those from Africa) pressing for COP-MOP 1 to adopt a strong and clear mandate to begin negotiations on an international regime.

They argued, in general, that in the event of accidents or incidents where LMOs cause damage to farmers' crops, the environment or human health, there should be a legally binding regime to determine who is responsible and how redress or compensation can be made to the victims and for the harm done.

During the negotiations of the Biosafety Protocol itself, the issue had been so divisive that in the end, the compromise was to insert a provision in the Protocol that requires COP-MOP 1 to take a decision on a process to elaborate international rules and procedures on liability and redress.

The COP-MOP eventually decided to set up a working group of experts on liability and redress which will meet before next year's meeting.

It will analyse potential and actual damage scenarios of concern in order to identify situations for which international rules may be needed, and analyse how international rules and procedures on liability and redress can be applied to the damage scenarios.

It will also elaborate options for rules and procedures, including definition, nature and scope of damage, valuation of damage to biodiversity and human health, threshold of damage, causation, channelling of liability, roles of Parties of import and export, standard of liability, mechanisms of financial security and standing or right to bring claims.

The working group will meet five times and propose international rules and procedures on liability and redress in a final report in 2007. The COP-MOP will then make a decision.

Besides the measures taken on these three issues, COP-MOP 1 also took decisions on seven other issues, including capacity-building, a medium-term work programme, information-sharing and the biosafety clearing house, budget and other financial issues.

Delegates to the meeting appeared rather satisfied with the progress made at COP-MOP 1.

Dr Tewolde Egziabher, a leading African scientist who is also head of the Ethiopian delegation and coordinator of the Africa Group, said he was especially pleased with the progress on liability and redress, an issue which for years the developing countries had been pushing for but which the developed countries had been opposing.

"Even at the start of the Kuala Lumpur meeting, the developed countries were stalling on this issue, but in the end we were able to prevail on them. Besides the Africa Group, I must credit Malaysia for being very active among the developing countries for this."

He added that the liability issue was critical as it was important that developing countries be able to be compensated if their farms, environment or human health were to be adversely affected by imported LMOs.

An international liability regime would also cause the private sector to be more careful and cautious in their activities relating to LMOs.

Tewolde was also happy that the Protocol would have a relatively strong compliance mechanism, unlike many other multilateral environment agreements. "With such a mechanism, it would be more difficult for Parties to shirk their obligations."

Regarding the "Article 18 measures", Tewolde said the COP-MOP 1 decision makes it easier for countries to insist that imported products containing LMOs be labelled.

He noted, however, that most of the leading exporters of genetically engineered products are not members of the Protocol and thus are not obliged to follow its rules.

Nevertheless, the decision at COP-MOP 1 would make it easier for importing countries to insist that the imports containing LMOs be accompanied by proper documentation, even from the countries that are non-Parties.

Tewolde added that the COP-MOP 1 decision on LMOs for food, feed or processing only covers interim measures but it was the basis for a more detailed process to develop a lasting system for the handling and transport of LMOs.

"Biosafety is important for African and other developing countries in order to protect agricultural and animal biodiversity," he said. If there is unintended contamination by genetically modified substances, it can affect crop diversity, agricultural productivity as well as human health.

"I am happy the Biosafety Protocol is moving from rules to measures and action, but although we made good progress in Kuala Lumpur, the challenges are very big and there's much more to be done."

First meeting of the Ad Hoc Open-ended Working Group on Liability and Redress under the Biosafety Protocol

Montreal, Canada
25-27 May 2005

Biosafety talks end without decision on documentation of GMOs

Lim Li Ching and Lim Li Lin

This article was published in the South-North Development Monitor (SUNS)*, No. 5815, 7 June 2005.*

NEGOTIATIONS under the Cartagena Protocol on Biosafety collapsed on the issue of documentation requirements for bulk shipments of genetically engineered commodities, after five days of intense and controversial talks. Two countries – Brazil and New Zealand – held the talks hostage as they repeatedly blocked consensus.

The second meeting of the Conference of the Parties serving as the Meeting of the Parties (COP-MOP 2) to the Cartagena Protocol was held in Montreal on 30 May-3 June. The meeting was supposed to take a final decision on the detailed requirements for how to identify and document shipments of genetically engineered commodities. This issue was the main work of this meeting.

These commodities are known in the Biosafety Protocol as "living modified organisms that are intended for direct use as food or feed, or for processing" (LMO-FFPs). Because of the intransigence of Brazil and New Zealand, no decision on the issue was adopted at the meeting.

The Cartagena Protocol is an international law that regulates the transboundary movement of genetically engineered organisms. It entered into force on 11 September 2003.

Article 18.2(a) of the Protocol deals with the detailed requirements for the documentation that should accompany shipments of LMO-FFPs. This same topic had been among the most contentious issues during negotiations for establishing the Cartagena Protocol and was in fact the final issue to be decided at the meeting that adopted the Protocol in Montreal in 2000.

The disagreements on it had then almost caused the negotiations to break down when major exporter countries tried to exclude these commodities altogether. These countries and their allies – the US, Canada, Australia, Argentina, Uruguay and Chile – called themselves the Miami Group.

As a compromise, in order to obtain agreement on the whole Protocol text, the other countries were forced to accept that documentation accompanying LMO-FFPs must clearly identify that the shipment "may contain" LMOs and are not intended for intentional introduction into the environment.

COP-MOP 2 should have taken a decision on the detailed requirements for this purpose, as Article 18.2(a) had a mandate to do so no later than two years after the Protocol's entry into force (i.e., by September 2005) and this was the last COP-MOP that could have adopted such a decision. Already, the meeting of the Open-Ended Technical Expert Group in March had ended without agreement, and the draft decision that was forwarded to COP-MOP 2 was in fact a controversial revised Chair's text on which there was no consensus.

The fact that no decision was adopted leaves open the question as to whether the mandate of Article 18.2(a) to take a final decision will expire. No meeting will be held before September 2005, when the mandate lapses. However, Brazil, which would be the host of COP-MOP 3 in March 2006, clearly indicated that it was willing to continue discussions on this issue at that meeting. Other countries also made similar references to continuing negotiations on this issue at COP-MOP 3.

The lack of adoption of a decision also leaves open the question as to which version of the draft text would be the basis of the negotiations at COP-MOP 3. In total, 11 versions of the draft decision were discussed. Usually, in such situations, the basis for negotiations reverts to the last agreed text by all Parties.

The delegate from Ethiopia, in his closing statement, invited all delegates from developing countries in the meantime to design through their national legislation strict requirements for the documentation accompanying shipments of LMO-FFPs, instead of waiting till COP-MOP 3 for a further decision to be taken on the issue.

The majority of Parties had wanted the COP-MOP to require documentation accompanying shipments of LMO-FFPs to clearly state that they contain LMOs and to also provide further details of their identity. In addition, they were keen to ensure that only LMOs approved in the importing countries are shipped to them.

Brazil and New Zealand, on the other hand, merely wanted the "may contain" language to remain, and were unwilling to compromise on this issue. This position means that shipments of commodity grains need not be segregated nor tested before leaving the country of export. Shipments of commodity grains can consist of mixtures of non-LMOs, approved LMOs and even unapproved LMOs, because of contamination by experimental LMOs. This allows "global genetic pollution to escape unnoticed and unscathed", as Ethiopia, which was the Chair of the Africa Group, explained.

The recent discovery of an unapproved and experimental genetically engineered maize, Bt 10, which had been inadvertently grown and exported commercially from the US, is a case in point. In response to this, the European Union (EU) took emergency measures to prevent its entry, by requiring a certificate accompanying shipments of corn gluten and brewers' yeast that expressly states that those shipments do not contain Bt 10. This in effect requires the testing of shipments before export.

Because Parties were keen to secure agreement on this very important issue, most were willing to compromise and accepted that in some specific cases, the "may contain" language could remain, provided that some detailed information, such as the identity of the LMOs that are or might be in the shipment, were also given. Negotiations had already begun to proceed in a Contact Group on this basis in late-night and early-morning sessions over the week.

However, from the start, Brazil and New Zealand seemed intent on merely blocking and delaying the negotiations. Over three late-night negotiating sessions, various versions of a draft decision were discussed and, at each turn, rejected by the two countries. At times, Peru and Mexico also actively supported and advanced the Brazilian and New Zealand positions.

By the last Contact Group session, which went on till 3 in the morning of 3 June, even intense negotiations within the "Friends of the Chair" (Malaysia, Ethiopia, Brazil, New Zealand and the EU) failed to yield any results, despite the majority of countries being prepared to compromise beyond their respective bottom lines.

Many delegates were perplexed by New Zealand's stance as it does not commercially produce or export GMOs. This led them to question New Zealand's ideological free trade stance, which was apparently without due regard for environmental or human health concerns, and to ask whose interest this position benefited. The two main negotiators from New Zealand were officials from the Ministry of Foreign Affairs and Trade.

Brazil was "once upon a time … a member of the Like-Minded Group of Developing Countries" during the Protocol negotiations, the Ethiopian delegate nostalgically recalled. However, domestic developments, including the approval of commercialised plantings of genetically engineered soya, had clearly led it to break ranks with the Group, which had fought so hard to protect the environment, health and socio-economic interests of developing countries in the face of intense pressure from industry and the main exporters and producers of genetically engineered organisms.

The Ethiopian delegate asked if this was "a rift that we have to take into future consideration when we deal with Brazil" and whether better protection for developing countries would continue to be "undermined by Brazil".

Because the Contact Group was unable to come to any consensus on the draft decision, the last text was sent to the larger Working Group on the last day of the meeting with many square brackets.

Non-governmental organisations (NGOs) attending the meeting, outraged by the behaviour of Brazil and New Zealand in stalling the negotiations, carried out a silent protest outside the Working Group meeting room, holding up placards with the words "Shame New Zealand, Shame Brazil", reflecting the mood of most of the delegates. A Brazilian NGO representative, in a closing statement, stressed that "the Brazilian delegation here does not represent the position of most Brazilians".

During the Working Group discussion, the Swiss delegation introduced a non-paper which was a text that sought to balance the competing interests. The Swiss proposed that the non-paper should be adopted in its entirety without any amendments. Despite reservations from Brazil and New Zealand, this was eventually taken up by the Chair of the Working Group and forwarded to the plenary as a Chair's text.

During the final plenary, Brazil and New Zealand again rejected the Chair's text outright. Many other Parties and regional groupings, including the Africa Group and the EU, were willing to accept the compromise as a decision to be adopted by COP-MOP 2 even though it was well below what they had hoped to achieve in this meeting.

To break this deadlock, the Asia and Pacific Group suggested that the COP-MOP revert to an earlier draft of the decision which better reflected their interests. That particular text would have required exporters to provide a clear statement that the LMOs have been approved in the Party of import, and to specify what LMOs have been used to constitute the mixture.

Because decisions at the COP-MOP are usually taken by consensus, Brazil and New Zealand were successful in derailing the talks, and thus, no decision was adopted on Article 18.2(a).

The issue of decision-making also came up during discussions on the rules and procedures for the meetings of the Compliance Committee set up under the Protocol. The Committee, in its earlier meeting in March, had proposed that decisions could be taken by a two-thirds majority, provided that all efforts to reach consensus have been exhausted.

However, New Zealand objected to this proposal, and the decision on the rules of procedure for the meetings of the Compliance Committee was adopted by COP-MOP 2 with the paragraph on voting remaining in square brackets. This unresolved issue is also reflected in the rules of procedure for the adoption of decisions by the Conference of the Parties to the Convention on Biological Diversity, the parent convention of the Cartagena Biosafety Protocol, which remains in square brackets.

But, in actual fact, decisions by a simple majority vote can be taken by subsidiary bodies to the Convention, and the Compliance Committee can be considered to be such a subsidiary body.

Other decisions were adopted by COP-MOP 2, including on notification; other scientific and technical issues; documentation requirements for LMOs for contained use, intentional introduction into the environment, and for any other LMOs within the Protocol's scope; capacity-building; risk assessment and risk management; and socio-economic considerations.

COP-MOP 2 also noted the report of **the first meeting of the Ad Hoc Open-ended Working Group on Liability and Redress** and its conclusions. The Working Group had met for three days prior to COP-MOP 2, from 25-27 May.

At COP-MOP 1 in Kuala Lumpur in 2004, a clear process to develop an international liability and redress regime for GMOs was adopted. The decision from COP-MOP 1 stipulates that five Working Group meetings will be held over three years, in order to enable the COP-MOP to fulfil the requirements of Article 27 of the Biosafety Protocol, including completing its mandate by 2008.

At the Working Group meeting in Montreal, the options for the elements of a liability regime were further elaborated. Importantly, inter-sessional work will be carried out between now and the Working Group's next meeting in February 2006. Countries and other stakeholders were invited to submit draft text to the Secretariat three months before the next meeting. The co-chairs of the Working Group, from the Netherlands and Colombia, will meet before then to develop a draft text on liability and redress, based on the submissions received.

The biosafety talks were also overshadowed by the Canadian government's refusal or delay in issuing visas to a number of delegates from developing countries who had intended to participate in the meetings, including some government representatives from Ethiopia (the chair of the Africa Group) and Iran, and civil society representatives from India and Togo. The Canadian delegation and officials from the capital met with some delegates from Africa to discuss the issue, and gave their promise that such incidents would not happen again.

Fifth meeting of the Ad Hoc Open-ended Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety

Cartagena, Colombia
12-19 March 2008

No agreement on liability regarding GMOs, another meeting planned

Lim Li Lin

This article was published in the South-North Development Monitor (SUNS)*, No. 6445, 1 April 2008.*

NEGOTIATIONS under the UN Cartagena Protocol on Biosafety to establish an international regime for liability and redress for damage caused by genetically modified organisms (GMOs) failed to conclude as mandated. The fifth meeting of the Working Group on the liability regime was held in Cartagena on 12-19 March, in the city in Colombia that gave its name to the Biosafety Protocol.

Following the failure of the group to reach an agreement, a decision was taken for another meeting in Bonn in May, aimed at reaching agreement.

Under the Biosafety Protocol, an international regime on liability and redress addressing damage from the transboundary movement of living modified organisms (LMOs) (as GMOs are known under the Biosafety Protocol) should be agreed upon and concluded by 2008.

"Liability and redress" has been a very contentious issue. In 2000, towards the end of negotiations to establish the Biosafety Protocol, countries could not agree to include liability provisions in the Protocol. Instead, an enabling clause was put in place which specified that the first Conference of the Parties serving as the Meeting of the Parties (COP-MOP) to the Protocol should start a process to elaborate liability rules and procedures, and complete this process within four years.

Most developing countries wanted the liability and redress provisions as they are mainly importing GMOs or subject to their illegal or unintentional transboundary movements. Countries producing and exporting GMOs as well as the biotechnology industry were very opposed to including such provisions in the Protocol.

Indeed, they were opposed to the entire notion of a Biosafety Protocol in the first place. The Protocol sets out international rules and procedures for regulating mainly the import and export of GMOs for environmental and health and safety reasons. Socio-economic concerns were also of particular importance for developing countries, and the Biosafety Protocol also addresses this.

Developing countries had always argued that if GMOs are as safe as industry and the producing countries claimed they were, then they need not have to be concerned about strong liability and redress provisions, which would give more confidence in their products. In fact, the inclusion of substantive liability and redress provisions in the Biosafety Protocol was seen as critical to its success, and during the negotiations, many delegates supported the NGO campaign "No Liability, No Protocol" and, later, "No Liability, No Biosafety".

At the first COP-MOP in 2004, a decision setting out the process to elaborate the international regime on liability and redress was adopted. This decision specified that a Working Group would meet five times to undertake this work, and shall complete its work in 2007 in order to enable the COP-MOP in 2008 to adopt the final report from the Working Group, as well as the proposed international rules and procedures on liability and redress, in order to fulfil the mandate of the Biosafety Protocol. The fourth COP-MOP will be held in May 2008 in Bonn.

Prior to and during the fifth meeting of the Working Group in Cartagena, the two Co-Chairs of the process, Rene Lefeber from the Netherlands and Jimena Nieto from Colombia, conducted informal consultations with individual delegations, regional groupings and observers. The Co-Chairs presented four options for the consultations, each dealing with the nature and form of the proposed international liability and redress regime.

The options were: (a) a legally binding instrument on private international law in combination with a non-legally binding instrument on substantive rules and procedures relating to civil liability; (b) a legally binding instrument on the administrative approach in combination with a non-legally binding instrument on civil liability; (c) domestic law requirements on the importer to establish, at the time of import of an LMO, and to maintain thereafter financial security to cover any damage to the conservation and sustainable use of biological diversity that such LMO may cause; and (d) a non-legally binding instrument on the administrative approach and/or civil liability in combination with a supplementary collective compensation arrangement which is open to states that have implemented the non-legally binding instrument.

In a plenary, Malaysia emphasised that all these options contain various elements which are useful to the international liability and redress regime, but that all of these elements need to be included in a legally binding regime for it to be effective.

In the meeting's first three days, the Working Group discussed options and operational text on settlement of claims, damage, the primary and supplementary compensation schemes, scope and complementary capacity-building measures. State responsibility had already been decided on at an earlier meeting, and the choice of instrument was an issue that the Co-Chairs were intending to address in a "Core Elements" paper that they announced would be made available on the fourth day of the meeting.

Sub-working groups were established to further narrow down the various options. Sub-working group 1 worked on settlement of claims (excluding the section on administrative procedures), damage and scope. Sub-working group 1 was co-chaired by Jurg Bally from Switzerland and Reynaldo Ebora from the Philippines.

Sub-working group 2 worked on the primary and supplementary compensation scheme, administrative procedures under the settlement of claims, and complementary capacity-building measures. The co-chairs for this sub-working group were Jane Bulmer from the United Kingdom and Dire Tladi from South Africa.

On Saturday (15 March), new working documents with further streamlined options for nearly all the elements were made available. The Co-Chairs of the Working Group also presented their much-awaited "Core Elements" paper, which was an attempt to marry substantive elements in the liability and redress regime with the nature and form of the instrument in various pieces.

