Liability & Redress for GMO Damage

Nagoya-KL Supplementary Protocol

A Record of Negotiations

Volume 2

by

Gurdial Singh Nijar & Gan Pei Fern

UNIVERSITY OF MALAYA
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Nagoya-KL Supplementary Protocol

CEBLAW was established by the Government of Malaysia and the University of Malaya to foster research, development and training in matters relating to biological diversity law and biosafety law. It is a national, regional and international resource centre for biodiversity law. It assisted the Government in the negotiations on international treaties relating to access and benefit sharing of genetic resources (under the Convention on Biological Diversity) and liability and redress (under the Cartagena Protocol on Biosafety).

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NAGOYA-KL SUPPLEMENTARY PROTOCOL : A RECORD OF THE NEGOTIATIONS VOLUME 2

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Dedicated to

Those who labored constructively to craft this Supplementary Protocol

and

The Co-Chairs for skillfully steering the process

Contents

Foreword

by
René Lefeber & Jimena Nieto Carrasco
Co-Chairs of the Working Group of Legal and Technical Experts on Liability and Redress

In a process of international negotiations that spans more than eight years, it is unlikely that there will be more than a few constant factors. Besides the co-chairs and secretariat staff, Gurdial Singh Nijar and Gan Pei Fern were part of the small group of people who participated in the negotiations on liability and redress for damage caused by genetically modified organisms from the beginning to the end.

Gurdial and Gan were there, and they were everywhere all of the time. Day and night, they could be seen in the meetings and the corridors taking and comparing notes. Only few knew at the time what they were up to: the production of a complete history of the negotiations. They produce a record, consisting of two volumes and covering all the meetings of technical experts, representatives of the parties to the Cartagena Protocol on Biosafety, and the friends of the co-chairs that brought these negotiations to a successful outcome.

The importance of this record cannot be overestimated. It provides, in fact, no less than the preparatory works (*travaux préparatoires*) of the Nayoya– Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety that was adopted on 15 October 2010. In addition to being a source for treaty interpretation, it will be a unique treasure for academic research of the negotiations. The official documents do not tell the whole story. Only this history of the negotiations provides the complete picture, including records of several confidential meetings where the fate of the negotiations

was at stake and critical decisions for advancing the negotiations were made.

Gurdial is not only to be lauded for this academic achievement. Feared at the beginning of the negotiations by some for his radical views and far-reaching ambitions for a comprehensive liability and redress regime for damage caused by genetically modified organisms, Gurdial was respected and admired at the end of the process by all for his eloquent interventions and tireless efforts to bring the negotiations to a successful outcome. Forcefully rejecting any suggestion that the negotiations could result in nothing more than a non-legally binding instrument in the form of guidelines, Gurdial pointed out that the Cartagena Protocol on Biosafety called for the development of 'rules and procedures' and not for 'guiderules'. Guidelines were put to rest and a treaty was adopted named after its place of adoption, Nagoya, and Gurdial's hometown, Kuala Lumpur (see the history of this process in this book for any other reasons there may have been for naming the treaty). Gurdial produced the ultimate guidebook of the history of the negotiations. He was, is and will always be a true friend of the co-chairs.

René Lefeber

Jimena Nieto Carrasco

Co-Chairs

Introduction

The Cartagena Protocol on Biosafety (CPB) was adopted on 29 January 2000. Because of the protracted nature of the negotiations that led to its adoption, it was not possible for Parties to the Protocol to agree on international rules and procedures for liability and redress arising out of the transboundary movement of living modified organisms (LMOs). Article 27 of the CPB provided for these rules to be elaborated and the process to be completed by 2008. The first meeting of the Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the CPB (COP-MOP) met in 2004 at Kuala Lumpur and initiated this process by establishing an *Ad Hoc* Open-ended Working Group of Legal and Technical Experts on Liability and Redress (WGLR) to fulfil the mandate under Article 27. Since then the process started and negotiations continued until the finalization of these international rules and procedures which led to the adoption of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (NKL SP) on 15 October 2010.

CEBLAW in 2008 published the first volume of this book,[1] which records the negotiations for the elaboration of these rules. It records the evolution of these rules through three different periods: from the inception and negotiation of the CPB, through its interpretation and implementation process to the process of elaborating a set of rules and procedures on liability and redress until the fourth COP-MOP.

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[1] Nijar, G.S., Lawson-Stopps, S., Gan, P.F., *Liability and Redress under the Cartagena Protocol on Biosafety: A Record of the Negotiations for Developing International Rules*, vol. 1, Kuala Lumpur:CEBLAW.

It also provides a snapshot of the elements under negotiation, the options put forward under each element, and the positions taken by the delegates.

The present volume continues the effort. It records the continuing negotiations for the elaboration of the rules and procedures after the fourth COP-MOP until the conclusion of the NKL SP at Nagoya, Japan on 11 October 2010 and adoption on 15 October 2010.

This present volume is divided into two parts:

Part I outlines a brief history of the process, starting from the first Friends of the Co-Chairs Group meeting (FOCC) at Mexico City in early 2009 up to the conclusion of the NKL SP.

Part II sets out the main body of this publication. This section is devoted to the issues and elements negotiated throughout, primarily through the FOCCs. Each Article in the NKL SP debated during the negotiations is included. The Articles are arranged following the order of the negotiating text (Annex 1 to document UNEP/CBD/BS/GF-L&R/1/4)[2] adopted by the first FOCC.[3] Each Article is dealt with in three sections. First, a short description of the concept embodied in each element. Secondly, a brief statement of the negotiating process and options derived from the proposals made by delegates, if any; and finally, a summary of each delegate's position. This provides a full understanding of the spectrum of views and proposals made. This, then, provides a comprehensive reference to the general concepts, the debate and the particular views of delegates in negotiations spanning the complete history of the negotiations. The final text agreed to at the FOCC 4 in Nagoya and finally adopted, appears at the end of each respective Article.

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[2] The document is available at http://bch.cbd.int/protocol/meetings/documents.shtml?eventid=3027 (last visited: 30 July 2012).

[3] The order of the Articles is different from the NKL SP. The renumbering process of the Articles was done at the FOCC 4 by the Co-Chairs together with the Parties.

The sources for this compilation are: notes taken at each negotiating session by members of the Centre of Excellence for Biodiversity Law (CEBLAW);[4] and the Earth Negotiations Bulletin Reports which provides a daily report of the meetings held. There were no written submissions made to the Secretariat of the CPB by Parties.

This publication incorporates the negotiations and proposals made at all the FOCCs held from February 2009 until October 2010. The NKL SP was concluded at the fourth FOCC, immediately preceding the COP-MOP 5 in Nagoya. The outcome was then presented to, and adopted by, the COP-MOP 5.

This publication completes the process recorded in the first volume, and together, contributes to the institutional memory and to the historical record of the development of the Supplementary Protocol.

Professor Gurdial Singh Nijar
Director
CEBLAW

[4] CEBLAW is a centre set up by the joint initiative of the Universiti Malaya and the Malaysian Government. It is based in Kuala Lumpur, Malaysia.

About the Authors

Professor Gurdial Singh Nijar is the Director of the Centre of Excellence for Biodiversity Law (CEBLAW). He is also professor of law at the Law Faculty of the Universiti Malaya at Kuala Lumpur, Malaysia where he developed and teaches the Masters programme on Biodiversity and Biosafety Law. He was a practicing lawyer for more than twenty years. He is a law graduate of Kings College London; and a postgraduate of Universiti Malaya. He is a barrister from the Middle Temple, London. He is also an advocate and solicitor in Malaysia, and was admitted as a barrister of the Supreme Court of the Australian States of New South Wales and Victoria.

He has been a key negotiator representing Malaysia since the process started in 2004 for the development of international rules and procedures on liability and redress.

Ms Gan Pei Fern is an Assistant Consultant at CEBLAW. She has been a member of the Malaysian delegation since 2008 for the development of international rules and procedures on liability and redress. She is a law graduate of Universiti Malaya and an Advocate and Solicitor in Malaysia.

Acronyms and Abbreviations

BCH	Biosafety Clearing House
CBD	Convention on Biological Diversity
CEBLAW	Centre of Excellence for Biodiversity Law
COP	Conference of the Parties to the Convention on Biological Diversity
COP-MOP	Conference of the Parties to the Convention on Biological Diversity serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety
CPB	Cartagena Protocol on Biosafety
EU	European Union
FOCC	Friends of the Co-Chairs Group Meeting
GRULAC	Group of Latin America and Caribbean Countries
ICCP	Intergovernmental Committee on the Protocol
IPR	intellectual property right
LMO	living modified organism
NCA	National Competent Authority
NKL SP	Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety
WGLR	*Ad Hoc* Open-ended Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

PART I: HISTORY OF THE PROCESS

A Brief Overview

The first volume of this book[1] included the process for the elaboration of the rules and procedures on liability and redress from the inception and negotiation of the Cartagena Protocol on Biosafety (CPB), through its interpretation and implementation process to the process of elaborating a set of rules and procedures until the fourth Conference of the Parties to the Convention on Biological Diversity serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety (COP-MOP). Since the fourth COP-MOP, the negotiations were continued in the format of a Friends of the Co-Chairs Group Meeting (FOCC) until the conclusion of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (NKL SP) at Nagoya, Japan on 11 October 2010.

The FOCC format was first set up, upon the suggestion of the Co-Chairs, at the fifth Working Group meeting (WG) in March 2008 to negotiate the "Core Elements Paper". This was presented by the Co-Chairs in an effort to push the negotiation process forward. The FOCC meeting yielded some modest results. It managed to reduce the revised proposed operational text document considerably, from 53 to 27 pages. Building on the efficiency of FOCC and as time ran out, the fifth WG agreed to an informal and enlarged meeting of the FOCC immediately preceding the COP-MOP 4 meeting in Bonn, Germany in May 2008.

This meeting was held from 7-10 May 2008. The COP-MOP 4 marked the deadline for adopting a decision on international rules and procedures for liability and redress. While the meeting did not

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[1] Nijar, G.S., Lawson-Stopps, S., Gan, P.F., *Liability and Redress under the Cartagena Protocol on Biosafety: A Record of the Negotiations for Developing International Rules*, vol. 1, Kuala Lumpur: CEBLAW.

adopt an international regime, delegates decided to reconvene the FOCC to complete negotiations on an international regime on liability and redress based on a compromise that envisioned a legally binding Supplementary Protocol focusing on an administrative approach but including a provision on civil liability, complemented by non-legally binding guidelines on civil liability. COP-MOP 4 charted the way forward. Delegates agreed to have two FOCCs before COP-MOP 5 to, hopefully, conclude the negotiations.

Who are the "Friends" of the Co-Chairs?

At the beginning, the group was composed of members of: JUSCANZ (although not appointed as such): Japan, New Zealand; Asia-Pacific: China, India, Malaysia, Philippines; European Union (EU): two representatives; African Group: four representatives; Group of Latin America and Caribbean Countries (GRULAC): four representatives; and others: Switzerland and Norway. The fifth WG agreed to enlarge the FOCC to finally consist of two representatives each from Central and Eastern Europe, and EU; and six each from GRULAC, Africa, and Asia Pacific. The Co-Chairs nominated Bangladesh, China, Malaysia, India, Palau, and Philippines to represent Asia Pacific, informing that Asia Pacific consists of distinct views and positions. GRULAC was represented by: Brazil, Bolivia, Colombia, Cuba, Ecuador, Mexico, Paraguay and Peru, with only six countries at the table at any one time. African Group was represented by Burkina Faso,[2] Ethiopia,[3] Liberia, Namibia, South Africa, and Uganda.

Bangladesh and Palau were absent in the first and second FOCC. The Co-Chairs at the second FOCC decided, upon a request by Malaysia, to nominate the Republic of Korea and Iran to replace

[2] Burkina Faso was absent in the final FOCC meeting.
[3] Ethiopia was absent in the final FOCC meeting.

Bangladesh and Palau. Republic of Korea attended the third and final FOCC meeting while Iran did not participate in any FOCC.

All meetings of the FOCC were open to observers. This was to ensure the transparency of the negotiation process. Observers from non-Party Governments, intergovernmental and non-governmental organizations and other stakeholders participated in these meetings. Thus, representatives from, among others, Canada and the United States of America attended the meetings as observers. Other observers included, to name a few, African Centre for Biosafety, African Union, Biotechnology Coalition of the Philippines, CropLife International, ECOROPA, Global Industry Coalition, Greenpeace International, Inter-American Institute for Cooperation on Agriculture, International Grain Trade Coalition, Public Research and Regulation Initiative, Third World Network, Union de Cientificos Comprometidos con la Sociedad, Universidad Nacional Agraria La Molina, Universidad Nacional Autonoma de México, and Washington Biotechnology Action Council/49th Parallel Biotechnology Consortium.

The Negotiations and Adoption of the draft Supplementary Protocol

Working Group meetings and the proceedings at COP-MOPs up to the fourth COP-MOP were dealt with in volume 1 of this book. This volume 2 only records the negotiations at meetings after the fourth COP-MOP.

The FOCC met four times prior to fifth COP-MOP to conclude the negotiations.

First Meeting of the Group of Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (FOCC 1)

Place: Mexico City, Mexico
Date: 23-27 February 2009

Surviving from the edge of collapsing[4], the first FOCC further negotiated the proposed operational texts contained in the Annex to decision BS-IV/12 of the fourth COP-MOP. The text consists of binding provisions on an administrative approach and one binding civil liability article, to be complemented by non-legally binding guidelines. The Parties at this first FOCC agreed to work towards a legally binding instrument in the form of a Supplementary Protocol with the understanding that the final decision in this regard would only be taken by the COP-MOP. It produced a draft text for a Supplementary Protocol on liability and redress to the Protocol, which will serve as a basis for further negotiations. The Group decided to have a second meeting the following year.

Second Meeting of the Group of Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (FOCC 2)

Place: Putrajaya, Malaysia
Date: 8-12 February 2010

The Parties in the FOCC 2 further negotiated the draft text for a Supplementary Protocol on liability and redress to the Protocol prepared by the first FOCC as contained in the report of the meeting. The meeting was considered fairly successful as 15 articles were "adopted" at the meeting. However on the other hand, the proposed text still contained many square brackets (indicating areas of disagreement) and most of the remaining articles contained key controversial issues outstanding since the beginning of the negotiations.

This meeting was the last negotiation session scheduled during COP-MOP 4, six months before COP-MOP 5 in Nagoya. The FOCC

[4] See Nijar, G.S., Lawson-Stopps, S., Gan, P.F., *Liability and Redress under the Cartagena Protocol on Biosafety: A Record of the Negotiations for Developing International Rules*, vol. 1, Kuala Lumpur: CEBLAW at p.25.

then agreed to another meeting to conclude the negotiations in June 2010 and requested the Executive Secretary of the Convention on Biological Diversity (CBD) to communicate to the Parties to the Protocol the text for a Supplementary Protocol on liability and redress for damage resulting from transboundary movements of LMOs to fulfill the six-month requirement for its adoption under Article 28(3) of the CBD, made applicable by Article 32 of the CPB.

Third Meeting of the Group of Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (FOCC 3)

Place: Kuala Lumpur, Malaysia
Date: 15-19 June 2010

The third FOCC reconvened to conclude the negotiations on the remaining articles of the Supplementary Protocol. To conclude the negotiations efficiently, the Co-Chairs laid down some ground rules, namely, to focus on outstanding issues (bracketed text) and not to reopen issues that have been discussed and agreed upon; additional proposal of text will not be accepted for consideration if there is any objection unless agreed to by the meeting that further time was required to consider the text; and the Co-Chairs will have the discretion to recommend any proposal (to resolve issues) that is consistent with existing text for the meeting's consideration. The Co-Chairs proposed the following sequence for the FOCC meeting:

1. Imminent threat of damage;
2. Financial security;
3. Reference to activity or LMOs (referring to Article 3 and 4 of the Draft Supplementary Protocol, whether the connection is between damage and the LMO or the activities in handling the LMO, which are transport, transit, handling and use);
4. Products thereof;
5. Definition of operator;

6. Reference to international law/obligation;
7. Civil liability (Article 13(2) of the Draft Supplementary Protocol);
8. Reservations;
9. Objective;
10. Signature;
11. Order of Articles;
12. Preamble;
13. Title; and
14. The Guidelines on Civil Liability prepared by the Co-Chairs following the FOCC's request at the end of the last meeting.

The meeting managed to resolve almost all the substantive issues except the application of the Supplementary Protocol to products; and the requirement for financial security. The Group agreed to hold a fourth meeting in Nagoya, Japan from 6 to 8 October 2010, immediately before the COP-MOP 5, to conclude the negotiations.

Fourth Meeting of the Group of Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (FOCC 4)

Place: Nagoya, Japan
Date: 6-11 October 2010

The fourth FOCC was tasked to conclude the negotiations on mainly two outstanding issues: the application of the Supplementary Protocol to products (scope - Article 3.2 and 3.3); and the requirement of financial security (Article 10). The meeting was extended from three days to five days (6-11 October 2010) because more time was needed to resolve the outstanding issues. The negotiations were at, several points, on the verge of collapsing. However after numerous small group meetings, "confessional sessions", bilateral meetings, informal consultations, and bilaterals with the Co-Chairs, the negotiations

were finally brought on track and concluded at around 2 a.m. in the morning of 11 October 2011, the first day of COP-MOP 5.

The FOCC submitted to COP-MOP 5 the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, together with a draft decision for consideration and adoption. The FOCC agreed to name the Protocol after the cities of Nagoya where it was to be adopted, and Kuala Lumpur, the city where the mandate to negotiate international rules and procedures on liability and redress were adopted by the COP-MOP 1 decision; and where two key meetings of the FOCC were held.

The report of the FOCC is available as document UNEP/CBD/BS/GF-L&R/4/3. It is important to note that the document has included an item clarifying the different understanding that Parties to the Protocol hold on the application of Article 27 of the Protocol to processed materials that are of LMO-origin. It is stated that 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 LMO in question.[5] This was the compromise to resolve the issue relating to the applicability of the Supplementary Protocol to "products thereof".

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

Place: Nagoya, Japan
Date: 11-15 October 2010

The COP-MOP adopted the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress in its decision BS-V/11 on

[5] See Item 12, at p. 3.

15 October 2010. The Supplementary Protocol provides for international rules and procedure on liability and redress for damage to biodiversity resulting from LMOs. COP-MOP 5 requested the UN Secretary-General to open the Supplementary Protocol for signature from 7 March 2011 to 6 March 2012 and called upon Parties to the Protocol to sign and ratify it at the earliest opportunity.

The COP-MOP also decided that additional and supplementary compensation measures may be taken in instances where the costs of response measures provided for in the Supplementary Protocol are not covered and that those measures may include arrangements to be addressed by the COP-MOP.[6] Furthermore, the COP-MOP urged Parties to cooperate in the development and/or strengthening of human resources and institutional capacities relating to the implementation of the Supplementary Protocol.[7]

[6] See Item 7 and 8 of decision BS-V/11.
[7] See Item 9 of decision BS-V/11.

PART 2: ARTICLES

Title and Preamble

Title

The title of the Treaty was agreed upon and adopted on the morning of 10 October 2010, the last day of the FOCC 4. The meeting agreed to name the Supplementary Protocol after the two cities, namely the "Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety". It is common practice to name treaties after their place of adoption. However, it was noted that Kuala Lumpur has a special place in the history of the Supplementary Protocol. Kuala Lumpur was the city where the initial mandate for the negotiations on liability and redress under Article 27 of the Protocol was adopted in February 2004 by the COP-MOP 1. The city of Kuala Lumpur also hosted the last two negotiation sessions preceding Nagoya (Malaysia also played a key role in the negotiations). Parties considered these events as crucial and, therefore, decided to acknowledge the places where these events took place by attaching the names of the two cities to the Supplementary Protocol.[8] The Japanese delegation at the closing of the meeting highlighted that the name "captures and symbolises the solidarity commitments throughout the negotiation process, a collective achievement".[9]

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[8] Secretariat of the Convention on Biological Diversity, *The Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety: An Introductory Note in Preparation for Signature and Ratification, Montreal*: UNEP, available at *http://bch.cbd.int/nkl_suppl_protocol/introductorynote.pdf* (last visited: 30 July 2012).

[9] Notes FOCC 4.

Preamble

The Preamble is defined as "introductory part (recital) of a bill, constitution, or statute that sets out in detail the underlying facts and assumptions, and explains its intent and objectives".[10] The Vienna Convention on the Law of Treaties 1969 says that "the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble".[11] In short, a preamble is only relevant in determining the context of the relevant treaty. Its objective is to clarify the meaning or purpose of the operative part of the text in case of an ambiguity or dispute. It prevails only where it provides a clear and definite interpretation where the meaning of the enacting words is indefinite or unclear.[12]

Delegates' Position

African Group

1. Submits preambular text recalling that:
   - the precautionary approach as outlined in RIO Declaration on Environment and Development;
   - the importance of maintaining the integrity of the environment and of biodiversity for future life on the planet; the current scientific uncertainty regarding the possible long term impact of LMOs on the integrity of biodiversity, taking also into consideration risks to human health;
   - the "polluter pays" principle in environmental law and that no victim of damage, including environmental damage, shall go uncompensated;

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[10] *http://www.businessdictionary.com/definition/preamble.html* (last visited: 4 January 2012).

[11] Article 31.

[12] *http://www.businessdictionary.com/definition/preamble.html* (last visited: 4 January 2012).

- transboundary movement of LMOs, by its nature, requires harmonisation of rules for liability and redress at the international level in addition to national legislation.

2. Agrees to remove the proposed text provided that Parties will not in future provide further text for preamble. This however does not exclude the possibility of shifting outstanding operational text from the substantive part to preamble.[13]
3. Proposes replacing "Bearing in mind" with "Reaffirming" the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development.
4. Proposes the title to refer to "Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafey".[14]

EU

1. Prefers not to have heading for each article at this juncture as it will prejudge the outcome of the negotiations.[15]
2. Commenting on a preambular text stating "taking into acc Principle 13 of the Rio Declaration on Environment and Development", asks for the retention of "Principle 13".[16]

Japan

1. Notes that the title should be consistent with the objective.[17]
2. Notes that the title would depend on how Article 1 (objective) would be. Urges Parties to conclude the negotiations, recalling the Decision of COP-MOP 1 that the negotiations on liability and redress should be concluded "within 4 years".
3. Emphasizes the need to strike a balance as Japan is one of the

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13 Notes FOCC 2.
14 Notes FOCC 3.
15 Notes FOCC 3.
16 Notes FOCC 4.
17 ENB FOCC 2.

largest importers of GMOs and very sensitive with the safety of food.

4. Supports having a Supplementary Protocol and that it has to be legally sound.
5. Urges Parties not to reopen what Parties have agreed upon.
6. Supports to keep the preamble simple.[18]
7. Prefers not to have heading for each article due to time constrain. Rationale: each heading involves the substance of the operational text and therefore requires considerable time to discuss.[19]
8. Considers the headings proposed by Co-Chair are viable but proposes the following replacement: Article 4 Causality; Article 9 Right of recourse; Article 11 State Responsibility and Article 16 Relationship with the Convention, the Protocol and other international law.
9. Commenting on a preambular text stating "taking into acc Principle 13 of the Rio Declaration on Environment and Development", asks for the deletion of "Principle 13" because the Supplementary Protocol deals with a narrower area comparing to Basle Convention.[20]

Malaysia

1. Urges Parties to deal with the substance and advance substantial reasons for in rejecting the African Group's proposals mere simplicity should not be an excuse. The CBD and CPB set the precedent. The CBD has 23 preambular paragraphs and the CPB has 13.[21]
2. Suggests providing heading for each article as it is useful as a

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18 Notes FOCC 2.
19 Notes FOCC 3.
20 Notes FOCC 4.
21 Notes FOCC 2.

guide and will not form part of the interpretation of the text.[22]

Mexico

1. On behalf of GRULAC, proposes the title to refer to the "Supplementary Protocol on Liability and Redress for Damage Resulting from the Transboundary Movement of LMOs".[23]
2. Thanks African Group for their proposal but felt the original Preambular paragraphs are sufficient, as otherwise have to reopen all paragraphs.[24]

New Zealand

Prefers to keep the preamble simple and short.[25]

FINAL TEXT: PREAMBLE

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,

Article 1 Objective

The objective provision sets out the overall aim of the treaty - the

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22 Notes FOCC 3.
23 Notes FOCC 2; ENB FOCC 2.
24 Notes FOCC 2.
25 Notes FOCC 2.

reason for its existence. It forms the heart of the political agreement upon which the agreement is founded. It also has an important role when interpreting provisions in the treaty. The objective of a treaty can have legal consequences for states that sign it but have not ratified it. It is then obliged to refrain from acts which would defeat the Treaty's objectives for the period pending the entry into force for it of the treaty.[26]

At FOCC 1, the issue on objective was not discussed. At FOCC 2, countries tabled several options for further consideration. However, delegates did not discuss the different options due to lack of time. At the end of the meeting, the text tabled remained in brackets with an asterisk stating that the objective "has neither been discussed nor negotiated". At FOCC 3, Parties started working on the text proposed by the Co-Chairs, as follows:

> "The objective of this Supplementary Protocol is to contribute to the conservation and sustainable use of biological diversity through the implementation of prompt, adequate and effective response measures, taking also into account risks to human health."