The paper's main components included a legally binding administrative approach and guidelines to civil liability as the primary compensation scheme. The administrative approach applied to damage to biological diversity, and placed obligations on the person in operational control of GMOs to inform the competent authority in the event of damage or imminent threat of damage, and to take response and restoration measures.

Discretion is left to the competent authorities to take such measures and recover the costs. Exemptions to and mitigation of liability would be up to domestic discretion based on an internationally agreed exhaustive list. Minimum amounts to the limitation in time (to bring a claim) and amount (of redress) would be agreed to at the international level. It would be left to domestic discretion to require evidence of financial security upon import of GMOs, and the issue of causation would be left to domestic law.

The civil liability guidelines would apply to any type of damage resulting from the transboundary movement of GMOs, when not redressed through the administrative approach. The standard of liability would be fault-based unless the approval of an import was made subject to strict liability.

The channelling of strict liability (where applicable) would be to the importer or to the person in operational control of GMOs (on a subsidiary basis). In the case of strict liability, the provisions for exemptions and mitigation, limitations in time and amount, and the financial coverage were the same as in the administrative approach.

The issue of causation was also left to domestic law, and there would be an enabling clause on private international law and an encouragement to recognise and enforce foreign judgments when they are based on domestic law that is compatible with the civil liability guidelines.

The supplementary compensation scheme would be for reimbursement of costs of response and restoration measures to redress damage to biological diversity. It envisaged a contractual compensation scheme by the private sector, and a collective compensation mechanism of the COP-MOP if damage has not been redressed through the administrative approach or the contractual compensation scheme by the private sector.

Access to the collective compensation mechanism is also conditional upon the implementation of the administrative approach in domestic law. No residual state liability was envisaged. The collective compensation mechanism was based on a proposal by Switzerland.

The final piece of the "Core Elements" paper was on complementary capacity-building measures which included an institutional arrangement to provide advice to Parties on the compatibility of draft domestic legislation with the legally binding administrative approach and the civil liability guidelines, and to the COP-MOP on access to the collective compensation mechanism, as well as to the domestic public entities of State in which recognition and enforcement of a judgment is sought, on the compatibility with the domestic law implementing the administrative approach and civil liability where judgment was rendered.

The Co-Chairs presented the meeting with three options: to accept the core elements as presented as a package and negotiate operational text within this framework, to reject the whole package, or to make amendments to the package and use it as a basis for further work. They stressed that not every issue had been addressed in the "Core Elements" paper, and that those issues were still open for negotiation. The meeting then adjourned for the weekend.

On Monday (17 March), a representative of the Global Industry Coalition was given the floor by the Co-Chairs at the beginning of the plenary session, before the floor was opened to government delegations to present their views on the "Core Elements" paper. The representative of industry spoke on behalf of six biotechnology companies – BASF, Bayer CropScience, Dow AgroSciences, DuPont/Pioneer, Monsanto and Syngenta – and presented a proposal.

They proposed a binding contractual obligation among the six companies and other companies that also want to be part of it, to remediate "actual damage to biological diversity" caused by their products, as a form of self-insurance.

This "compact" would mean that only the responsible company would remediate or pay a claim after the actual damage to biological diversity had been "proven pursuant to the claim procedure detailed in the compact". The conditions for a Party to submit a claim and for the approval of such a claim would be set out. The Party whose claim was allowed would be a third-party beneficiary.

Rene Lefeber, the Co-Chair from the Netherlands, then thanked industry and warmly welcomed their proposal. He stressed that this was a "monumental, historic step", a "first historic moment", and that the multinational corporations were reaching out and offering to become part of the biosafety community. His request to the plenary to applaud the initiative of industry was however greeted with lukewarm applause.

Many delegations were uncomfortable with the Co-Chair's championing of the industry initiative. This surfaced in the final plenary when adopting the report of the meeting. Very detailed paragraphs on the statement by industry had been included in the report of the meeting, including claims about the safety of their products, when the meeting report normally just states that a statement had been made and by whom.

Norway, Bolivia and Palau questioned the necessity of such detail in the report, and the imbalance in highlighting so prominently the industry statement as compared to other statements. Palau also questioned the need to reflect the Co-Chair's response to the statement as this was not the case with regard to other statements.

Many delegations cautiously welcomed the industry initiative and said that it remains to be seen what the details are. Palau noted that the industry proposal was based on strict liability. Most delegations felt that a framework within which to negotiate the operational text was helpful, but nearly all articulated their dissatisfaction with the "Core Elements" paper as it was, and outlined the changes that they would like to see if the paper were to be accepted as a basis for further work.

Only Japan, which has been the most resistant to an international instrument on liability and redress, cautioned against making any changes to the package deal. The European Commission was agreeable to most parts of the "Core Elements" paper, except for the legally binding nature of the administrative approach, as it had placed a proposal on the table for a "two-step" approach, which envisaged domestic action with a view to reviewing this after six years.

A statement by Ecoropa on behalf of NGOs firmly rejected the "Core Elements" paper. The NGOs criticised the paper as being "counterproductive to liability and redress on the ground". They voiced many concerns with the paper. The administrative approach simply placed a burden on importing countries to take action, while there was no corresponding financial burden on exporting countries to bear the costs in case of damage.

Any civil liability regime must be legally binding and be based on strict liability, said the NGOs. If not, it could be counterproductive for developing countries that have or intend to put in place strict liability regimes, as they will be subject to heavy pressures to establish the lowest common denominator (fault-based liability) which is already the status quo in most countries under existing legislation.

The NGOs also voiced their dissatisfaction with the privatisation of the supplementary compensation scheme, as the conditions would likely result in a mechanism in name only.

They stressed the importance of including damage to human health, socio-economic damage, and damage arising from unintentional and illegal transboundary movements. The importance of reversing the burden of proof at the international level was also stressed.

The Co-Chairs then placed two options before the meeting – to use the "Core Elements" paper as a package and as a basis for further work, or to return to working on the operational text options that had emerged from the sub-working groups.

Faced with these options, when all delegations had expressed an intention to refine and amend the "Core Elements" paper, most delegations unhappily chose to revert to working on the operational text options. Switzerland however proposed forming a "Friends of the Co-Chairs" group to exchange views on the core elements and to discuss possible ways to move forward.

This proposal was accepted and a "Friends of the Co-Chairs" group was formed with four representatives each, at any one time, from Africa and the Latin American and Caribbean Group (GRULAC), four representatives from Asia-Pacific – which were named as Malaysia, China, India and the Philippines – two representatives from the European Union, and Switzerland, Japan, Norway and New Zealand.

The meeting was initially open to all other Parties, non-Parties (the US, Canada, Australia, Argentina, Chile and Uruguay – the original "Miami Group" countries that opposed the Biosafety Protocol – are not Parties) and observers, without speaking rights.

The "Friends of the Co-Chairs" group met from 8 am on Tuesday till 4 am on Wednesday, the last day of the meeting. By the end of the meeting, some headway had been made in agreeing the core elements that would be the basis on which to work on the operational text options. It was agreed that all elements dealing with the nature and form of the liability and redress regime would be deleted, and that this would be decided at the COP-MOP in May.

The core elements that were agreed to in the "Friends of the Co-Chairs" meetings were incorporated with the corresponding operational text options. This document was adopted by the Working Group and will be forwarded to the COP-MOP.

It was decided that the "Friends of the Co-Chairs" should meet in Bonn, prior to the COP-MOP, from 7 to 9 May to continue its work. The meeting would be preceded by regional group meetings on 6 May.

This time, the "Friends of the Co-Chairs" meeting would comprise six representatives each from Africa and GRULAC, six representatives from the Asia-Pacific region (which were named as Bangladesh, China, India, Malaysia, Palau and the Philippines), two representatives each from the European Union, and Central and Eastern Europe, and New Zealand, Norway, Switzerland and Japan. The meeting would be open to advisors from Parties as selected by the Friends.

The outcome of the meeting will also be presented to the COP-MOP, which will then decide on how to proceed with the rest of the negotiations. It is expected that a Contact Group will be formed early in the week to negotiate substantively on liability and redress, in order to reach a final outcome by the end of the COP-MOP.

Many doubts have been expressed about the feasibility and desirability of continuing this work beyond the COP-MOP because of financial constraints. The momentum and good faith of most Parties currently exists to reach agreement by May on an international liability and redress regime for GMOs.

Meeting of the Friends of the Co-Chairs of the fifth meeting of the Ad Hoc Open-ended Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety

Bonn, Germany
7-9 May 2008

Progress after tough talks on liability regime for GMOs

Lim Li Lin

This article was published in the South-North Development Monitor (SUNS)*, No. 6481, 26 May 2008.*

FOUR years of negotiations on an international liability and redress regime for genetically modified organisms (GMOs) under the Convention on Biological Diversity (CBD) have failed to conclude as planned. Instead, another two meetings have been scheduled to conclude the negotiations, in order that the agreement can be adopted at the next Conference of the Parties serving as the Meeting of the Parties (COP-MOP) to the CBD's Biosafety Protocol in Japan in 2010.

The last round of negotiations was held prior to and during the fourth COP-MOP in Bonn, which was on 12-16 May. It saw the emergence of a group of "Like-Minded Friends" comprising around 80 Parties. This group put forward a proposal to break the impasse in the negotiations, and the proposal will now be the basis for the further work.

Countries could not agree to include liability and redress provisions in the Biosafety Protocol when the agreement was adopted in 2000. Instead, an enabling clause was agreed which specified that the first COP-MOP to the Protocol should start a process to elaborate liability and redress rules and procedures, to be completed within four years.

The first COP-MOP was held in 2004, and thus the final liability and redress regime should have been adopted in Bonn last week.

Five Working Group meetings were held over the years, but no agreement could be reached. Just before the Bonn COP-MOP, four days of closed-door "Friends of the Co-Chairs" meetings were held. The Co-Chairs are Jimena Nieto of Colombia and Rene Lefeber of the Netherlands.

This group was constituted in Cartagena in March 2008, at the final meeting of the Working Group. It comprises six representatives each from Asia-Pacific, Africa and GRULAC, as well as two representatives each from the EU and CEE, and Norway, Switzerland, New Zealand and Japan. Other Parties are allowed to be present, as advisors to the Friends.

During the Friends of the Co-Chairs meeting, a group of six major biotechnology companies presented their proposal of a contractual compensation agreement (a "Compact") which they claimed is intended to provide an alternative to the compensation funds and financial security requirements under discussion in the liability and redress negotiations.

The Compact documents threatened that if the fourth COP-MOP did not support their proposal as an alternative, the companies may decide to withdraw their offer.

The Compact is an agreement among its corporate members to provide recourse for "actual" damage to biological diversity if their products are the cause. The terms and conditions, and its governance are defined by the members of the Compact. States become "third-party beneficiaries" if they consent and if their claim is allowed.

Many delegates expressed serious concerns over the industry initiative. The Compact is proposing to redefine the roles of States and corporations. The corporations are attempting to create legal rights and obligations, and States are allowed, as third parties, to attempt to enforce those rights.

Non-governmental organisations strongly condemned the industry initiative as an “empty gesture” aimed at undermining the liability and redress negotiations.

An NGO statement said “the industry would become at the same time defendant and judge of the liability claims for damage”, and the privatisation of international law would set “a bad precedent within the whole UN system”. The NGOs called for the Compact to be “dismissed with the contempt that it deserves”.

At the end of the Friends of the Co-Chairs meeting in Bonn, some progress had been made to reduce the voluminous negotiating text, but delegates braced themselves for gruelling negotiations during the week of the COP-MOP itself. A “Contact Group” on liability and redress began meeting on the first day of the COP-MOP, and continued meeting throughout the week.

The liability and redress negotiations dominated the entire COP-MOP discussions. The discussion at the Contact Group began with the nature of the liability and redress regime. This issue had dogged the negotiations throughout; due to this unresolved issue – whether the instrument or parts of it should be legally binding – many of the discussions on the substantive issues were inconclusive.

Most developing countries, and two developed countries, supported a legally binding liability regime, including civil liability. One grouping supported a legally binding administrative approach. A few delegates were opposed to a legally binding regime.

Early in the week, the Contact Group also continued to work on reducing text options, and completed this task. However, the opposing views on the nature of the liability and redress instrument, which were now finally clearly articulated, continued to cast a shadow over the negotiations. The discussions had come full circle, and a deep chasm was visible.

The process then saw the emergence of a group of “Like-Minded Friends” (LMF) “representing those countries whose position is that an international instrument on liability and redress should have binding elements on civil liability”.

On Tuesday (13 May), the second day of the five-day COP-MOP, the LMF, led by Malaysia, put forward a proposal to break the impasse. The LMF group currently comprises around 80 developing-country Parties (including all members of the Africa Group) and Norway. The number of countries signing up to the LMF continued to climb during the week.

The LMF proposal wanted the legally binding instrument to include three main elements: (1) preserving 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) provisions for the reciprocal recognition and enforcement of foreign judgments; and (3) a clause to review the guidelines no later than three years after entry into force of the liability and redress instrument, with a view to considering making them binding.

It was a heavily compromised proposal, since most developing countries and Norway have been behind a strong binding civil liability regime throughout years of negotiations. However, given the divide, the compromise was put forward in order to bridge the opposing positions.

Two countries registered their opposition to the LMF proposal.

Veiled threats to resort to a two-thirds majority vote to adopt the liability and redress instrument by amending the Biosafety Protocol, and to request the countries which opposed the proposal to leave the discussion as they were not going to ratify the liability and redress instrument anyway were made. Currently, there are 147 Parties to the Biosafety Protocol. Two-thirds of that figure is 98.

(During negotiations in Working Group II of the COP-MOP under “Assessment and Review”, New Zealand, immediately supported by Brazil and Japan, attempted to introduce the following text: “There is no need for amendments to the Protocol or annexes or to alter compliance procedures at this time.” New Zealand further clarified that the proposal was in the context of the medium-term programme of work which covers the fifth COP-MOP. This was however resisted by Zimbabwe, Belize, Norway and the EU, and their proposal was eventually dropped.)

Later in the Contact Group, the Co-Chairs posed three questions: (1) Were there any objections to a legally binding administrative approach? (2) Were there any objections to an article that addressed civil liability in the legally binding instrument? (3) Were there any objections to a non-legally binding instrument on liability and redress?

To question (1), two countries registered their objection. Consultations were conducted between Peru and Paraguay, and the Co-Chairs. The two countries later dropped their objections.

To question (2), one country registered its objection. Bilateral consultations between Japan and the Co-Chairs were initially conducted, after which Japan engaged in a bilateral consultation with members of the LMF, facilitated by the Co-Chairs.

Many countries voiced their objections to question (3).

The bilateral consultations between Japan and members of the LMF were particularly difficult, lasting until the early hours of the morning and for much of the next day. Civil society groups began to campaign against Japan as the host of the next COP-MOP. Signs declaring “Anywhere but Nagoya” and “Japan – hostile host” were seen around the convention centre.

In the end, all concerns were accommodated, and an alternative text to the LMF’s proposal on civil liability was introduced, and later incorporated into the LMF’s proposal.

The discussion in the Contact Group then centred on whether the current text, with the proposal of the LMF as amended, could be the basis for further negotiations. It was stressed by the Co-Chairs that the negotiations needed to continue in good faith, and that “nothing is agreed until everything is agreed”, as the draft text still contained many square brackets (indicating no consensus).

It became clear that the final agreement would not be reached in Bonn, and that further work was required later. Other components of the “package” included guidelines on civil liability, a supplementary compensation scheme, settlement of claims, and complementary capacity-building measures.

A heated discussion ensued on this issue, and one delegation appeared to have some difficulties with this proposed way forward. Finally, there was agreement that the package could be the basis for further negotiations.

The delegation that in the end remained the most resistant put forward broad caveats that caused many observers and delegates to question the sincerity of their acceptance to negotiate on the basis of the “package”.

The caveats included: that the final agreement must not legitimise discriminatory trade practices and freeze current international imbalances, must not result in barriers to trade or to the development of science and technology, and should be placed in the context of sustainable development, and the struggle to eradicate hunger and poverty.

One NGO commented that “Brazil almost torpedoed four years of negotiations to create a legally binding regime to ensure compensation and redress for damage caused by international trade in GMOs”.

The final decision adopted by the COP-MOP on liability and redress mandates a “Group of the Friends of the Co-Chairs” to meet for five days in early 2009 and, if deemed necessary by the Co-Chairs, to meet again for five days in early 2010. Malaysia and Mexico offered to host the meetings, and Japan offered financial support.

The timing of the two meetings is carefully scheduled to ensure that there is a six-month gap between the last meeting and COP-MOP 5 in Nagoya, Japan. A six-month rule on the communication of the instrument to Parties applies to proposed amendments to the Convention on Biological Diversity, the Biosafety Protocol, and to adoption and amendment of any of their annexes.

The composition of the Group remains the same as the Friends of the Co-Chairs group that was originally agreed to in Cartagena. Other Parties may participate, as advisors to the Friends, and the participation of other observers in the meeting is at the discretion of the Co-Chairs.

Importantly, the Group will further negotiate international liability and redress rules and procedures on LMOs on the basis of the text annexed to the decision. This text contains the compromise package that was agreed to at the end of the Contact Group. Many square brackets and alternative text had also been introduced to the proposal by the LMF as amended.

The COP-MOP adopted a total of 18 substantive decisions: a report of the compliance committee; three decisions on handling, transport, packaging and identification of LMOs; on the Biosafety Clearing-House; capacity-building; notification requirements; socio-economic considerations; cooperation with other organisations, conventions and initiatives; public awareness, education and participation; risk assessment and risk management; monitoring and reporting; financial mechanism and resources; roster of biosafety experts; assessment and review; subsidiary bodies; liability and redress; and the programme budget.

First meeting of the Group of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety

Mexico City, Mexico
23-27 February 2009

Talks on liability and redress for GMOs make some progress

Lim Li Lin

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PARTIES to the UN Cartagena Protocol on Biosafety, at a meeting in Mexico City, have agreed that a legally binding Supplementary Protocol will be developed on liability and redress for damage from genetically modified organisms (GMOs).