After a lengthy discussion especially on the issue of reference to "civil liability provision", the Co-Chairs proposed language which was adopted without further amendment. The objective proposed was rather neutral. It compresses the Objective and Article 27 of the Cartagena Protocol into one provision. Article 1 was adopted on the fourth day of FOCC 3.

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[26] Article 18 of the Vienna Convention on the Law of Treaties. See also, Glowka *et al.*, *A Guide to the Convention on Biological Diversity*, IUCN, Gland and Cambridge, 1994, at p.15.

Delegates' Positions

African Group

Supports the inclusion of civil liability in the objective.[27]

Bolivia

1. On Co-Chairs' proposal, supports Malaysia to include civil liability because all key concepts/core issues should be reflected in the objective.
2. Supports Paraguay to include the notion of Article 27 of the Cartagena Protocol - liability and redress for the damage resulting from the transboudary movement.
3. Prefers Co-Chairs' proposal to Colombia's proposal.[28]

Brazil

1. Proposes "the objective of this Supplementary Protocol is to contribute to ensuring that response measures are taken in the event of damage or the imminent threat of damage to the conservation and sustainable use of biological diversity, taking into account damage to human health resulting from the transboundary movement of LMOs".[29]
2. Supports Co-Chairs' proposal.[30]

China

Supports Colombia's proposal as it is simpler and clearer.[31]

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27 Notes FOCC 3.
28 Notes FOCC 3.
29 Notes FOCC 2.
30 Notes FOCC 3.
31 Notes FOCC 3.

Colombia

Proposes that "the objective of this Supplementary Protocol is to enable prompt, adequate and effective response measures in the field of liability and redress so as to ensure the conservation and sustainable use of biological diversity, taking into account risks to human health".[32]

Cuba

Proposes reference to human health.[33]

Ethiopia

Agrees to the insertion by Peru.[34]

EU

1. Emphasizes that the substance of the Supplementary Protocol is the operative part and not the objective and therefore urges not to spend too much time on the discussion of the objective.[35]
2. Supports Co-Chairs' proposal.
3. Disagrees with Colombia's proposal because the meaning of "so as to ensure" is unclear.
4. Agrees with Paraguay's proposal after replacing "general rules" with "international rules and procedures".
5. Opposes including civil liability in the objective. Explains that the objective is to contribute to the conservation and sustainable use of biodiversity. The notion of response measures is broader than civil liability and civil liability is to complement the administrative approach.[36]

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32 Notes FOCC 3.
33 Notes FOCC 2.
34 Notes FOCC 2.
35 Notes FOCC 2.
36 Notes FOCC 3.

India

1. Supports Malaysia's proposal and suggests the inclusion of "risks to" human health.[37]
2. Supports mentioning civil liability for a complete objective.
3. Prefers Co-Chairs' proposal to Colombia's proposal.[38]

Japan

1. Supports Co-Chairs' proposal.
2. Prefers Colombia's proposal because it has captured the gist of the Supplementary Protocol – on liability and redress.
3. Says that Parties should not include "damage" in the objective.[39]

Malaysia

1. Proposes to work on the Mexican proposal. Inserts the text in italics to reflect two aspects of the Supplementary Protocol, i.e. administrative approach, and one binding provision on civil liability: "The objective of this Supplementary Protocol is to *address issues of liability and redress arising from damage resulting from the transboundary movement of LMOs* as well as to provide for prompt, adequate and effective response measures in the event of damage and/or imminent threat of damage to the conservation and sustainable use of biodiversity resulting from the transboundary movement of LMOs, *taking into account risks to human health*".[40]
2. On Co-Chairs' proposal, suggests to add "provision on civil liability". Highlights that the civil liability was the only approach wanted by developing countries to meet the mandate of Article

[37] Notes FOCC 2.
[38] Notes FOCC 3.
[39] Notes FOCC 3.
[40] Notes FOCC 2.

27. The objective is to achieve conservation and sustainable use of biodiversity through both the administrative approach and civil liability.

3. Prefers Co-Chairs' proposal to Colombia's proposal.
4. Agrees with Paraguay's proposal after replacing "general rules" with "international rules and procedures".[41]

Mexico

1. Proposes "The objective of this Supplementary Protocol is to establish mechanisms for compensation in case of damage and prompt, adequate and effective response measures in the event of damage [and/or imminent threat of damage] to the conservation and sustainable use of biodiversity resulting from the transboundary movement of LMOs".[42]
2. Prefers Co-Chairs' proposal to Colombia's proposal.[43]

Norway

1. Agrees to work on either Co-Chairs' or Colombia's proposal.
2. Supports the inclusion of civil liability in the objective, which clarifies the Supplementary Protocol without changing its content.[44]

Paraguay

1. Prefers removing reference to "imminent threat of damage",[45] as the scope of damage is already addressed in the Protocol. Rationale: movements of LMOs involve issuance of certificate

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41 Notes FOCC 3.

42 "Imminent threat of damage" is bracketed because Mexico explained that the issue has not been fully discussed: Notes FOCC 2.

43 Notes FOCC 3.

44 Notes FOCC 3.

45 ENB FOCC 2.

and therefore there may be damage but the damage should not be "imminent".[46]

2. Proposes that the objective of the Supplementary Protocol is to contribute to the conservation and sustainable use of biological diversity "by establishing general rules to address liability and redress for damage resulting from LMOs" through the implementation of prompt, adequate and effective response measures, taking also into account risks to human health.
3. Opposes the inclusion of "provision on civil liability", saying it is not "convenient" to do so.[47]

Peru

Proposes to adopt the language in Article 4 of the CPB: "The objective of the present Supplementary Protocol is to contribute to ensuring that prompt, adequate and effective response measures are taken in the event of damage or imminent threat of damage to the conservation and sustainable use of biodiversity *resulting from transboundary movement, transit, handling and use of LMOs taking also into account risks to human health*".[48]

Republic of Korea

Supports the inclusion of civil liability in the objective.[49]

Switzerland

Explains that the objective summarizes the main effect of the instrument and suggests to keep the objective simple and leave it open for discussion at the end of the negotiations when Parties know

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46 Notes FOCC 2.

47 Notes FOCC 3.

48 Language inserted to the original text and is highlighted in italic is adopted from Article 4: Notes FOCC 2.

49 Notes FOCC 3.

the substance and the outcome of the Supplementary Protocol.[50]

FINAL TEXT: 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 Definitions

Definitions were discussed as a separate item as well as in the context of other substantive provisions throughout the negotiations. Among others, the definitions discussed include: imminent threat of damage, incident, operator, response measures, and, significant adverse effect. Article 2 was finally agreed by Parties on the fourth day of FOCC 3.

Imminent threat of damage and Incident

At FOCC 3, the definition of "imminent threat of damage" and "incident" was deleted after the delegates agreed with Article 7(3) (bis) as follows:

> "Where relevant information, including available scientific information or information available in the BCH indicates that there is a sufficient likelihood that damage will result if timely response measure are not taken the operator shall be required to take appropriate response measures so as to avoid such damage."
>
> Preamble: "*Bearing in mind* the precautionary approach contained in principle 15 of the Rio Declaration on Environment and Development."

[50] Notes FOCC 2.

The word "imminent threat of damage" and its concept were replaced with, and captured by, "sufficient likelihood of damage".

Delegates' Position

African Group

1. Wants to retain the definition of imminent threat of damage[51] and explains the importance of addressing the possibility of damage before the actual damage occurs.
2. Opposes imposing the burden of proof on the existing capacity of the national competent authority which is limited.[52]
3. Supports the inclusion of imminent threat of damage in the Supplementary Protocol and says that it is an integral part of the liability and redress regime.[53]

Brazil

1. Says that the definition of "incident" would have systemic effects on the Supplementary Protocol and calls for its deletion.
2. Proposes a new definition of imminent threat of damage, meaning "an incident that will cause damage in the near future based on scientific evidence of damage caused by the same LMO in other places or that damage will occur if action is not taken".[54]
3. Explains that the national competent authority should prove the damage and proposes that "the national competent authority shall bear the burden of proof concerning the imminent threat of damage to the conservation and sustainable use to the biological diversity" to complete the definition of imminent threat of damage.

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51 ENB FOCC 2; Notes FOCC 2.
52 Notes FOCC 2.
53 Notes FOCC 3.
54 ENB FOCC 1.

4. Suggests determining the occurrence/s of imminent threat of damage based on scientific and other relevant knowledge from the International Office of Epizootics, International Plant Protection Convention, and Codex Alimentarius Commissions. Explains that naming the three institutions will make the definition clearer; otherwise may act as a barrier to trade.[55]
5. Says that the definition of "incident" could be removed once agreement on other issues such as imminent threat of damage is achieved.[56]
6. Clarifies that not against the inclusion of the concept of imminent threat of damage in the Supplementary Protocol but prefers to link it to response measures.
7. Proposes defining "imminent threat of damage" as "an occurrence or occurrences determined according to international laws on the basis of clear … as well as best available scientific and relevant information that is likely to result in damage if not addressed in a timely manner. The best scientific information may include risk evaluation and other information included in the Biosafety Clearing House".[57]

China

Opposes the retention of the definition of imminent threat of damage, stressing that it goes beyond the scope of Article 27 of the Cartagena Protocol.[58]

Colombia

1. Proposes a definition stating that "incident" should mean "any occurrence or series of occurrences originating in a

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55 Notes FOCC 2.
56 ENB FOCC 2.
57 Notes FOCC 3.
58 ENB FOCC 1; ENB FOCC 2; Notes FOCC 2; Notes FOCC 3.

transboundary movement of LMOs having the same origin that causes damage or creates a grave and imminent threat of causing damage."

2. Commenting on Mexico's amendments to Brazil's proposed definition of "imminent threat of damage", expresses concerns about including cases of potential damage under the Supplementary Protocol.
3. Rejects the inclusion of imminent threat in the Supplementary Protocol.[59]
4. Says that the notion of imminent threat of damage can be addressed in a specific scenario, in relation to response measures and with scientific proof.[60]

Cuba

Supports Panama in opposing referencing "imminent threat of damage" in any part of the Supplementary Protocol because it falls outside the mandate of the FOCC under Article 27 of the Cartagena Protocol.[61]

Ecuador

Opposes the inclusion of imminent threat of damage in the whole text of the Supplementary Protocol but expresses willingness to work further if linked only to response measures.[62]

EU

Feels strongly that the concept of imminent threat must be addressed in the Supplementary Protocol. Explains that the Supplementary Protocol must reflect the Cartagena Protocol and the latter looks at

[59] ENB FOCC 1.
[60] Notes FOCC 3.
[61] ENB FOCC 1.
[62] Notes FOCC 3.

risks resulting from LMOs including preventive measures.[63]

India

1. On the definition of "incident", argues that this issue is covered under scope, so there is no need to define it.
2. Puts forward wording linking imminent threat to the probability that significant adverse effects are likely to occur if immediate response measures are not taken.[64]
3. Sees merit in addressing imminent threat of damage and to link it to response measures.
4. Disagrees with inserting the words 'imminent threat of damage' throughout the text where damage appears.[65]

Malaysia

1. Commenting on Brazil's proposed definition for "imminent threat of damage", proposes to use the permissive term "may" instead of "will".
2. Argues that because the Supplementary Protocol is in the field of liability and redress, it is appropriate to include the concept of imminent threat of damage.[66]
3. Suggests dealing with Article 7 (Response Measures) before the Brazilian proposal on the definition of imminent threat of damage.[67]
4. Highlights that the Cartagena Protocol deals with risks which includes the element of 'possibility'.
5. Emphasises that, for example, the BP Gulf of Mexico oil incident where government must be empowered to take measures if the

63 Notes FOCC 3.
64 ENB FOCC 1.
65 Notes FOCC 3.
66 ENB FOCC 1.
67 Notes FOCC 2.

oil spread can affect biodiversity and thanks the Secretariat's paper for making clear why imminent threat of damage is within the scope of the Cartagena Protocol.

6. Prefers extending the inclusion of imminent threat of damage beyond response measures.[68]

Mexico

1. Commenting on Brazil's proposed definition of "imminent threat of damage", proposes referring to potential damage instead.[69]
2. Wants to retain the definition of imminent threat of damage.
3. Supports retaining the definition of incident.[70]
4. Strongly against the inclusion of imminent threat of damage throughout the text in the Supplementary Protocol as it is not coherent with the title 'liability and redress'. Prefers its exclusion altogether but as a compromise, can agree to include it in response measures.[71]

New Zealand

1. Commenting on the definition of "incident", calls for the deletion of "grave".
2. Questions the use of a Supplementary Protocol on liability and redress for damage if it does not cover imminent threat of damage.[72]
3. Likes the inclusion of imminent threat of damage but is flexible as to whether to include it in the Supplementary Protocol. Urges Parties to give clear indication of the specific difficulties

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68 Notes FOCC 3.
69 ENB FOCC 1.
70 ENB FOCC 2.
71 Notes FOCC 3.
72 ENB FOCC 1.

countries have for its inclusion.[73]

Panama

1. On the definition of "incident", brackets the phrase "or creates an imminent threat of causing damage".
2. Expresses general opposition to referencing "imminent threat of damage" in any part of the Supplementary Protocol because it falls outside the mandate of the FOCC under Article 27 of the Cartagena Protocol. Explains that "imminent threat of damage" can be dealt with according to Articles 16 and 17 of the Cartagena Protocol or in domestic law.[74]

Paraguay

1. Proposes to bracket imminent threat of damage.[75]
2. Strongly objects to the Supplementary Protocol dealing with imminent threat of damage.[76]

Philippines

Puts forward wording for definition of "imminent threat of damage" as "a situation evaluated through science-based risk-assessment, and determined to be likely to result in damage if not timely addressed by appropriate response measures".[77]

Peru

1. Wants to retain the definition.[78]
2. Insists that the concept of imminent threat of damage must be

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[73] Notes FOCC 3.
[74] ENB FOCC 1.
[75] Notes FOCC 2.
[76] Notes FOCC 3.
[77] Notes FOCC 1.
[78] Notes FOCC 2.

included in the whole text of the Supplementary Protocol to fulfil the goal of the protocol through preventive approach as well.[79]

Republic of Korea

Strongly supports the inclusion of imminent threat of damage in the Supplementary Protocol because the concept is within the scope of the Cartagena Protocol and without response measure on imminent threat, the Supplementary Protocol will fail to fulfil the objective of the Protocol.[80]

South Africa

1. Puts forward wording linking imminent threat to scientific evidence of damage caused by the same LMOs in similar environments.[81]
2. Raises concerns over the inclusion of imminent threat of damage and is willing to have further discussion.[82]

Switzerland

On the definition of "incident", argues that this issue is covered under scope, so there is no need to define it.[83]

Operator

The definition of "operator" started off with three options. The first option defined operator as "any person any person in operational control or direct or indirect command or control of the activity at the time of the incident causing damage resulting from the

[79] Notes FOCC 3.
[80] Notes FOCC 3.
[81] ENB FOCC 1.
[82] Notes FOCC 3.
[83] ENB FOCC 1.

transboundary movement of LMOs; of the LMO at the time that the condition that gave rise to the damage or imminent threat of damage arose including, where appropriate, the permit holder or the person who placed the LMO on the market; and/or as provided by domestic law". The second option lists down the operator as the developer, producer, notifier, exporter, importer, carrier, or supplier. The last option states that operator is "any person in operational control of the activity at the time of the incident and causing damage resulting from the transboundary movement of LMOs". Later delegates debated whether to introduce an additional qualifier referring to any person to whom intentional commission of the act or reckless negligence can be attributed. The definition was discussed extensively throughout FOCC 1 and 2. At FOCC 3, delegates discussed the definition separately as well as in the context of Article 7 (response measures) before it was finally agreed upon on the fourth day of FOCC 3. This was the last definition Parties reached consensus on in Article 2.

Delegates' Positions

African Group

1. Opposes referring operator to persons in "command or control," and supports operational text that defines the operator as the "developer, producer, notifier, exporter, importer, carrier or supplier of LMOs".[84]
2. Opposes the qualifier "operational" control, noting that the operator may exert indirect forms of control.
3. Supports the option listing a number of possible operators.[85]
4. Insists referring operator to person in "direct or indirect" control of the LMO and agrees to drop "operational" control as it means

[84] ENB FOCC 1.
[85] ENB FOCC 2; Notes FOCC 2.

"direct control". Supports Malaysia's proposal.[86]

Bolivia

Insists referring operator to person in "direct or indirect" control of the LMO. Explains that the addition of "operational" control is limited and will exclude situation such as gene flow, which is intrinsic to the LMOs.[87]

Brazil

1. Supports an operational text defining operator as any person in operational control of the activity at the time of the incident causing damage.[88]
2. Questions whether the integrated definition captures the need for a causal link between activity and damage.
3. Supports the brief descriptive option referring to any person in operational control of the activity at the time of the incident causing damage.[89]
4. Prefers restricting the operator to person in "direct operational" control of the LMO "and causing the damage".[90]

China

Supports the brief descriptive option referring to any person in operational control of the activity at the time of the incident causing damage.[91]

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86 Notes FOCC 3.
87 Notes FOCC 3.
88 ENB FOCC 1.
89 ENB FOCC 2; Notes FOCC 2.
90 Notes FOCC 3.
91 ENB FOCC 2; Notes FOCC 2.

Colombia

1. Supports an operational text defining operator as any person in operational control of the activity at the time of the incident causing damage.[92]
2. Stresses the need to pinpoint the person to whom responsibility will be channelled.[93]
3. Prefers the list of operator to be indicative rather than prescriptive.[94]

Cuba

Supports an operational text defining operator as any person in operational control of the activity at the time of the incident causing damage.[95]

Ecuador

Supports an operational text defining operator as any person in operational control of the activity at the time of the incident causing damage.[96]

EU

1. Proposes to refer operator to person in "command or control".
2. Commenting on the operational text defining "operator" as any person in control of the activity at the time of the incident of the LMO at the time that the condition that gave rise to the damage arose, and as provided by domestic law, asks to remove the reference to provisions of domestic law.

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92 ENB FOCC 1.
93 ENB FOCC 2.
94 Notes FOCC 3.
95 ENB FOCC 1.
96 ENB FOCC 1.

3. Notes that it is important to narrow down who is responsible at which stage.[97]
4. Supports a more generic definition: the brief descriptive option referring to any person in operational control of the activity at the time of the incident causing damage.
5. Disagrees with Paraguay's proposal as it suggests subjective notions in identifying operator.[98]
6. Prefers explicitly listing the operators concerned in the definition without the need to state "direct or indirect control".
7. Says that it is useful to have a preambular paragraph putting in context the "polluter pays" principle.[99]

India

1. Supports an operational text defining operator as any person in operational control of the activity at the time of the incident causing damage.[100]
2. Says the unqualified reference to control would be too broad, and the qualifier "operational" was necessary to channel liability.
3. Supports the brief descriptive option referring to any person in operational control of the activity at the time of the incident causing damage,[101] and proposes consolidating this option with the option listing a number of possible operators, with the explicit exclusion of farmers from the list of operators.[102]
4. Prefers that the operator responsible to be determined by domestic law.[103]

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97 ENB FOCC 1.
98 Notes FOCC 2.
99 Notes FOCC 3.
100 ENB FOCC 1.
101 ENB FOCC 2.
102 Notes FOCC 2.
103 Notes FOCC 3.

Japan

1. Supports an operational text defining operator as any person in operational control of the activity at the time of the incident causing damage.[104]
2. Supports the brief descriptive option referring to any person in operational control of the activity at the time of the incident causing damage.[105]
3. Prefers restricting the operator to person in "direct" control of the LMO.
4. Opposes deleting "operational" as the operator needs to be the one who is capable of taking response measures.
5. Agrees with retaining the list of operators provided they are limited to those in operational control.[106]

Malaysia

1. Calls for flexibility to allow for a range of actors to be covered and to ensure that the burden is not cast on the wrong person, for example, if the damage occurs because of an intrinsic quality of a seed, then the burden should be on the seed producer.[107]
2. Says that the definition of operator for the administrative approach might differ from the one used for civil liability,[108] considering the person in command and control might not be the one responsible in a civil liability claim.[109]
3. Highlights that "operational control" has limited meaning relating to only physical activities to control. Agrees with Switzerland to keep the meaning of operator as broad as possible to encompass

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104 ENB FOCC 1.
105 Notes FOCC 2.
106 Notes FOCC 3.
107 ENB FOCC 1.
108 ENB FOCC 2; Notes FOCC 2.
109 Notes FOCC 2.

all possibilities. As a compromise, proposes referring operator to person in "direct or indirect, or operational, control" of the LMO.[110]

Mexico

1. Stressing the need for flexibility, supports an operational text defining "operator" as any person in control of the activity at the time of the incident of the LMO at the time that the condition that gave rise to the damage arose, and as provided by domestic law.[111]
2. Supports maintaining "any person in operational control, direct or indirect".
3. Agrees later, as a compromise, to remove "direct or indirect".[112]
4. Believes identification of operator is not simple and therefore it should be left for the domestic legislation to decide. Suggests referring operator to person in "direct or indirect" control of the LMO. Prefers deleting "operational" because "operational control" means "direct control". Later suggests retaining the list of operators only, emphasizing that there can be more than one operator responsible.
5. Disagrees with Bolivia that gene flow itself is damaging. Gene flow is just a natural occurrence and does not by itself cause damage to the environment.[113]

New Zealand

1. Proposes to refer operator to person in "command or control".
2. Commenting on the operational text defining "operator" as any person in control of the activity at the time of the incident

[110] Notes FOCC 3.
[111] ENB FOCC 1.
[112] Notes FOCC 2.
[113] Notes FOCC 3.

of the LMO at the time that the condition that gave rise to the damage arose, and as provided by domestic law, asks to remove the reference to provisions of domestic law.[114]

3. In response to India's request to exclude farmers from the list of operators, says that in some cases it could be necessary to attach liability to largescale farmers.[115]
4. Suggests "potential damage" to capture the concept of sufficient likelihood of damage.
5. Prefers a wider definition of "operator" to ensure that prompt action can be taken. Wide discretion should be given to state to identify the operator.
6. Commenting on Paraguay's proposal, expresses concerns over "at the time that the condition gives rise to".[116]

Norway

1. Opposes referring operator to persons in "command or control," and supports operational text that defines the operator as the "developer, producer, notifier, exporter, importer, carrier or supplier of LMOs".[117]
2. Prefers referring operator to person in "direct or indirect" or "indirect or operational" control of the LMO.
3. Commenting on Paraguay's proposal, proposes deleting "at the time that the condition that gives or may give rise".[118]

Paraguay

1. Supports an operational text defining operator as any person in operational control of the activity at the time of the incident

[114] ENB FOCC 1.
[115] ENB FOCC 2.
[116] Notes FOCC 3.
[117] ENB FOCC 1.
[118] Notes FOCC 3.

causing damage.[119]

2. Proposes that "operator" means "any person in direct or indirect command or control of the activity at the time of the incident to whom can be directly attributed the acts or intentional omission, reckless or negligence causing damage resulting from transboundary movement of LMOs".[120]
3. Prefers restricting the operator to person in "direct operational" control of the LMO, emphasizing the physical nexus between the operator and the LMO.
4. Agrees with the list of operators and prefers the list to be indicative by adding "among others".
5. Proposes "operator is the permit holder or any person who transport, transits, handles the LMO at the time that the condition that gives rise to the damage arose and could include, as appropriate and as determined by domestic law, the person who placed the LMO on the market, developer, producer, notifier, exporter, importer, carrier or supplier".[121]

Philippines

1. Prefers describing the operator responsible as "operator at fault".
2. Expresses concern that farmers are included in the definition of operator.[122]

South Africa

1. Welcomes a definition that identifies the operator responsible for the damage.[123]
2. Supports the brief descriptive option referring to any person

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[119] ENB FOCC 1.
[120] Notes FOCC 2.
[121] Notes FOCC 3.
[122] Notes FOCC 3.
[123] ENB FOCC 1.

in operational control of the activity at the time of the incident causing damage.[124]

Switzerland

1. Stressing the need for flexibility, supports an operational text defining "operator" as any person in control of the activity at the time of the incident of the LMO at the time that the condition that gave rise to the damage arose, and as provided by domestic law.[125]
2. Asks to retain the reference to the permit holder and to include a provision that domestic law will determine who the operator is.[126]
3. Insists referring operator to person in "direct or indirect" control of the LMO to cover, for example, permit holder who is not in control anymore after selling the product.
4. Supports the African Group in deleting "operational control".[127]

Response Measures

The definition of "response measures" was debated at every FOCC. Ultimately at FOCC 3, the definition was tidied up and finalized after delegates had agreed on the new Article 7(3)(bis)[128] on appropriate response measures where sufficient likelihood of damage. Operators are now required to take response measures in both cases of damage and likelihood of damage.