The negotiations took place from 23-27 February 2009, continuing from five previous meetings of a Working Group on liability and redress that began its work in 2005.

The Mexico City negotiations inched slowly forward, dealing with a number of difficult issues. Though some progress was made, much remains unresolved, one key disagreement being what should form part of the Supplementary Protocol.

While "nothing is agreed until everything is agreed", the meeting did agree that the form of the instrument would be a Supplementary Protocol to the Cartagena Protocol. This means that the Supplementary Protocol must be adopted by consensus, and the number of Parties required for its entry into force will be specified in the Supplementary Protocol itself (the current draft provides an option of 30 or 50 ratifications, acceptances, approvals or accessions for it to enter into force).

The other options on the form of the legally binding instrument were an amendment of the Biosafety Protocol, an annex to the Biosafety Protocol, or a protocol to the Convention on Biological Diversity (the parent treaty of the Biosafety Protocol). The Co-Chairs (Jimena Nieto from Colombia and Rene Lefeber from the Netherlands) proposed that a supplementary protocol to the Biosafety Protocol was appropriate, given the fact that the instrument should be within the framework of biosafety, the outcome will be supplementary and is not changing anything, and annexes are restricted to scientific, technical, procedural or administrative matters. All the Parties at the meeting supported this.

The negotiations have been underway since 2005, with the Working Group under the Protocol having met five times to elaborate international rules and procedures on liability and redress. Its last meeting was in March 2008, in order for the fourth Conference of the Parties serving as the Meeting of the Parties (COP-MOP 4) to the Biosafety Protocol, which was held in Bonn in May 2008, to adopt the outcome of its work.

However, the negotiations have been dogged by deep divisions between Parties that want a legally binding international agreement on liability and redress and those that do not want it, thus making progress extremely slow. Despite an extra small-group meeting of the "Friends of the Co-Chairs" in Bonn before and during COP-MOP 4, the negotiations still could not be concluded. Another two meetings of the "Friends of the Co-Chairs" group were mandated by a decision in Bonn, and its outcome will be forwarded to COP-MOP 5 to be held in Nagoya, Japan in October 2010.

The meeting in Mexico City was the first of the two "Friends of the Co-Chairs" group meetings. The next five-day meeting of this group will be held in Malaysia in early 2010. The timing of that meeting will need to meet the rule of communicating the text of any proposed protocol to the Parties to the Biosafety Protocol at least six months before its adoption.

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 Biosafety Protocol may also attend the "Friends of the Co-Chairs" meeting. 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.

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

The negotiations have dragged on and the outcome may now only be adopted in 2010 in Nagoya, marking a 10-year delay in having international rules and procedures for liability and redress for GMO damage (the Biosafety Protocol was adopted in 2000, and came into force in 2003). The meeting in Mexico City came after the very difficult negotiations in Bonn last May when the talks 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". This Like-Minded Friends grouping led by Malaysia made a proposal that helped to break the impasse.

Finally, a careful political agreement was hammered out in Bonn which became the basis for further negotiations. The crux of the issue was the nature of the international liability and redress regime – whether the instrument or parts of it should be legally binding. It was essentially agreed in Bonn that the international liability and redress regime would be legally binding and would comprise administrative approaches and contain: (1) a clause that would 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) provisions on reciprocal recognition and enforcement of foreign judgments; and (3) a clause to review the guidelines after the entry into force of the instrument with a view to considering making them binding or elaborating a more comprehensive binding regime on civil liability.

(In the course of the negotiations over the years, there were objections from several Parties to having the international agreement set the substantive rules for civil liability whereby victims of damage from GMOs can turn to national courts for redress. Many Parties also prefer the "administrative approach" whereby liability would be a matter to be resolved between the liable entity and the executive arm of a government.)

The Bonn agreement was based on the proposal by the Like-Minded Friends group, which comprised around 80 developing countries (including all of the Africa Group) and Norway. This proposal 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 Bonn, the final compromise package was essentially struck between the Like-Minded Friends group and Japan, which had initially opposed including one binding provision on civil liability. Peru and Paraguay had also initially opposed having a binding administrative approach. In the discussion on the text that was to be the basis for further work, Brazil had stipulated a number of caveats based on trade concerns. However, given the divide, the compromise was put forward in order to reach a common understanding on the direction of the negotiations so as to advance the negotiations. Other components of the "package" agreed in Bonn included guidelines on civil liability, a supplementary compensation scheme, settlement of claims, and complementary capacity-building measures.

The meeting in Mexico City discussed the proposed operational text that will be in the legally binding Supplementary Protocol. This includes the administrative approach and the few provisions on civil liability. There are still numerous square brackets (indicating a lack of consensus) in this text.

The guidelines on civil liability, and other provisions (supplementary compensation scheme, settlement of claims, and complementary capacity-building measures) were not discussed. Civil society observers at the meeting expressed concern that the one last meeting in Malaysia in 2010 would not be sufficient to complete the negotiations. An additional concern was that given the time constraints, other important provisions, such as the supplementary compensation scheme, would be relegated to a decision of the COP-

MOP rather than included in the legally binding Supplementary Protocol, which would need to conform to the six-month rule to be adopted by the COP-MOP in Nagoya in 2010. By default, if there is insufficient time to negotiate the other provisions, they may not be included in the Supplementary Protocol, but rather be negotiated in Nagoya as part of a decision of the COP-MOP.

As part of the report of the Mexico City meeting, a draft decision for COP-MOP 5 in Nagoya is placed in an appendix. The Supplementary Protocol as well as the guidelines on civil liability are both annexes to the draft decision. This indicates that the guidelines on civil liability will not be part of the Supplementary Protocol (which will be a legally binding treaty). However, this is still a draft decision, and the final decision will be made in Nagoya.

A number of issues proved particularly difficult, and point to the deep gulf that still exists between the Parties. These included issues such as whether “products thereof” (products derived from GMOs) should be included in the scope of the Supplementary Protocol, limitation in time, damage to human health, the concept of imminent threat of damage, response measures, the definition of operator, exemptions and mitigation, and financial security. These issues are being addressed in the context of a legally binding administrative approach.

On the third day of the meeting in Mexico City, the few legally binding provisions on civil liability were discussed. The agreement in Bonn was that these provisions would be part of the legally binding instrument – preserving the right of Parties to put in place domestic laws and policies on civil liability and redress, recognition and enforcement of foreign judgments, and a review of the civil liability guidelines. During the discussion, it appeared that some Parties were attempting to retreat from the Bonn agreement.

Panama stated that the legally binding Supplementary Protocol was only for the administrative approach, and that civil liability provisions would be contained in a decision of COP-MOP 5. This was met with an unhappy response from Malaysia, supported by Norway and Ethiopia. Co-Chair Lefeber also clarified that the agreement reached in Bonn was to work on some legal provisions on civil liability in the same instrument that contains the provisions on administrative approaches.

The meeting then proceeded to discuss the clauses on civil liability to be included in the legally binding instrument. On the right of Parties to develop a domestic civil liability regime, there were two options in the text from Bonn. Option 1 (proposed by Japan) 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”. Option 2 spelt out the right of Parties to have a domestic civil liability regime, and specified the elements that this would include, taking into account the guidelines on civil liability.

The discussions progressed relatively smoothly on this issue. Entrenched positions on the issue of whether financial security should be addressed as an element in domestic civil liability regimes could not be reconciled. The Group of Latin American and Caribbean (GRULAC) countries insisted that this would be a trade barrier.

On the recognition and enforcement of judgments, the European Community (EC) was adamant that this was something that it could not address in any substantive way. The original proposal in Bonn from the Like-Minded Friends group simply envisaged that Parties should recognise and enforce foreign judgments on liability and redress for damage caused by GMOs according to domestic laws, and that any Party which does not have legislation on recognition of foreign judgments should endeavour to enact such laws. In the event that Parties do have domestic laws on this, they should endeavour to extend those laws to other Parties that are not presently covered by those laws.

The final part of the package relating to the binding civil liability clause was the review of the guidelines with a view to considering a binding civil liability regime. The GRULAC countries wanted this provision deleted. The EC stated that the political agreement in Bonn was to have a review clause in the legally binding instrument, but it could not be a review of the civil liability guidelines, as they are not part of the Supplementary Protocol.

Ethiopia responded strongly to these statements. It said that having guidelines on civil liability was already a compromise as the position of developing countries all this while has been to have a legally binding international law on civil liability, but from what has been said, the guidelines might as well be thrown away. “How can we review the guidelines if we do not recognise that they exist? Unless the guidelines are in some way acknowledged in the Supplementary Protocol, they are not in existence,” Ethiopia said. It asked for the guidelines to be acknowledged, and for there to be a review process to allow the possibility that they could become international law.

Malaysia also responded strongly. It said that the overwhelming number of countries wanted a binding civil liability regime, but this was contentious, and so the compromise package was agreed upon. This was further diluted because of continuing objections, to the point where developing countries have only one binding element on civil liability – "virtually nothing". In the light of what they had to give up, the Like-Minded Friends group then asked for the opportunity to review the guidelines. If this was not granted, it would be bad faith, Malaysia said.

The EC confirmed that it would like to have a general review clause of the Supplementary Protocol in the Protocol itself, and a clause on reviewing the guidelines in the decision that adopts the guidelines. It said that the two processes should be separate.

Malaysia clarified that the Like-Minded Friends group had accepted as a compromise a weak provision on civil liability with a review clause with a view to making them binding. All this is located in the legally binding approach, and that was also the compromise. The outcome of the review is not being prejudged, it said, but merely given direction. The review is therefore not about evaluating its effectiveness but with a view towards a binding civil liability regime.

Co-Chair Lefeber then proposed to move the discussions forward and to delete Option 1 on the right of Parties to develop a domestic civil liability regime, since the discussion had shown that there was consensus around working with Option 2.

However, the EC said that in the light of the discussions on the review clause, it would like to keep Option 1. This was met with angry responses from Ethiopia and Malaysia. Malaysia said that everything that it had agreed to in the spirit of compromise so far, such as on exemptions, it reserved again. Ethiopia also stated that it was going back on everything that it had agreed to delete, and wanted all the text back in place. It said that it was happy to have either Option 1 deleted or all the cancelled text reinstated.

Amidst this tense atmosphere, the Co-Chairs proposed a break, during which bilateral consultations took place informally. After the break, Malaysia proposed text in an attempt to find a compromise. The current draft of this provision with the bracketed un-agreed parts now reads:

"[1. The [institutional mechanism under the Supplementary Protocol] shall undertake [3] years after the entry into force of this Supplementary Protocol a review of the effectiveness of the Supplementary Protocol.

"2. This review shall include a consideration of [further and necessary steps] [whether further steps are necessary] to provide for an effective civil liability regime on liability and redress.]"

These clauses will now go forward to the next meeting of the "Friends of the Co-Chairs" group in Malaysia next year.

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

Kuala Lumpur, Malaysia
8-12 February 2010

International treaty on liability for LMO damage in sight

Lim Li Ching and Lim Li Lin

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THE next few months will likely see the birth of an international treaty on liability and redress for damage caused by living modified organisms (LMOs).

After almost 10 years of debate over a legally binding instrument for liability and redress, there are expectations that a new treaty will be up for adoption at the fifth Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety in October in Nagoya, Japan.

(The Cartagena Protocol uses the term "living modified organisms" for what are commonly known as "genetically modified organisms". The Protocol is a treaty under the Convention on Biological Diversity (CBD) that was adopted in 2000 and entered into force in 2003. There are currently 153 Parties.)

While the years of negotiations have taken their toll and the final outcome would be watered down from what the overwhelming majority of developing countries first envisioned, a Supplementary Protocol to the Cartagena Protocol would be a historic first step towards practically addressing damage from LMOs. Meanwhile, the door is still kept open for addressing civil liability more comprehensively in the future.

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") that met in Kuala Lumpur, Malaysia on 8-12 February has 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 CBD Secretariat (that serves both the Convention and the Cartagena Protocol) at least six months before its adoption. The meeting of the Group of the Friends of the Co-Chairs in Kuala Lumpur was the last negotiation session scheduled at least six months before the COP-MOP in Nagoya. The proposed text still contains many square brackets (indicating areas of disagreement).

Further negotiations will now take place in Montreal on 17-19 June. There is talk of the possibility of an additional three to five days' meeting prior to the COP-MOP in Nagoya, subject to agreement by the host government, Japan.

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

The FoCC 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 FoCC meetings 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.

This procedure is designed to have a smaller group at the negotiating table but maintains the UN tradition of transparency and inclusiveness of all Parties.

The composition of the group at the next meeting in Montreal in June will be the same, except that the number of advisors will be limited to six for the Africa 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, the 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 Montreal meeting. Palau and Bangladesh did not attend the meetings in Mexico City and Kuala Lumpur, and will be replaced by South Korea and Iran.

The two FoCC meetings came after the very difficult 2008 Bonn negotiations that 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 collapse.

The proposal was the basis for the Bonn agreement to continue the negotiations. 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. 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 considering making them binding or elaborating a more comprehensive binding regime on civil liability.

("Response measures" are defined in the text and can be summarised as actions to avoid, minimise, contain or mitigate damage, as well as to restore biological diversity. If the concept of "imminent threat of damage" that is still under debate was to be included in the Supplementary Protocol, response measures would also entail taking the necessary preventive measures.)

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

The proposal by the Like-Minded Friends was itself already heavily compromised, 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 last year, 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.

However, this agreement to have a legally binding instrument on administrative approaches with one provision on civil liability continues to be undermined by Parties that still resist such an instrument.

Therefore, 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. Most of the last few days of the meeting were closed to advisors and observers as the FoCC group continued to work late into the night on the contentious issue of this one provision on civil liability (Article 13).

In the first instance, the EU, Japan and Paraguay attempted to roll back the Bonn agreement, by indicating their unwillingness to work on text that originated from the compromise proposal put forward in Bonn by the group of Like-Minded Friends.

This text 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 allowed for Parties to take into account the guidelines on civil liability when developing their domestic legislation or policy.

After protracted discussions, the FoCC agreed to work on the basis of that text on a "provisional basis". The text later 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).

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 civil liability, as relating to so-called traditional damage, 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 the Caribbean). The small group worked late at night on 11 February to produce 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 FoCC group on the last morning (12 February), the EU reportedly attempted to further water down the text. The Africa 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 Africa Group.

The resulting text, now contained in Article 13.2 of the Supplementary Protocol text, 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 Africa Group reserved its right to revisit the wording of this paragraph and this is reflected 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 Kuala Lumpur meeting report which contains proposed operational text for working towards non-legally binding provisions, and circulate them to the FoCC group prior to their next meeting.

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 considering making them binding or elaborating a more comprehensive binding regime on civil liability.

At the Mexico City meeting in February 2009, the EU insisted 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 such, 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 text in brackets was discussed at the Kuala Lumpur meeting.

The first paragraph of Article 14 on the review of the effectiveness of the Supplementary Protocol was not controversial. However, problems arose regarding the second paragraph that 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 for the countries that had wanted a binding civil liability regime, the review remained an important component of their agreement to a "watered-down" civil liability regime and the guidelines.

The text that was eventually adopted 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."

By the end of the meeting, the FoCC group had adopted 15 out of 25 of the Articles of the draft Supplementary Protocol. This amounts to over 60% of 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" (i.e., products of LMOs) 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 remain unresolved because of the strongly held positions of Parties and may well prove to be deal breakers.

The next meeting in June in Montreal will thus be under pressure to resolve all the difficult issues before Nagoya.

Pending a more comprehensive international system, countries can in the meantime enact strong liability and redress provisions in their national laws.

Third meeting of the Group of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety

Kuala Lumpur, Malaysia
15-19 June 2010

Treaty on liability for GMO damage closer to completion

Lim Li Ching and Lim Li Lin

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THE text of an international law on liability and redress for damage caused by living modified organisms (LMOs) came a step closer to finalisation following a meeting of a negotiating group under the Cartagena Protocol on Biosafety.

The new treaty is slated for adoption when Parties to the Cartagena Protocol gather for their fifth biennial meeting in October 2010 in Aichi Nagoya, Japan.

The Group of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety had its third meeting in Kuala Lumpur on 15-19 June 2010 to further negotiate international rules and procedures on liability and redress. The first meeting was held in Mexico City in February 2009 and the second in Kuala Lumpur/Putrajaya in February 2010. The Co-Chairs are Rene Lefeber from the Netherlands and Jimena Nieto from Colombia.

The Group of the Friends comprises six representatives each from the Africa Group, the Latin America and Caribbean Group, and Asia-Pacific; two representatives each from the European Union and Central and Eastern Europe; and one representative each from New Zealand, Norway, Switzerland and Japan.

These negotiations have been underway since 2005, with a Working Group under the Cartagena Protocol having met five times. Its last meeting was held in March 2008, in an endeavour to complete the process within the four years as specified in the Cartagena Protocol. Because of the deep divisions on the issue, the negotiations could not be completed as mandated, despite extra small-group meetings of the Friends in Bonn before and during the 2008 COP-MOP.

As such, another two meetings of the Group of the Friends were mandated by a decision in Bonn. However, the last meeting in February 2010 still could not resolve the difficult issues. Hence, a decision was made to meet again in June.[1]

Meanwhile, the text for a Supplementary Protocol on liability and redress (containing square brackets, indicating a lack of consensus) was communicated to Parties by the Executive Secretary of the CBD on 6 April 2010, to meet the requirement that the text of any proposed protocol has to be communicated to the Parties at least six months before its adoption.

The main outstanding issues to be resolved were: (i) imminent threat of damage; (ii) financial security; (iii) whether the scope should refer to “activities” or “living modified organisms”; (iv) products thereof; (v) the definition of “operator”; (vi) the reference to international law/obligations; (vii) civil liability; (viii) reservations; (ix) objective; (x) signature; (xi) order of Articles; (xii) preamble; and (xiii) title.

No other issue was opened for discussion, as agreed Articles had already been adopted by the Group of the Friends at the February 2010 meeting.