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124 ENB FOCC 2; Notes FOCC 2.

125 ENB FOCC 1.

126 ENB FOCC 2; Notes FOCC 2.

127 Notes FOCC 3.

128 "Where relevant information, including available scientific information or information available in the BCH indicates that there is a sufficient likelihood that damage will result if timely response measure are not taken the operator shall be required to take appropriate response measures so as to avoid such damage."

Delegates' Positions

African Group

1. On the first part of the sub-paragraph that calls on parties to restore biodiversity to the condition that existed before the damage occurred, supports the phrase "if technically and economically feasible" to be placed and elaborated in the main provisions of the Supplementary Protocol.[129]
2. Supports the deletion of "to the extent it is technically and economically feasible" because in retaining the words, Parties are vulnerable to anybody, making it technically or economically unfeasible for restoration.[130]
3. Highlights that EU's suggestion gives the choice of whether to avoid, minimize, contain or mitigate the damage".[131]

Bolivia

Expresses concern replacing the loss of biodiversity as one of the response measures because it is technologically impossible.[132]

Brazil

1. Proposes chapeau to the definition, emphasizing reasonable actions not covered under domestic law concerning civil liability.
2. On preventing, minimizing or containing damage, adds that the text should contain the phrase "minimize or contain damage or, as appropriate, imminent threat of damage."
3. Supports Malaysia insisting on retaining the notion that response measures should be legitimized, not only to prevent

[129] ENB FOCC 1.
[130] Notes FOCC 2.
[131] Notes FOCC 3.
[132] Notes FOCC 3.

further damage, but also where there is an imminent threat.

4. On restorative measures, calls for flexibility to allow for national discretion, presenting a number of formulations, which result to "restore biological diversity, if not covered under domestic law concerning civil liability."
5. On the sub-paragraph that calls on parties to restore biodiversity to the condition that existed before the damage occurred, supports to insert the phrase "if technically and economically feasible".[133]
6. Raises concerns about overly burdensome obligations.
7. Proposes that response measures be defined by domestic law.[134]
8. Supports the insertion of "under Article 7" (Response Measures).[135]

Colombia

1. On the part of the sub-paragraph setting out that restoration can take place by, *inter alia*, replacing the loss of components of biodiversity with other components for the same use, requests adding "another type of use".[136]
2. Suggests the threat of imminent damage be linked to an "incident".[137]
3. Supports response measures to mean only reasonable actions to "avoid, minimize, contain or mitigate damage, as appropriate".[138]

Ecuador

Provides revised language that response measures are actions to "minimize or contain damage or, as appropriate, control imminent

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[133] ENB FOCC 1.
[134] ENB FOCC 2.
[135] Notes FOCC 3.
[136] ENB FOCC 1.
[137] Notes FOCC 1.
[138] Notes FOCC 3.

threat of damage or prevent further spread of damage."[139]

EU

1. Proposes chapeau to the definition, stating that response measures are "reasonable actions in the event of damage or imminent threat of damage".
2. On preventing, minimizing or containing damage, said the reference to prevention referred to cases of immediate risk.
3. On restorative measures, argues that the phrase proposed by Brazil is confusing.
4. On the sub-paragraph that calls on parties to restore biodiversity to the condition that existed before the damage occurred, opposes the insertion of the phrase "if technically and economically feasible".
5. On the part of the sub-paragraph setting out that restoration can take place by, *inter alia*, replacing the loss of components of biodiversity with other components for the same use, asks for the suggestion to replace "*inter alia*" with "as appropriate", to be bracketed.[140]
6. Suggests response measures to mean only reasonable actions to "avoid, minimize, contain or mitigate damage, as appropriate".[141]

India

1. On the sub-paragraph that calls on parties to restore biodiversity to the condition that existed before the damage occurred, opposes the insertion of the phrase "if technically and economically feasible".[142]
2. Opposes the addition of the word "prevent" because "avoid"

[139] ENB FOCC 1.
[140] ENB FOCC 1.
[141] Notes FOCC 3.
[142] ENB FOCC 1.

which is broader in meaning includes the meaning of "prevent".[143]

Japan

1. On the sub-paragraph that calls on parties to restore biodiversity to the condition that existed before the damage occurred, calls to insert the phrase "if technically and economically feasible".
2. On the part of the sub-paragraph setting out that restoration can take place by, *inter alia*, replacing the loss of components of biodiversity with other components for the same use, insists on retaining a bracketed reference stating that such restoration measures be taken under "appropriate circumstances." Supports replacing "*inter alia*" with "as appropriate".[144]
3. Supports limiting restoration of biodiversity "to the extent it is technically and economically feasible".[145]

Malaysia

1. On preventing, minimizing or containing damage, said the reference to prevention referred to cases of immediate risk.
2. Insists on retaining the notion that response measures should be legitimized, not only to prevent further damage, but also where there is an imminent threat.
3. On the sub-paragraph that calls on parties to restore biodiversity to the condition that existed before the damage occurred, opposes the insertion of the phrase "if technically and economically feasible".
4. On the part of the sub-paragraph setting out that restoration can take place by, *inter alia*, replacing the loss of components of

[143] Notes FOCC 3.
[144] ENB FOCC 1.
[145] Notes FOCC 2.

biodiversity with other components for the same use, supports replacing "*inter alia*" with "as appropriate".[146]

5. Suggests the threat of imminent damage be linked to an "activity".[147]
6. Supports not to limit restoration of biodiversity "to the extent it is technically and economically feasible". It is implicit that the restoration has to be reasonable.[148]
7. Instead of adding "sufficient likelihood of damage", proposes the insertion of "under Article 7" (Response Measures) to capture the whole meaning of the article.[149]

Mexico

1. On preventing, minimizing or containing damage, suggests an abbreviated text reading: "minimize or control damage and prevent further spread of damage, if necessary."
2. On the first part of the sub-paragraph that calls on parties to restore biodiversity to the condition that existed before the damage occurred, suggests the phrase "if technically and economically feasible" to be placed and elaborated in the main provisions of the Supplementary Protocol.[150]
3. Supports the deletion of "to the extent it is technically and economically feasible" because its inclusion opens the possibility of not doing anything to restore the biological resources and emphasizes that there is always something needs to be done and can be done.[151]

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146 ENB FOCC 1.
147 Notes FOCC 1.
148 Notes FOCC 2.
149 Notes FOCC 3.
150 ENB FOCC 1.
151 Notes FOCC 2.

New Zealand

1. Calls for the inclusion of measures that "mitigate" and "avoid" damage.
2. On restorative measures, argues that the phrase proposed by Brazil is confusing.
3. On the part of the sub-paragraph setting out that restoration can take place by, *inter alia*, replacing the loss of components of biodiversity with other components for the same use, suggests replacing "*inter alia*" with "as appropriate".[152]
4. Raises concerns about overly burdensome obligations.[153]
5. Prefers limiting restoration of biodiversity "to the extent it is technically and economically feasible".[154]
6. Supports the insertion of "under Article 7".
7. Agrees that EU's suggestion gives the choice of whether to avoid, minimize, contain or mitigate the damage".
8. Suggests "prevent, minimize, contain, mitigate or otherwise avoid".[155]

Panama

Opposes Brazil's and South Africa's proposal to add the phrase "minimize or contain damage or, as appropriate, imminent threat of damage."[156]

Peru

Suggests "prevent" in addition to EU's proposal to capture the use of "response measures" in the context of likelihood of damage.[157]

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[152] ENB FOCC 1.
[153] ENB FOCC 2.
[154] Notes FOCC 2.
[155] Notes FOCC 3.
[156] ENB FOCC 1.
[157] Notes FOCC 3.

South Africa

On preventing, minimizing or containing damage, adds that the text should contain the phrase "minimize or contain damage or, as appropriate, imminent threat of damage."[158]

Significant adverse effect

The definition of "significant adverse effect" was agreed to at FOCC 2.

Delegates' Positions

African Group

1. On whether a factor on adverse effects on human health should be freestanding or contingent on damage to conservation and sustainable use of biodiversity, prefers to refer only to adverse effects on human health.[159]
2. Agrees qualifying the list of factors determining significant adverse effect as indicative list.
3. Emphasizes the importance of retaining a factor on adverse effects to local and regional biodiversity. Explains that this is important for those countries that do not have a national regime in place.[160]

Brazil

1. On a list of factors for determining the significance of adverse effects, suggests stating that the list is exhaustive.
2. Opposes a factor considering any locally or regionally important components of biological diversity identified in accordance with CBD Article 7(a) (identification and monitoring of components

[158] ENB FOCC 1.
[159] ENB FOCC 1.
[160] Notes FOCC 2.

of biodiversity important for its conservation), arguing that there is an overall obligation to protect biodiversity and no specific aspects should be singled out.

3. On whether a factor on adverse effects on human health should be freestanding or contingent on damage to conservation and sustainable use of biodiversity, prefers to refer only to adverse effects on human health.[161]

China

Proposes keeping brackets around a factor on adverse effects to local and regional biodiversity, because "local and regional" is not clear.[162]

Colombia

1. On a factor addressing reduction of the ability of components of biodiversity to provide goods and services, proposes to refer to goods and "ecosystem services" instead.
2. Opposes a factor considering any locally or regionally important components of biological diversity identified in accordance with CBD Article 7(a) (identification and monitoring of components of biodiversity important for its conservation), arguing that there is an overall obligation to protect biodiversity and no specific aspects should be singled out.
3. On whether a factor on adverse effects on human health should be freestanding or contingent on damage to conservation and sustainable use of biodiversity, supports wording for a factor referencing the extent to which adverse effects on the conservation and sustainable use of biodiversity have adverse effects on human health.[163]

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[161] ENB FOCC 1.
[162] Notes FOCC 2.
[163] ENB FOCC 1.

EU

1. Clarifies that a factor considering any locally or regionally important components of biological diversity identified in accordance with CBD Article 7(a) (identification and monitoring of components of biodiversity important for its conservation), is not a limiting provision, but meant to help national authorities determine significant adverse effects, and suggests removing reference to CBD Article 7(a) for simplification.
2. On whether a factor on adverse effects on human health should be freestanding or contingent on damage to conservation and sustainable use of biodiversity, prefers to refer only to adverse effects on human health.[164]
3. Proposes replacing the extent of adverse effects on locally or regionally important components of biological diversity as one of the basis to determine "significant" adverse effect by language allowing Parties in order to ensure conservation and sustainable use of biological diversity, to establish in their domestic legislation which components of biological diversity are covered by the obligation to undertake domestic response measures.[165]

India

On whether a factor on adverse effects on human health should be freestanding or contingent on damage to conservation and sustainable use of biodiversity, prefers to refer only to adverse effects on human health.[166]

Japan

1. On a factor addressing reduction of the ability of components of

[164] ENB FOCC 1.
[165] Notes FOCC 2.
[166] ENB FOCC 1.

biodiversity to provide goods and services, expresses concerns about the reference to goods and services. Later agrees to its reference.

2. On whether a factor on adverse effects on human health should be freestanding or contingent on damage to conservation and sustainable use of biodiversity, supports wording for a factor referencing the extent to which adverse effects on the conservation and sustainable use of biodiversity have adverse effects on human health.[167]

Malaysia

On whether a factor on adverse effects on human health should be freestanding or contingent on damage to conservation and sustainable use of biodiversity, prefers to refer only to adverse effects on human health.[168]

Mexico

1. Proposes qualifying as indicative, rather than exhaustive, the list of factors determining significant adverse effect.[169]
2. Proposes retaining a factor on adverse effects to local and regional biodiversity, with no detailed reference on how to implement it.[170]

New Zealand

1. Proposes reference to the extent of effects on locally or regionally important biodiversity.
2. On whether a factor on adverse effects on human health should be freestanding or contingent on damage to conservation

[167] ENB FOCC 1.
[168] ENB FOCC 1.
[169] ENB FOCC 1; Notes FOCC 2.
[170] Notes FOCC 2.

and sustainable use of biodiversity, supports wording for a factor referencing the extent to which adverse effects on the conservation and sustainable use of biodiversity have adverse effects on human health.[171]

Norway

Agrees keeping brackets around a factor on adverse effects to local and regional biodiversity.[172]

Paraguay

On whether a factor on adverse effects on human health should be freestanding or contingent on damage to conservation and sustainable use of biodiversity, supports wording for a factor referencing the extent to which adverse effects on the conservation and sustainable use of biodiversity have adverse effects on human health.[173]

Philippines

On whether a factor on adverse effects on human health should be freestanding or contingent on damage to conservation and sustainable use of biodiversity, supports wording for a factor referencing the extent to which adverse effects on the conservation and sustainable use of biodiversity have adverse effects on human health.[174]

South Africa

On a factor addressing reduction of the ability of components of biodiversity to provide goods and services, opposes to refer to goods and "ecosystem services".[175]

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171 ENB FOCC 1.
172 Notes FOCC 2.
173 ENB FOCC 1.
174 ENB FOCC 1.
175 ENB FOCC 1.

Switzerland

Clarifies that a factor considering any locally or regionally important components of biological diversity identified in accordance with CBD Article 7(a) (identification and monitoring of components of biodiversity important for its conservation), is not a limiting provision, but meant to help national authorities determine significant adverse effects, and suggests removing reference to CBD Article 7(a) for simplification.[176]

Damage

The definition of damage was agreed to at FOCC 2.

Delegates' Positions

African Group

1. Prefers referencing damage to human health.
2. On a paragraph listing factors for determining "significant" adverse or negative effects on the conservation and sustainable use of biodiversity, prefers referencing the adverse or negative effects on human health.[177]

EU

Proposes text stating that Parties may use criteria set out in their domestic law to establish liability for any damage that falls within the scope of the Supplementary Protocol.[178]

India

1. On a paragraph listing factors for determining "significant"

[176] ENB FOCC 1.
[177] ENB FOCC 1.
[178] ENB FOCC 2.

adverse or negative effects on the conservation and sustainable use of biodiversity, prefers making effects on human health contingent on adverse or negative effects to the conservation and sustainable use of biodiversity.
2. Suggests changing the text to state "shall be without prejudice to" domestic law, which was accepted.[179]

Japan

1. Highlights that the proposed definition applies only to the legally binding administrative approach, and that a different definition would have to be developed for a legally binding provision on civil liability.
2. Adds a new paragraph stating that the definition of damage "shall not affect the domestic law of Parties in the field of civil liability."[180]

Malaysia

1. Prefers referencing damage to human health.[181]
2. Commenting on EU's proposal, notes that this is an operative provision.[182]

Mexico

On a paragraph listing factors for determining "significant" adverse or negative effects on the conservation and sustainable use of biodiversity, prefers making effects on human health contingent on adverse or negative effects to the conservation and sustainable use of biodiversity.[183]

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[179] ENB FOCC 1.
[180] ENB FOCC 1.
[181] ENB FOCC 1.
[182] ENB FOCC 2.
[183] ENB FOCC 1.

New Zealand

Suggests referencing the specific articles of the Supplementary Protocol to clarify that the definition of damage relates to the administrative approach.[184]

Paraguay

On a paragraph listing factors for determining "significant" adverse or negative effects on the conservation and sustainable use of biodiversity, prefers making effects on human health contingent on adverse or negative effects to the conservation and sustainable use of biodiversity.[185]

FINAL TEXT: 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;

[184] ENB FOCC 1.
[185] ENB FOCC 1.

(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

The scope establishes the general coverage of the instrument. It includes the reference to the activities giving rise to the harm (the

'functional scope'); and the subject matter that causes the damage.[186] The functional scope could be broad and cover all possible activities that find their origin in the transboundary movement of LMOs, such as transit, handling and use; as well as activities which are intentional, unintentional, legal, illegal and activities in contravention of the CPB. Alternatively the scope could be narrowly limited to damage that is caused while the LMOs are being transported across boundaries. As to subject matter, the CPB applies to all LMOs. It is important to note that the definition of LMO in the CPB is confined to those that are the result of modern biotechnology. This is a much narrower category of organisms than that referred to in Articles 8(g) and 19 of the CBD, which uses the term "living modified organisms resulting from biotechnology".[187] At FOCC 3, delegates agreed to the narrow approach, that the Supplementary Protocol deals with damage resulting from the LMO itself and not from the activities dealing with the LMO. As a result, "transport, transmit, handling and use" were deleted from Article 3; "resulting from activities as referred to in Article 3" were deleted from Article 4 and in Article 6; and "activity" was replaced with "an LMO".

As to the issue of subject matter, the inclusion of "products thereof" in the scope was one of the final two outstanding issues at FOCC 4. The Co-Chairs started the negotiation by asking whether "including products contain LMOs" was acceptable. The negotiation was led by two groups. The first group, consisting of African Group, Bolivia, Malaysia, Peru, and Republic of Korea, insisted on the inclusion of the reference to "products thereof". The second group, consisting of Brazil, Paraguay, Mexico, Philippines and South Africa opposed its inclusion.

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[186] The geographical scope will be covered under the next Article.

[187] This paragraph has been adapted from Nijar, G.S., et al (2008), *Liability and Redress under the Cartagena Protocol on Biosafety*, Kuala Lumpur: CEBLAW.

After several sessions of negotiations, Parties failed to find a compromise solution. The Co-Chairs then took an active role in trying to resolve the divergence. The Co-Chairs consulted the groups separately. They clarified that if Parties so wished, the Supplementary Protocol could be expanded to modified organism beyond LMO. It was important to be precise in establishing the scope to ensure that domestic law which provides for such extension was within the scope of the Cartagena Protocol. Two scenarios were put forward by the Co-Chairs:

i) Country A exports soy flour that originates from an LMO;
ii) Country A exports soya bean to country B. Country B processes and kills the soya bean. It then enters the food chain and causes damage to biodiversity.

It was agreed that the Cartagena Protocol does not cover the first scenario. There were different interpretations as to whether the Cartagena Protocol would cover the second scenario. The ambiguity stemmed from the phrase "damage resulting from LMOs" in Article 27 of the Cartagena Protocol. It allows for both interpretations. First, that the Protocol only provides for damage resulting *directly* from LMOs and not products. Whereas the second interpretation allows damage resulting from products to be covered so long as the causal link is established. Thus, the second scenario would be covered if the causal link can be proved, that finds its origin in LMOs. There was then no need for reference to "products thereof" in the Supplementary Protocol. This would be superfluous.

As both these two readings were possible, the Co-Chairs proposed that Parties should "agree to disagree". This agreement could be reflected in the FOCC 4 report, and the formulation agreed to by the two groups. The Co-Chairs proposed the following language:

> "Parties may apply the Supplementary Protocol to damage, as defined in the Supplementary Protocol, caused by non-living material that finds its origin in a transboundary movement of a LMO."

However the language was rejected outright by the EU, when presented to the FOCC. Tense moments followed as the meeting adjourned for informal consultations. The EU then proposed a text[188]. Delegates then worked on both the EU and the Co-Chairs' texts. Finally a compromise text[189] was agreed upon in the early morning of the first day of COP-MOP 5. This agreement is important as it forms the context for the purpose of the interpretation of the Supplementary Protocol.[190]

Delegates' Positions

African Group

1. Prefers deleting "risks to", "damage to" and "adverse effects on" human health to keep the scope simple and straight forward.[191]

Imminent threat of damage

2. Supports the inclusion of "imminent threat of damage" in the scope.[192]
3. Supports adding "sufficient likelihood of damage" to the scope of the Supplementary Protocol. Commenting on Paraguay's proposal, says that the provision must be placed in the scope

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188 "It emerged during the negotiations of the Supplementary Protocol that Parties to the Protocol appear to hold different understandings of the application of the Protocol to processed material that is of LMO origin and therefore of the application of the Supplementary Protocol to damage caused by such material."

189 This appears at the end of this section, in the Box "FINAL TEXT: Article 3 SCOPE".

190 Vienna Convention on the Law of Treaties, Article 31(2)(a), "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty".

191 Notes FOCC 2.

192 Notes FOCC 2.

and not only Article 18.[193]

Products thereof

4. On functional scope, prefers to refer to LMOs and products of LMOs, highlighting that recent scientific evidence of horizontal gene transfer among higher organisms was a reason for extending the scope of the Supplementary Protocol to products of LMOs.[194]
5. Opposes the deletion of "products thereof" from the scope.[195]
6. Prefers (minus South Africa) the inclusion of products thereof. Supports Bolivia in using the words of the Cartagena Protocol. Rationale: risk assessment (as provided in Annex 3 of the Cartagena Protocol) includes processed material and therefore, processed material must also be dealt with when dealing with damage.
7. Says that the purpose of carrying out risk assessment, as clarified by Malaysia, is set out in Annex 3 of the CPB. Item 4 makes it clear that lack of scientific knowledge/consensus should not be excuse for not carrying out the risk assessment. We should not redefine the provisions of the CPB which are relevant to the Supplementary Protocol. It is intended to give an option for redress and compensation when there is damage including risks associated with products of LMOs: see item 5 of Annex 3.
8. Commenting on Colombia's proposal, says that it is very limited.
9. Commenting on Philippines's proposal, says that "reproducing" is a new word. Urges to stick to "replicating" as mentioned in the Protocol.
10. Supports Malaysia's proposed text in the report.
11. Commenting on EU's proposal, says that Parties hold different

[193] Notes FOCC 3.
[194] ENB FOCC 1.
[195] Notes FOCC 2.

understandings of the application "of Article 27 of" the Protocol to processed material that are of LMO origin. Disagrees with Switzerland's proposal on this issue.[196]

Bolivia

Imminent threat of damage

1. Supports adding "sufficient likelihood of damage" to the scope to ensure its consistency with Article 7 of the Supplementary Protocol and emphasizes that the scope gives the overall framework for the Supplementary Protocol.
2. Proposes working on New Zealand's and Malaysia's insertion, otherwise, proposes addressing them in the definition of "damage".[197]

Products thereof

3. Insists that it is important to include the notion of products thereof. Suggests as a compromise, to replace "products thereof" with the "definition" of products thereof from Annex 3 of Cartagena Protocol which reads "processed materials that are of LMO origin, containing detectable novel combinations of replicable genetic material obtained through the use of modern biotechnology".
4. Agrees with Ukraine that the replication of organisms is not only in the environment. Stresses that including products thereof, does not widen the scope because products thereof are provided in the risk assessment section of the CPB.
5. Says that Mexico's amendment narrows the scope. Rationale: there are sections of DNA that are products thereof but cannot replicate itself in certain context. The amendment would exclude

[196] Notes FOCC 4.
[197] Notes FOCC 3.

certain condition, for example, LMOs transferred to a country for the use in the lab. There is a potential of escape that would cause damage.

6. Points out that with the advancement of technology, DNA can be products thereof. A fraction of DNA can be taken from a LMO, shipped (transboundary) and later inserted in another product. The Supplementary Protocol needs to cover its possible adverse effect to the environment. DNA can also be a product thereof from a LMO. It is hard to limit only processed material that includes, for example, only seeds. Because of advancement of technology, it is important to have the current, updated and broad understanding of what the Protocol means.
7. As a compromise, prefers Mexico's amendment to Philippines's amendment.
8. Supports Malaysia's proposed text in the report.[198]

Brazil

Products thereof

1. On the functional scope, prefers to refer only to LMOs and not products of LMOs.[199]
2. Proposes the deletion of "products thereof".[200]
3. Supports Japan, Philippines and Mexico. Urges for compromise to conclude the negotiations.
4. Prefers India's proposal "as defined in the Protocol", but can accept Malaysia's proposal "LMO within the context of the Protocol". Urges Parties to compromise by accepting Colombia's proposal "as referred to in the Protocol".[201]

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198 Notes FOCC 4.
199 ENB FOCC 1.
200 Notes FOCC 2.
201 Notes FOCC 4.

Imminent threat of damage

5. Opposes the inclusion of the concept of imminent threat beyond response measures.[202]
6. Accepts Mexico's proposal "capable of replicating in the environment".[203]

Activities

7. Supports New Zealand's proposal.[204]

China

Products thereof

1. On the functional scope, prefers to refer only to LMOs and not products of LMOs.[205]
2. Opposes the inclusion of products thereof, emphasizing that the scope of the Supplementary Protocol must be subjected to the scope of the Cartagena Protocol.[206]
3. Commenting on Mexico's proposal accepted by Malaysia on behalf of others, supports India's comment.
4. Highlights that "product thereof" if included in the Supplementary Protocol, must be defined clearly and must refer to LMOs.
5. Supports India's proposal "as defined in the Protocol".[207]

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[202] Notes FOCC 3.
[203] Notes FOCC 4.
[204] Notes FOCC 3.
[205] ENB FOCC 1.
[206] Notes FOCC 3.
[207] Notes FOCC 4.