The following is a summary of the discussions and final outcomes on some of the more contentious issues discussed at the June meeting. The Articles referred to here are those in the text officially communicated to the Parties on 6 April 2010; changes have been made since to the order and numbering of Articles.

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[1] The third meeting of the Group of the Friends of the Co-Chairs was subsequently held in Kuala Lumpur, Malaysia, on 15-19 June 2010.

Financial security

The issue of financial security was not resolved and proved to be the most contentious issue. A further Group of the Friends meeting is scheduled for 6-8 October, just before the Aichi Nagoya meeting of the Parties on 11-15 October. This issue, together with whether or not "products thereof" or products derived from GMOs should be included within the scope of the Supplementary Protocol, will be the last two outstanding issues to be resolved by the Group of the Friends in Nagoya. The issue of financial security will inevitably be the most difficult to resolve, with many entrenched and polarised positions among the Parties.

Co-Chair Lefeber started the Kuala Lumpur discussion by asking whether there were any objections to Article 12.1 dealing with financial security. The current provision has not been agreed to and is couched in non-obligatory language ("may"). It allows Parties to "require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance". It also contains a qualifier – "consistent with international law/obligations" – that has not been agreed on.

Ten countries objected to the inclusion of the provision – Brazil, Paraguay, Ecuador, Mexico, Colombia, Costa Rica, Cuba, Panama, South Africa and New Zealand. The Co-Chair then proposed deletion of the provision, without hearing from the majority of countries that supported its inclusion. This provoked heated and impassioned responses, particularly from Africa Group countries. Liberia, Cameroon, Egypt, Malaysia, India, Bolivia, Peru, the EU, Switzerland and Norway spoke in favour of the provision. Switzerland and the EU indicated that they already require this in their national laws.

The developing countries in favour of having a provision on financial security argued that the provision is not even mandatory, and that a debate and negotiation on the issue is the way forward, not deletion of the provision altogether. Egypt said that it would "feel ashamed to accept a situation where sovereign rights are not asserted in an environmental treaty, just because it may constitute some trade difficulty".

"All countries are equal, and some are more equal than others," it said. "In the Africa Group, very few countries are going to be able to exercise their sovereign rights if they do not have a clause in an environmental treaty that allows them to do that, as without this, they would not dare exercise their sovereign rights."

Egypt explained that there is an African model biosafety law, approved many years ago by heads of state, that includes financial security, and that it is impossible for the Africa Group to accept a Supplementary Protocol that does not recognise the sovereign right of a country to have financial security.

The Co-Chair agreed that the provision was supported by the majority of countries, and then asked if the Friends who were objecting to Article 12.1 could be flexible and accommodate new language that would take into account those concerns. Of the 10 objectors, Brazil and Paraguay were adamant that they could not accept any provision on financial security, whilst the others indicated that they were willing to work on text and find compromise language. (However, Brazil and Paraguay both later signalled that a compromise could be found in Nagoya.)

Further discussions on the issue during the meeting proved unsuccessful.

Malaysia pointed out that Parties have the right to ask for financial security in any case, that this is not something new, and some countries already require it. But if a provision were not included in the Supplementary Protocol, then countries that are against its inclusion would lose the right to regulate the implementation of financial security measures in other countries. This could be done through establishing criteria that Parties should take into account when implementing the financial security provision of the Supplementary Protocol.

Due to the very divergent views on the issue, it was concluded that formal negotiations at this stage on Article 12 would not bring results; hence, only an informal discussion was held one night to "brainstorm" on financial security.

Other international obligations/agreements

The relationship of the Supplementary Protocol to other international obligations and agreements was an issue in relation to a number of provisions. This is usually understood to refer to the relationship with the World Trade Organisation agreements.

Under Article 7.1, a Party shall provide for response measures "[consistent with international obligations]", and implement them in accordance with its domestic law. Article 7 is on response measures, the core of the Supplementary Protocol.

(Under Article 12.1 dealing with financial security, "consistency with international law/obligations" has not been decided on, and that whole provision remains in square brackets.)

Japan proposed the deletion of Article 7.1 and a new Article 7.8: “The response measures shall be implemented [in a manner consistent with international obligations and] in accordance with the domestic law of the Parties.” Brazil also wanted the issue mentioned specifically in Article 7.

Malaysia and India suggested that this issue should be dealt with in the preamble, much like how it was resolved in the negotiations of the Cartagena Protocol on Biosafety.

The European Union proposed that Article 22.1 of the CBD – “The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity” – would be the more appropriate reference, as the Supplementary Protocol is primarily focused on damage to the environment and the liability of the operator. It suggested adding this concept to Article 18.3, which deals with the relationship of the Supplementary Protocol with the CBD and Cartagena Protocol.

This was translated into a possible additional Article: “The provisions of the Supplementary Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.”

Japan wanted this additional Article deleted, while the EU and Malaysia spoke in favour of deleting Article 7.8 instead, and stressed that actually neither was needed, but that the new Article was only needed to balance Article 7.8 that was proposed by Japan. Malaysia insisted that there should be no hierarchy implied or subordination of the Supplementary Protocol to other international agreements or obligations.

The EU suggested adding the term “*mutatis mutandis*” to Article 18.3, in order to make the provisions of the CBD and the Cartagena Protocol apply to the Supplementary Protocol. This would mean that Article 22.1 of the CBD would apply to the Supplementary Protocol. Malaysia suggested specifically highlighting this by adding the phrase “including in particular paragraph 1 of Article 22” (of the CBD).

Colombia suggested a new Article 18.4 as a way forward: “This Supplementary Protocol shall be implemented in accordance with international obligations.”

In the end, the additional Article was deleted and the following were adopted as a package on this issue: Article 7.8 (“Response measures shall be implemented in accordance with domestic law”); Article 18.3 (“Except as otherwise provided in this Supplementary Protocol, the provisions of the Convention and the Protocol shall apply, *mutatis mutandis*, to this Supplementary Protocol”); and Article 18.4 (“Without prejudice to paragraph 3 above, this Supplementary Protocol shall not affect the rights and obligations of a Party under international law”).

Malaysia (supported by Namibia) said that Article 18.4 merely restates and makes visible an existing reality. By the same token, it said, the attempts to make visible a right to have financial security were resisted. It said that until the issue of financial security is included in the Supplementary Protocol, it would like to keep Article 18.4 in square brackets or record its reservation in a footnote.

However, it was decided that this concern will only be reflected in the report of the meeting. Brazil objected to this inclusion in the report, saying that financial security and the relationship to other international obligations/agreements are different issues which are not linked. Its understanding was that the Supplementary Protocol would be adopted as a whole. Brazil’s understanding will also be reflected in the report of the meeting.

Imminent threat of damage

The concept of “imminent threat of damage”, although widely accepted and used in other environmental and/or liability and redress laws, faced stiff opposition at the Kuala Lumpur meeting and took up the first two days of discussions. The concept essentially allows for preventative measures to be taken in the event of a grave and immediate threat of damage. This is in line with the precautionary principle that is an accepted principle underpinning the CBD and the Cartagena Protocol.

However, Paraguay, China and South Africa objected to the inclusion of the concept in the Supplementary Protocol, citing trade concerns, whilst others such as Brazil, Colombia, Mexico, Japan and Ecuador preferred the concept to only apply in relation to response measures (i.e., measures taken in response to damage caused by GMOs).

Peru, Bolivia, Malaysia, South Korea, Norway, the EU and the Africa Group (with the exception of South Africa) strongly supported the concept, arguing that it was essential to fulfil the goals of the Supplementary Protocol and was in line with the objective of the Cartagena Protocol, as the administrative approach to deal with liability has to include a preventative function. With regard to the concern that the inclusion of the concept could lead to arbitrary measures that could impede trade, they highlighted that the Cartagena Protocol already provides safeguards and that qualifiers could be crafted to ensure that the application of such measures is adequately guided.

Initial discussion focused on the operationalisation of the concept of imminent threat of damage in relation to response measures as articulated in Articles 7.2 and 7.3, which relate to the actions required of the operator and competent authority respectively. The question was: while these actions are required in the event of damage, should they also apply to cases where damage has not yet occurred but is a strong possibility?

At the end of prolonged discussion, Colombia proposed language to address the specific scenario raised by imminent threat of damage, in a separate Article.

Paraguay, China and South Africa, the strongest objectors to including the phrase "imminent threat of damage", were invited by the Co-Chairs for a separate discussion. Eventually, these countries agreed on the inclusion of the phrase "sufficient likelihood of damage" to describe the situation that should also be addressed by preventative response measures. The objectors also insisted that this compromise was on the understanding that the concept would only be included in Article 7 on response measures.

The final formulation of the paragraph addressing sufficient likelihood of damage in Article 7 reads: "Where relevant information, including available scientific information or information available in the Biosafety Clearing-House, indicates that there is a sufficient likelihood that damage will result if timely response measures are not taken, the operator shall be required to take appropriate response measures so as to avoid such damage."

Attempts to make reference to the precautionary principle in this paragraph were rebuffed, and this was eventually moved to the preamble: "Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development."

Also in the preamble is reference to sufficient likelihood of damage: "Recognizing the need to provide for appropriate response measures where there is damage or sufficient likelihood of damage, consistent with the Protocol." There is no other mention of sufficient likelihood of damage in the draft Supplementary Protocol.

This was the compromise reached despite valiant attempts led by Peru and Bolivia to have the concept explicitly mentioned in the Scope and Objective, as well as in the definition of "operator" and "response measures". In the latter, the concept is captured by the inclusion of the idea that, among others, response measures are reasonable actions to prevent damage. The inclusion of the concept of sufficient likelihood of damage in the operational text of the Supplementary Protocol is significant, even though it is not explicitly mentioned in the Scope and Objective.

Operator

On the definition of "operator", one of the issues was how to deal with the multiplicity of operators throughout the chain. It was decided that the definition of operator could include the permit holder, person who placed the LMO on the market, developer, producer, notifier, exporter, importer, carrier or supplier. This is an indicative, not exhaustive, list of possible operators that should be determined at the national level.

Also of concern was how to capture in particular the operators that are responsible at the time of the condition giving rise to the damage, as well as the operators at the time that the response measure is required. Text specifying these options was debated but ultimately deleted.

It was however decided that the definition of operator should include both the person in direct and indirect control of the LMO. This is understood to capture both the person that is in operational control of the LMO when the response measures are required (e.g., the carrier) as well as the person responsible for damage due to the intrinsic properties of the LMO (i.e., the developer or producer).

Another issue was on how to incorporate the concept of "imminent threat of damage" into the definition of operator. No agreement was reached on this, and the definition of operator makes no reference to damage or possible damage. However, the provision on response measures specifies that action must be taken by the operator in the event of damage or a "sufficient likelihood of damage".

After some debate, it was also decided that the definition of operator should not be restricted to response measures, as the term also appears in the provision on financial security.

The final text defining operator reads: “any person in direct or indirect control of the LMO which could, as appropriate and as determined by domestic law, include, inter alia, the permit holder, person who placed the LMO on the market, developer, producer, notifier, exporter, importer, carrier or supplier.”

Civil liability

The issue of civil liability, whereby victims of damage from GMOs can turn to national courts for redress, almost caused the negotiations to collapse in Bonn in 2008 due to strenuous objections from several Parties to having international substantive rules for civil liability.

A group of Like-Minded Friends emerged at that time “representing those countries whose position is that an international instrument on liability and redress should have binding elements on civil liability”. The Like-Minded Friends grouping comprised around 80 developing countries (including all of the Africa Group) and Norway.

An agreement was reached in Bonn which 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. The regime would also contain one binding provision on civil liability that would preserve the right of Parties to put in place domestic laws and policies on civil liability and redress.

The one provision on civil liability to be included in the legally binding Supplementary Protocol proved to be the most contentious at the last meeting of the Group of the Friends in February 2010. While there had been 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 too difficult to resolve.

Thus, the resulting text from the February meeting was in brackets, and called for Parties to assess whether domestic law provides for adequate rules and procedures for traditional damage “incidental” to damage to biodiversity, and to consider several options for applying civil liability approaches.

The Africa Group had however reserved the right to revisit the wording of this paragraph, in a footnote to the text. It reiterated its position at the recent June meeting, that there must be a binding article on civil liability in the Supplementary Protocol, in line with the Bonn agreement, and proposed continuing the negotiations on the basis of the bracketed text.

The discussion then focused largely on the following issues: (i) whether the obligations to apply and develop general and specific civil liability laws or a combination of both in relation to traditional damage (spelt out as material or personal damage) should be mandatory; (ii) whether to narrow the consideration of traditional damage as “incidental” to damage as defined in the Supplementary Protocol, and how strong this linkage should be; and (iii) whether an assessment of the adequacy of domestic laws is necessary before the application or development of civil liability laws.

The bracketed text had limited the application of civil liability to material or personal damage “incidental” to the damage as defined in Article 2.2(c), which defines damage as “an adverse effect on the conservation and sustainable use of biological diversity, taking also into account risks to human health”.

Malaysia argued that the dictionary meaning of “incidental” conveyed an impression of minor accompaniment and subordination, which would severely limit the applicability of civil liability to very few situations.

Bolivia argued for the deletion of the phrase, while Japan and the EU stressed that there should be some linkage to an adverse effect on the conservation and sustainable use of biodiversity.

The Co-Chairs proposed a compromise package: that the obligation on Parties to assess and apply or develop civil liability laws should be mandatory, and that the linkage between traditional damage and damage to biodiversity be addressed by the term “associated with”. The latter was viewed as a better option than “incidental to” and would provide more leeway for inclusion of a broader range of damage scenarios.

Diverging opinions however emerged on the issue of assessment, with the EU adamant that any assessment needs to be clearly defined in terms of when it should be conducted, and would be a precursor to considering applying or developing civil liability laws. Various proposals by the EU were shot down, and it then dug in its heels, saying that it had been flexible in accepting the opening up of the text, to help Parties have more committed civil liability provisions. The EU claimed that it needed to take home the text and consider whether it was workable, saying that “we have some very firm instructions on the issue”.

So after a break, the reconvened meeting was pleasantly surprised to find that the EU had dropped its insistence on having reference to an assessment. The final text reads: "Parties shall, with the aim of providing adequate rules and procedures in their domestic law on civil liability for material or personal damage associated with the damage as defined in Article 2, paragraph 2 (c): (a) Continue to apply their existing general law on civil liability; (b) Develop and apply or continue to apply civil liability law specifically for that purpose; or (c) Develop and apply or continue to apply a combination of both."

The whole of Article 13 was eventually adopted late in the night, to applause.

Reflecting on the tortuous path of the issue of civil liability, from its consideration as the main liability and redress approach at the start of the negotiations on Article 27 of the Cartagena Protocol itself, to the 2008 compromise in Bonn to accept a binding administrative approach with the inclusion of one provision on civil liability, to the near-collapse at the last meeting on this issue, several developing-country delegates were pleased that there was finally something legally binding on civil liability.

In light of the progress made on the one binding civil liability provision, Malaysia proposed that the heavily bracketed consolidated text on the draft guidelines on civil liability (following comments from Friends and observers on a draft prepared by the Co-Chairs) be shelved. The guidelines were part of the Bonn agreement, emerging as a compromise between those who wanted civil liability as the core of the Supplementary Protocol and those who favoured the administrative approach.

Malaysia said that Parties should complete the Supplementary Protocol and implement its binding civil liability provision as a first priority, and that the guidelines could be revived in the future if needed, particularly after the entry into force of the Supplementary Protocol and the outcome of any review of the implementation of the civil liability provision (as envisaged by an article on assessment and review).

Japan objected, wanting the guidelines to be finalised and seeking assurance that there would not be proposals for extension of the mandate to work on the guidelines beyond the Aichi Nagoya meeting of Parties in October. In the end, it was decided that the text of the consolidated draft guidelines would be attached to the report of the meeting for further consideration in October.

The Aichi Nagoya meeting will need to resolve the sticky issues of financial security and products thereof, but with 19 of the 21 Articles already adopted and seven brackets remaining, the prospects are promising that the world will finally see an international treaty addressing liability and redress for damage resulting from GMOs.

While compromises have been made along the way, the Supplementary Protocol would herald a start in ensuring that those responsible for damage are held to account.

Fourth meeting of the Group of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety

Nagoya, Japan
6-8 October 2010

New treaty on liability for GMO damage

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IN the early hours of 11 October, a negotiating group under the Cartagena Protocol on Biosafety completed the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety.

The text of this international law on liability and redress for damage caused by living modified organisms (LMOs) will now be forwarded for adoption to the fifth Conference of the Parties serving as the Meeting of the Parties (COP-MOP 5) to the Cartagena Protocol, which is meeting in Nagoya, Japan from 11-15 October.

The two main substantive issues that were the subject of the negotiations – whether or not "products thereof" should be included in the scope of the Supplementary Protocol, and financial security – were finally resolved after very long and difficult negotiations which dragged on for an extra two days beyond the scheduled time.

While mention of "products thereof" was eventually removed from the operative text of the Supplementary Protocol, the report of the meeting records an understanding that Parties may apply the Supplementary Protocol to damage caused by processed materials that are of LMO origin, provided that a causal link is established between the damage and the LMO in question.

This understanding is significant as it clarifies that the Supplementary Protocol may apply to damage caused not only by LMOs but also by their products, which may be dead material. The scope of the Cartagena Protocol is limited only to living modified organisms; however, the issue of products thereof is covered by the Cartagena Protocol with regard to information-sharing, and in information required in notifications for the advance informed agreement (AIA) and simplified procedure, as well as in the principles for risk assessment.

The right of Parties to provide for financial security is also enshrined in the Supplementary Protocol. Financial security is important to ensure that, if for any reason, the responsible party cannot pay for the damage caused by an LMO, there will be some means available to do so.

Background to the negotiations

The Group of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety had scheduled its fourth meeting in Nagoya from 6-8 October, just prior to COP-MOP 5, to further negotiate international rules and procedures on liability and redress. The Co-Chairs are Rene Lefeber from the Netherlands and Jimena Nieto from Colombia.

The Group of the Friends comprises six representatives each from the Africa Group, the Latin America and Caribbean Group, and Asia-Pacific; two representatives from the European Union and from Central and Eastern Europe; and one representative each from New Zealand, Norway, Switzerland and Japan.