Colombia

Imminent threat of damage

1. Emphasizes that the inclusion of "sufficient likelihood of damage" in the scope would raise a lot of issues. Prefers to address this concept through the operational text and not in the abstract. It is a specific scenario which needs only to be dealt with in response measures.

Activities

2. Prefers replacing "find their origin" with "originate".[208]

Products thereof

3. On the functional scope, prefers to refer only to LMOs and not products of LMOs.[209]
4. Opposes Co-Chairs' proposal "including products containing LMOs", as it is a tautology.[210]
5. Proposes "products" to mean "processed materials that are of LMO origin, containing detectable novel combinations of replicable genetic material obtained through the use of modern biotechnology" and the insertion of Japan's proposal "LMOs, including LMOs contained in products".
6. Supports the inclusion of the understanding that 'replicating' means 'naturally reproducing LMOs' in the report.
7. Commenting on Malaysia's proposal "LMO within the context of the Protocol" and India's proposal "as defined in the Protocol", suggests as a compromise "as referred to in the Protocol". [211]

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[208] Notes FOCC 3.
[209] ENB FOCC 1.
[210] Notes FOCC 3.
[211] Notes FOCC 4.

Costa Rica

Opposes adding "sufficient likelihood of damage" in the scope of the Supplementary Protocol.[212]

Cuba

1. On the functional scope, prefers to refer only to LMOs and not products of LMOs.[213]
2. Proposes the deletion of "products thereof".[214]
3. Opposes adding "sufficient likelihood of damage" in the scope of the Supplementary Protocol.[215]
4. Supports the inclusion of the understanding that "replicating" means "naturally reproducing LMOs" in the report.[216]

Ecuador

1. Opposes adding "sufficient likelihood of damage" throughout the text of the Supplementary Protocol.[217]

Products thereof

2. Supports Brazil in the deletion of "products thereof" and explains that Article 20 of the Protocol is dealing with a different concept.[218]
3. Likes Japanese proposal but can agree with Mexico's amendment.
4. Supports the inclusion of the understanding that "replicating" means "naturally reproducing LMOs" in the report.[219]

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212 Notes FOCC 3.
213 ENB FOCC 1.
214 Notes FOCC 2.
215 Notes FOCC 3.
216 Notes FOCC 4.
217 Notes FOCC 3.
218 Notes FOCC 2.
219 Notes FOCC 4.

EU

Imminent threat of damage

1. Agrees with the legitimacy of adding "sufficient likelihood of damage" to the scope of the Supplementary Protocol but prefers to confine it to only "damage".
2. As a compromise, proposes "with respect to response measures, this Supplementary Protocol applies to damage and situations where there is sufficient likelihood that damage will result if timely response measures are not taken".[220]

Activities

3. Underscores that the Supplementary Protocol deals with liability for imported risk, which refers to LMOs from transboundary movement and it is an issue of causation rather than the handling of LMOs.
4. Opposes that the Supplementary Protocol applies to damage resulting from "the use of" LMOs because it excludes accidental release.
5. Opposes Mexican's proposal as it does not include liability for imported risk.
6. Proposes "this Supplementary Protocol applies to damage resulting from transboundary movements of LMOs [and products thereof] within the scope of the Protocol". Later supports Malaysian's second proposal.[221]

Products thereof

7. On the functional scope, prefers to refer only to LMOs and not products of LMOs.[222]

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[220] Notes FOCC 3.

[221] Notes FOCC 3. The text in brackets subject to further discussion.

[222] ENB FOCC 1.

8. Supports Chair's proposal, "products containing or consisting of LMOs". Asks for time to discuss internally Bolivia's proposal.
9. Underscores that the Cartagena Protocol refers to processed material which contains "replicable" genetic material. In other words, it means the processed material must be "living".
10. Questioning Bolivia's example, says that the focus of the liability and redress would then be broadened to include any transboundary movement of non-viable gene sequences. Secondly, the new LMOs created in a lab will be subject to the procedure under the Supplementary Protocol if moved to another country. If damage resulted from it, Article 4 causation will apply - the link is damage and the LMOs.
11. Finds Bolivia's proposal of no added value. Prefers the Chair's text or Japan's text.
12. Agrees with the definition with either the insertion of "replicating in the environment" or "naturally reproducing" as both carry the same meaning.
13. Can support "as referred to in the Protocol" though it is not the preferred outcome.
14. Disagrees with the text proposed by the Co-Chairs and expresses concerns of the status of the text in the FOCC 4 report. Rationale: the Supplementary Protocol should not be used to interpret the Protocol. The text does not capture the ambiguity discussed in the process. Proposes instead "it emerged during the negotiations of the Supplementary Protocol that Parties to the Protocol appear to hold different understandings of the application of the Protocol to processed material that is of LMO origin and therefore of the application of the Supplementary Protocol to damage caused by such material."[223]

[223] Notes FOCC 4.

Guatemala

Supports the inclusion of the understanding that "replicating" means "naturally reproducing LMOs" in the report.[224]

India

1. Supports referencing "risks to" human health.[225]

Imminent threat of damage

2. Highlights that the Cartagena Protocol and the Supplementary Protocol deal mainly with damage and that the concept of imminent threat only relevant to response measures. Disagrees with Peru's proposal.[226]

Products thereof

3. On the functional scope, prefers to refer only to LMOs and not products of LMOs.[227]
4. Opposes the inclusion of "products thereof".[228]
5. Commenting on Mexico's proposal accepted by Malaysia on behalf of others, requests for time to consider. Feels that too much language have been added on and that the job of risk assessment is not to deal with liability issues. Prefers Philippines's proposal "naturally reproducing".
6. Proposes to report in the body of the report of the meeting: "China, India, Japan Paraguay and Philippines are of the understanding that 'replicating' means 'naturally reproducing LMOs'" with a footnote stating "Paraguay reserves its right to reopen the debate (regarding the definition) in the plenary of

[224] Notes FOCC 4.
[225] Notes FOCC 2.
[226] Notes FOCC 3.
[227] ENB FOCC 1.
[228] Notes FOCC 3.

the COP-MOP".

7. Commenting on Malaysia's proposal "LMO within the context of the Protocol", proposes linguistic changes by replacing it with "as defined in the Protocol".[229]

Japan

1. Prefers referring to "risks to" human health, as opposed to "damage to" or "adverse effects on".[230]

Products thereof

2. On the functional scope, prefers to refer only to LMOs and not products of LMOs.[231]
3. Opposes the inclusion of "products thereof" in the scope.[232]
4. Commenting on Co-Chairs' proposal "including products containing LMOs", says that the clause indicates that the substance other than the LMOs can be within the scope of the Supplementary Protocol.[233]
5. Opposes "products thereof" or "products containing LMOs". Rationale: the scope of the Supplementary Protocol should be the same as the mother treaty – the Cartagena Protocol. The enlargement of scope might require the operator to find out the root of the product. It will be very costly. Japan's NCA is not capable to do that.
6. Expresses concerns that the concept of "product containing LMOs" includes both LMO part and non-LMO part. Proposes instead "LMOs, including LMOs contained in products". Rationale: the former proposal would hold operator responsible

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229 Notes FOCC 4.
230 Notes FOCC 2.
231 ENB FOCC 1.
232 Notes FOCC 2.
233 Notes FOCC 3.

for the damage caused by the portion of products which is not LMO. The proposal is to capture situations like bacteria in yogurt.

7. Explains that Mexico's addition "replicable in the environment" means "living" and therefore redundant.
8. In the spirit of compromise, accepts Mexico's proposal "capable of replicating in the environment", with the understanding that it means LMOs.
9. Supports the inclusion of the understanding that "replicating" means "naturally reproducing LMOs" in the report.
10. Supports India's proposal "as defined in the Protocol".
11. Commenting on EU's proposal, proposes that Parties hold different understandings of the application of the Protocol to processed material "of LMO that finds its origin of transboundary movement".[234]

Malaysia

1. Explains that "damage" is covered under "risks to" human health and in order to be consistent with the Cartagena Protocol, proposes using "risks to".[235]

Products thereof

2. On functional scope, prefers to refer to LMOs and products of LMOs.[236]
3. Recognises the overwhelming objections to include "products thereof" and proposes, as a compromise, adopting the language of Article 20(3)(c), Annex 1 and Annex 3, "containing detectable novel combinations of replicable genetic material obtained

[234] Notes FOCC 4.
[235] Notes FOCC 2.
[236] ENB FOCC 1.

through the use of modern biotechnology".[237]

4. Highlights that the description of products thereof appears not only in Annex 3 but in Article 20(3)(c) too. Supports the inclusion of products thereof in the Supplementary Protocol. Agrees with Mexico's explanation. That is captured in Article 20(3)(c). Amendment is to capture other concern related to risks as set out in Annex 3.
5. Emphasizes that when there is no compromise, the safest way is to go back to the text of the Cartagena Protocol as proposed by Bolivia. Mexico's addition may be limiting. Where a product contains foreign DNA and replicates, later causes implication and poses risk to human health, this should be covered by the Supplementary Protocol.
6. Highlights that Article 20 and the Annex 3 is linked to liability. Annex 3 deals with the identification of adverse effects of LMOs under risk assessment and Article 20(3) is about addressing this concern on conservation and sustainable use of biodiversity, and risks to human health. If that risk materialises, then redress must be provided.
7. Addressing Japan's concern, if there is no liability for damage from arising from a product of LMO origin, then it would be covered by product liability laws. Article 4 (Causation) of the Supplementary Protocol would answer Japan's concern: must establish a causal link between the damage and the LMO.
8. We have to consider products thereof in the context of liability and redress. If there is damage posed by LMOs and products thereof, we must deal with it. The 3 articles in the CPB – we have been highlighting since the beginning of this debate. Also, the Introduction to the official text of the CPB refers to biosafety as a concept related to the possible adverse effect of the product of

[237] Notes FOCC 2.

modern biotechnology. We are not dealing with the scope itself only, but also the risks to the environment and human health. Articles 7 (Application of the Advance Informed Agreement Procedure (AIA)) and 8 (Notification) deal with possible damage to the environment and the potential risks. Annex 3 also deals with risks associated to LMOs and products thereof. We are here dealing with damage that will arise from the risks. Article 20 also deals with providing information of risk assessments including for products thereof. So the CPB contemplates possible damage from products thereof.

9. Bolivia's argument and the different views expressed, suggest that the safest shelter is to use agreed language. If you include Mexican's proposal, you are extending the clause and the scope.
10. Our national competent authority is clear as to what it is going to approve, namely, LMOs and products of LMOs. If the products thereof are approved by our authority under AIA, should not there be liability when there's damage caused by it? Therefore submits that products thereof should be included in the Supplementary Protocol.
11. Commenting on Colombia's proposal, says that the removal of "thereof" from "product" would remove the link to the LMOs.
12. On behalf of Parties insisting on the inclusion of products thereof, accepts Mexico's proposal "capable of replicating in the environment".
13. Disagrees with recording the understanding of what "replicating" means in the report as it is unprecedented to have the understanding of every compromise text declared and recorded. Urges Parties to accept the compromise text in good faith as it is.
14. Proposes language to be inserted in the report to reflect the state of play, stating that "the text with regard to 'products thereof' arrived at after protracted negotiations reflect 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 from LMOs and products thereof".

15. On behalf of the group, agrees removing reference to "products thereof" and proposes replacing it with "LMO within the context of the Protocol".
16. Commenting on EU's proposal, proposes the deletion of "appear to". Prefers the Chairs' text and can agree to EU's proposal as chapeau with the addition of "one such understanding is that...".[238]

Imminent threat of damage

17. As a compromise, proposes "including to the avoidance of such damage" to replace "sufficient likelihood of damage". Recognises the concerns of certain Parties in making this explicit in the scope for clarity. Later proposes to include in the definition of "damage", "or where the context so admits, where there is sufficient likelihood of such damage resulting".
18. Commenting on New Zealand's proposal, suggests replacing "Desiring" with "Recognising the need" to provide for appropriate response measures where there is damage or sufficient likelihood of damage in the context of this Supplementary Protocol".[239]

Activities

19. Proposes that the Supplementary Protocol applies to damage resulting from "the use of" LMOs. Later proposes that it "applies to damage resulting from LMOs which find their origin in a transboundary movement".[240]

Mexico

1. Prefers referencing "damage to" human health because the word "risks" is not clear and might require new definition.

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238 Notes FOCC 4.
239 Notes FOCC 3.
240 Notes FOCC 3.

2. Can agree to the deletion of "damage to" but prefers maintaining "adverse effects on".[241]

Products thereof

3. On the functional scope, prefers to refer only to LMOs and not products of LMOs.[242]
4. Prefers the deletion of "products thereof" because it is outside the scope of the Cartagena Protocol.[243]
5. Says that the definition of products thereof as in Annex 3 of the Cartagena Protocol is cumbersome. Agrees with its use by adding "and which can replicate in the environment" to make it clear that the modified organisms are living.
6. Explains that the "replicable genetic material" provided in Annex 3 of the Cartagena Protocol refers to LMOs. Says that in a lab, scientists replicate almost any material everyday. However genetic material cannot replicate in the environment without the organism.
7. On how to understand Annex 3, gives an example: cotton fibre - may still contain seeds, cuttings, material not by itself organisms but which will replicate. Should make it clear then in the context of risk. When we import for use at laboratory - not subject to risk assessment because it is not an organism.
8. Emphasizes that the risk assessment under the Cartagena Protocol is performed *only* for LMOs. They are organisms which can replicate on their own.
9. Explains that the Protocol does not intend to regulate degraded DNA or partly degraded DNA. If these imported material for food and feed causes illness to animal, it is a problem of the quality of the product and will be handled by Mexico's Ministry

241 Notes FOCC 2.
242 ENB FOCC 1.
243 Notes FOCC 2.

of Agriculture.

10. Supports the inclusion of the understanding that 'replicating' means 'naturally reproducing LMOs' in the report.[244]

Imminent threat of damage

11. Opposes adding "sufficient likelihood of damage" to the scope of the Supplementary Protocol because it is just one specific situation addressed in the Supplementary Protocol and that the scope becomes not understandable with the addition.[245]

Activities

12. Highlights that Article 27 of the Protocol deals with damage caused by the LMOs. The activities such as transport or transit are just means of transferring the LMOs transboundary. Proposes that the Supplementary Protocol applies to damage resulting from "LMOs [and products thereof] which find their origin in a transboundary movement".[246]

Namibia

Emphasizes that "damage" does not cover "likelihood of damage" and insists on adding "sufficient likelihood of damage" in the scope of the Supplementary Protocol so that the scope is complete, comprehensive and workable for Namibia.[247]

New Zealand

Imminent threat of damage

1. As a compromise, proposes "and to the avoidance of such damage"

[244] Notes FOCC 4.
[245] Notes FOCC 3.
[246] Notes FOCC 3.
[247] Notes FOCC 3.

to replace "sufficient likelihood of damage". Later proposes as preambular paragraph "Desiring to provide for appropriate response measures where there is damage or sufficient likelihood of damage in the context of this Supplementary Protocol".[248]

Activities

2. Proposes that the Supplementary Protocol applies to damage resulting from transport, transit, handling and use of living modified organisms [and products thereof] "within the context of the Protocol".[249]

Products thereof

3. Commenting on Co-Chairs' proposal "including products containing LMOs", says that this issue is important but it is not something to be dealt with in the Supplementary Protocol as the Supplementary Protocol does not deal with food safety.[250]
4. Supports the inclusion of the understanding that 'replicating' means 'naturally reproducing LMOs' in the report.
5. Suggests clarifying that there are four countries that cannot accept "replicating" and want "naturally reproducing"; two countries (New Zealand and Japan) can accept "replicating" but understand it as LMOs; and others wish to reflect the state of negotiations.
6. Agrees with both proposal "LMO within the context of the Protocol" and "as defined in the Protocol". Urges Parties to accept Colombia's proposal "as referred to in the Protocol" as a compromise.[251]

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[248] Notes FOCC 3.
[249] Notes FOCC 3.
[250] Notes FOCC 3.
[251] Notes FOCC 4.

Norway

Products thereof

1. On the functional scope, prefers to refer only to LMOs and not products of LMOs.[252]
2. Accepts Mexico's proposal "capable of replicating in the environment".
3. Supports the inclusion of the understanding that 'replicating' means 'naturally reproducing LMOs' in the report.
4. Agrees with all three proposals, "as defined in the Protocol", "LMO within the context of the Protocol" and "as referred to in the Protocol".[253]

Panama

On the functional scope, prefers to refer only to LMOs and not products of LMOs.[254]

Paraguay

Imminent threat of damage

1. Opposes the inclusion of "sufficient likelihood of damage" in the scope.
2. Suggests adding instead in Article 18 (relationship clause), "Supplementary measures adopted in Article 7(3)(bis)[255] (on appropriate response measures where sufficient likelihood of

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[252] ENB FOCC 1.

[253] Notes FOCC 4.

[254] ENB FOCC 1.

[255] "Where relevant information, including available scientific information or information available in the BCH indicates that there is a sufficient likelihood that damage will result if timely response measure are not taken the operator shall be required to take appropriate response measures so as to avoid such damage."

damage) must be interpreted in the context of this paragraph", without adding any text to Article 3 (Scope). Explains that the inclusion in the scope would be interpreted by countries to apply the Supplementary Protocol in all situations and not just specific situations provided under Article 7(3)(bis).

3. Expresses its clear mandate not to amend the definition of damage.[256]

Products thereof

4. On the functional scope, prefers to refer only to LMOs and not products of LMOs.[257]
5. Opposes Co-Chairs' proposal "including products containing LMOs", as it broaden the scope of the Supplementary Protocol and it is "suspicious".[258]
6. Can accommodate Mexico's proposal. Expresses concerns about Bolivia's explanation because the Cartagena Protocol is about transboundary movement and not dealing with LMOs in the lab.
7. Opposes having a new definition as proposed by Bolivia and finds Japan's proposal acceptable.
8. Commenting on Mexico's proposal accepted by Malaysia on behalf of others, requests for time to consider. Later prefers strongly Philippines's text "naturally reproducing". Refuses to accept the language "capable of replicating in the environment" even if the understanding that "replicating" refers to LMOs is recorded in the report.
9. Supports India's proposal "as defined in the Protocol" and later agrees with Colombia's proposal "as referred to in the Protocol"

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256 Notes FOCC 3.
257 ENB FOCC 1.
258 Notes FOCC 3.

with reference to Article 3 of the Protocol.[259]

Peru

1. Prefers referencing "risks to" human health as stated in the Cartagena Protocol.[260]

Imminent threat of damage

2. Proposes adding "imminent threat of damage" to the scope of the Supplementary Protocol.[261]
3. Proposes adding "sufficient likelihood of damage" to the scope of the Supplementary Protocol for clarity.[262]

Activities

4. Prefers to retain "activities" because sometimes the damage does not relate to the LMOs but the activities, for example, transport, handling and use.[263]

Products thereof

5. Proposes inserting "affects the biodiversity, taking into consideration risk to human health" to Bolivian's proposal.
6. Supports Malaysia's proposed text in the report.[264]

Philippines

Products thereof

1. On the functional scope, prefers to refer only to LMOs and not

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[259] Notes FOCC 4.
[260] Notes FOCC 2.
[261] Notes FOCC 2.
[262] Notes FOCC 3.
[263] Notes FOCC 3.
[264] Notes FOCC 4.

products of LMOs.[265]

2. Supports the deletion of "products thereof" and asks for more time to further reflect on this issue.[266]
3. Opposes the inclusion of products thereof. Rationale: it falls outside the scope. Article 20 of the Cartagena Protocol refers to the summary of risk assessment and therefore it is in a different context. Annex 3 has to be put in context. Its Para 5 talks about "receiving environment".
4. Asks for time to reflect on Mexico's proposal. Cautions to be careful about "replicable" as it is different from the context of Annex 3.
5. Agrees with Mexico. Points out that "replicating" might be misunderstood. Highlights that there will be problem during implementation if refer to DNA sequence.
6. Commenting on Mexico's proposal accepted by Malaysia on behalf of others, proposes instead that "products thereof" mean processed materials that are of LMO origin, containing detectable novel combinations of replicable genetic material obtained through the use of modern biotechnology, and that are capable of "naturally reproducing" in the environment. Rationale: "replicating" is open to misinterpretation that it includes replicable genetic material or DNA and not only LMOs. Agrees to accept "capable of replicating in the environment" only if Parties make a declaration in the report the understanding that it refers only to LMOs.
7. Convinced that products thereof outside scope. Annex 1(i) (which mentions information required in notifications under Articles 8, 10 and 13 of the CPB) cannot be taken in isolation but in context of the organisms and not the component of organisms.

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[265] ENB FOCC 1.

[266] Notes FOCC 2.

8. Supports India's proposal "as defined in the Protocol".[267]

Republic of Korea

Products thereof

1. Highlighting the purpose of the Supplementary Protocol which is for the conservation and sustainable use of biodiversity, emphasises that if the concept of products thereof are removed, an important element is being removed because products thereof may cause damage to biodiversity. Supports Co-Chairs for the consistency. Supports Malaysia and Bolivia.
2. Supports Malaysia's proposed text in the report.[268]

South Africa

Products thereof

1. Opposes the inclusion of "product thereof". Rationale: it is beyond the scope of the Supplementary Protocol. The Supplementary Protocol should be limited to modified organisms that are living. This will also impose administrative burden. Does not support Bolivian's proposal but can look at Mexico's amendment.
2. Commenting on Mexico's proposal accepted by Malaysia on behalf of others, requests for time to consider and later agrees to the text.
3. Supports the inclusion of the understanding that 'replicating' means 'naturally reproducing LMOs' in the report.[269]

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[267] Notes FOCC 4.
[268] Notes FOCC 4.
[269] Notes FOCC 4.

Switzerland

Activities

1. Proposes "LMOs are related to transboundary movement" in place of "LMOs find their origin in transboundary movement".
2. Explains that from the point of view of a scientist, it is the LMO which causes the damage. But from the legal point of view, country cannot hold the LMO liable. Someone has to be linked to the LMOs.
3. Says that "handling" in Switzerland's law used for all stages, including production and use. Agrees to leave out activities.[270]

Products thereof

4. On the functional scope, prefers to refer only to LMOs and not products of LMOs.[271]
5. Accepts Mexico's proposal "capable of replicating in the environment" and urges for compromise.
6. Supports the inclusion of the understanding that "replicating" means "naturally reproducing LMOs" in the report.
7. Commenting on EU's proposal, proposes instead "it emerged during the negotiations of the Supplementary Protocol that Parties to the Protocol hold different understandings of the application of the Supplementary Protocol to damage caused by such material."[272]

Ukraine

1. Supports the inclusion of products thereof and reference to text used in the Cartagena Protocol. Supports Malaysia. Explains

[270] Notes FOCC 3.
[271] ENB FOCC 1.
[272] Notes FOCC 4.

that replicable material is the same as living. Not sure whether should limit it to the environment as proposed by Mexico but can live with it.

2. Supports Bolivia's wording with the amendment by Mexico. Says that "products containing LMOs" provides different understanding.
3. Emphasizes that someone must be responsible for damage that arises from the products.
4. Supports Malaysia's proposed text in the report.
5. Supports Malaysia's proposal on behalf of the group reading "LMO within the context of the Protocol" and clarifies that India's proposal has no added value because in any event the definition of the Cartagena Protocol will apply to the Supplementary Protocol.[273]

FINAL TEXT: 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.

[273] Notes FOCC 4.

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.

Report of FOCC 4 (UNEP/CBD/BS/GF-L&R/4/3, 11 October 2010)

12. It emerged during the negotiations 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.

Article 4 Geographic Scope

The geographical scope deals with the territorial area in which the damage occurs. The question here is: should the instrument relate only to matters within the territory and control of a Party; or should it extend to areas beyond national jurisdiction, such as the high seas? Article 3(k) of the Protocol defines the term "transboundary movement" as: '*the movement from one Party to another Party…*' This appears to exclude areas outside the jurisdiction of States. However, the narrow scope leaves unaddressed situations where an activity outside

a country's jurisdiction causes damage within.[274] Under this article, the issue of non-Parties was also discussed. The Cartagena Protocol allows for the movement of LMOs between Parties and non-Parties. Generally, an instrument cannot create obligations for non-Parties. Hence the scope of an instrument cannot cover damage caused by the acts of non-Parties. The Protocol addresses the issue of non-Parties in its Article 24 and in COP-MOP decisions implementing this Article. They provide guidance to Parties on activities involving non-Parties. A Party is obliged by Article 24 to ensure that the movement of the LMOs is consistent with the Protocol's objectives – which is essentially to ensure an adequate level of safety in activities relating to LMOs that may adversely affect biodiversity and human health. Similarly a regime would not be able to impose its rules on non-Parties but oblige Parties to be responsible for any consequence arising from the activity or the LMO. Parties can enter into agreements or other arrangements with non-Parties, and even provide for a higher level of protection than that under the Protocol. The only prudent solution for a Party of import is to provide contractually for recourse to the non-Party if any liability results.[275]

At FOCC 2, a narrow geographic scope was agreed to, namely that the Supplementary Protocol applies to damage that occurred in the areas within the limits of the national jurisdiction of Parties and that Parties may use criteria set out in their domestic law in order to establish liability for any damage that falls within the limits of their national jurisdiction. On the issue of non-Parties, it was agreed that domestic law implementing the Supplementary Protocol "shall" apply to damage resulting from the transboundary movement of LMOs from non-Parties. These provisions appear in Articles 3(5), 3(6) and 3(7) in the NKL SP.