The liability and redress negotiations have been underway since 2005, with a Working Group under the Cartagena Protocol having met five times. Because of the deep divisions on the issue, the negotiations could not be completed as mandated, and several extra small-group meetings of the Friends were held, with the last finishing on 11 October.

Financial security

The issue of financial security proved to be the most contentious. At the recently concluded meeting in Nagoya, the entrenched and polarised positions among the Parties were still apparent when Co-Chair Lefeber began the discussion by asking whether there were any objections to the principle in Article 10.1 enshrining the right of Parties to provide for financial security in their domestic law.

Paraguay called for the deletion of the Article, with Brazil, Mexico and South Africa also indicating that they could not accept this concept.

Brazil further indicated that while its "instructions at this stage are to not to accept the article as it stands", it could work with a compromise solution. Such a compromise could include the idea of asking the Executive Secretary (of the CBD) to conduct studies on the environmental and financial consequences of providing for financial security, to enable the meeting of the Parties to the Supplementary Protocol to make a more informed decision on this issue.

The Friends were then asked which Parties could not accept a Supplementary Protocol without a provision on financial security.

Malaysia reminded the meeting of the history of the provision and how it has been watered down over the course of the negotiations. The current text is now couched in non-obligatory language ("may") and merely reiterates this right of Parties. There is also a qualifier (which has not been agreed on) – "consistent with international law/obligations". Malaysia asked why, even with these concessions in place, some Parties should still insist on depriving others of their sovereign rights.

Bolivia, Cameroon (speaking on behalf of the Africa Group, with the exception of South Africa), Peru, India, Ukraine and Norway also spoke up in strong support of having a provision on financial security in the Supplementary Protocol.

The Co-Chairs then allowed a further discussion on the issue to try to see if common ground could be found.

When it became apparent that a large gulf still remained, with the EU raising concerns that the whole negotiations could collapse on this issue, the Co-Chairs then proposed that they convene "confessionals" with the Parties who had indicated that financial security is an issue either way, so that they could indicate their bottom lines and to see if a way out could be found. ("Confessionals" are a practice that has been routinely carried out in the World Trade Organisation negotiations, and involve countries speaking privately with the Chair, as opposed to negotiating directly with other Parties.)

The Parties that had to "confess" were Brazil, Mexico, Paraguay and South Africa on the one side, and Bolivia, Peru, Malaysia, India, the Africa Group (except for South Africa), Ukraine and Norway on the other.

However, the next morning, the Co-Chairs had to conclude that "we are not within a zone of possible agreement" and pleaded with delegations to reconsider their instructions. They then decided to convene a meeting with those Friends – Brazil, Mexico, Paraguay and South Africa – who had objected to financial security.

This was followed by further discussions in plenary, wherein Brazil elaborated on its compromise proposal, which would comprise preambular language on the rights of countries to have financial security and a specific decision by the Parties recognising the need for studies and mandating the Secretariat to put together a technical paper so that the first meeting of the Parties to the Supplementary Protocol can take a decision on the issue.

Malaysia pointed out that there have been several studies on the issue already, and called instead for a proposal in the operational text, because there cannot be a situation where widespread damage goes uncompensated because no funds are available. In response to the concerns that there could be trade implications, it stressed that "we cannot have commerce destroying biodiversity".

After ascertaining that there was now willingness from Parties to engage, the Co-Chairs invited Paraguay, Brazil, Mexico and South Africa on the one side, and Malaysia, Bolivia, Africa, Peru and India on the other side, to a closed-session meeting that evening. These discussions continued the next day.

On Friday afternoon (8 October), Malaysia reported back to the meeting that they had reached agreement on Article 10 on financial security.

It presented the package that was agreed, namely, deletion of the original text in brackets, with new provisions that: (i) retained the right of Parties to provide, in their domestic law, for financial security; (ii) obliged Parties to exercise that right in a manner consistent with their rights and obligations under international law, taking into account the final three preambular paragraphs of the Protocol; (iii) mandated the first meeting of the Parties to the Supplementary Protocol to request the Secretariat to undertake a comprehensive study on the modalities of financial security mechanisms, an assessment of the environmental, economic and social impacts of such mechanisms, in particular on developing countries, and an identification of the appropriate entities to provide financial security; and (iv) mandated the first review of the effectiveness of the Supplementary Protocol (contained in Article 13) to include a review of the effectiveness of Article 10.

Paraguay asked for its concern over the reference to the last preambular paragraph of the Cartagena Protocol in Article 10 to be reflected in the report of the meeting. (The final three preambular paragraphs of the Cartagena Protocol reflect a delicate balance in the relationship between the Protocol and other international agreements and need to be read together.)

After a short discussion, the new Article 10 on financial security was adopted. It was particularly significant for the Parties that had fought very hard for the inclusion of a provision on financial security, for the administrative approach contained in the Supplementary Protocol places obligations on the Party of import, which may have cost implications. Without provision for financial security, the Supplementary Protocol would have placed obligations on importing Parties without addressing the issue of financial security.

The draft decision of COP-MOP 5 adopting the Supplementary Protocol also contains a provision on additional and supplementary compensation measures for situations where the costs of response measures have not been covered. The meeting of the Parties to the Supplementary Protocol can address arrangements for these measures.

“Products thereof”

The Co-Chairs opened the discussion on “products thereof” by recalling their proposal made at the June 2010 meeting in Kuala Lumpur – to replace “and products thereof” in Articles 3.2 and 3.3 dealing with scope, with “including products containing LMOs”.

Bolivia responded that it did not agree with the Co-Chairs’ proposal, suggesting instead the formulation found in Article 20.3(c) of the Cartagena Protocol, as well as in Annexes I and III: “processed materials that are of living modified organism origin, containing detectable novel combinations of replicable genetic material obtained through the use of modern biotechnology”.

Japan opposed the inclusion of either “products thereof” or “products containing LMOs”, arguing that these phrases would expand the scope of the Supplementary Protocol beyond the scope of the Cartagena Protocol.

South Africa, the Philippines, Brazil, Paraguay and China agreed with this argument.

On the other hand, Namibia noted that the Africa Group (with the exception of South Africa) was in favour of including reference to “products thereof” and that the group could go along with the Bolivian proposal. This was supported by Malaysia, Ukraine and South Korea.

The rationale for the inclusion of “products thereof” lies in their mention in the Cartagena Protocol in relation to risk assessment, which places them squarely within liability considerations as mandated by Article 27 of the Cartagena Protocol, for if that risk materialises, then there must be provisions for liability and redress. Therefore, the inclusion of “products thereof” would provide for a comprehensive and adequate protocol dealing with damage from LMOs. According to Malaysia, anything less would be “Cartagena Protocol-minus”.

Moreover, as pointed out by Bolivia, developments in the technology, and a fuller consideration of LMOs beyond just genetically engineered plants, mandated that Parties should carefully consider if damage from certain “products thereof” would not be captured if that concept were to be excluded from the Supplementary Protocol.

Mexico proposed that the phrase “and which can replicate in the environment” be added to the Bolivian proposal, to clarify that the products contain “living” modified organisms. After a broad-ranging discussion, the meeting agreed to reflect on the proposal to include the Bolivian text, as amended by Mexico, in Article 2 of the Supplementary Protocol, on the use of terms. The Co-Chairs’ proposal (“including products containing LMOs”) and a proposal by Japan to replace “and products thereof” with “including LMOs contained in products” would also still be on the table.

The next day, discussions continued with Parties mainly reiterating their positions. Some, like Paraguay and the Philippines, threw their support behind the Japanese proposal. Others, like the Africa Group (with the exception of South Africa), Bolivia, Malaysia and Ukraine, urged for sticking to the description of “products thereof” used in the Cartagena Protocol, as it was already agreed language. Still others, like Brazil and Ecuador, preferred the Mexican amendment. The EU favoured the Co-Chairs’ proposal, but that proposal was eventually withdrawn by the Co-Chairs following further debate.

Informal consultations then took place, with Malaysia reporting back that the Friends were working on the Bolivian-Mexican proposal. In the spirit of compromise, Malaysia offered a modification to the Mexican proposal, namely, using the description of “products thereof” in the Cartagena Protocol with the addition of the phrase “and that are capable of replicating in the environment”. After more discussion on this proposal, the Philippines proposed that the text be modified to read “(and that) are capable of naturally reproducing in the environment”.

When the meeting came back to the issue on 8 October afternoon, the Friends agreed to include a definition of “products thereof” in the Supplementary Protocol and hence to their inclusion in Articles 3.2 and 3.3 dealing with scope.

However, discussion as to whether to use the compromise proposal of “replicating” or the Philippines’ proposal of “naturally reproducing” sparked more entrenched positions.

Co-Chair Lefeber reminded the meeting that the agreement of some of the Friends was that they could accept the term “replicating” on the condition that there would be a declaration in the report of the meeting clarifying that the definition of “products thereof” applies to LMOs only. He proposed this as a way out of the impasse.

Malaysia then strongly objected, saying that the text was already a compromise and a reflection of the common understanding.

Following some discussion, Co-Chair Lefeber proposed that clean text be adopted for the definition of “products thereof” in Article 2 – “‘Products thereof’ means processed materials that are of living modified organism origin, containing detectable novel combinations of replicable genetic material obtained through the use of modern biotechnology, and that are capable of replicating in the environment” – and that the brackets in Articles 3.2 and 3.3 be removed.

In addition, he suggested that those Friends who had difficulty with the language record their understanding in a footnote in the text or in the meeting’s report.

India proposed a footnote in the text of the Supplementary Protocol stating that China, India, Japan, Paraguay and the Philippines are of the understanding that “replicating” means “naturally reproducing LMO” and that Paraguay reserved its right to reopen the debate in the plenary of the COP-MOP that is taking place this week. Paraguay also asked for its reservation to be in the report of the meeting.

Malaysia then requested that the following be also reflected in the meeting’s report: “(The) text with regard to products thereof, arrived at after protracted negotiations, reflects a compromise by a large number of countries. Its aim is to give maximum leeway for Parties to fully implement the liability and redress provisions with regard to damage arising out of living modified organisms and products thereof.”

What followed then was a scramble of Parties associating themselves with either of the two statements, which raised concerns that such an exercise was not useful, as the two were not mutually exclusive, neither was it productive to have different understandings of a definition. When it was clear that this issue could not be resolved, the Co-Chairs proposed to revert to the agreement that Parties had reached on 8 October afternoon, after the informal consultations.

On 9 October, the Friends were in informal consultations throughout the day. When the meeting reconvened, Malaysia, supported by Ukraine, proposed that the references to “and products thereof” in Articles 3.2 and 3.3 be replaced by the phrase “within the context of the Protocol”. India proposed “as defined in the Protocol” instead, as it felt it brought more clarity. This was supported by China, Japan, Paraguay and the Philippines. Colombia forwarded “as referred to in the Protocol” as a compromise, but this was opposed by India.

Further consultations took place, after which Paraguay proposed that the Colombian proposal be amended to specifically refer to Article 3 of the Cartagena Protocol on the use of terms. The Friends could not come to agreement and asked for more time to consult with capitals.

Informal consultations continued on 10 October. The Co-Chairs convened and facilitated a meeting of Friends representing both sides of the divide to understand each other’s positions. Co-Chair Lefeber reported back on the meeting, explaining that the Friends concerned had recognised that if a State so wishes, it could expand the scope of the Supplementary Protocol to “products thereof” in its domestic law and nothing in the Supplementary Protocol prevents that.

They had then discussed various scenarios of damage and came to an understanding on two possible interpretations of the provisions to be included in the report of the meeting and the report of COP-MOP 5.

The EU proposed adding language describing negotiations as they transpired. Further discussion eventually produced the following text that has been included in the report of the Group of the Friends of the Co-Chairs:

"It emerged during the negotiation of the Supplementary Protocol that Parties to the Protocol hold different understandings of the application of Article 27 of the Protocol to processed materials that are of living modified organism-origin. One such understanding is that Parties may apply the Supplementary Protocol to damage caused by such processed materials, provided that a causal link is established between the damage and the living modified organism in question."

With that, the references to "products thereof" in Article 3 were then removed, resolving the final substantive issue that had dogged the negotiations for years. As other outstanding issues in the preamble had already been dealt with, the clean text of the Supplementary Protocol was then adopted to applause.

Some conclusions

The birth of this new multilateral environmental agreement has been a difficult one, with many compromises made along the way. A major change has been the shift from a civil liability regime to an administrative approach focusing on response measures, which emerged from the ashes of the near-collapsed negotiations in Bonn in 2008.

However, many delegates considered that the Supplementary Protocol, among other things: (i) has a legally binding provision on civil liability with an in-built review mechanism that could provide for the potential further development of international civil liability rules and procedures; (ii) includes the concept of "sufficient likelihood of damage" which allows Parties to take preventive measures to avoid such damage; and (iii) enshrines the right of Parties to provide for financial security in their domestic law.

Furthermore, the understanding that Parties may apply the Supplementary Protocol to processed materials that are of LMO origin is clearly reflected in the report of the meeting.

(With inputs from Doreen Stabinsky.)*

Fifth Conference of the Parties serving as the Meeting of the Parties (COP-MOP 5) to the Cartagena Protocol on Biosafety

Nagoya, Japan
11-15 October 2010

Biosafety Protocol steps forward

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THE biennial meeting of Parties to the UN Cartagena Protocol on Biosafety ended in Nagoya on 15 October with a major advance in international law. A new environmental treaty was adopted – the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety.

A number of significant decisions of the fifth Conference of the Parties serving as the Meeting of the Parties (COP-MOP 5) to the Cartagena Protocol were also adopted. A Strategic Plan for the next 10 years (2011-2020) and its multi-year programme of work for the next five years (2012-2016) lay out a plan and vision for its implementation. Key decisions that take forward issues at the heart of the debate over biosafety – on risk assessment and socio-economic impacts – were also adopted.

[The Cartagena Protocol deals with living modified organisms (LMOs) that may have adverse effects on the conservation and sustainable use of biological diversity, "taking also into account risks to human health, and specifically focusing on transboundary movements". The Protocol uses the term "living modified organisms" for what are commonly known as genetically modified organisms (GMOs). The parent treaty of the Protocol is the Convention on Biological Diversity (CBD), which is currently holding its 10th Conference of the Parties in Nagoya.]

Liability and redress

The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress is a supplementary protocol to the Cartagena Protocol on Biosafety. Negotiations on the Supplementary Protocol took more than six years, over 10 negotiating sessions, and other preparatory meetings. However, having a substantive international liability and redress regime to address damage resulting from LMOs is actually 10 years overdue.

When the Cartagena Protocol was adopted in January 2000 in Montreal, developing countries had actually wanted to have substantive provisions on liability and redress included in the Protocol itself. During the Cartagena Protocol negotiations, many civil society observers and developing-country delegates supported the "No Liability, No Protocol" campaign.

However, liability and redress issues proved too contentious to resolve, and the compromise was to negotiate liability and redress rules at a later stage, after the entry into force of the Cartagena Protocol. This process began in earnest in 2005.

The name of the Supplementary Protocol reflects the contribution of two countries to the process: Nagoya, Japan where the negotiations of the Supplementary Protocol were completed and the Supplementary Protocol adopted; and Kuala Lumpur, Malaysia where the first COP-MOP was held in 2004 where the mandate of the first negotiating group was adopted, and where two negotiating meetings were held (and were supposed to be completed).

It was also Malaysia, during the negotiations of the CBD, that had introduced the biosafety issue to ensure that conservation and sustainable use of biodiversity would not be threatened by LMOs.

The negotiations were difficult and were heavily opposed by those with an interest in the production and export of GMOs – the biotechnology industry, biotechnology scientists and non-Parties to the Cartagena Protocol – who had also actively worked to water down the Protocol and block the negotiations.

Developing countries and some developed countries like Norway, on the other hand, had always maintained that an international regime to deal with damage caused by LMOs was necessary because of the unique risks of LMOs and their transboundary nature, and in order to ensure that those responsible would be held liable.

This is necessary to prevent damage to biological diversity, the environment and people, particularly in poor countries. In cases where damage does occur, a liability regime should ensure that financial resources are made available to enable or compensate for necessary measures to redress the damage.

At times, it appeared that there would be no agreement on the Supplementary Protocol. In particular, the issue of the nature of the liability regime had been very difficult to resolve. Most developing countries wanted to have a binding international regime that would set substantive rules on civil liability whereby victims of damage from LMOs can turn to national courts for redress.

Instead, the Supplementary Protocol takes an "administrative approach" whereby response measures are required of the operator (person or entity in control of the LMO) or the competent authority if the operator is unable to take response measures. This would cover situations where damage has already occurred, or when there is a sufficient likelihood that damage will result if timely response measures are not taken.

However, countries can still provide for civil liability in their domestic law and the first review of the Supplementary Protocol (five years after its entry into force) will assess the effectiveness of domestic civil liability regimes. This could trigger further work on an international civil liability regime.

Much has been left to countries to determine and implement at the national level. This reflects the lack of consensus among countries in the negotiations. The process to truly ensure that there is justice when damage to people and the environment occurs is still a long and winding road.

Safe or unsafe?

One of the main dynamics influencing the negotiations in Nagoya was the political rift between those countries that consider that the Cartagena Protocol should be used to prevent damage arising from the risks that LMOs pose to biological diversity and human health and those countries that attempt to downplay those risks because they are, or plan to be, exporters of LMOs and products thereof.

This split was quite evident in discussions on the Strategic Plan, risk assessment and risk management, and capacity-building on socio-economic issues. Discussions on the latter two revolved around the establishment or continuation of technical expert groups that would further consider risks of LMOs and provide guidance to Parties on addressing those risks.

Risk assessment and risk management

COP-MOP 5 continued and built on work on risk assessment and risk management initiated by COP-MOP 4 (held in Bonn in 2008), where Parties established an ad hoc technical expert group (AHTEG) on risk assessment and risk management to: (a) develop a "roadmap" on the necessary steps to conduct a risk assessment; (b) consider needs for specific guidance documents for different types of LMOs and lay out a plan for developing those guidance documents; and (c) develop modalities for producing further guidance documents and testing the roadmap.