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[274] This paragraph has been taken from Nijar, G.S., et al (2008), *Liability and Redress under the Cartagena Protocol on Biosafety*, Kuala Lumpur: CEBLAW.

[275] This paragraph has been taken from Nijar, G.S., et al (2008), *Liability and Redress under the Cartagena Protocol on Biosafety*, Kuala Lumpur: CEBLAW.

Delegates' Positions

China

Prefers that the domestic law implementing the Supplementary Protocol "should" also apply to damage resulting from the transboundary movement of LMOs from non-Parties.[276]

Cuba

Prefers that the domestic law implementing the Supplementary Protocol "shall" also apply to damage resulting from the transboundary movement of LMOs from non-Parties.[277]

Ecuador

Prefers that the domestic law implementing the Supplementary Protocol "shall" also apply to damage resulting from the transboundary movement of LMOs from non-Parties.[278]

EU

1. Proposes to exclude from the scope of the Supplementary Protocol activities related to national defense, international security or natural disaster management, evoking language from the draft UNEP guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment. Later asks to relocate the proposed wording to the section on exemptions, for discussion at a later stage.[279]
2. Prefers that the domestic law implementing the Supplementary

[276] Notes FOCC 2.
[277] Notes FOCC 2.
[278] Notes FOCC 2.
[279] ENB FOCC 1.

Protocol "shall" also apply to damage resulting from the transboundary movement of LMOs from non-Parties.[280]

India

Prefers that the domestic law implementing the Supplementary Protocol "shall" also apply to damage resulting from the transboundary movement of LMOs from non-Parties.[281]

Japan

1. On whether to include a reference to exclusive economic zones, proposes to apply the Supplementary Protocol to damage in areas within the limits of national jurisdiction of Parties.[282]
2. Prefers that the domestic law implementing the Supplementary Protocol "should" also apply to damage resulting from the transboundary movement of LMOs from non-Parties but later agreed to "shall".[283]

Liberia

Favors retaining text that specifies that Parties should not be restricted from requiring domestic measures to address damage.[284]

Mexico

Prefers that the domestic law implementing the Supplementary Protocol "shall" also apply to damage resulting from the transboundary movement of LMOs from non-Parties.[285]

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[280] Notes FOCC 2.
[281] Notes FOCC 2.
[282] ENB FOCC 1.
[283] Notes FOCC 2.
[284] ENB FOCC 2.
[285] Notes FOCC 2.

Article 5 Limitation in time

The coverage of a regime may be limited by a time frame. One such situation is where the activity ceased before the entry into force of the instrument; or its incorporation into the domestic law of a country. That means that the instrument will not apply to retroactive acts. This reflects a well established rule of interpretation against the retroactive application of a treaty.[286] At FOCC 2, delegates agreed on text stating the Supplementary Protocol applies to damage that results from a transboundary movement of LMOs that started after the entry into force of the Supplementary Protocol for the Party into whose jurisdiction the transboundary movement was made. This text is now appears as Article 3(4) of the NKL SP.

Delegates' Positions

African Group

Prefers keeping a reference that the Supplementary Protocol shall not restrict domestic law from dealing with damage that started before the Supplementary Protocol enters into force. This is to preserve the sovereign rights of a Party.[287]

Brazil

Prefers deleting a reference that the Supplementary Protocol shall not restrict domestic law from dealing with damage that started before the Supplementary Protocol enters into force because this contradicts the first paragraph which states that the Supplementary Protocol applies to transboundary movements after its entry into force.[288]

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[286] This paragraph has been taken from Nijar, G.S., et al (2008), *Liability and Redress under the Cartagena Protocol on Biosafety*, Kuala Lumpur: CEBLAW.

[287] Notes FOCC 2.

[288] Notes FOCC 2.

Colombia

On the text stating that the rules and procedures apply to damage resulting from a transboundary movement of LMOs that started after the entry into force of the Supplementary Protocol, proposes to replace "started after" with "occurred" instead.[289]

EU

1. Opposes Colombia's proposal to replace "started after" with "occurred", noting that the starting point should be the transboundary movement of LMOs, not the occurrence of damage.
2. Proposes clarifying that the rules and procedures would refer to the entry into force for the Party into which the transboundary movement took place.[290]
3. Prefers deleting a reference that the Supplementary Protocol shall not restrict domestic law from dealing with damage that started before the Supplementary Protocol enters into force.[291]

India

1. On the text stating that the rules and procedures apply to damage resulting from a transboundary movement of LMOs that started after the entry into force of the Supplementary Protocol, expresses concern about the formulation "started after".
2. Opposes EU's proposal in clarifying that the rules and procedures would refer to the entry into force for the Party into which the transboundary movement took place.[292]

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289 ENB FOCC 1.
290 ENB FOCC 1.
291 Notes FOCC 2.
292 ENB FOCC 1.

Japan

Prefers deleting a reference that the Supplementary Protocol shall not restrict domestic law from dealing with damage that started before the Supplementary Protocol enters into force.[293]

Malaysia

As a compromise, proposes "provided that such measures are consistent with the objective and provisions of this SP" after a reference that the Supplementary Protocol shall not restrict domestic law from dealing with damage that started before the Supplementary Protocol enters into force.[294]

Mexico

1. Underscores the difficulty of accepting retroactive application of the Supplementary Protocol.[295]
2. Prefers keeping a reference that the Supplementary Protocol shall not restrict domestic law from dealing with damage that started before the Supplementary Protocol enters into force for further reflection.[296]

New Zealand

1. Opposes Colombia's proposal to replace "started after" with "occurred", noting that the starting point should be the transboundary movement of LMOs, not the occurrence of damage.
2. Clarifies the understanding that the Supplementary Protocol must have entered into force for both Parties.[297]

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[293] Notes FOCC 2.
[294] Notes FOCC 2.
[295] ENB FOCC 1.
[296] Notes FOCC 2.
[297] ENB FOCC 1.

Peru

Prefers deleting a reference that the Supplementary Protocol shall not restrict domestic law from dealing with damage that started before the Supplementary Protocol enters into force.[298]

Switzerland

1. Clarifies the understanding that the Supplementary Protocol must have entered into force for both Parties.[299]
2. Prefers deleting a reference that the Supplementary Protocol shall not restrict domestic law from dealing with damage that started before the Supplementary Protocol enters into force.[300]

South Africa

Raising concerns about difficulties in proving whether an LMO came into the country before or after the Supplementary Protocol's entry into force, proposes referring to the event when damage occurred rather than the time of import.[301]

Article 6 Causal Link

Causation relates to establishing a link in fact and in law between the damage and the LMO (including the related activity). Normally, the claimant has the task (burden) of establishing the link. He has to produce convincing evidence showing that the LMO or the activity caused the harm on a balance of probabilities. Causation can be difficult to establish if there are multiple causes at work; or if there is a highly technical and complex chain of events or processes. Sometimes a claim by the defendant of trade secrets in respect of the

[298] Notes FOCC 2.
[299] ENB FOCC 1.
[300] Notes FOCC 2.
[301] ENB FOCC 1.

technology producing or utilizing the LMO may make it difficult for a claimant to establish causation. Some national jurisdictions try to overcome this difficulty by allowing for rebuttable presumptions. That is, if facts point to harm being caused by an operator of an LMO, he is presumed to be liable. It is then for him to adduce enough evidence to show that he is not to blame. In this way, the evidential burden of proof is reversed and shifts to the defendant. This may be in situations when the substance or activity has a high degree of risk and is inherently hazardous. However it is not confined to such situations. Some national jurisdictions establish a framework which enables a court to draw common sense conclusions based on the circumstances of the case without the need to show with scientific certainty that a substance caused or contributed to the harm.[302]

The final text agreed upon at FOCC 2 avoided all these complicated legal issues by leaving them to domestic level.

FINAL TEXT: 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 7 Primary Compensation Scheme

This article addresses the respective roles and obligations of the operator and the competent authority in implementing domestic response measures in the case of damage and sufficient likelihood of damage. This is also known as an administrative approach which is contrasted with a civil liability approach. An administrative approach does not involve adjudication by the courts. All matters are dealt

[302] This paragraph has been taken from Nijar, G.S., et al (2008), *Liability and Redress under the Cartagena Protocol on Biosafety*, Kuala Lumpur: CEBLAW.

with administratively – usually by a designated national competent authority. The object is to ensure speedy and adequate preventative, response and remedial measures where there is harm caused by LMOs, and is especially useful where the harm is in respect of a diffuse right such as to the environment and in this context, to biodiversity or its components. Usually, under this approach, a person/entity with the closest connection is identified, such as an operator, to assume certain responsibilities with regard to the damage. Usually the operator will be required to notify the national competent authority whenever the harm occurs or is imminent. The operator will then be required to undertake the necessary measures and respond to the damage caused or imminently threatened – to remedy, reduce, mitigate or prevent. He has to bear all costs. If the operator fails to take any of these measures then the national competent authority may undertake the measures and recover the costs from the operator. The standard of liability is strict and the obligation, as noted, is channeled to a single person – usually the operator/person in operational control. The operator may also be given the right to show why he should not be held responsible. In some situations where remediation and repair of the damage is not possible or would cost more than the value of the damage, the person responsible may be required to make monetary compensation for the value of the damage.

One of the final outstanding issues in this article was the issue of consistency with international law and obligations. To resolve the issue, Co-Chairs proposed the following new text and amending Article 18.3:

> "Article 13 bis
>
> The provisions of this Supplementary Protocol shall not affect the rights and obligations of any Parties deriving from any international obligations except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity."

"Article 18.3

Except as otherwise provided in this Supplementary Protocol, the provisions of the Convention and the Protocol shall apply to this Supplementary Protocol."

At the end of FOCC 3, the issue of consistency with international obligations was finally resolved by amending Article 18.3. The following text was finally adopted:

"Without prejudice to paragraph 3 above, this Supplementary Protocol shall not affect the rights and obligations of a Party under international law."

Article 13bis was dropped. Article 7.8 was amended and adopted as follows:

"Response measures shall be implemented in accordance with domestic law."

Delegates' Positions

African Group

1. Regarding obligations of the operator to investigate, assess and evaluate damage and take appropriate response measures, suggests referring to "imminent threat of damage" rather than damage alone.[303]
2. Prefers Parties to require the operator in the event of damage to "immediately" inform the competent authority.[304]
3. Supports the inclusion of "imminent threat of damage". Rationale: many environmental liability and redress regime focus on prevention. It would be unrealistic to prevent this Supplementary Protocol from working in the direction of

[303] ENB FOCC 1.
[304] Notes FOCC 1.

preventing damage. When there is indication that threat is imminent, damage should be prevented and not compensated.[305]

4. In response to EU's insertion "when necessary", explains that a threat to biodiversity is never a small issue that can be solved by the operators themselves and therefore duty of the operator to inform the NCA should not be qualified.[306]
5. Feels that Mexico's proposal of "incident" is too limiting because not all threat or damage can be related to an "incident". Insists on retaining "imminent".
6. Commenting on Mexico's proposal, emphasises the need to place the burden on the operator and not the competent authority.
7. Supports that the "situation likely to result in damage" be also based on other relevant information, for example, decrease in yields which are based on statistics and not just scientific evidence. This is because developing countries have limited capacity in coming up with scientific proof and they should not be prohibited from taking action if other information suggests the likelihood of damage.
8. Supports the inclusion of precautionary approach because "likelihood" deals with "probability".
9. In the case of likelihood of damage, adds to require the operator to: immediately inform the NCA; and evaluate the situation.
10. Proposes deleting "operator" as it is conflicting to ask the competent authority to identify person responsible, and at the same time asking the responsible operator to take action.
11. Proposes Parties to require "appropriate" operator to take action.[307]

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[305] Notes FOCC 2; Notes FOCC 3.

[306] Notes FOCC 2.

[307] Notes FOCC 3.

Consistency with international obligations

12. Commenting on a text requiring decisions made by Parties to be consistent with international law, supports Malaysia and agrees to deal with the issue in preamble of the Supplementary Protocol.[308]
13. Suggests that the Supplementary Protocol shall be implemented "in harmony" with international obligations.[309]

Bolivia

1. Stresses the link between precautionary approach and "polluter pays" principle.
2. Emphasizes that the liability obligation includes taking preventive measures.
3. Supports the inclusion of "imminent threat", either retaining it in the respective articles or in the definition of "damage".
4. Prefers to widen the scope of "imminent threat" to include situations of illegal introduction of LMOs, instead of those covered under risk assessment procedures.
5. Explains that the closest expression to imminent threat is "situation likely to result in damage", and to be based on scientific information "and other relevant information", including for example, social problems between a farmer and GM introduction.
6. Explains that the precautionary approach is relevant to address a situation where there is a low likelihood of damage but if it happens the magnitude of the damage is huge. Also cannot agree with "sufficient" likelihood as it does not include this situation.[310]

[308] Notes FOCC 2.
[309] Notes FOCC 3.
[310] Notes FOCC 3.

Brazil

1. Supports a scheme flexible enough for domestic implementation.
2. Regarding obligations of the operator to investigate, assess and evaluate damage and take appropriate response measures, suggests referring to "imminent threat of damage" rather than damage alone.[311]
3. Proposes to explicitly attribute the burden of proof of damage to the competent authority.
4. Concerning remedies available to the operators with respect to decisions taken by the competent authority, requests reference to courts.[312]
5. Proposes language stating that 'Decisions of the competent authority imposing or intending to impose response measures should be reasoned and notified to the operator, where identified. There should be remedies available including the opportunity for review of such decision, inter alia, including through access to an independent body such as a court of law.[313]
6. Disagrees with addressing imminent threat of damage and flags the issue of financial security.
7. Supports Ecuador on Colombian proposal and emphasizes the need to set out the conditions in which "impending damage" would apply, based on scientific proof, to avoid arbitrary decision.
8. Agrees replacing "impending damage" with "situation likely to result in damage" but reemphasizes the importance of basing it on scientific evidence. Later suggests that "'impending damage' determined on the basis of the best available scientific information, including information available in the BCH, and

[311] ENB FOCC 1.
[312] ENB FOCC 2.
[313] Notes FOCC 2.

other relevant information to be likely to result in damage if not addressed in a timely manner."

9. Precautionary approach is relevant only for risk assessment and risk management.
10. Prefers "competent authority" than "Parties" to take action.[314]

Consistency with international obligations

11. Emphasizes that the Supplementary Protocol must not shy away from international obligation but be consistent with other international laws, since this article is the core provision for NCA imposing obligation on operator, even in the case of imminent threat of damage. This is a "loose clause" that gives power to NCA and may "open a Pandora's box".[315]
12. Proposes new text specifying that the response measures shall be implemented in a manner consistent with international obligations and in accordance with the domestic law (Article 7.8).
13. Prefers to provide expressly for the obligation of a Party to act consistently with international obligations. Commenting on India's proposal, says that it is important to reinforce this notion in the operational text rather than in the preamble.
14. Agrees that it is feasible for the Supplementary Protocol to have response measures, because it is dealing with environment. However the concern is trade barriers and the misuse of the Supplementary Protocol for non-environmental purposes. Therefore it is crucial to highlight the need to be consistent with international obligations in this particular article. It would not be sufficient to have it in Article 13 dealing with civil liability only.
15. Speaking for Brazil and Colombia, accepts Co-Chairs' proposal

[314] Notes FOCC 3.
[315] Notes FOCC 2.

(Article 13bis) and Malaysia's and EU's amendment to Article 18.3, provided that the text specifying that the response measures shall be implemented in a manner consistent with international obligations and in accordance with the domestic law (Article 7.8) remains.

16. Underscores that there is a delink between Article 18 and the issue of financial security.[316]

China

1. Regarding obligations of the operator to investigate, assess and evaluate damage and take appropriate response measures, opposes referring to "imminent threat of damage" rather than damage alone.[317]
2. On the question whether the competent authority can also require the operator to take preventive action in the event of an "imminent threat of damage, expresses concerns as to its implications.
3. Concerning remedies available to the operators with respect to decisions taken by the competent authority, objects to the word "independent" review of such decisions.[318]
4. Disagrees with the inclusion of "imminent" because the word is difficult to be defined and uncertain.[319]

Colombia

1. Regarding obligations of the operator to notify the competent authority in the event of damage, favors to limit such an obligation to the requirements of the competent authority.[320]

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316 Notes FOCC 3.
317 ENB FOCC 1.
318 ENB FOCC 2.
319 Notes FOCC 3.
320 ENB FOCC 1.

2. In response to EU's insertion "when necessary", supports that the NCA should be taken on board (by the operator) in any event to know what is happening (imminent threat of damage) and to solve the problem.[321]
3. Proposes deleting imminent threat of damage and addressing the concept through the new text describing and not defining the situation - "where scientific information not foreseen at the time of the relevant risk assessment indicates that there is impending damage to be caused to the conservation and sustainable use of biological diversity resulting from LMOs that find their origin in a transboundary movement as defined in Article 2.2(c) if timely action is not taken, the competent authority shall require the operator to take appropriate actions so as to avert such damage".
4. Supports Malaysia that the competent authority should be empowered to act not just in the case of damage but also threat.
5. Prefers replacing "incident" with "a situation if not addressed in a timely manner would result in damage".
6. Prefers stronger language by replacing "likelihood that damage will result" with "damage likely to occur".
7. Agrees more than one operator may be responsible in the event of damage.

Consistent with international obligations

8. Proposes "Response measures shall be taken in a manner consistent with the provisions outlined below and be implemented in accordance with domestic law".
9. Proposes "response measures shall be implemented in accordance with international obligations and domestic law".
10. Proposes new Article 18.4 saying that "this Supplementary Protocol shall be implemented in accordance with international

[321] Notes FOCC 2.

obligations". Explains that international instruments should not have a hierarchy and prevent an interpretation to mean "precondition".[322]

Ecuador

1. Expresses discomfort with Colombia's proposed text and expresses concerns with its placement.
2. Disagrees with the addition of precautionary approach.[323]

EU

1. Regarding obligations of the operator to investigate, assess and evaluate damage and take appropriate response measures, prefers the operator to notify the competent authority in the event of damage.
2. Suggests stating that the operator must notify the competent authority "whenever the threat is not dispelled by response measures by the operator."[324]
3. Prefers Parties to require the operator in the event of damage to "immediately" inform the competent authority.[325]
4. Seeks to introduce an additional paragraph stating that domestic legislation may establish which components of biodiversity require response measures.[326]
5. Suggests having the operator to inform the authority only "where necessary" and take action independently where not and explains that this only applies in the situation of imminent threat of damage.[327]

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322 Notes FOCC 3.
323 Notes FOCC 3.
324 ENB FOCC 1.
325 Notes FOCC 1.
326 ENB FOCC 2.
327 Notes FOCC 2.

6. Agreeable to include "imminent threat of damage" in "incident" as Cartagena Protocol deals with prevention.
7. Proposes that the competent authority has the right "to decide, in accordance with domestic law, that the operator should not bear all or part of the costs".
8. Suggests language stating that 'provides for the opportunity for the review of such decisions, inter alia, through…', 'Decisions of the competent authority imposing or intending to impose response measures should be reasoned and notified to the operator, where identified who should be informed of the remedies available under domestic law'.
9. Suggests a new paragraph stating that in implementing this Article, Parties may, in order to ensure conservation and sustainable use of biological diversity, establish in their domestic legislation which components of biological diversity are covered by the obligation to undertake domestic response measures.[328]
10. Highlights its understanding that the article is addressing damage foreseen in the risk assessment.
11. Emphasizes that the concept of "imminent threat" is a well established concept and the administrator will know how to apply it.
12. Supports that the competent authority should be empowered to act not just in the case of damage but also likelihood of damage.
13. Prefers that the likelihood of damage be based on either "scientific information or other relevant factual information". This is because if something occurs during risk management it can be based purely on factual information and not necessarily scientific.
14. Feels that the precautionary approach is not suitable here because the likelihood must be based on the scientific information or other relevant information.

[328] Notes FOCC 2.

15. Clarifies that the primary channelling of liability will be to the person identified by the competent authority, which may not be the person in control and therefore not the person responsible for paying for the damage.
16. Proposes Parties to require "responsible" operator to take action. Disagrees with deleting "operator" as this will take away the "polluter pays" principle.

Consistent with international obligations

17. On consistency with international obligations, expresses serious concern on where the negotiation is heading. Highlights that the inclusion of Japan's or Brazil's proposal is inconsistent with Article 22(1) of the CBD (relationship with other conventions), because the reason of inconsistency cannot be brought as an excuse whenever there is serious damage to the biodiversity. Cannot understand why, when one party take measures to protect its own biodiversity, the party needs to first check whether the measures are consistent with international obligations. Urges for the supply of examples of what constitute inconsistency with international obligation.
18. Proposes amending Article 18.3 stating that except as otherwise provided in the Supplementary Protocol, the provisions of the Convention and the Protocol shall apply "mutatis mutandis" to the Supplementary Protocol.
19. Opposes strongly the inclusion of Article 7.8 (the response measures shall be implemented in a manner consistent with international obligations and in accordance with the domestic law) as suggested by Brazil as Parties have not discussed Article 12 (Financial Security).
20. Agrees with Malaysia's insertion to Article 18.4 and Japan's proposal deleting "in a manner consistent with international obligations and" from Article 7.8.
21. Supports that the Supplementary Protocol shall be implemented

"in harmony" with international obligations.

22. Proposes adding "without prejudice to paragraph 3 above," to India's proposal stating that the Supplementary Protocol shall not affect the rights and obligations of a Party under international law.[329]

Ethiopia

Points to the need for the clause: recourse to remedies by the operator shall not impede the competent authority from taking effective response measures "under appropriate circumstances" to address emergency situations.[330]

India

1. Regarding obligations of the operator to investigate, assess and evaluate damage and take appropriate response measures, prefers the operator to notify the competent authority in the event of damage.[331]
2. Objects to EU's proposal introducing an additional paragraph stating that domestic legislation may establish which components of biodiversity require response measures.[332]
3. Agrees with Malaysia and Mexico that "imminent threat" should be included and that the operator has obligation to inform the NCA when there is imminent threat of damage.
4. Suggests that the competent authority "may" implement appropriate response measures to replace "has the discretion to" because the latter seems to give wide discretion to the competent authority. Suggests text later stating that the competent authority implements response measures in accordance with its domestic

[329] Notes FOCC 3.
[330] ENB FOCC 2.
[331] ENB FOCC 1.
[332] ENB FOCC 2.

law if the operator has failed to do so.

5. Disagrees with the EU's proposal that the competent authority has the right "to decide, in accordance with domestic law, that the operator should not bear all or part of the costs".
6. Agrees with Bolivia that Colombian proposal does not bring out the message of imminent threat clearly and therefore should be replaced with "situation likely to result in damage".
7. Prefers that the likelihood of damage be based on both the "scientific information and other relevant information".
8. Disagrees with "proven" likelihood and precautionary approach being placed here.
9. Agrees leaving flexibility for domestic law to decide on the operator responsible in the event of damage, on a case by case basis.
10. Suggests language stating that 'Decisions of the competent authority imposing or intending to impose response measures should be informed of the available remedies. Such decisions are subject to review through access to an independent body and courts. Provided that recourse to such remedies shall not impede the right of the competent authority to take response measures, as may be necessary.'

Consistent with international obligations

11. Commenting on a text requiring decisions made by Parties to be consistent with international law, supports Malaysia and agrees to deal with the issue in the preamble of the Supplementary Protocol.
12. Proposes preambular text stating that the Supplementary Protocol shall be consistent with the obligation under other international legal instruments. Prefers strongly to have the text in the preamble instead of Article 7 (Response Measures).
13. Says that the proposed Article 18.4 by Colombia that "this Supplementary Protocol shall be implemented in accordance

with international obligations" would tie the hand of the states in taking action.