The AHTEG met twice between Bonn and Nagoya. At COP-MOP 5, Parties had before them several products developed by the AHTEG: the roadmap, as well as three guidance documents for conducting risk assessments of different types of LMOs: LM mosquitoes, LM crops with stacked traits, and LM crops engineered for abiotic stress tolerance.

Parties at COP-MOP 5 were to consider these results of the AHTEG and determine next steps on risk assessment and risk management under the Cartagena Protocol.

Divisions emerged between Parties that wished to continue the AHTEG and other Parties that were not happy with the outcomes of the AHTEG process. Conflict emerged on what to do with the roadmap and the guidance documents, on the current membership of the AHTEG, and on the terms of reference for the continued work of the group.

Several developing-country Parties led the critique of the outcomes of the current AHTEG. Brazil, India, the Philippines, Paraguay and Mexico emerged at this meeting as strong deniers of the risks posed by LMOs, and either critiqued the composition of the AHTEG or stressed that the AHTEG outcomes should be further reviewed and "validated".

Non-Parties to the Cartagena Protocol such as the United States also expressed their dissatisfaction with the AHTEG outcomes.

After it became clear that there was wide support (from the Africa Group and many other developing-country Parties, as well as developed-country Parties such as the European Union and Norway) for continuation of the current AHTEG, the countries that were not happy with the AHTEG and its outcomes fought for its expansion to include persons "with hands-on experience" in risk assessment and risk management, as well as language in its revised terms of reference referring to "peer review" of the roadmap and guidance documents.

A long discussion ensued on whether or not to retain the word "peer" in front of "review", which was concluded when the Chair replaced the word "peer" with "scientific".

The final COP-MOP decision provides for the continuing review and testing of the roadmap and guidance documents by the AHTEG, with a view to developing a revised version.

Socio-economic considerations

Under the agenda item on capacity-building, Parties considered several recommendations from the sixth Coordination Meeting for Governments and Organizations Implementing or Funding Biosafety Capacity-Building Activities regarding capacity-building needs for the assessment of socio-economic impacts of LMOs.

The Coordination Meeting had identified lack of capacity as one of the main reasons preventing countries from taking socio-economic impacts into consideration in their decision-making.

To address these capacity-building needs, the Coordination Meeting recommended to the COP-MOP to establish an expert group on socio-economic considerations to, inter alia, develop criteria and guidance to assist Parties in determining which socio-economic considerations to include in their decision-making.

During the COP-MOP discussions on the topic, a split emerged over whether an expert group was necessary at this time.

While the Africa Group and Bolivia were strongly in favour of convening an expert group, the EU, supported by several other countries, considered that it was premature for an expert group to develop guidance on taking socio-economic considerations into account during decision-making, or that an expert group was not the appropriate means to address the topic. Budgetary constraints were also considered in the deliberations.

Negotiations on this item stretched into the final plenary, and the final compromise was to conduct online forums and hold a workshop on socio-economic considerations, with the results to be forwarded to COP-MOP 6 for further consideration. The Norwegian government offered to support the workshop with a $75,000 contribution.

Strategic Plan

The Strategic Plan for the implementation of the Cartagena Protocol sets out five focal areas: facilitating the establishment and further development of effective biosafety systems for the implementation of the Cartagena Protocol; capacity-building; compliance and review; information-sharing; and outreach and cooperation.

Under the first focal area, Mexico had wanted LMOs that are not likely to have adverse impacts on biological diversity to be included. This was opposed by Peru, Norway and the EU, and was eventually dropped.

On the issue of scientific and technical advice, the EU opposed provisions on mechanisms for providing scientific and technical advice in the Strategic Plan and the multi-year programme of work. These provisions were deleted.

The issue of socio-economic considerations also reared its head in these discussions. The EU did not want an emphasis on socio-economic guidance or guidelines for Parties in reaching decisions on imports, but rather on research and information exchange. They were strongly opposed by the Africa Group, which wanted a focus on how Parties can take into account socio-economic considerations in their decision-making.

The final language strikes a compromise: "To, on the basis of research and information exchange, provide relevant guidance on socioeconomic considerations that may be taken into account in reaching decisions on the import of LMOs."

This is further qualified with the reference to "peer reviewed research" relevant to socio-economic considerations.

Finances and resources

COP-MOP 5 saw a difficult debate on the issue of the financial mechanism and resources, with many developing countries lamenting the lack of support for implementation of biosafety measures at the national level.

Many developing countries called for the establishment of a special biosafety fund within the Global Environment Facility (GEF), to allow for funding of biosafety projects outside the new GEF System for Transparent Allocation of Resources (STAR).

However, the EU, represented at the meeting by the German GEF Council member, refused to include such a request to the GEF because it was outside the mandate of the COP-MOP to decide the structural organisation of the GEF.

The final compromise language urged Parties to give priority to biosafety when applying for GEF funding under the biodiversity focal area, and urged the GEF to consider, during the next GEF replenishment process, defining specific quotas for biosafety funding for each country.

"Handling, transport, packaging and identification"

During COP-MOP 5, Parties considered two issues under the implementation of the Protocol on handling, transport, packaging and identification of LMOs.

First, they reviewed documentation requirements for LMOs intended for use as food, feed or for processing and, because of limited experience gained to date in implementation of these requirements, decided to postpone further consideration of this issue until COP-MOP 7 (in 2014).

Secondly, the Parties considered the need for and modalities of developing standards with regard to identification, handling, packaging and transport practices.

They agreed to request the Executive Secretary to commission a study analysing gaps, guidance on the use of existing standards, and the possible need for elaboration of standards under the Protocol, for further consideration of the matter at COP-MOP 6.

COP-MOP 6 will be held in India in 2012.

Appendix 1
Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety

The Parties to this Supplementary Protocol,

Being Parties to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, hereinafter referred to as "the Protocol",
Taking into account Principle 13 of the Rio Declaration on Environment and Development,
Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development,
Recognizing the need to provide for appropriate response measures where there is damage or sufficient likelihood of damage, consistent with the Protocol,
Recalling Article 27 of the Protocol,

Have agreed as follows:

Article 1. Objective

The objective of this Supplementary Protocol is to contribute to the conservation and sustainable use of biological diversity, taking also into account risks to human health, by providing international rules and procedures in the field of liability and redress relating to living modified organisms.

Article 2. Use of terms

1. The terms used in Article 2 of the Convention on Biological Diversity, hereinafter referred to as "the Convention", and Article 3 of the Protocol shall apply to this Supplementary Protocol.
2. In addition, for the purposes of this Supplementary Protocol:
   (a) "Conference of the Parties serving as the meeting of the Parties to the Protocol" means the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol;
   (b) "Damage" means an adverse effect on the conservation and sustainable use of biological diversity, taking also into account risks to human health, that:
   (i) Is measurable or otherwise observable taking into account, wherever available, scientifically-established baselines recognized by a competent authority that takes into account any other human induced variation and natural variation; and
   (ii) Is significant as set out in paragraph 3 below;
   (c) "Operator" means any person in direct or indirect control of the living modified organism which could, as appropriate and as determined by domestic law, include, *inter alia*, the permit holder, person who placed the living modified organism on the market, developer, producer, notifier, exporter, importer, carrier or supplier;
   (d) "Response measures" means reasonable actions to:
   (i) Prevent, minimize, contain, mitigate, or otherwise avoid damage, as appropriate;
   (ii) Restore biological diversity through actions to be undertaken in the following order of preference:
   a. Restoration of biological diversity to the condition that existed before the damage occurred, or its nearest equivalent; and where the competent authority determines this is not possible;
   b. Restoration by, *inter alia*, replacing the loss of biological diversity with other components of biological diversity for the same, or for another type of use either at the same or, as appropriate, at an alternative location.
3. A "significant" adverse effect is to be determined on the basis of factors, such as:
   (a) The long-term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonable period of time;

(b) The extent of the qualitative or quantitative changes that adversely affect the components of biological diversity;
(c) The reduction of the ability of components of biological diversity to provide goods and services;
(d) The extent of any adverse effects on human health in the context of the Protocol.

Article 3. Scope

1. This Supplementary Protocol applies to damage resulting from living modified organisms which find their origin in a transboundary movement. The living modified organisms referred to are those:
(a) Intended for direct use as food or feed, or for processing;
(b) Destined for contained use;
(c) Intended for intentional introduction into the environment.
2. With respect to intentional transboundary movements, this Supplementary Protocol applies to damage resulting from any authorized use of the living modified organisms referred to in paragraph 1 above.
3. This Supplementary Protocol also applies to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.
4. This Supplementary Protocol applies to damage resulting from a transboundary movement of living modified organisms that started after the entry into force of this Supplementary Protocol for the Party into whose jurisdiction the transboundary movement was made.
5. This Supplementary Protocol applies to damage that occurred in areas within the limits of the national jurisdiction of Parties.
6. Parties may use criteria set out in their domestic law to address damage that occurs within the limits of their national jurisdiction.
7. Domestic law implementing this Supplementary Protocol shall also apply to damage resulting from transboundary movements of living modified organisms from non-Parties.

Article 4. Causation

A causal link shall be established between the damage and the living modified organism in question in accordance with domestic law.

Article 5. Response measures

1. Parties shall require the appropriate operator or operators, in the event of damage, subject to any requirements of the competent authority, to:
(a) Immediately inform the competent authority;
(b) Evaluate the damage; and
(c) Take appropriate response measures.
2. The competent authority shall:
(a) Identify the operator which has caused the damage;
(b) Evaluate the damage; and
(c) Determine which response measures should be taken by the operator.
3. Where relevant information, including available scientific information or information available in the Biosafety Clearing-House, indicates that there is a sufficient likelihood that damage will result if timely response measures are not taken, the operator shall be required to take appropriate response measures so as to avoid such damage.
4. The competent authority may implement appropriate response measures, including, in particular, when the operator has failed to do so.
5. The competent authority has the right to recover from the operator the costs and expenses of, and incidental to, the evaluation of the damage and the implementation of any such appropriate response measures. Parties may provide, in their domestic law, for other situations in which the operator may not be required to bear the costs and expenses.
6. Decisions of the competent authority requiring the operator to take response measures should be reasoned. Such decisions should be notified to the operator. Domestic law shall provide for remedies, including the opportunity for administrative or judicial review of such decisions. The competent authority shall, in accordance with domestic law, also inform the operator of the available remedies. Recourse to such remedies shall not impede the competent authority from taking response measures in appropriate circumstances, unless otherwise provided by domestic law.

7. In implementing this Article and with a view to defining the specific response measures to be required or taken by the competent authority, Parties may, as appropriate, assess whether response measures are already addressed by their domestic law on civil liability.
8. Response measures shall be implemented in accordance with domestic law.

Article 6. Exemptions

1. Parties may provide, in their domestic law, for the following exemptions:
   (a) Act of God or *force majeure*; and
   (b) Act of war or civil unrest.
2. Parties may provide, in their domestic law, for any other exemptions or mitigations as they may deem fit.

Article 7. Time limits

Parties may provide, in their domestic law, for:
(a) Relative and/or absolute time limits including for actions related to response measures; and
(b) The commencement of the period to which a time limit applies.

Article 8. Financial limits

Parties may provide, in their domestic law, for financial limits for the recovery of costs and expenses related to response measures.

Article 9. Right of recourse

This Supplementary Protocol shall not limit or restrict any right of recourse or indemnity that an operator may have against any other person.

Article 10. Financial security

1. Parties retain the right to provide, in their domestic law, for financial security.
2. Parties shall exercise the right referred to in paragraph 1 above in a manner consistent with their rights and obligations under international law, taking into account the final three preambular paragraphs of the Protocol.
3. The first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol after the entry into force of the Supplementary Protocol shall request the Secretariat to undertake a comprehensive study which shall address, *inter alia*:
   (a) The modalities of financial security mechanisms;
   (b) An assessment of the environmental, economic and social impacts of such mechanisms, in particular on developing countries; and
   (c) An identification of the appropriate entities to provide financial security.

Article 11. Responsibility of States for internationally wrongful acts

This Supplementary Protocol shall not affect the rights and obligations of States under the rules of general international law with respect to the responsibility of States for internationally wrongful acts.

Article 12. Implementation and relation to civil liability

1. Parties shall provide, in their domestic law, for rules and procedures that address damage. To implement this obligation, Parties shall provide for response measures in accordance with this Supplementary Protocol and may, as appropriate:
   (a) Apply their existing domestic law, including, where applicable, general rules and procedures on civil liability;
   (b) Apply or develop civil liability rules and procedures specifically for this purpose; or
   (c) Apply or develop a combination of both.
2. Parties shall, with the aim of providing adequate rules and procedures in their domestic law on civil liability for material or personal damage associated with the damage as defined in Article 2, paragraph 2 (b):
   (a) Continue to apply their existing general law on civil liability;

(b) Develop and apply or continue to apply civil liability law specifically for that purpose; or
(c) Develop and apply or continue to apply a combination of both.

3. When developing civil liability law as referred to in subparagraphs (b) or (c) of paragraphs 1 or 2 above, Parties shall, as appropriate, address, *inter alia*, the following elements:
(a) Damage;
(b) Standard of liability, including strict or fault-based liability;
(c) Channelling of liability, where appropriate;
(d) Right to bring claims.

Article 13. Assessment and review

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 Articles 10 and 12.

Article 14. Conference of the Parties serving as the meeting of the Parties to the Protocol

1. Subject to paragraph 2 of Article 32 of the Convention, the Conference of the Parties serving as the meeting of the Parties to the Protocol shall serve as the meeting of the Parties to this Supplementary Protocol.
2. The Conference of the Parties serving as the meeting of the Parties to the Protocol shall keep under regular review the implementation of this Supplementary Protocol and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Supplementary Protocol and, *mutatis mutandis*, the functions assigned to it by paragraphs 4 (a) and (f) of Article 29 of the Protocol.

Article 15. Secretariat

The Secretariat established by Article 24 of the Convention shall serve as the secretariat to this Supplementary Protocol.

Article 16. Relationship with the Convention and the Protocol

1. This Supplementary Protocol shall supplement the Protocol and shall neither modify nor amend the Protocol.
2. This Supplementary Protocol shall not affect the rights and obligations of the Parties to this Supplementary Protocol under the Convention and the Protocol.
3. Except as otherwise provided in this Supplementary Protocol, the provisions of the Convention and the Protocol shall apply, *mutatis mutandis*, to this Supplementary Protocol.
4. Without prejudice to paragraph 3 above, this Supplementary Protocol shall not affect the rights and obligations of a Party under international law.

Article 17. Signature

This Supplementary Protocol shall be open for signature by Parties to the Protocol at the United Nations Headquarters in New York from 7 March 2011 to 6 March 2012.

Article 18. Entry into force

1. This Supplementary Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Protocol.
2. This Supplementary Protocol shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves it or accedes thereto after the deposit of the fortieth instrument as referred to in paragraph 1 above, on the ninetieth day after the date on which that State or regional economic integration organization deposits its instrument of ratification, acceptance, approval, or accession, or on the date on which the Protocol enters into force for that State or regional economic integration organization, whichever shall be the later.

3. For the purposes of paragraphs 1 and 2 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

Article 19. Reservations

No reservations may be made to this Supplementary Protocol.

Article 20. Withdrawal

1. At any time after two years from the date on which this Supplementary Protocol has entered into force for a Party, that Party may withdraw from this Supplementary Protocol by giving written notification to the Depositary.
2. Any such withdrawal shall take place upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.
3. Any Party which withdraws from the Protocol in accordance with Article 39 of the Protocol shall be considered as also having withdrawn from this Supplementary Protocol.

Article 21. Authentic texts

The original of this Supplementary Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Supplementary Protocol.
DONE at Nagoya on this fifteenth day of October two thousand and ten.

Appendix 2

Submission from Third World Network to the Open-Ended Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety

20 November 2005

Background:

THE issue of liability and redress for damage arising from GMOs under the Biosafety Protocol is ongoing work. Article 27 of the Biosafety Protocol stipulates that the 1st Meeting of the Parties shall adopt a process to elaborate "international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms … and shall endeavour to complete this process within four years".

The 1st Meeting of the Parties in Kuala Lumpur in February 2004 established an Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress and adopted the terms of reference for the Working Group, as well as an indicative work plan. The Working Group is supposed to meet five times to negotiate a liability and redress regime, and is scheduled to complete this work by 2007, in order for the following Meeting of the Parties to complete the process by adopting the liability and redress regime within the mandate of four years (2008).

The 1st meeting of the Working Group was held in May 2005 in Montreal. The meeting elaborated on the different options, approaches and issues. The report from the meeting contains an annex listing the various options, approaches, issues, scenarios and possible elements.

The 1st meeting of the Working Group invited Parties, other governments, relevant international organisations and stakeholders to submit views, in particular with respect to approaches, options and issues in the annex to the report, preferably in the form of proposals for text, no later than three months before the 2nd meeting of the Working Group.

The 2nd meeting of the Working Group is scheduled to take place from 20-24 February 2006 in Montreal. Accordingly, the CBD Secretariat requested for views to be submitted no later than 1 November 2005.

In order to move the process forward, the Co-Chairs of the Working Group, with the assistance of the CBD Secretariat, will synthesise the proposed text that is submitted, and produce a working draft for consideration by the 2nd meeting of the Working Group. It is expected that the working draft produced by the Co-Chairs will form the basis of the text that will be negotiated in the Working Group meetings.

Submission:

<u>Choice of instrument</u>

The legally binding instrument should be a Liability and Redress Protocol to the Cartagena Protocol on Biosafety.

Interim measures should be put in place immediately, pending the development and entry into force of the liability and redress protocol. The measures and the development of such measures must not prejudice or delay the development of the liability and redress protocol.

<u>Scope</u>

The scope of the international liability and redress protocol should cover damage resulting from the transboundary movement, transit, handling, and use of all living modified organisms and their products.

It should include intentional, unintentional and illegal transboundary movements.

The international liability and redress protocol should apply to damage caused in areas within the limits of national jurisdiction or control of Parties as well as in areas beyond any national jurisdiction.

Damage

The types of damage should include the following:

1. Damage to the environment includes:
   a. loss or changes to biological diversity
   b. impairment of soil quality
   c. impairment of water quality
   d. impairment of air quality

2. Damage to human health includes:
   a. loss of life or personal injury
   b. loss of income
   c. public health measures
   d. impairment of health

3. Socio-economic damage, especially in relation to indigenous people and local communities, includes:
   a. loss of income
   b. impairment or loss of cultural, social and spiritual values
   c. impairment or loss of food security
   d. loss of competitiveness

4. Traditional damage:
   a. loss of life or personal injury
   b. loss of or damage to property
   c. economic loss

5. Cost of response measures including remediation and restoration

6. Cost of preventive measures

The burden of proving damage should be reversed.

Standard of liability

Strict liability should apply.
Liability may only be mitigated in the following cases:

1. Damage caused directly by an Act of God where such occurrences could not have been reasonably foreseen and are of an exceptional nature;
2. Damage caused directly by an unforeseeable act of war or civil unrest, unless this is instigated or initiated by the Party;
3. Damage caused wholly by the wrongful intentional act of a third party.
   - This shall not apply where the damage results from any false, misleading or fraudulent claim or the suppression or omission of any material facts by the person under the obligation to provide such information.
   - This shall not apply unless it can be shown that the person under the obligation to provide such information has ensured or has taken all reasonable steps to ensure that the third party has understood all material information.

Causation

Cumulative effects resulting from an LMO, multiple LMOs or multiple incidents that cause damage should be taken into account.

The complexity of interaction of LMOs with the receiving environment and time scales involved should be taken into account, but causation cannot be avoided on the basis of these complexities, so long as the damage or any part of it can be related to that LMO.

There should be a reversal of the burden of proof in establishing causation. If a basic causal link can be established between damage and an LMO, then the person or entity deemed liable has to prove that the damage was not caused by the LMO in question.

Channelling of liability

Any one or more of the following, including persons or entities acting on his, her or its behalf, should be held liable depending on the circumstances, including:

1. the exporter
2. the Party of export
3. any person who holds the approval in the Party of export
4. the developer
5. the producer
6. the importer
7. the carrier
8. the supplier

The circumstances should include intentional, unintentional and illegal transboundary movement, and should be in respect of damage caused by LMOs for introduction into the environment, LMOs for direct use for food or feed or for processing, LMOs for contained use, and LMOs in transit.

Where the primary liable person cannot be identified, the Party of export should be held liable.

Nature and time of relief

There should be provision for interim relief, both monetary (e.g., if damage is established but the nature and extent are still unknown) and non-monetary (e.g., injunction). When damage has occurred, there should be an immediate obligation for cessation of the activity that could cause further damage.

Nature and extension of liability

There should be a right of recourse among other wrong doers under the liability and redress protocol.

Joint and several liability should apply. If two or more persons are liable, full compensation can be sought from any or all of the persons liable.

Vicarious liability should apply.

There should be provision for the lifting of the corporate veil in order to ascertain the principals. This is for situations including where companies may set up shell companies or claim that they are separate legal entities to avoid liability.

Limitation in time

Limitation in time to bring a claim should run at least 10 years after the person or entity who has suffered the damage knows or ought to have known about the damage, and that it was caused by the LMO in question.

There should be no absolute time limit to bring a claim.

If there are multiple incidents which caused the damage, the limitation in time should run from the last incident.

If the incident takes place over a period of time, the limitation in time should run from the end of the incident.

Financial limit

There should be no upper financial limit.

Insurance and other financial guarantees

There should be a clear and mandatory obligation on Parties to ensure that insurance, bonds or other financial guarantees are established and maintained for amounts not less than a minimum limit. Proof of coverage should be provided before an activity takes place.

There should be a fund set up under the liability and redress protocol. The fund can be used to ensure redress in situations where redress was not fully obtainable including where:

- the liable person is bankrupt or ceases to exist
- a time limit has expired

- financial securities of the primary liable person are not sufficient to cover liabilities
- the primary liable person escapes liability on the basis of a defence

Standing/right to bring claims

The person who has suffered damage, the Party whose citizen has suffered damage, or any person or group of persons should be entitled to bring a claim in respect of:

1. their own interest
2. the interests of a person/s who is unable to bring a claim
3. the interest of protecting the environment or biological diversity

Settlement of disputes, non-compliance

There should be strong mechanism(s) under the liability and redress protocol for dealing with non-compliance, dispute settlement and settlement of claims.

Monitoring

There should be mandatory monitoring and reporting of adverse incidents/impacts. Parties should report every case that may lead to liability. These cases should be posted on the Biosafety Clearing-House.

Non-Parties

Parties importing from non-Parties and Parties exporting to non-Parties should ensure that, in respect of liability and redress, such transboundary movement does not result in a lower level of protection than provided for under the liability and redress protocol.

Appendix 3

Comments by Third World Network on the Draft Guidelines on Civil Liability and Redress in the Field of Damage Resulting from Transboundary Movements of Living Modified Organisms – Proposal of Co-Chairs

31 May 2010

Background:

NEGOTIATIONS under the Cartagena Protocol on Biosafety for an international law on liability and redress for damage caused by living modified organisms (LMOs) will continue in Kuala Lumpur from 15-19 June 2010, at the 3rd meeting of the "Group of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety" (GFCC). Some progress has been made on the text of a Supplementary Protocol on liability and redress for damage resulting from transboundary movements of LMOs, which is expected to be adopted at the fifth Meeting of the Parties to the Cartagena Protocol on Biosafety in October 2010 in Nagoya, Japan, although there are still crucial outstanding issues to be resolved at the Kuala Lumpur meeting.

The issue of civil liability (which would allow victims of damage from LMOs to turn to national courts for redress) has been at the centre of the negotiations – developing countries have always held the position that there needs to be a comprehensive international binding civil liability instrument, but several Parties have objected to this, leading to an impasse. Following a compromise agreement reached in Bonn in 2008, which saved the negotiations from collapsing then, it was agreed 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.

However, the regime would also contain one legally binding provision on civil liability, which would, among others, 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, and provide for a review of the guidelines after the entry into force of the instrument, with a view to considering making them binding or elaborating a more comprehensive binding regime on civil liability

In this light, the Co-Chairs of the GFCC (Jimena Nieto from Colombia and Rene Lefeber from the Netherlands) prepared draft guidelines on civil liability based on Appendix II of the report of the 2nd GFCC meeting, which contained proposed operational text in the context of working towards non-legally binding provisions on civil liability. These draft guidelines were circulated to the GFCC, advisors and observers, and comments were invited. A revised version of the guidelines will be circulated at the next meeting in Kuala Lumpur.

TWN comments:

Note: Third World Network (TWN)'s comments are highlighted in the following ways:
(i) Comments are in bold and italicised
(ii) Additional text suggestions are in bold and italicised within the Guidelines
(iii) Strikethrough is used for text suggested for deletion within the Guidelines

Draft Guidelines on Civil Liability and Redress in the Field of Damage Resulting from Transboundary Movements of Living Modified Organisms
Proposal of Co-Chairs[1]

At the outset, TWN reiterates that a legally binding international civil liability instrument would best fulfil the mandate of Article 27 of the Cartagena Protocol on Biosafety for international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs), and would best ensure an adequate level of protection in the field of the safe transfer, handling and use of LMOs.

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[1] The use of brackets appearing in the proposed text of the Guidelines is related to outstanding issues in the draft text of the Supplementary Protocol.

Guidelines on civil liability must not substitute for the legally binding provision on civil liability in the Supplementary Protocol (SP), and the review of the effectiveness of the SP and the provision on civil liability which may lead to a binding international civil liability regime in the future.

The relationship between the draft Guidelines and the draft SP must be understood in light of the Bonn understanding for one binding provision on civil liability in the legally binding instrument, preserving the right of Parties to put in place domestic laws and policies on civil liability, and to review the Guidelines with a view to considering making them binding.

In this light, and in the interim, the Guidelines could be useful in providing guidance to Parties for their domestic civil liability regimes, with a view towards developing a legally binding international civil liability regime. It is on this understanding that TWN would like to comment on these draft Guidelines.

Guideline 1. Objective

The objective of these Guidelines is to provide guidance to Parties regarding ~~domestic~~ rules and procedures on civil liability for damage resulting from ~~transboundary movements of~~ living modified organisms ***and products thereof***, taking also into account risks to human health.

In line with the Bonn understanding, and with Article 14 of the draft SP on the review of the effectiveness of Article 13 on civil liability, these Guidelines should not be limited to providing guidance to Parties solely on domestic rules and procedures on civil liability. The Bonn understanding and the intention of Article 14 of the draft SP envisage the possible development of a legally binding international instrument on civil liability in the future. The conclusions adopted by the 2nd meeting of the Group of the Friends of the Co-Chairs on Liability and Redress in paragraph (a) specify that, inter alia, the draft SP and the draft Guidelines are the basis of rules and procedures on liability and redress in the context of the Cartagena Protocol on Biosafety which has mandated the elaboration of international rules and procedures on this matter.

If the Guidelines provide guidance to Parties for their domestic civil liability regimes, all damage resulting from LMOs should be covered, not necessarily limited to damage resulting from the transboundary movement of LMOs. As such, the title of the draft Guidelines should also be modified to reflect this. If the Guidelines are later developed into an internationally binding civil liability regime, this scope can be modified accordingly.

Products thereof are referred to in the Cartagena Protocol in Article 20(3)(c) on information-sharing and the Biosafety Clearing-House in the context of risk assessment, in Annex I on information required in notifications, and in Annex III on risk assessment. This points to the fact that products thereof can cause damage, and liability and redress should apply whenever there is damage associated with LMOs and products thereof. In this regard, references to LMOs should be accompanied by "and products thereof".

Guideline 2. Use of terms

1. The terms used in Article 2 of the Convention, Article 3 of the Protocol ~~and Article 2 of the Supplementary Protocol~~ apply to these Guidelines except as otherwise defined in paragraph 2 below.

The relationship between the draft Guidelines and the draft SP must be understood in light of the Bonn understanding and Article 14 of the draft SP. As such, nothing in the draft SP should be understood to obviate any provision in the draft Guidelines. In any case, it is only until Article 2 of the SP is fully agreed that a judgment can be made about its merits and whether it can be usefully applied to the Guidelines, as a practical matter.

2. In addition, for the purposes of these Guidelines:

(a) "Damage" means:
(i) ***Impairment of health, l***oss of life or personal injury ~~[incidental to damage to the conservation and sustainable use of biological diversity]~~;
(ii) ***Impairment of use of, l***oss of or damage to property ~~[incidental to damage to the conservation and sustainable use of biological diversity]~~;
(iii) ***Loss of income or other*** ~~Pure~~ economic loss;
(iv) Costs of response measures;
(v) Damage to the ***environment and the*** conservation and sustainable use of biological diversity***;*** ~~not redressed under the Supplementary Protocol.~~

(vi) Loss of or damage to cultural, social and spiritual values, or other loss or damage to indigenous or local communities, or loss of or reduction of food security.

The categories of damage and scope of the categories of damage should be broadened to reflect the definition of damage contained in Appendix II of the report of the 2nd meeting of the Group of the Friends of the Co-Chairs on Liability and Redress. These are important areas of damage for developing countries, and the definition of damage in the Guidelines should be as wide as possible to capture any damage that may occur, given that the draft SP has a limited definition of damage.

References to the SP and text that is contingent upon the SP should be deleted. There is no agreement that the Guidelines will only cover damage not covered by the SP. None of the use of terms in the Guidelines are contingent on or related to definitions in the SP.

~~(b) "Damage to the conservation and sustainable use of biological diversity" means damage as defined in Article 2, paragraph 2(c), of the Supplementary Protocol;~~

~~(c) "Pure economic loss" means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of components of biological diversity and incurred as a result of damage to the conservation and sustainable use of biological diversity;~~

(d) "Supplementary Protocol" means [Supplementary Protocol on [Liability and Redress for] Damage Resulting from Transboundary Movements of Living Modified Organisms to the Cartagena Protocol on Biosafety].

Relevant text from section III B on "Valuation of damage" from Appendix II of the report of the 2nd meeting of the Group of the Friends of the Co-Chairs on Liability and Redress, in particular 1(b), (c), (d), 2, 3(i) and (ii), should be included, as further clarification on the valuation of damage provides necessary guidance particularly for developing countries.

Further definitions may also be necessary as the draft Guidelines evolve.

Guideline 3. Scope

1. These Guidelines apply to damage resulting from transport, transit, handling and use of living modified organisms ~~[~~and products thereof~~]~~ ~~provided that these [living modified organisms][activities] find their origin in a transboundary movement~~. The living modified organisms referred to are those:
   (a) Intended for direct use as food or feed, or for processing;
   (b) Destined for contained use;
   (c) Intended for intentional introduction into the environment.

2. With respect to intentional transboundary movements, these Guidelines apply to damage resulting from any authorized ***or unauthorized*** use of the living modified organisms ~~[~~and products thereof~~]~~ referred to in paragraph 1 above.

3. These Guidelines also apply to damage resulting from unintentional transboundary movements as referred to in Article 17 of the Protocol as well as damage resulting from illegal transboundary movements as referred to in Article 25 of the Protocol.

4. These Guidelines also apply to damage resulting from the transboundary movements from non-Parties, in accordance with Article 24 of the Protocol.

Products thereof are referred to in the Cartagena Protocol in Article 20(3)(c) on information-sharing and the Biosafety Clearing-House in the context of risk assessment, in Annex I on information required in notifications, and in Annex III on risk assessment. This points to the fact that products thereof can cause damage, and liability and redress should apply whenever there is damage associated with LMOs and products thereof.

If the Guidelines provide guidance to Parties for their domestic civil liability regimes, all damage resulting from LMOs and products thereof should be covered, not necessarily limited to damage resulting from the transboundary movement of LMOs and products thereof. If the Guidelines are later developed into an internationally binding civil liability regime, this scope can be modified accordingly.

An intentional transboundary movement, i.e., which has been approved by a country of import, may still contain unauthorized LMOs, hence the scope of the Guidelines should cover both authorized and unauthorized use of LMOs and products thereof.

As specified in Article 24 of the Cartagena Protocol, transboundary movements of LMOs between Parties

and non-Parties shall be consistent with the objective of the Protocol. Furthermore, Parties to the Convention on Biological Diversity that are not Parties to the Cartagena Protocol are still bound by the Convention's relevant provisions, including Article 8(g) and Article 19(4), which address LMOs. All this points to the necessity of including transboundary movements of LMOs and products thereof from non-Parties within the scope of the Guidelines. At the national level, LMOs should be regulated regardless of their origin. The bulk of LMOs and products thereof originate from countries which are not Parties to the Cartagena Protocol.

Guideline 4. Liability

1. The standard of liability should be strict ~~where the damage has been caused by a living modified organism that a risk assessment has identified as hazardous~~.

2. ~~In cases where the standard of liability is strict, l~~***L***iability should be channelled to the operator.

3. ~~In cases where the standard of liability is strict and~~ ***Where*** two or more operators have caused the damage, their liability should be joint and several.

4. ~~In cases where the standard of liability is strict, t~~***T***he right of recourse or indemnity that an operator may have against another person should not be limited or restricted.

Strict liability is the appropriate standard of liability for LMOs and products thereof, in accordance with the precautionary principle that underpins both the Cartagena Protocol and the Convention on Biological Diversity.

Damage may occur even if no risk assessment has been conducted, e.g., in cases where there is unintentional or illegal release of experimental LMOs or products thereof that have yet to undergo a risk assessment or in cases where no risk assessment was conducted but release occurred due to human error, such as in the Bt 11 case where Bt 11 was mixed up with Bt 10 which had been approved in some countries.

Damage may occur even if a risk assessment does not identify an LMO or product thereof as "hazardous", given the dynamic state of current scientific knowledge on LMOs and products thereof and the uncertainty and gaps in knowledge that exist.

Liability and redress should therefore apply whenever there is damage; this should not be qualified.

The operator should be defined to include any person in direct or indirect control of the activity at the time of the incident causing damage resulting from LMOs or products thereof, or any person in direct or indirect control of the LMO or product thereof at the time that the condition giving rise to the damage arose, and could include the permit holder, person who placed the LMO or product thereof on the market, developer, producer, notifier, exporter, importer, carrier or supplier.

Guideline 5. Exemptions *or mitigation*

Parties ~~should~~ ***may*** consider the application of exemptions ***or mitigation*** from liability, in particular:
(a) Act of God or *force majeure* ***of an exceptional, inevitable and uncontrollable nature***;
(b) Act of war or civil unrest***, except in the case of the hostile use of LMOs***.

If a country allows for exemptions or mitigation from liability on the basis of (a), this should only be allowed in the case where the operator proves that the damage was caused by natural phenomena of an exceptional, inevitable and uncontrollable nature.

If a country allows for exemptions or mitigation from liability on the basis of (b), this should not be allowed to exempt or mitigate the operator from liability for damage in the case of deliberate use of LMOs in an act of war or civil unrest.

Guideline 6. Time limits

Parties ~~should~~ ***may*** consider the application of relative and/or absolute time limits, including the commencement of the period ***and the life cycle of the LMO*** to which a time limit applies.

The consideration of the life cycle of different LMOs must be taken into account in cases where there is an application of time limits, as some LMOs (e.g., transgenic trees) have extremely long life cycles and it may take decades before damage is known to have been caused by it.

Guideline 7. Financial limits

Parties should consider the application of minimum financial limits. Parties ~~should~~ ***may*** consider the application of ***maximum*** financial limits.

Minimum financial limits are necessary to attempt to ensure that the damage is sufficiently redressed and that the burden is not passed on to the public or the authorities. Maximum financial limits should be large enough to attempt to ensure that the damage is sufficiently redressed and that the burden is not passed on to the public or the authorities.