14. Clarifies that "serious damage" has been dealt with in the CBD.
15. Opposes the use of "in harmony" because it is not suitable in a multilateral treaty. Proposes "This Supplementary Protocol shall not affect the Parties' other international rights and obligations".[333]

Japan

1. Supports a scheme flexible enough for domestic implementation.[334]
2. Suggests that the competent authority "shall be entitled to" identify the operator which has caused the damage; evaluate the damage and determine which response measures should be taken by the operator.
3. Proposes that "the decisions of the NCA requiring the operator to take response measures should be reasoned. Such decisions should be notified to the operator."[335]
4. Can support the inclusion of the concept of imminent threat of damage in the Supplementary Protocol by first discussing its definition.
5. Prefers replacing the term with "highly probable to cause damage" or "immediately".
6. Prefers "sufficient" likelihood or a situation "highly" likely to result in damage.
7. Suggests replacing "actions so as to avert such damage" with response measures.
8. Prefers to provide for the obligation of a Party to act consistently with international obligations specifically in this article.

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[333] Notes FOCC 2.
[334] ENB FOCC 1.
[335] Notes FOCC 2.

Consistent with international obligations

9. Proposes "The response measures shall be implemented in accordance with the domestic law of the Parties".
10. Cautions the use of "mutatis mutandis" by EU in Article 18.3.
11. Commenting on the new Article 13bis[336] proposed by the Co-Chairs, says that the provision is too broad and will not fit in the Supplementary Protocol. Unless "serious damage" and "threat to biological diversity" are defined, these expressions will open up huge debate and questions. Also, a combination of Article 7.8 (response measures to be implemented consistent with international obligations) and Article 13 bis will not work.
12. Suggests deleting "in a manner consistent with international obligations and" from Article 7.8. Agrees there should not be hierarchy between international instruments and opposes having specific reference to Article 22.1 of the CBD.[337]

Malaysia

1. Supports a scheme flexible enough for domestic implementation.
2. Regarding obligations of the operator to investigate, assess and evaluate damage and take appropriate response measures, proposes also referring to "the incident causing damage".[338]
3. Prefers Parties to require the operator in the event of damage to "immediately" inform the competent authority.[339]
4. Points to the need for the clause: recourse to remedies by the operator shall not impede the competent authority from taking

[336] "The provisions of this Supplementary Protocol shall not affect the rights and obligations of any Parties deriving from any international obligations except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity."

[337] Notes FOCC 3.

[338] ENB FOCC 1.

[339] Notes FOCC 1.

effective response measures "under appropriate circumstances," to address emergency situations.[340]

5. Supports the inclusion of "imminent threat of damage". Rationale: Parties should not wait for the damage resulting from the transboundary movements of LMOs to occur. A State should not be prevented from taking action when they know of imminent threat.
6. In response to EU's insertion "when necessary", felt that it is inappropriate to give the operator discretion to decide when to inform because if the operator cannot resolve it, damage would be huge.
7. Explains that Japan's proposal seems to suggest that the Supplementary Protocol empowers the competent authority to do what they are not initially entitled to.
8. Proposes the deletion of the reference to "an independent body, such as a court" from the remedies available to review the decisions of the competent authority imposing or intending to impose response measures. Otherwise it would cause delay and prevent the competent authority from requiring the operator to take immediate response measures.[341]
9. Emphasises that the inclusion of imminent threat is not about tagging LMOs as harmful.
10. Prefers to limit response measures to emergency situation, rather than leaving it too broad like something that "might occur" as it is unfair to the operator.
11. Disagrees with the use of "incident" as it limits the scope to an actual occurrence, suggests instead, "damage or likelihood of damage".
12. Highlights that "imminent" is referring to the "threat" or "realisation of the damage" and not the "damage".

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340 ENB FOCC 2.

341 Notes FOCC 2.

13. Prefers not to eliminate the obligation of the operator to evaluate the damage or imminent threat of damage as developing countries may not have the capacity to evaluate.
14. Disagrees that the competent authority only be empowered to act in the case of damage and not likelihood of damage.
15. In dealing with the concerns that imminent could lead to abuse and be a trade barrier, suggests spelling out the criteria how imminent threat has to be established, i.e. must be based on scientific evidence.
16. Suggests replacing "impending damage" with "a likelihood that damage will result".
17. Adds the concept of precautionary approach.
18. Highlights that there is legal causation beside scientific causation in respect of the likelihood of damage.
19. Disagrees with deleting "operator".

Consistent with international obligations

20. Commenting on a text requiring decisions made by Parties to be consistent with international law, highlights that the issue had been dealt with comprehensively under the Preamble of the Cartagena Protocol, and therefore it is inappropriate to single out this issue in this particular section. Suggests as a compromise to deal with the issue in the preamble of the Supplementary Protocol. Urges not to reopen the same debate here.[342]
21. Urges for the supply of reasoning behind having response measures "consistent with international obligations". Appreciates Brazil's concern. Urges adopting the same format as in the Cartagena Protocol, by adding the text in the preamble. Also agrees with the inclusion of the reference to Article 22 of the CBD in the preamble. Cautions that the interpretation may be

[342] Notes FOCC 2.

that only Article 7 is required to be implemented consistently with international obligations.

22. Proposes amending Article 18.3, that except as otherwise provided in the Supplementary Protocol, the provisions of the Convention", including in particular paragraph 1 of Article 22," and the Protocol shall apply to the Supplementary Protocol.
23. Clarifies the understanding that if Articles 18.3 and 18.4 are adopted, then Article 7.8 will go. Agrees there should not be any hierarchy between international instruments.
24. Suggests that the Supplementary Protocol shall be implemented on the understanding that it is not intended to subordinate the Supplementary Protocol to other international agreements.[343]

Mexico

1. Regarding obligations of the operator to investigate, assess and evaluate damage and take appropriate response measures, prefers the operator to notify the competent authority in the event of damage.[344]
2. Prefers Parties to require the operator in the event of damage to "immediately" inform the competent authority.[345]
3. On the question whether the competent authority could also require the operator to take preventive action in the event of an "imminent threat of damage", expresses concerns as to its implications.[346]
4. Believes that "imminent threat of damage" maybe beyond the scope of liability and redress because redress does not exist when the treat is imminent. However supports to place in provisions where imminent threat would fit.

[343] Notes FOCC 3.
[344] ENB FOCC 1.
[345] Notes FOCC 1.
[346] ENB FOCC 2.

5. In response to EU's insertion "when necessary", believes that in many cases, operator does not have full capacity to solve the problem. In all cases, the NCA should be informed to learn from what and why the threat is happening and to prevent it from happening again.[347]
6. Disagrees with the operator "evaluating the damage" because it is difficult and damage are often not as immediate as in the case of oil spill and prompt action needs to be taken without wasting time in evaluation.
7. Proposes replacing "in the event of damage [or imminent threat of damage];" with "in the case of an incident to:".
8. Suggests that an "incident" means "an occurrence or occurrences that, having their origin in the transboundary movement of LMOs cause damage or give rise to a situation to be likely to result in damage if not addressed in a timely manner".
9. Suggests that the competent authority shall "in the case of damage", identify the operator, evaluate the damage and determine which response measure to take by the operator.
10. Explains that the competent authority needs to identify the operator in the case of damage to address situations where damage occurs many years after the incident.
11. Disagrees with the inclusion of "imminent threat of damage" in this article because it attaches the idea that in principle the LMO is harmful and that the scope of the protocol is about when there is a problem how to deal with it. Someone has to be responsible. Highlights that the Secretariat's paper shows that imminent threat does not apply for LMOs.
12. Emphasises that LMOs do not pose danger but may pose unintended impact.
13. Highlights that it is difficult to know when "imminent" situations arises and that the concept is new in the case of LMOs.

[347] Notes FOCC 2.

14. Explains the article on response measures (Article 7), saying that Article 7.2 addresses situations where something happens without actual damage occurring but the damage is possible to happen whereas Article 7.3 provides that once the damage has been realised, the response measures should be remedial, and to prevent the damage from occurring further.
15. Emphasizes the need for the competent authority to identify the operator responsible and not to provide response measures.
16. Explains that the situation where the damage will be "imminent" is where the new scientific evidence indicates the threat and therefore proposes the deletion of "not foreseen at the time of the relevant risk assessment".
17. Agrees with not linking imminent to occurrence provided it is linked to scientific basis and new data.
18. Agrees with basing the likelihood of damage on scientific evidence and other information.
19. Commenting on the inclusion of the precautionary approach, says that the approach is used in risk assessment in deciding whether to import and use and not in the case of taking an action in liability and redress. There must be certainty that the damage will definitely occur if no action is being taken.
20. Agrees that the operator in paragraph 2 may be different from operator in paragraph 3. The person informing the authority is the one which discovered the damage and he may be asked to take action. Despite this, paragraph 2 does not put the blame on the operator informing but merely asking him to take remedial measures.
21. Suggests "or operators" to allow for more than one operator being asked to take action in the event of damage.

Consistent with international obligations

22. Agrees with New Zealand to provide for the obligation of a Party to act consistently with international obligations as a general

provision and not specifically in this Article.[348]

New Zealand

1. Regarding obligations of the operator to investigate, assess and evaluate damage and take appropriate response measures, suggests referring to "imminent threat of damage" rather than damage alone.[349]
2. Prefers Parties to require the operator in the event of damage to "immediately" inform the competent authority.[350]
3. Points to the need for the clause: recourse to remedies by the operator shall not impede the competent authority from taking effective response measures "under appropriate circumstances," to address emergency situations.[351]
4. Commenting on a text requiring decisions made by Parties to be consistent with international law, supports its retention to avoid trade barrier.[352]
5. Points out that the article deals with two different temporal scope. First, at the time of incident where there is a threat of damage; and secondly, the damage or threat of damage occurs long after the incident happened. In the latter case, there is a need to require for evaluation of damage and remedial action being taken.
6. Disagrees with Mexico's proposal requiring the competent authority to identify the operator responsible to take action only in the case of "damage" because the effect posed by the LMO can be there but not "significant" so as to allow the competent authority to take action under the Article.

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348 Notes FOCC 3.
349 ENB FOCC 1.
350 Notes FOCC 1.
351 ENB FOCC 2.
352 Notes FOCC 2.

7. Agrees with basing the likelihood of damage on scientific evidence "and" other information.
8. Prefers "competent authority" than "Parties" to take action.
9. Suggests to provide for the obligation of a Party to act consistently with international obligations as general provision and not specifically in this Article but the notion must be reinforced in the operational text and not in the preamble.
10. Disagrees with EU, explains that implementing provision (Article 7 of the Supplementary Protocol) is different from existing obligation (Article 22(1) of the CBD).
11. Explains that the operator who has discovered the damage as provided in paragraph 2 and the operator who has caused and is responsible for the damage as provided in paragraph 3 may not be the same. Thus, urges leaving the discretion to the competent authority to identify the operator responsible, as the underscored purpose is to ensure that damage is being dealt with.
12. Proposes Parties to require "appropriate" operator to take action.[353]

Norway

1. Regarding obligations of the operator to investigate, assess and evaluate damage and take appropriate response measures, suggests referring to "imminent threat of damage" rather than damage alone.[354]
2. Proposes text stating that the Party shall, in the event of damage [or imminent threat of damage] require an operator, subject to the requirements of the competent authority, to investigate, assess and evaluate the damage [or imminent threat of damage] and take appropriate response measures.[355]

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[353] Notes FOCC 3.
[354] ENB FOCC 1.
[355] Notes FOCC 1 (text in brackets remained to be discussed).

3. Objects to EU's proposal introducing an additional paragraph stating that domestic legislation may establish which components of biodiversity require response measures.[356]
4. Cautions that the duty of the operator to inform the NCA of imminent threat might be a burden to the operator.
5. Commenting on a text requiring decisions made by Parties to be consistent with international law, highlights that the issue had been dealt with comprehensively under the Preamble of the Cartagena Protocol.[357]
6. Supports that "imminent threat of damage" should be kept in the Supplementary Protocol, Articles 1, 2 and 7, in line with EU, Malaysia, Liberia and Egypt.
7. Suggests that "situation likely to result in damage" be based on scientific information "and/or" other relevant information".[358]

Paraguay

1. Supports a scheme flexible enough for domestic implementation.[359]
2. On the question whether the competent authority could also require the operator to take preventive action in the event of an "imminent threat of damage", expressed concerns as to its implications.[360]
3. Disagrees with the inclusion of imminent threat. Explains that the inclusion would introduce new procedures on top of the existing one dealing with risk which has already been covered by the Protocol, and therefore would be difficult.
4. Agrees with Mexican proposal dealing with "incident".

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356 ENB FOCC 2.
357 Notes FOCC 2.
358 Notes FOCC 3.
359 ENB FOCC 1.
360 ENB FOCC 2.

5. Insists that "imminent threat" is outside the scope of the Protocol.
6. Prefers more certainty by adding "proven" likelihood that damage will result.

Consistent with international obligations

7. Says that the India's proposal on consistency with international obligations is too broad and requires "huge amount" of obligations to be shown before Parties can adopt the Supplementary Protocol.[361]

Peru

1. Proposes replacing "significance" of the damage with "magnitude" as the former in Spanish carries a different meaning.
2. Supports Malaysia when commenting on a text requiring decisions made by Parties to be consistent with international law.[362]
3. Disagrees with replacing imminent threat with "incident" because there can be no such "incident" as a trigger but the threat exists.
4. Highlights that "imminent threat of damage" is a well known concept and it is different from "potential damage" which is wider. Supports New Zealand's proposal to differentiate the time period.
5. Supports Bolivia that the closest replacement would be "situation likely to result in damage". Highlights the need to emphasize not only scientific information but also the behaviour of competent authority not to act arbitrarily.
6. In deciding whether the likelihood of damage be based on either one or both the scientific information and other relevant

[361] Notes FOCC 3.
[362] Notes FOCC 2.

information, cautions that the burden in having both information in all cases will amount to a limitation.
7. Supports the inclusion of precautionary approach.
8. Suggests in the case of likelihood of damage, to take appropriate "preventive" measures so as to "prevent" such damage from occurring.[363]

Philippines

1. Suggests the operator to "evaluate the incident".
2. Supports Mexico that the decision whether the damage has occurred or will occur to biodiversity must be science-based.[364]

Republic of Korea

1. Prefers that the likelihood of damage be based on either the scientific information "or" other relevant information.
2. Supports the inclusion of precautionary approach.[365]

South Africa

1. On the question whether the competent authority could also require the operator to take preventive action in the event of an "imminent threat of damage", expresses concerns as to its implications.[366]
2. Prefers that the likelihood of damage be based on both the "scientific information and other factual evidence".[367]

Switzerland

1. Points to the need for the clause: recourse to remedies by the

[363] Notes FOCC 3.
[364] Notes FOCC 3.
[365] Notes FOCC 2.
[366] ENB FOCC 2.
[367] Notes FOCC 2.

operator shall not impede the competent authority from taking effective response measures "under appropriate circumstances" to address emergency situations.[368]

2. In response to Peru's proposal, suggests the deletion of "significance". Rationale: "significant" has been referred to in the definition of damage and explained in Article 3 of the Supplementary Protocol.[369]
3. Points out that the Colombian's proposal fails to address a situation where Parties want to prevent damage or contain the unintentional release of contained use LMOs and there may be no damage yet but threat only.[370]

FINAL TEXT: 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

[368] ENB FOCC 2.
[369] Notes FOCC 2.
[370] Notes FOCC 3.

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 8 Exemptions and Mitigations

This article refers to the acts which may exempt or mitigate the finding of liability. In other words, these are defences that a person otherwise liable may raise, to exonerate itself. There are usually various defences available especially where liability is strict. These include:

- *Force majeure*;
- Intentional intervention by a third party;
- Act of God – the result of natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character;

- War and hostilities;
- State of the art;
- Compliance with legal requirements; and
- Development risks.

These defences exempt (or mitigate the extent of) liability as the damage is due to the happening of events outside the control of the operator. The more contentious ones are the defence of 'development risks', 'state of the art', and, compliance with legal requirements. The 'development risk' defence describes situations in which the product is defective when put into circulation but the producer can seek to avoid liability by proving that the defect was not reasonably discoverable, given the then existing knowledge. 'State of the art' connotes that the product was safe when judged against the prevailing safety standard at the time it was put into circulation. In the latter case, it matters not that there may well be other more efficacious means of avoiding the damage. The defence of 'compliance with legal requirements' allows a defendant to plead that the defect is due to compliance with mandatory regulations issued by the authorities and that the defect is the inevitable result of the compliance. A proposed limitation on exemptions for act of God or *force majeure*, recognizes the potential for evolutionary damage due to the nature of the technology involved with the creation of LMOs and the potential for damage caused by climatic occurrences due to increased levels of greenhouse gas emissions. Some consider that there should be no exemption for such circumstances as they are caused by human activities, not simply uncontrollable natural occurrences.[371]

The final text was agreed upon on the second day of FOCC 2. It was a simple one, leaving the discretion to countries to provide in their domestic law, possible exemptions and/or mitigations.

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[371] This part has been adapted from Nijar, G.S., et al (2008), *Liability and Redress under the Cartagena Protocol on Biosafety*, Kuala Lumpur: CEBLAW.

Delegates' Positions

African Group

1. On an exemption for compliance with compulsory measures imposed by a public authority, prefers its deletion as it is covered by a similar provision on "intervention by third party".
2. Suggests the deletion of the list of exemptions and urges Parties to focus on provisions that are mandatory.[372]

Brazil

1. Regarding an exemption for intervention by a third party, prefers the deletion of a qualifying sentence that it should only relate to instances where the damage was caused despite the fact that appropriate safety measures were in place.
2. Prefers the retention of the article on exemptions because otherwise, Parties may think that they are prohibited from imposing exemptions at the domestic level.[373]

Ecuador

Supports the deletion of the whole article on exemptions.[374]

EU

1. Proposes stating that Parties may provide for differentiated responsibility if the operator proves that the damage arose from any one or more of the circumstances on the exhaustive list.
2. Calls on delegates to allow flexibility for jurisdictions wanting to provide certain exemptions or mitigations.
3. Wants to retain an exemption for an activity not considered

[372] Notes FOCC 2.
[373] Notes FOCC 2.
[374] Notes FOCC 2.

likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out, stressing that the list of exemptions is not mandatory, and Parties need not use any exemption or mitigation.

4. On an exemption related to national or international security, explains that it is a standard clause in international instruments.
5. Looking at the section as a whole, suggests that delegates make a distinction between exemptions and mitigating factors.[375]
6. Introduces reference to "exemptions and mitigation as Parties deem fit".
7. Proposes deletion of the word "invoked" as does not know how exemptions can be "invoked" by the operator.
8. Insists to retain an exemption for compliance with compulsory measures imposed by a public authority.
9. Supports the deletion of the list of exemptions.
10. Proposes text stating that Parties may provide, in their domestic law, for situations in which the operator should not bear all or part of the costs.[376]
11. On an exemption for an activity expressly authorized by and fully in conformity with an authorization given under domestic law, calls on delegates to allow flexibility for jurisdictions wanting to provide the exemption.[377]

India

1. Commenting on EU's proposal, cautions against using the phrase "differentiated responsibilities" because of its meaning in international law.[378]

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375 ENB FOCC 1.
376 Notes FOCC 2.
377 ENB FOCC 2.
378 ENB FOCC 1.

2. Questions how national security or international security can be invoked by the operator in the case of recovery of the costs and expenses.[379]
3. On an exemption for compliance with compulsory measures imposed by a public authority, prefers its deletion as it is covered by a similar provision on "intervention by third party".
4. Supports Malaysia and the deletion of the whole article on exemption because Parties in any event have the right to provide for exemptions at domestic level.[380]

Japan

1. On whether the text should refer to exemptions and mitigations, or just mitigations, prefers referring only to exemptions.
2. Wants to retain an exemption for an activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out, stressing that the list of exemption is not mandatory, and Parties need not use any exemption or mitigation, and calls for flexibility to be shown to provide options for Parties.[381]
3. Questions how national security or international security can be invoked by the operator in the case of recovery of the costs and expenses.[382]
4. Prefers the retention of the article on exemptions because otherwise, Parties may think that they are prohibited to impose exemptions at the domestic level.[383]

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379 Notes FOCC 1.
380 Notes FOCC 2.
381 ENB FOCC 1.
382 Notes FOCC 1.
383 Notes FOCC 2.

Malaysia

1. Commenting on EU's proposal, cautions against using the phrase "differentiated responsibilities" because of its meaning in international law.[384]
2. Regarding an exemption for intervention by a third party, prefers the qualifying sentence that it should only relate to instances where the damage was caused despite the fact that appropriate safety measures were in place. Rationale: to prevent onerous burden imposed on developing countries once the chain is broken by a third party.
3. Opposes an exemption for an activity expressly authorized by and fully in conformity with an authorization given under domestic law, arguing that any additional exemptions or mitigations would potentially undermine the Supplementary Protocol. Rationale: Governments of developing countries which approve the transboundary LMO should not be burdened with an obligation for clean-up costs because Governments approve the LMO on the basis of the documents submitted by the applicant in good faith. Such an exemption may affect or discourage approvals by developing countries.
4. Supports the deletion of the list of exemptions if it is not an exhaustive list.
5. Proposes text stating that Parties may provide, in their domestic law, for any other exemptions as it may deem fit.[385]

Mexico

1. Regarding an exemption for intervention by a third party, prefers the deletion of a qualifying sentence that it should only relate to instances where the damage was caused despite the fact that

[384] ENB FOCC 1.
[385] Notes FOCC 2.

appropriate safety measures were in place.
2. Suggests the deletion of the list of exemptions.[386]

New Zealand

1. Introduces reference to "exemptions and mitigation as Parties deem fit".
2. On an exemption for an activity expressly authorized by and fully in conformity with an authorization given under domestic law, calls on delegates to allow flexibility for jurisdictions wanting to provide the exemption.
3. Highlights that it is needed to leave to the NCA to decide under what circumstance the operator has the right to plea not to pay the cost; and the other is the discretion for the NCA not to seek reimbursement.
4. Supports Malaysia and proposes language stating that Parties may provide, in their domestic law, for other situations in which the operator can invoke an exemption or mitigation.[387]

Norway

1. Supports the deletion of the list of exemption if it is not an exhaustive list.
2. Adds "mitigation" to Malaysia's proposed text.[388]

Paraguay

1. Introduces reference to "exemptions and mitigation as Parties deem fit".
2. Prefers Parties "shall" provide for exemptions in their domestic law.
3. Prefers the retention of the article on exemptions because otherwise, Parties may think that they are prohibited to impose

[386] Notes FOCC 2.
[387] Notes FOCC 2.
[388] Notes FOCC 2.

these at the domestic level.[389]

Philippines

On an exemption for compliance with compulsory measures imposed by a public authority, expresses difficulty with "public authority". Prefers its deletion as it is covered by a similar provision on "intervention by third party".[390]

South Africa

Looking at the section as a whole, suggests that delegates make a distinction between exemptions and mitigating factors.[391]

Switzerland

1. Wants to retain an exemption for an activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out, stressing that the list of exemptions is not mandatory, and Parties need not use any exemption or mitigation, and calls for flexibility to be shown to provide options for Parties.[392]
2. Supports the deletion of the list of exemptions.[393]

FINAL TEXT: 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.

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389 Notes FOCC 2.
390 Notes FOCC 2.
391 ENB FOCC 1.
392 ENB FOCC 1.
393 Notes FOCC 2.

2. Parties may provide, in their domestic law, for any other exemptions or mitigations as they may deem fit.

Article 9 Right of Recourse

Sometimes the injury is indivisible and there may be more than one person who may be sued for the damage. The claimant can then sue and obtain judgment against any one or more of such persons. Under a rule of the common law, any tortfeasor whose act has been a proximate cause of the damage must compensate for the whole of it. This means that not all the tortfeasors need to be sued and the claimant may proceed to recover the whole amount from any one of the defendants. The party which pays will have a right of recourse in respect of the amount he has paid out, or seek contribution from, other joint tortfeasors, that is, the other party whose judgment amount he has satisfied. For apportionment of liability, where more than one person is liable for the damage, the amount payable is apportioned according to the degree of culpability of each defendant.[394]

The text concerning the right of an operator to seek recourse or indemnity from third parties was not bracketed since FOCC 1. In other words, there were no negotiations on this issue. Ultimately, the same text with the change of "rules and procedures" to "Supplementary Protocol" was agreed upon on the second day of FOCC 2 and later appeared as Article 9 of the Supplementary Protocol.

FINAL TEXT: 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.

[394] This paragraph has been taken from Nijar, G.S., et al (2008), *Liability and Redress under the Cartagena Protocol on Biosafety*, Kuala Lumpur: CEBLAW.

Article 10 Time Limits

This issue deals with limitation in time for which an action can be taken for recovery of costs and expenses for response measure. There are two types of time limits, relative and absolute. A relative time limit provides for situations where a claimant is given a time period within which to bring his claim. Time limits are fixed so that the defendant does not have a potential claim hanging over his head for a long time. Time limits also ensure that evidence is available. Absolute time limits may also be fixed. No action can be presented after that period expires. When time begins to run must also be established. Generally time is fixed from the date when the damage occurred or is reasonably discoverable. Where the incident consists of continuous occurrences, the time usually runs from the date of the last occurrence or incident.[395]

At FOCC 1, the group agreed to allow for domestic law to decide on and provide for time limits for recovery of costs and expenses, without setting any specific cut-off times. This avoided a long list of complicated related issues. On the second day of FOCC 2, after a relatively short discussion, delegates agreed to retain the simple provision that now appears as Article 7 of the Supplementary Protocol.