Guideline 8. Financial security

1. ~~[~~Parties ***should*** ~~may[, consistent with international [law][obligations],]~~ require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.~~]~~

2. ~~[~~Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities.~~]~~

Given that the operator may be unable to meet his or her liability, financial security should be required. A minimum amount of financial security should be determined.

Guideline 9. Claims for compensation

1. Any person or group of persons, including public authorities, should be entitled to claim compensation for ~~loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of~~ damage resulting from ~~the transboundary movement of~~ living modified organisms ***and products thereof*** in addition to, where appropriate, the reimbursement of the costs of response measures.

~~2. Parties may allow claims for compensation of damage to the conservation and sustainable use of biological diversity.~~

Claims for liability and redress by any persons should be allowed for all types of damage; this should not be qualified.

If the Guidelines provide guidance to Parties for their domestic civil liability regimes, all damage resulting from LMOs and products thereof should be covered, not necessarily limited to damage resulting from the transboundary movement of LMOs and products thereof. If the Guidelines are later developed into an internationally binding civil liability regime, this scope can be modified accordingly.

Products thereof are referred to in the Cartagena Protocol in Article 20(3)(c) on information-sharing and the Biosafety Clearing-House in the context of risk assessment, in Annex I on information required in notifications, and in Annex III on risk assessment. This points to the fact that products thereof can cause damage, and liability and redress should apply whenever there is damage associated with LMOs and products thereof.

Guideline 10. Settlement of claims

1. Parties should provide for civil law procedures to settle claims for compensation of damage.

2. Where agreed by both or all parties, claims for compensation of damage may be submitted to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

Guideline 11. Access to information

Any person or group of persons ~~sustaining~~ ***claiming compensation for*** damage should be entitled to any information directly relevant to the presentation of a claim for compensation of damage from the operator or the competent authority in possession of such information~~, unless such disclosure is not permitted under Article 21 of the Protocol, is specifically prohibited by law or violates the legally protected interests of third parties~~.

Any information directly relevant to the claim for compensation of damage must be made available to any person or group of persons claiming compensation for damage. This is in order to ensure that the victims are enabled to seek full redress for the damage.

Further additions:

In addition, the text from Section IV A 2 on the provision of interim relief from Appendix II of the report of the 2nd meeting of the Group of the Friends of the Co-Chairs on Liability and Redress should be included: "Any competent court or tribunal may issue an injunction or declaration or take such other appropriate interim or other measure as may be necessary or desirable with respect to any damage or imminent threat of damage." This is to ensure that the damage or the threat of damage does not continue or perpetuate.

Additional and supplementary compensation measures should also be included, in the event that cases of damage are not redressed through the primary compensation scheme.

Appendix 4

The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress: Process, provisions and key issues for developing countries

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The following was first published as a Third World Network Biosafety Briefing in October 2011.

LIABILITY is an obligation of a (natural or legal) person to provide compensation or take redress measures for damage resulting from an action or a situation for which that person is deemed to be responsible under the applicable law. The purpose of liability rules can be four-fold; they have a (i) preventive function, in that they provide incentives for the implementation of and compliance with existing rules; (ii) absorptive function, by internalising the environmental, health, socio-economic and other costs of an activity; (iii) punitive function, as they impose sanctions against wrongful conduct and help implement the "polluter pays" principle; and (iv) corrective function, that requires the restoration of the damage.[1]

In relation to living modified organisms (LMOs), the issue of liability will only arise when there has been damage caused by LMOs. (The Cartagena Protocol on Biosafety uses the term "living modified organisms" for what are commonly known as genetically modified organisms, GMOs.) It must be established – in fact and in law – that the harm is directly attributed to the LMO (in particular its properties, their reproduction or modification) or the activity in relation to it. Further, it must be established that there is a person who can be identified as being responsible. Only then will the issue of compensating for the harm done arise.[2]

The need for an LMO-specific liability regime (as opposed to merely using or adapting existing liability instruments) is underlined by the specific nature of LMOs and the potential damage they may cause. For example, once LMOs are released, the transgenes cannot be easily recalled or removed from the environment. There may also be possible long-term effects, whereby damage may only appear over time, or even increase incrementally over time. Furthermore, there are specific difficulties related to LMOs, such as in proving damage and causation, valuing areas of damage from LMOs (e.g., environmental or socio-economic) which are usually not as well developed under existing liability regimes, and in defining the affected person(s) who can bring a claim, e.g., on behalf of the environment or affected communities.

Many have argued that there is a need for an international regime on liability and redress because of the transboundary nature of LMOs, particularly their trade, the involvement of multinational companies in their development and production, and state responsibility/liability. This implies a need to clarify international law procedures, and for possible harmonisation or minimum liability standards in countries.

The process under the Cartagena Protocol on Biosafety

Thus, during the negotiations of the Cartagena Protocol on Biosafety, the issue of liability and redress rules being developed and included in the Protocol was raised. This, however, proved too controversial to be resolved at the time, and as a compromise, it was agreed that such rules would be negotiated at a later date.

As such, Article 27 of the Cartagena Protocol committed the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP-MOP, the governing body of the Protocol) to adopt, at its first meeting, a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs. The COP-MOP was to endeavour to complete this process within four years.

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1 Secretariat of the Convention on Biological Diversity (2011). Liability and redress: Basic concepts. Workshop material no. 1. SCBD, Montreal.

2 Nijar, G.S. (2007). Liability and redress for damage arising from genetically modified organisms: Law and policy options for developing countries. In Lim L.C. and Traavik, T. (eds.), *Biosafety First: Holistic approaches to risk and uncertainty in genetic engineering and genetically modified organisms*. Tapir Academic Press, Trondheim.

Accordingly, at the first meeting of the COP-MOP in 2004, an Ad Hoc Open-ended Working Group of Legal and Technical Experts on Liability and Redress was established, and terms of reference and an indicative work plan agreed. In accordance with Article 27, the work was scheduled to end four years later, in 2008.

Five meetings of the Working Group were held in May 2005, February 2006, February 2007, October 2007 and March 2008. However, the negotiations were difficult and were opposed by those with an interest in the production and export of LMOs. Parties failed to complete the process in 2008 as mandated, despite meeting in a small-group setting just before COP-MOP 4 and in a contact group during COP-MOP 4 in Bonn, Germany.

Consequently, COP-MOP 4 renewed the mandate for further work and established a new format for the negotiations, in the form of a Group of the Friends of the Co-Chairs of the former Working Group, to continue the work on liability and redress.

This Group met four times, in February 2009, February 2010, June 2010 and October 2010. It finally agreed to the text of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, which was adopted on 15 October 2010 at COP-MOP 5 in Nagoya, Japan.

The Supplementary Protocol is open for signature between 7 March 2011 and 6 March 2012. To date, there are 26 signatories to the Supplementary Protocol. It will enter into force after 40 Parties to the Cartagena Protocol ratify it.

Key elements of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress

Nature and approach of the instrument

Most developing countries wanted a binding international regime that would set substantive rules on civil liability, whereby victims of damage from GMOs can turn to national courts for redress. However, the issue of the nature of the regime, and whether the instrument or parts of it should be legally binding, became so contentious that negotiations almost collapsed in Bonn in 2008. The emergence of a group of "Like-Minded Friends" (around 80 developing-country Parties and Norway, and including all of the Africa Group), however, pushed through a compromise agreement that the international instrument on liability and redress should have binding elements on civil liability.

The package agreed to included an agreement that the international liability and redress regime would be legally binding and would comprise administrative approaches; and that while there would be no legally binding international civil liability rules and procedures, there would be a clause that would 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. The Bonn agreement was a heavily compromised proposal, given that most developing countries and Norway have been firmly behind a comprehensive and binding international civil liability regime, and had argued for this throughout the years of negotiations.

Therefore, because of the compromises made, the Supplementary Protocol takes an "administrative approach", whereby liability would be a matter to be resolved between the liable entity and the executive arm of a government, and response measures are required of the operator (person or entity in control of the LMO) or the competent authority, if the operator is unable to take response measures. The provision of response measures in the event of damage, or a sufficient likelihood of damage, resulting from LMOs is thus the central obligation of Parties to the Supplementary Protocol.

Definition of damage, scope, liable entity

Damage is defined in the Supplementary Protocol as an adverse effect on the conservation and sustainable use of biological diversity, taking into account risks to human health.[3] A threshold applies, in that the damage has to be measurable or otherwise observable, and significant. An indicative list of factors that should be used to determine the significance of an adverse effect is included.[4] Once the threshold of significant damage has been met, the need for response measures arises.

The Supplementary Protocol applies to damage resulting from LMOs that find their origin in a transboundary movement. The LMOs referred to are those (i) intended for direct use as food or feed, or for processing; (ii) destined for contained use; and (iii) intended for intentional introduction into the environment.[5] It also applies to damage resulting from unintentional transboundary movements and illegal transboundary movements.[6]

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[3] Paragraph 2(b) of Article 2 of the Supplementary Protocol.

[4] Paragraph 3 of Article 2 of the Supplementary Protocol.

[5] Paragraph 1 of Article 3 of the Supplementary Protocol.

[6] Paragraph 3 of Article 3 of the Supplementary Protocol.

Furthermore, domestic law implementing the Supplementary Protocol shall also apply to damage resulting from transboundary movements of LMOs from non-Parties;[7] this is a critical issue as some of the major producers and developers of LMOs are non-Parties to the Cartagena Protocol and hence cannot be Parties to the Supplementary Protocol, unless they first ratify the Cartagena Protocol.

The liable entity is identified in the Supplementary Protocol as the "operator". This is defined as any person in direct or indirect control of the LMO. As appropriate, and as determined by national law, this could include, inter alia, the permit holder, person who placed the LMO on the market, developer, producer, notifier, exporter, importer, carrier or supplier.[8]

Response measures

The central obligation that Parties to the Supplementary Protocol assume is to provide for response measures in the event of damage, or a sufficient likelihood of damage, resulting from LMOs. Response measures are defined as reasonable actions to (i) prevent, minimise, contain, mitigate or otherwise avoid damage, as appropriate; and (ii) restore biological diversity.[9] Response measures must be implemented by, and in accordance with, domestic law.

Response measures are required in both situations where damage to biodiversity has already occurred, and when there is a sufficient likelihood that damage will result if timely response measures are not taken.[10] If there is damage, the operator has obligations to immediately inform the competent authority, evaluate the damage and take appropriate response measures.[11] Meanwhile, the competent authority has to identify the operator responsible, evaluate the damage and determine which measures should be taken by the operator.[12] The competent authority may itself implement appropriate response measures, including when the operator has failed to do so.[13]

It is understood that the operator is responsible for paying for the costs incurred in the exercise of its obligations under the Supplementary Protocol. In addition, the competent authority has the right to recover from the operator the cost and expenses of, and incidental to, the evaluation of the damage and the implementation of response measures.[14]

Some key issues for developing countries

Civil liability

The issue of civil liability proved to be one of the most contentious in the negotiations. As indicated earlier, most developing countries had actually envisioned that the international liability regime under the Cartagena Protocol would encompass substantive civil liability rules. Due to the compromises made during the course of the negotiations, the Supplementary Protocol contains only one legally binding clause on civil liability, which preserves Parties' rights to put in place domestic civil liability rules and procedures.

In the obligation to provide, in domestic law, for rules and procedures that address damage, Parties shall provide for response measures. Parties may also assess whether response measures are already addressed by their domestic civil liability law.[15]

For damage to biodiversity, taking into account risks to human health, Parties may apply general existing civil liability rules and procedures, apply or develop specific civil liability rules and procedures, or apply or develop a combination of both.[16] This is an additional tier that Parties may turn to in order to seek redress, since the Supplementary Protocol already provides for an administrative approach to such damage.

While the Supplementary Protocol per se does not cover traditional damage (which includes personal injury, loss or damage to property or economic interests), Parties are obliged to continue to apply existing general civil liability law, develop and apply or continue to apply specific civil liability law or develop and apply or continue to apply a combination of both, with regard to material or personal damage.[17] The scope of material or personal damage is qualified by requiring an association with damage as defined in the Supplementary Protocol, that is, damage to biodiversity, taking into account risks to human health.

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[7] Paragraph 7 of Article 3 of the Supplementary Protocol.
[8] Paragraph 2(c) of Article 2 of the Supplementary Protocol.
[9] Paragraph 2(d) of Article 2 of the Supplementary Protocol.
[10] Paragraph 3 of Article 5 of the Supplementary Protocol.
[11] Paragraph 1 of Article 5 of the Supplementary Protocol.
[12] Paragraph 2 of Article 5 of the Supplementary Protocol.
[13] Paragraph 4 of Article 5 of the Supplementary Protocol.
[14] Paragraph 5 of Article 5 of the Supplementary Protocol.
[15] Paragraph 7 of Article 5 of the Supplementary Protocol.
[16] Paragraph 1 of Article 12 of the Supplementary Protocol.
[17] Paragraph 2 of Article 12 of the Supplementary Protocol.

When developing new specific civil liability laws, rules and procedures to address damage caused by LMOs, Parties shall, inter alia, address damage, the standard of liability (including strict or fault-based liability), channelling of liability where appropriate and the right to bring claims.[18] In the course of negotiations after the Bonn session, the civil liability guidelines that were initially on the table were dropped.

The first review of the Supplementary Protocol (five years after its entry into force) will assess the effectiveness of the provision on civil liability.[19] This may lead to further work on an international civil liability regime.

Financial security

In cases where damage does occur, a liability regime should ensure that financial resources are available to enable or compensate for necessary measures to redress the damage. This issue was also very contentious, with some Parties opposing any mention of financial security, while others argued that without provision for financial security, the Supplementary Protocol would have placed obligations on importing Parties (which may have cost implications) without ensuring that the costs are borne by the person or entity concerned.

In the end, the Supplementary Protocol merely retains Parties' right to provide, in domestic law, for financial security.[20] This right has to be exercised in a manner consistent with the rights and obligations under international law.[21]

However, the provision on financial security requires the first meeting of the Parties to the Supplementary Protocol to request the Secretariat to undertake a comprehensive study on financial security.[22] This study should address, inter alia, (i) the modalities of financial security mechanisms; (ii) an assessment of environmental, economic and social impacts of such mechanisms, in particular on developing countries; and (iii) an identification of the appropriate entities to provide financial security.

The first review of the Supplementary Protocol, five years after entry into force, will also include a review of the effectiveness of the provision on financial security.[23]

Furthermore, the decision adopted at COP-MOP 5 on liability and redress states that where the costs of response measures have not been covered, such a situation may be addressed by additional and supplementary compensation measures. These may include arrangements to be addressed by the COP-MOP in the future.

"Products thereof"

Whether or not "products thereof" should be included in the scope of the Supplementary Protocol was very contentious. Some Parties argued that the Cartagena Protocol itself does not include "products thereof" in its scope. (The scope of the Cartagena Protocol is limited only to *living* modified organisms; however, the issue of "products thereof" is covered by the Cartagena Protocol with regard to information-sharing,[24] and in information required in notifications for the advance informed agreement and simplified procedure,[25] as well as in the principles for risk assessment.[26])

Others argued that the rationale for the inclusion of "products thereof" lies in their mention in the Cartagena Protocol in relation to risk assessment, which places them squarely within liability considerations as mandated by Article 27 of the Cartagena Protocol, for if that risk materialises then there must be provisions for liability and redress. Therefore the inclusion of "products thereof" would provide for a comprehensive and adequate instrument dealing with damage from LMOs.

While mention of "products thereof" was eventually removed from the operative text of the Supplementary Protocol, the report of the fourth meeting of the Group of the Friends of the Co-Chairs records an understanding that Parties may apply the Supplementary Protocol to damage caused by processed materials that are of LMO origin, provided that a causal link is established between the damage and the LMO in question.

This understanding is significant as it clarifies that the Supplementary Protocol may apply to damage caused not only by LMOs but also by their products, which may be non-living material. In any case, if a Party so wishes, it can include "products thereof" in its domestic law implementing the Supplementary Protocol.

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18 Paragraph 3 of Article 12 of the Supplementary Protocol.
19 Article 13 of the Supplementary Protocol.
20 Paragraph 1 of Article 10 of the Supplementary Protocol.
21 Paragraph 2 of Article 10 of the Supplementary Protocol.
22 Paragraph 3 of Article 10 of the Supplementary Protocol.
23 Article 13 of the Supplementary Protocol.
24 Paragraph 3(c) of Article 20 of the Cartagena Protocol on Biosafety.
25 Paragraph (i) of Annex I of the Cartagena Protocol on Biosafety.
26 Paragraph 5 of Annex III of the Cartagena Protocol on Biosafety.

Conclusions

The Supplementary Protocol sets international minimum standards on liability and redress for damage resulting from LMOs, and specifically covers one approach to liability (the administrative approach). As such, domestic law should implement and augment the Supplementary Protocol, and much is left to countries at the national level to determine and implement. Parties to the Supplementary Protocol should put in place substantive laws with regard to liability and redress to address damage from LMOs, and this could include specific civil liability rules and procedures.

The Supplementary Protocol is therefore just the beginning in the journey for liability and redress. Remaining gaps will need to be addressed at the national level, or through future work under the Supplementary Protocol, such as that mandated for civil liability and financial security. This could be aided by complementary capacity-building measures, which are already envisaged for the development and/or strengthening of human resources and institutional capacities relating to the implementation of the Supplementary Protocol.

Concerns over the potential health, environmental and socio-economic risks posed by genetically engineered crops and food have been at the heart of longstanding calls for an international regime to assign responsibility for and deal with any damage caused by these genetically modified organisms (GMOs), specifically to provide compensation or take redress measures. The need for such a regime was finally realised in October 2010 with the adoption of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety.

This landmark treaty was the culmination of long and difficult negotiations among Parties to the Cartagena Protocol on Biosafety. This book, a collection of contemporaneous reports from Third World Network publications, charts the challenging journey from the setting of the negotiating mandate in 2004 to the 2010 adoption of the liability and redress accord. While the agreement is seen to fall short of what its proponents had originally envisaged, it remains a beginning in the journey for liability and redress. Remaining gaps will need to be addressed at the national level, or through future work under the Supplementary Protocol.

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