Delegates' Positions

African Group

1. Prefers setting the minimum cut-off times for both relative and absolute time limit.[396]
2. Emphasizes that it is impossible to include time limit. Rationale:

[395] This paragraph has been adapted from Nijar, G.S., et al (2008), *Liability and Redress under the Cartagena Protocol on Biosafety*, Kuala Lumpur: CEBLAW.

[396] Notes FOCC 1.

damage involving biodiversity is very complicated and may be picked up only much later. Also, there would be no absolute time period and no clear starting and ending point. The problem may be suspected 10 years ago, but confirmed later, while nobody could solve it immediately. Highlights an example stating the link between smoking and lung cancer.[397]

Colombia

Prefers not to set time limit.[398]

EU

1. Can support no setting of time limit.[399]
2. Says that time limit is essential. Rationale: concerns a situation where there maybe positive knowledge of the state regarding the damage but, for some reason, no immediate action is taken. If the action was taken later, it would be unfair for the operator because the magnitude of the damage may turn out to be bigger.[400]

India

1. Prefers not to set time limit.[401]
2. Disagrees to identify the initial stage (for establishing the time limit) and proposes to leave the question for scientist to determine.[402]

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397 Notes FOCC 2.
398 Notes FOCC 1.
399 Notes FOCC 1.
400 Notes FOCC 2.
401 Notes FOCC 1.
402 Notes FOCC 2.

African delegates at FOCC 2. *(Photo credit: IISD RS)*

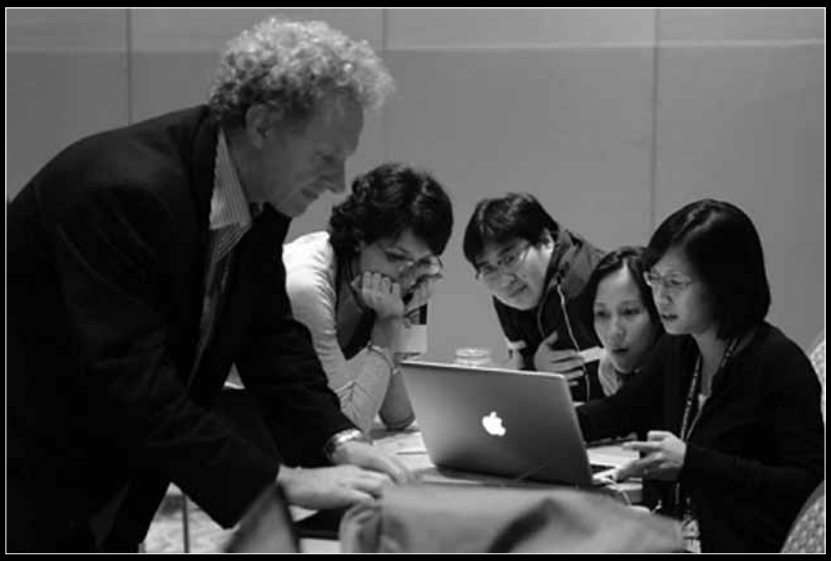
China consulting with colleagues. *(Photo credit: IISD RS)*

Co-Chair gavels the 'adoption' of the text.

Delegates from Norway, Japan and New Zealand. *(Photo credit: IISD RS)*

EU members during the negotiations. *(Photo credit: IISD RS)*

GRULAC countries consult informally. *(Photo credit: IISD RS)*



NGOs at work. *(Photo credit: IISD RS)*

Small group negotiations with New Zealand, Malaysia and the African Group.
(Photo credit: IISD RS)

Japan

Proposes including time limit in "implementing response measures". Rationale: agrees with EU that there maybe a situation where damage occurs without notice, and after ten years, the competent authority requests the operator to take action. This would be unfair to the operator.[403]

Malaysia

1. Agrees with African Group as well as the need to have some kind of time limit. Rationale: otherwise the operator may be perpetually under a threat of being sued. Proposes to leave the issue of time limit in relation to the "time for recovery of costs and expenses or taking response measures as well as when such time limits will commence", to the discretion of the Parties in their domestic law.
2. States that the commencement of time limit must relate to when the damage was discovered or ought to have been reasonably discoverable.[404]

Mexico

Prefers not to set out the minimum cut-off times for both relative and absolute time limit.[405]

New Zealand

Agrees with either setting out the time limit or otherwise.[406]

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[403] Notes FOCC 2.
[404] Notes FOCC 2.
[405] Notes FOCC 1.
[406] Notes FOCC 1.

FINAL TEXT: 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 11 Financial Limits

Financial limits cap the amount recoverable in respect of a claim. At FOCC 1, delegates could not agree to setting a maximum amount of recoverable costs and expenses, leaving a final reference in brackets stating that such limits shall not be less than a given number of special drawing rights, with the number still outstanding. Finally on the second day of FOCC 2, delegates agreed not to set the amount, while still explicitly providing for the discretion of Parties to provide for it under their domestic law.

Delegates' Positions

African Group

Supports not limiting the recovery of costs and expenses, thus favoring full recovery.[407]

Brazil

1. Supports not limiting the recovery of costs and expenses, thus favoring full recovery.[408]
2. Supports that domestic law may provide for financial limits for the recovery of costs and expenses without qualification.[409]

[407] ENB FOCC 1.
[408] ENB FOCC 1.
[409] Notes FOCC 2.

Colombia

Prefers to allow flexibility for setting domestic limitations in amount.[410]

India

Supports not limiting the recovery of costs and expenses, thus favoring full recovery.[411]

Mexico

Prefers to allow flexibility for setting domestic limitations in amount.[412]

New Zealand

Inserts "related to response measures" after "Parties may provide in their domestic law for financial limits for the recovery of costs and expenses".[413]

Panama

Prefers to allow flexibility for setting domestic limitations in amount.[414]

Paraguay

Prefers to allow flexibility for setting domestic limitations in amount.[415]

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410 ENB FOCC 1.
411 ENB FOCC 1.
412 ENB FOCC 1.
413 Notes FOCC 2.
414 ENB FOCC 1.
415 ENB FOCC 1.

Philippines

Prefers to allow flexibility for setting domestic limitations in amount.[416]

FINAL TEXT: 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 12 Financial Security

A provision on "Financial Security" requires a person carrying out an activity to furnish financial security to satisfy any successful claim made against it. This makes it compulsory for operators to take out insurance coverage or other forms of financial security. Depending on the terms of the coverage, sometimes the insurance company can be sued directly. The defences that the insurers can raise are usually circumscribed. They have the right of subrogation or recourse if they satisfy the claim on behalf of the insured. They can also often ask that the insured be joined as a co-defendant. In place of insurance, the operator may be asked to provide some other form of financial guarantee. He could, for example, be asked to post a bond in a specified sum.[417]

The negotiations on this issue started before FOCC 1 under the topic "Coverage". The negotiations took place at all FOCCs but delegates failed to find a way forward.[418] At FOCC 4, the issue of

[416] ENB FOCC 1.

[417] This part has been adapted from Nijar, G.S., et al (2008), *Liability and Redress under the Cartagena Protocol on Biosafety*, Kuala Lumpur: CEBLAW.

[418] First part of the FOCC 3 negotiations on this article was conducted under Chatham House rules and therefore its record does not appear in this book. The second part, where the rules do not apply, is complied in this section.

financial security was one of the final two outstanding issues that remained to be resolved.

The negotiations broke down when four Parties refused to attribute the rights of Parties to require financial security. A bigger number of Parties, on the other hand, insisted on keeping the provision. This article nearly suffered the fate of being a deal breaker. The Co-Chairs convened "confession" sessions - each country were required to reveal its bottom line in confidence to the Co-Chairs. Confessionals were made by Brazil, Mexico, Paraguay, South Africa, Bolivia, Peru, Malaysia, India, African Group, Ukraine and Norway. No solution emerged from these sessions. On the second day, Parties reached another deadlock in the negotiations on this issue. Malaysia, on behalf of one group, declared that they were happy to engage in the preliminary discussion to find a basis for a bilateral consultation provided that there was willingness on the other side to consider the inclusion of a proposal on financial security in the operational text. Whereas Brazil, on behalf of another group, said that they were ready to have preliminary discussion without any precondition but were open to all possibilities to find compromise language. A bilateral meeting was convened (no outcome) and then reconvened. The meetings were attended by Mexico, Brazil, Paraguay, South Africa on one side, and Malaysia, Bolivia, Namibia, Tanzania, Cameroon, Peru, Malawi on the other. Finally a compromise text was concluded as follows:

"Article 10

1. Parties retain the right to provide in their domestic law for financial security.
2. Parties shall exercise the rights in paragraph 1 above in a manner consistent with their rights and obligations under international law, taking into account the final 3 preambular paragraphs of the Protocol.

3. The first COP-MOP after the entry into force of the Supplementary Protocol shall request the Secretariat to undertake a study of the modalities of financial security mechanisms and assess the environmental, economic and social impacts, particularly to developing countries, as well as identifying the appropriate entities to provide financial security.

Article 13

… The first review shall include a review of the effectiveness of Article 10 and 12."

(referred to as "Text A")

Text A was then accepted by Parties as language to work on. Article 10 was finally adopted after some editorial changes and Article 13 was then adopted again, with the insertion of "Article 10".

Delegates' Positions

African Group

1. Urges delegates to retain the provision since it is in the national interest of certain countries.[419]
2. Highlights that the CPB dealt with transboundary movement of LMOs only and any homegrown biotechnology may not be relevant (as regards the imposition of financial security).
3. Explains that it is normal trade standard between two parties to impose financial security in any transaction and parties should not be restricted to do so. It is the right of an importing country that should be respected.[420]
4. Insists on having the right of Parties to require financial security provided in the Supplementary Protocol. Asked to record that

[419] ENB FOCC 2; Notes FOCC 2.
[420] Notes FOCC 2.

there are 9 countries which presented strictly trade arguments in a strictly environmental forum even though the wording is sufficiently careful in dealing with the concerns of WTO. Highlights that countries in Africa are not able to exercise their sovereign rights without the Supplementary Protocol reaffirming them.

5. Underscores that the provision is necessary so as the prerogative of Parties to ask for financial security is not challenged. Reminds that the provision is just "restating the fact of life" and not something new.
6. Highlights that the impact of the Supplementary Protocol (will be) mostly on pharmaceutical, instead of agriculture, products where it is more controversial. Urges to leave the prerogative to Parties and allow to be included, a non-mandatory financial security requirement.[421]
7. Insists in having provision attributing the right of Parties to require financial security in the operational part. Points out that study proposed by Brazil could sometimes be biased. Urges EU, Switzerland and Norway to share their experiences in having such requirement in their domestic law.[422]

Bolivia

1. Says that the provision providing for the rights of Parties to require financial security is just an enabling clause, leaving the choice to Parties on whether to require such security. Highlights that the essence of the Protocol and the Supplementary Protocol is the "polluter pays" principle and therefore it is not feasible to have it without the provision.
2. Considering the complexities raised by Philippines and Mexico, says that the concerns are real but complexity should not be

[421] Notes FOCC 3.
[422] Notes FOCC 4.

limitation for Parties to take measures to protect biodiversity. Highlights the role of precautionary approach in strengthening sustainable development. Emphasizes that there are different alternatives for financial mechanisms.

3. Prefers to have the issue addressed in operational text instead of in preamble. Requests guidance from trade and insurance or financial mechanism representatives.[423]
4. Insists in having provision attributing the right of Parties to require financial security. Supports Malaysia in having financial security in text and not just in preamble.[424]

Brazil

1. Says that the provision would be difficult to operationalize, send a negative signal to the biotechnology industry, and hamper entry of small- and medium-sized national enterprises into the sector.[425]

   Rationale: international law does not provide for self-insurance. Trade insurance covers only whether goods are delivered and not environmental issues. Parties are not prohibited from requesting financial security from operator if the clause is removed. Also, there are problems of uncertainty in relation to the quantum and the period of the security. It would also hamper food security.[426]
2. Does not see the value in having a specific article dealing with financial security in the Supplementary Protocol. Prefers not to have any kind of text regarding financial security in the Supplementary Protocol.
3. Expresses concerns that the requirement will definitely infringe WTO rules and therefore cannot accept it.

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423 Notes FOCC 3.
424 Notes FOCC 4.
425 ENB FOCC 2; Notes FOCC 3.
426 Notes FOCC 2.

4. Says that Brazil is not in a position and has no mandate to discuss the issue. Assures having analysis of this issue and to compromise in Nagoya. Indicates possibility in having text on financial security in preamble.[427]
5. Says that the article is sensitive and not implementable. Suggests the Secretariat to conduct a study proposed by Brazil with input from experts from other international organisations or conventions, on the economic and social impact of accepting such a provision so as to make a more informed decision at COP-MOP 1 of the Supplementary Protocol. Agrees with having a preambular language on the right of countries to have financial scheme. Says that Paraguay has a big problem with accepting a specific provision on the issue of financial security.
6. Suggests having specific decision saying Parties recognise the need to have study and as Parties of the Cartagena Protocol, decide to mandate the Executive Secretary to prepare technical paper before entry into force of the Supplementary Protocol at first meeting to decide on what to do. Indicates to supply language if needed.
7. Clarifies that Brazil is a megadiverse country and needs to balance its commercial interest and the protection of biodiversity. Highlights that Brazil and Paraguay are the only two countries exporting GM agriculture commodities. Emphasizes that biodiversity should not "destroy" commerce. Highlights that there should not be any provision in the Supplementary Protocol that could not be implemented. Also, damage caused by LMOs has not yet happened. There is no insurance company that is in this business.
8. Commenting on Text A above, underlines the delicate balance achieved by Parties and that any modification would create

[427] Notes FOCC 3.

another imbalance.[428]

Colombia

Does not support the right of Parties to require the operator to establish and maintain financial security as it poses a lot of issues and concerns.[429]

Costa Rica

Supports the deletion of the right of Parties to require the operator to establish and maintain financial security, including through self-insurance.[430]

Cuba

Supports the deletion of the right of Parties to require the operator to establish and maintain financial security, including through self-insurance.[431]

EU

1. Prefers to keep the language of Parties requiring the operator to establish and maintain financial security during the time limits.[432]
2. Supports the retention of the provision providing for the rights of Parties to require financial security because it is just an enabling clause that does not amount to a trade barrier.
3. Highlights that the EU directive provides for similar enabling clause and nine member countries have put in place domestic legislation, either mandatory or voluntarily, asking for financial

[428] Notes FOCC 4.
[429] Notes FOCC 3.
[430] Notes FOCC 3.
[431] Notes FOCC 3.
[432] ENB FOCC 1.

security.[433]

4. Expresses its willingness to go either way.[434]

Ecuador

Prefers the deletion of the right of Parties to require the operator to establish and maintain financial security, including through self-insurance.[435]

India

1. Prefers to keep the language of Parties requiring the operator to establish and maintain financial security during the time limits.[436]
2. Supports the Supplementary Protocol to provide for the right of Parties to require the operator to establish and maintain financial security, saying that the provision is just an enabling clause and will not have trade issue implications.
3. Disagrees with Japan's insertion.[437]
4. Insists on having provision attributing the right of Parties to require financial security.[438]

Japan

1. Opposes language providing that Parties require the operator to establish and maintain financial security during the time limits.[439]
2. Proposes that Parties "may" take measures to encourage the

[433] Notes FOCC 3.
[434] Notes FOCC 4.
[435] Notes FOCC 3.
[436] ENB FOCC 1.
[437] Notes FOCC 3.
[438] Notes FOCC 4.
[439] ENB FOCC 1.

development of financial security instruments and markets to cover "the cost of response measures".[440]

3. Commenting on the compromise Text A above, proposes Parties retain the right to provide in their domestic law for financial security "which is necessary and reasonable for the implementation of response measures under this Supplementary Protocol".[441]

Malaysia

1. Points out that the provision would not hamper biotechnology, and that industry has been actively seeking to provide for financial security with the insurance industry.[442]
2. Explains that it is only a "may" provision which allows Parties who want to require financial security from the operator to be able to do so bilaterally. Urges for collaborative efforts, including with industry, to deal with the situation in long run.[443]
3. Highlights that financial security is crucial so that in case damages are awarded, they are in fact paid. Emphasizes the history of the negotiations in this regard: started with need for compulsory fund, later diluted to some kind of insurance, and then now leaving the choice to Parties whether to require financial security or not.
4. Proposes specifying financial guarantees "including insurance".
5. Disagrees with Japan's insertion.
6. Urges to set out criteria/indicative list for financial security. Suggests to get guidance from WTO, keeping in mind some Parties' views on tradeissues.
7. Taking into account the complexities raised by Philippines

[440] Notes FOCC 3.
[441] Notes FOCC 4.
[442] ENB FOCC 2.
[443] Notes FOCC 2; Notes FOCC 3.

and Mexico, urges to capture and address these complexities in the Supplementary Protocol instead of being silent about it. Emphasizes that Minister Juan Mayor who chaired the CPB negotiations, made it clear then that if the Protocol is without financial security, it is worthless. Points out that Malaysia has been active in biotech project, even so, Malaysia is in favour of financial security being furnished.[444]

8. Insists on having provision attributing the right of Parties to require financial security. Emphasizes the main reasons why developing countries need the provision. Highlights the need for developing countries to have assurance that if damage occurs, government will not be held financially responsible but the company carrying out the activity.
9. Commenting on Brazil's proposal to conduct a study, highlights that lengthy studies have been conducted and presentations have been made. Emphasizes that countries should not allow commerce to "destroy" biodiversity.[445]

Mexico

1. On behalf of GRULAC, opposes language providing that Parties require the operator to establish and maintain financial security during the time limits, noting its potential repercussions on developing countries' economies and food prices.[446]
2. On behalf of GRULAC, requests the deletion of the provision by which Parties may require operators to establish and maintain financial security[447] and feels that it is impossible for countries at this juncture to request for financial guarantee.[448]

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444 Notes FOCC 3.
445 Notes FOCC 4.
446 ENB FOCC 1.
447 ENB FOCC 2.
448 Notes FOCC 2.

3. Reluctant in engaging with para 1 of Text A (above) dealing with the right of Parties to require financial security.
4. Explains that financial security may give false sense of security and that there should not be a cap/limit in restoring the biodiversity as will be offered by the insurance company.
5. Emphasises that Parties are asking insurance here for risk that is not known. Also, the proposed paragraphs (on financial security) are over-simplified. Evaluation is a problem. Rationale: time is a factor. It is difficult to value if it manifest many years later. Also, it is difficult to know who the operators are.
6. Suggests to include the issue in the preamble and asks to do an analysis of what the risks are.[449]
7. Supports Brazil proposal.[450]

New Zealand

1. Prefers to delete the language of Parties requiring the operator to establish and maintain financial security during the time limits.[451]
2. Supports Brazil and expresses concern of its inconsistency with WTO.
3. Highlights that the exclusion from the Supplementary Protocol does not prohibit the right of Parties to require financial security, if they wish to.[452]

Norway

1. Prefers to keep the language of Parties requiring the operator to establish and maintain financial security during the time

[449] Notes FOCC 3.
[450] Notes FOCC 4.
[451] ENB FOCC 1.
[452] Notes FOCC 3.

limits.[453]

2. Proposes keeping reference to self-insurance.[454]
3. Highlights that Norway has put in place the requirement for financial security in their domestic law.
4. Prefers that Parties "are urged to" take measures to encourage the development of financial security instruments.[455]
5. Insists on having provision attributing the right of Parties to require financial security. Clarifies that Norway does not have experience in implementing the law relating to financial security because Norway does not import LMOs.[456]

Panama

Supports the deletion of the right of Parties to require the operator to establish and maintain financial security, including through self-insurance.[457]

Paraguay

1. Supports Brazil and prefers not to have any kind of text regarding financial security in the Supplementary Protocol. Rationale: Paraguay is not putting trade consideration over environmental concern but Paraguay depends highly on exporting agriculture products and does not have a diversified economy.
2. Clarifies that Paraguay has no mandate to consider either para 1 or 2 of Article 12 (Financial Security), and that there is radical opposition from private sector in Paraguay on this issue.
3. Says that Article 12 (Financial Security) does not reflect a balance. Reason: Article 12 (Financial Security) penalises only

[453] ENB FOCC 1.
[454] Notes FOCC 2.
[455] Notes FOCC 3.
[456] Notes FOCC 4.
[457] Notes FOCC 3.

one party – the operator (countries selling or exporting the LMOs) whereas trade involving LMOs benefited both sides. There should be financial mechanism involving not only operator but all actors.[458]

4. Insists on the complete deletion of the Article. Expresses concerns of the impact of requirement of financial security on agriculture products. Unfair for developing countries because developing countries lack of capacity to provide insurance. Also it is difficult to ascertain insurance for different kinds of LMOs.[459]

Peru

1. Supports the Supplementary Protocol to provide for the right of Parties to require the operator to establish and maintain financial security, highlighting the need at national level, some kind of concrete warranty that the operators will not have excuse not to pay.[460]
2. Insists on having provision attributing the right of Parties to require financial security.[461]

Philippines

1. Says that investment in biotechnology programmes is a national priority.[462]
2. Points out that Philippines have conducted a series of consultations with different sectors, and therefore agrees with the complexity explained by Mexico. Emphasizes, for example, it is impossible to ask for financial security in the case of transfer from farmer to farmer (pollinator).

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458 Notes FOCC 3.
459 Notes FOCC 4.
460 Notes FOCC 3.
461 Notes FOCC 4.
462 ENB FOCC 2; Notes FOCC 2.

3. Says that Philippines does not support the deletion of financial security but needs to consult further. Just like South Korea, the government is strongly supporting biotech. Believes it is an alternative to traditional technology.[463]

South Africa

1. Requires a full debate on the issue as South Africa is also in the process of developing biotechnology sector.[464]
2. Does not support the right of Parties to require the operator to establish and maintain financial security, including through self-insurance. Rationale: many of South Africa's GM products are produced by public and funded by the state.[465]
3. Opposes having any provision on financial security or attributing the rights of Parties to require financial security.
4. Raises questions in implementing Article 12(1) - how would financial security be implemented in practice? What is the quantum? Would it be an administrative burden for competent authority to determine damage and compensation required? Does it have obligatory effect to have measures in place for every country? Its implication on trade? Its baseline? Is it negative for innovation and food security? How to evaluate damage? Its implication for increases in food price in developing countries?[466]

Switzerland

1. Prefers to keep the language of Parties requiring the operator to establish and maintain financial security during the time limits.[467]

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463 Notes FOCC 3.
464 ENB FOCC 2; Notes FOCC 2.
465 Notes FOCC 3.
466 Notes FOCC 4.
467 ENB FOCC 1.

2. Highlights that the exclusion from the Supplementary Protocol does not prohibit Parties from requiring financial security through their domestic laws, as in the case of Switzerland.[468]
3. Points out that Switzerland has implemented provisions relating to financial security. Although there has been no real damage, and there are certain problems in implementing such provisions, for example, no insurance company insuring liability from LMOs, there are ways and possibilities to deal with the issue. Says that the government asks insurance from the operator, who is the permit holder, universities doing research or big companies.[469]

Ukraine

Insists on having provision attributing the right of Parties to require financial security and highlights that Ukraine has such similar provision in domestic law.[470]

FINAL TEXT: 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;

[468] Notes FOCC 3.
[469] Notes FOCC 4.
[470] Notes FOCC 4.

(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 13 Civil Liability

A person may bring a civil claim in a court against another person for damage he has suffered. This way he establishes civil (as opposed to criminal) liability against that person through the normal court process. There will be clear rules and procedures that he has to follow. Courts of different countries may have different rules. It may then be difficult for a person unfamiliar with those rules to make a claim in a court of another jurisdiction. This difficulty may be overcome if the fundamental rules and procedures are harmonized across jurisdictions through an international instrument.[471]

The need for civil liability was one of the heavily debated issues in the history of liability and redress in the context of the Protocol. Developing countries started the negotiations on the basis of Article 27 of the Protocol, asking for a binding civil liability regime. However Parties failed to reach consensus on the need for establishing a civil liability regime. At COP-MOP 4, Parties finally compromised and agreed to include one binding provision on civil liability in the Supplementary Protocol, to be complemented by non-legally binding guidelines. Since then, Article 13 remained one of the most contentious provisions in the draft Supplementary Protocol until it was agreed on the fourth day of FOCC 3 in June 2010.

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[471] This paragraph has been adapted from Nijar, G.S., et al (2008), *Liability and Redress under the Cartagena Protocol on Biosafety*, Kuala Lumpur: CEBLAW.

Delegates' Positions

African Group

1. On language stating that the guidelines be revised "with a view to elaborating a more comprehensive binding regime on civil liability," recalls that the option to further elaborate the civil liability regime had been a key condition for their approval of the compromise achieved during COP/MOP4.
2. Supports an option providing for Parties to enforce foreign judgments arising from the implementation of the provisions on civil liability, and for Parties who do not have legislation concerning enforcement of foreign judgments to endeavor to enact such laws.[472]
3. Insists in having a mandatory civil liability provision.
4. Proposes deleting "incidental to the damage as defined in Article 2".
5. Prefers Parties shall assess whether their domestic law provides for adequate rules and procedures on civil liability for material or personal damage, and "apply" their existing domestic laws, including where applicable general rules and procedures on civil liability; "apply" or developing civil liability rules and procedures specifically for this purpose; or "apply" or developing a combination of both.
6. On EU's proposed text (see item 8 under "EU"), raises concern whether it is a precondition before the ratification of the protocol and whether a new body is required to assess the process.[473]

Bolivia

1. Expresses concern that Parties which did not participate in the previous FOCC meetings like Bolivia, may have concern over

[472] ENB FOCC 1.
[473] Notes FOCC 3.

the weak language of this article (Civil Liability). Urges that the text reflects Art 27 of the Cartagena Protocol.
2. Supports African Group's proposal (see item 4 and 5, "African Group").
3. Expresses concern about the impact of damage on local farmers and supports Malaysia to include in the article, damage that is obvious as a minimum.[474]

Brazil

1. On the nature of the conditions set out in the provision and their impact on newly implemented civil liability systems, raises concerns that the conditions could require Parties to implement special systems for civil liability if their existing systems did not meet the conditions.
2. Supports an option providing for Parties to enforce foreign judgments arising from the implementation of the provisions on civil liability, and for Parties who do not have legislation concerning enforcement of foreign judgments to endeavor to enact such laws.[475]
3. On an operational text providing for the review of the guidelines for working towards a non-legally binding approach on civil liability, prefers moving this provision into the COP/MOP decision adopting the Supplementary Protocol.[476]

EU

1. On the nature of the conditions set out in the provision and their impact on newly implemented civil liability systems, says they should be non-binding and not require states to harmonize their laws.

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[474] Notes FOCC 3.
[475] ENB FOCC 1.
[476] Notes FOCC 1.

2. Opposes an element on access to justice or right to bring claims, arguing it is incompatible with civil law systems.
3. Prefers an operational text providing only for the enforcement of foreign judgments in accordance with domestic law, rejecting language that would require developing or changing domestic laws on enforcement of foreign judgments.[477]
4. On an operational text providing for the review of the guidelines for working towards a non-legally binding approach on civil liability, says that this provision should be part of the general review clause that would review the implementation of the Supplementary Protocol, including further revision of civil liability.[478]
5. On whether Parties "should", "shall" or "may" assess whether their domestic law provides for adequate rules and procedures on civil liability, prefers to keep the choice open at this juncture.
6. Says that "incidental to" works for EU and agrees that the material or personal damage captured should be linked to the environment. Cautions Parties not to lose sight of the administrative approach which focuses on damage to biodiversity, including risk to human health. The latter should not be in the context of civil liability.
7. Disagrees with the inclusion of "pecuniary" losses because it is not suitable for certain systems within EU.
8. Proposes "Before a state or regional economic integration organization deposits its instrument of ratification, acceptance, approval or accession, it" shall assess whether its domestic law provides for adequate rules and procedures on civil liability for material or personal damage associated with the damage as defined in Article 2, paragraph 2 (c) and ", as appropriate, decide to:".

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[477] ENB FOCC 1.
[478] Notes FOCC 1.

9. Proposes text indicating that Parties shall "as appropriate, decide to" apply their existing domestic law, including where applicable general rules and procedures on civil liability; apply or develop civil liability rules and procedures specifically; or apply or develop a combination of both.
10. Proposes later that Parties shall "continue to apply their existing general domestic law on civil liability; develop or continue to apply civil liability rules and procedures specifically for this purpose; or develop or continue to apply a combination of both. Explains that the addition makes it clear that it is not an obligation to start, but to continue apply, the established civil liability system.
11. Proposes that Parties shall provide for response measures and may, as appropriate, "continue to" apply their existing domestic law, including where applicable general rules and procedures on civil liability; develop "and apply or continue to apply" civil liability law specifically for that purpose; or "develop and apply or continue to apply" a combination of both.[479]

India

1. Supports an element on access to justice or right to bring claims.
2. Supports an option providing for Parties to enforce foreign judgments arising from the implementation of the provisions on civil liability, and for Parties who do not have legislation concerning enforcement of foreign judgments to endeavor to enact such laws.[480]
3. On EU's proposed text, raises concerns that it does not state the period to assess (whether domestic law provides for adequate rules and procedures on civil liability). This will in some way delay the process.

[479] Notes FOCC 3.
[480] ENB FOCC 1.

4. Prefers "pecuniary loss and personal injury" replacing "material or personal loss".
5. Clarifies that in common law system, it is insufficient to require the application of "rules and procedures" on civil liability, but there should be a statute or Act that sets out substantive law; the former are subordinate law.
6. Suggests replacing "law" with "laws".[481]

Japan

1. On the nature of the conditions set out in the provision and their impact on newly implemented civil liability systems, says they should be non-binding and not require states to harmonize their laws.
2. Prefers an operational text providing only for the enforcement of foreign judgments in accordance with domestic law, rejecting language that would require developing or changing domestic laws on enforcement of foreign judgments.
3. Highlights that the definition of damage under the civil liability provision would be different from that under the administrative approach.[482]
4. On whether Parties "should", "shall" or "may" assess whether their domestic law provides for adequate rules and procedures on civil liability, prefers to keep the choice open at this juncture.
5. Prefers strongly Parties to 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, paragraph 2(c).[483]

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[481] Notes FOCC 3.
[482] ENB FOCC 1.
[483] Notes FOCC 3.

Malaysia

1. Clarifies that the provision on civil liability should: ensure that Parties have a civil liability system in place, while leaving flexibility as to whether to address LMOs as part of a general system or through a specific system; and ensure that any such law includes the generic common elements of any civil liability system.
2. Supports provision on access to justice or right to bring claims.
3. Supports an option providing for Parties which have in their law the enforcement of foreign judgments, to enforce foreign judgments arising from the implementation of the provisions on civil liability, and for Parties who do not have such legislation, to endeavor to enact such laws.
4. On language stating that the guidelines be revised "with a view to elaborating a more comprehensive binding regime on civil liability," recalls that the option to further elaborate the civil liability regime had been a key condition for their approval of the compromise achieved during COP/MOP4. Proposes new text envisioning a three-year period for reviewing the guidelines on civil liability.[484]
5. Supports African Group's proposal. Highlights that "incidental" means "minor and subordinate". Agrees with Japan's intention in creating a linkage but the "material or personal damage" should not be seen as "subordinate" to the damage to biological diversity.
6. Urges to explore how the issue on "risk to human health" arises in this context. Do we need to see whether health is affected arising from a change in the variability of biodiversity? How would this apply? Is this workable? Or do we want to deal with cases where somebody's health is affected by LMOs. We have

[484] ENB FOCC 1.

urging the latter position.

7. On Chair's proposal substituting personal "damage" to "loss", raises concern on whether personal injury will be excluded. Suggests putting on record "material does not include pecuniary loss". Urges that damage that is obvious should be stated in the article as a minimum.
8. On EU's proposal "as appropriate, decide to", raises concerns that it will allow Parties not to take action if they feel it is "not appropriate".
9. Highlights that in common law, "material loss" does not necessarily include "pecuniary loss" as suggested by New Zealand.
10. Clarifies that in common law system, it is insufficient to require the application of "rules and procedures" on civil liability, but substantive law like statues or Act should be highlighted, because the former are subordinate laws.
11. Commenting on EU's proposal, adds that Parties shall develop "and apply" or continue to apply civil liability law specifically for this purpose; or develop "and apply" or continue to apply a combination of both.
12. Opposes EU's addition of "continue to" in Article 13.1 (Parties' obligation to provide for response measures in their domestic law that address damage resulting from transboundary movements of LMOs) because many countries like Malaysia and in African Group do not have a system in place providing for response measures.[485]

Mexico

1. Supports an option providing for Parties to enforce foreign judgments arising from the implementation of the provisions

[485] Notes FOCC 3.

on civil liability, and for Parties who do not have legislation concerning enforcement of foreign judgments to endeavor to enact such laws.[486]

2. On an operational text providing for the review of the guidelines for working towards a non-legally binding approach on civil liability, prefers moving this provision into the COP/MOP decision adopting the Supplementary Protocol.[487]

New Zealand

1. On the nature of the conditions set out in the provision and their impact on newly implemented civil liability systems, says they should be non-binding and not require states to harmonize their laws.
2. Proposes new chapeau language, stating that this provision would be implemented either through their existing domestic laws, including, where applicable, general provisions on civil liability; or a specific civil liability regime; or a combination of both.
3. Prefers an operational text providing only for the enforcement of foreign judgments in accordance with domestic law, rejecting language that would require developing or changing domestic laws on enforcement of foreign judgments.[488]
4. On an operational text providing for the review of the guidelines for working towards a non-legally binding approach on civil liability, prefers moving this provision into the COP/MOP decision adopting the Supplementary Protocol.[489]
5. Suggests Parties to assess whether their domestic law provides for adequate rules and procedures on civil liability for material

[486] ENB FOCC 1.
[487] Notes FOCC 1.
[488] ENB FOCC 1.
[489] Notes FOCC 1.

or personal damage "associated with" the damage as defined in Article 2, paragraph 2(c).[490]

Norway

Fully supports Malaysia that Parties are working towards a civil liability provision that is binding.[491]

Panama

Supports an option providing for Parties to enforce foreign judgments arising from the implementation of the provisions on civil liability, and for Parties who do not have legislation concerning enforcement of foreign judgments to endeavor to enact such laws.[492]

Paraguay

1. Prefers an option stating Parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with LMOs, as it provides enough flexibility.[493]
2. On whether Parties "should", "shall" or "may" assess whether their domestic law provides for adequate rules and procedures on civil liability, prefers to keep the choice open at this juncture.[494]

Switzerland

On an operational text providing for the review of the guidelines for working towards a non-legally binding approach on civil liability, says that this revised provision should be included in both the

[490] Notes FOCC 3.
[491] Notes FOCC 1.
[492] ENB FOCC 1.
[493] Notes FOCC 1.
[494] Notes FOCC 3.

Supplementary Protocol as well as in the guidelines.[495]

FINAL TEXT: 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.[496]

[495] Notes FOCC 1.

[496] A review of this article on civil liability was finally agreed upon to be incorporated under the article on Review (Article 13).

Article 14 Review

A review clause is essential to a treaty to ensure that its provisions are effective and achieve the intended purpose. It is also important to ensure that these provisions are relevant and at par with the development of modern biotechnology. The discussion on the review provision largely focused on: whether the first review of the Supplementary Protocol should take place after a fixed number of years or once sufficient experience had been gained; whether to align the review process and periodicity of the Supplementary Protocol with that of the Cartagena Protocol; and whether to include reference to specific instances of damage as content for the review. Since FOCC 2, delegates started to discuss the review of the effectiveness of the implementation of civil liability provision under this article. The article was agreed upon on the last day of FOCC 2, when delegates agreed to a compromise language stipulating a review of the article on civil liability. On the other hand, the periodic review of the effectiveness of the Protocol every five years was agreed upon behind closed doors. This Article was later agreed upon, for the second time, after the conclusion of the negotiations on financial security (Article 10), with the insertion of "Article 10" to be reviewed by the first review of COP-MOP.

Delegates' Positions

African Group

1. Supports Malaysia.
2. Flags that the review clause only covers the review of how the Supplementary Protocol address the issue of damage and not the implementation of the Protocol.
3. Proposes language stating that the first review shall include a

review of the effectiveness of Article 13 (civil liability).[497]

Brazil

1. Proposes that the first "review should be conducted within Article 35 of the Cartagena Protocol. Proposes: the COP-MOP shall undertake, at least 3 years after the entry into force of this Supplementary Protocol and in the context of the assessment and review process foreseen in Article 35 of the Cartagena Protocol, a review of its effectiveness."
2. Expresses readiness to accept "whether further steps are necessary to provide for an effective civil liability regime" as content for the review.
3. Commenting on Malaysia's proposal stating that this review shall include a consideration of whether further steps are necessary to provide for effective rules and procedures on civil liability under Article 13 (civil liability), suggests to replace "whether further steps are necessary to provide for" with "ways to contribute providing".[498]

EU

1. Proposes reviewing the effectiveness of the Supplementary Protocol once sufficient experience has been gained with the operation of the Supplementary Protocol.
2. Points out that Article 35 of the Cartagena Protocol may not be best applied here. Rationale: the scope of the Protocol dealing with various activities different from the scope of the Supplementary Protocol which deals only with liability and redress concerning damage.
3. Proposes to include reference to specific instances of damage as content for the review.

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[497] Notes FOCC 2.
[498] Notes FOCC 2.

4. Opposes the Co-Chairs' proposal stating that "the review shall include a consideration of the further elaboration of international rules and procedures in the field of liability and redress resulting from transboundary movements of LMOs including additional further rules and procedures on civil liability", because that amounts to keeping Article 27 of the Protocol "alive".[499]

India

1. Disagrees with reviewing after sufficient experience has been gained. Rationale: Article 35 of the Cartagena Protocol does not provide for this. Operation of the Protocol starts only after its entry into force and thus this provision will not be binding for Parties which just signed to it. Suggesting "sufficient experience gained" is merely a delaying tactic for not doing anything at all.
2. Proposes the first review after 5 years, and then to review every 5 years.
3. Opposes to replace the content for the review with reference to specific instances of damage and urges Parties not to shy away from civil liability.[500]

Japan

Proposes text to review the "effectiveness of the domestic civil liability laws of the Parties".[501]

Malaysia

1. Supports India and opposes "sufficient" element because do not want to subject to this ambiguous criteria. Proposes to have an earlier review if circumstances so require.
2. Agrees with reference to specific instances of damage as

[499] Notes FOCC 2.
[500] Notes FOCC 2.
[501] Notes FOCC 2.

additional element and not substitution of the original language. Rationale: the original language was accepted by Parties in Mexico who wanted civil liability regime as a package and had agreed that it not be watered down further.

3. Supports the Co-Chairs' proposal stating that "the review shall include a consideration of the further elaboration of international rules and procedures in the field of liability and redress resulting from transboundary movements of LMOs including additional further rules and procedures on civil liability".
4. Proposes language stating that this review shall include a consideration of whether further steps are necessary to provide for effective rules and procedures on civil liability under Article 13 (civil liability).[502]

Paraguay

Prefers reviewing the effectiveness of the Supplementary Protocol five years after its entry into force.[503]

FINAL TEXT: 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.

[502] Notes FOCC 2.
[503] Notes FOCC 2.

Article 15 – 23 Institutional Provisions

At FOCC 1, delegates requested not to engage in a debate of the institutional provisions to allow time for work on other contentious operational texts. Out of the nine provisions, five were agreed to by Parties at FOCC 2 and the balance was agreed to at FOCC 3.

Article 15 Responsibility of States for Internationally Wrongful Acts

This article was agreed to by delegates at FOCC 2. It states that the Supplementary Protocol shall not affect the rights and obligations of states regarding the responsibility of States for internationally wrongful acts.

FINAL TEXT: 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 16 COP-MOP to the Protocol

This article was agreed to by delegates at FOCC 2. It states that the COP-MOP to the Cartagena Protocol shall also serve as the MOP to the Supplementary Protocol; and the COP-MOP shall:

a) keep the Supplementary Protocol's implementation under review; and
b) make the decisions necessary to promote its effective implementation; and

c) perform the functions assigned to it:
   i. by the Supplementary Protocol and,
   ii. *mutatis mutandis*, by paragraphs 4(a) and (f) of Cartagena Protocol Article 29.

Delegates' Positions

India

Prefers that non-Parties to the Supplementary Protocol to participate as observers in decision-making only and not participate in taking decisions.[504]

Japan

1. Proposes that the COP-MOP serve as "meeting of the Parties" to the Supplementary Protocol instead of as "governing body".
2. Prefers that non-Parties to the Supplementary Protocol could participate as observers in decision-making and not participate in taking decisions.[505]

Mexico

Prefers that non-Parties to the Supplementary Protocol to participate as observers in decision-making and not participate in taking decisions.[506]

Paraguay

Prefers that non-Parties to the Supplementary Protocol to participate as observers in decision-making and not participate in taking decisions.[507]

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[504] Notes FOCC 2.
[505] Notes FOCC 2.
[506] Notes FOCC 2.
[507] Notes FOCC 2.

FINAL TEXT: 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 17 Secretariat

This article was agreed to by delegates at FOCC 2.

FINAL TEXT: Article 15 SECRETARIAT

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

Article 18 Relationship with the Convention and the Protocol

This article was agreed to by delegates at FOCC 2. However to resolve the issue of consistency with international obligations, Co-Chairs at FOCC 3 proposed to amend this article, although it was agreed upon at FOCC 2. The relevant discussions on the consistency with international obligations and the amendments to Article 18.3 ("Except

as otherwise provided in this Supplementary Protocol, the provisions of the Convention and the Protocol shall apply to this Supplementary Protocol") and Article 18.4 ("This Supplementary Protocol shall be implemented in accordance with international obligations") are compiled under "Article 7" (Primary Compensation Scheme).

The final Article states that:

a) the Supplementary Protocol shall supplement the Cartagena Protocol and neither modify nor amend it;
b) the Supplementary Protocol shall not derogate from the rights and obligations under the CBD and the Cartagena Protocol;
c) the provisions of the CBD and the Cartagena Protocol shall apply to the Supplementary Protocol, unless otherwise stated; and
d) Without prejudice to (c) above, the Supplementary Protocol shall not affect the rights and obligations of a Party under international law.

Paragraph (d) was added after the negotiations on Article 7 (Primary Compensation Scheme).

Delegates' Positions

Brazil

Prefers the option specifying that the Supplementary Protocol shall supplement and neither modifies nor amends the Protocol, nor derogates from Parties' rights and obligations under the CBD and the CPB, while being subject to both, unless explicitly stated otherwise in the Supplementary Protocol.[508]

[508] Notes FOCC 2.

EU

Prefers the option specifying that the Supplementary Protocol shall supplement and neither modifies nor amends the Protocol, nor derogates from Parties' rights and obligations under the CBD and the CPB, while being subject to both, unless explicitly stated otherwise in the Supplementary Protocol.[509]

Malaysia

Commenting on South Africa's proposal "relationship with international laws", says that it is too general and does not reflect the meaning of the article.[510]

New Zealand

1. Asks to clarify the relationship between the Supplementary Protocol, the Cartagena Protocol and the CBD.[511]
2. Commenting on India's proposal "Relationship with the Convention, the Protocol and other international treaties", prefers "international laws" as the former is too restrictive.[512]

Paraguay

Prefers the option specifying that the Supplementary Protocol shall supplement and neither modifies nor amends the Protocol, nor derogates from Parties' rights and obligations under the CBD and the CPB, while being subject to both, unless explicitly stated otherwise in the Supplementary Protocol.[513]

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509 Notes FOCC 2.
510 Notes FOCC 4.
511 ENB FOCC 1.
512 Notes FOCC 4.
513 Notes FOCC 2.

South Africa

Commenting on India's proposal "Relationship with the Convention, the Protocol and other international treaties", prefers "international laws" as the former is too restrictive. Suggests instead "relationship with international laws".[514]

FINAL TEXT: 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 19 Amendments to the Supplementary Protocol

Delegates agreed to delete the article at FOCC 2.

Article 20 Signature

This article was agreed to by delegates at FOCC 3. The Co-Chairs proposed the dates and the duration for opening the Supplementary

[514] Notes FOCC 4.

Protocol for signature. The closing date will fall on Tuesday, a working day taking into account the fact that many States often sign a treaty on the last date.

FINAL TEXT: 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 21 Entry into Force

This article was agreed to on the fourth day of FOCC 3. The final outstanding issue was the number of instruments of ratification etc., deposited for the Supplementary Protocol to enter into force. Paraguay wanted the fiftieth while Peru wanted the thirtieth. As a compromise, the Co-Chairs suggested fortieth and it was agreed upon by all the delegates.

FINAL TEXT: 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 22 Reservations

This article was agreed to at FOCC 3.

Delegates' Positions

EU

Brackets text prohibiting reservations to be made to the Supplementary Protocol.[515]

India

Disagrees with allowing reservations to be made to the Supplementary Protocol. Rationale: the CBD and CPB do not allow reservations and EU's proposal is sending a wrong signal to other negotiating Parties.[516]

Malaysia

Urges removing brackets around reservation clause because Article 37 of the CPB clearly prohibits the making of any reservations.[517]

FINAL TEXT: Article 19 RESERVATIONS

No reservations may be made to this Supplementary Protocol.

[515] Notes FOCC 2.
[516] Notes FOCC 2.
[517] Notes FOCC 2.

Article 23 Withdrawal

This article was agreed to at FOCC 3

FINAL TEXT: 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.

PART 3: GUIDELINES ON CIVIL LIABILITY

Guidelines on Civil Liability

The decision to develop civil liability guidelines arose as a compromise at COP-MOP 4, where delegates decided to complete negotiations on an international regime on liability and redress that envisions a legally binding Supplementary Protocol focusing on an administrative approach and including a provision on civil liability that will be complemented by non-legally binding guidelines on civil liability. The FOCC 1 had not touched on the civil liability guidelines. At FOCC 2, delegates for the first time discussed briefly how to move forward on the civil liability guidelines since they were developed at COP-MOP 4 (section 2 of the Annex to Decision BS-IV/12). However, considering the lack of time because of the requirement for circulating legally-binding instruments at least six months prior to its adoption (Article 28(3), CBD), delegates decided to focus on resolving outstanding issues in the Supplementary Protocol. At the end of FOCC 2, the meeting decided to ask the Co-Chairs to develop draft civil liability guidelines and circulate them prior to FOCC 3 for further elaboration. At the FOCC 3, the delegates agreed to drop the guidelines, predominantly because of its non-binding nature and there being insufficient time to negotiate them.

Delegates' Positions

African Group

1. Expresses interest in discussing the guidelines, however more interested in finalising legally binding component.[518]
2. Agrees to drop the guidelines provided it is fully reported in the meeting report to COP-MOP.[519]

[518] Notes FOCC 2.
[519] Notes FOCC 4.

Brazil

Notes that guidelines for working towards non-legally binding provisions on civil liability and the supplementary scheme contained in the report's appendices had been neither discussed nor negotiated at FOCC 1.[520]

Colombia

1. Agrees to Malaysia's proposal that the Guidelines on civil liability can be revisited.
2. Acknowledges that civil liability is an important issue for many developing countries, however now should focus on perfecting the Supplementary Protocol.[521]

EU

Says that EU is fully committed and prepared to go into the negotiations on the substance of the Civil Liability guidelines.[522]

India

1. Agrees with Mexico. Proposes to take up the issue of civil liability guidelines later but focus first on the binding provisions.[523]
2. Believes the guidelines can be taken up further later in this meeting to prevent Article 12 (Implementation and Relation to Civil Liability) and Article 13 (Assessment and Review) to be opened up in COP-MOP.
3. Agrees to drop the guidelines provided it is fully reported in the meeting report to COP-MOP.[524]

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520 ENB FOCC 1.
521 Notes FOCC 3.
522 Notes FOCC 2.
523 Notes FOCC 2.
524 Notes FOCC 4.

Japan

1. Pointing to the requirement for circulating legally-binding instruments at least six months before their adoption, asks to close discussion on the guidelines on civil liability during this meeting in order to focus on resolving outstanding issues in the Supplementary Protocol.
2. Brackets a decision stating to adopt the Guidelines on Civil Liability and Redress in the Field of Damage Resulting from Transboundary Movements of Living Modified Organisms, as contained in annex II to the decision.[525]
3. Agrees with Malaysia. Highlights that the commitment of Parties is to complete the Supplementary Protocol in Nagoya and not to prolong the process.[526]

Malaysia

1. Proposes to start discussing the guidelines only when Parties feel guidance is needed. Proposes to shelve the Guidelines. Does not see the purpose of including it in the Supplementary Protocol. Focus now should be to work on domestic civil liability provisions.[527]
2. Proposes to note in the meeting report that the removal of the guidelines should not prejudice the review of the effectiveness of civil liability.[528]

Mexico

Does not see how delegates can get agreement on the guidelines given the lack of time. Prefers to proceed with the substantive provisions so

[525] Notes FOCC 2.
[526] Notes FOCC 3.
[527] Notes FOCC 3.
[528] Notes FOCC 4.

that at least one document will be concluded.[529]

Norway

Agrees to drop the guidelines provided it is fully reported in the meeting report to COP-MOP.[530]

Paraguay

Supports Malaysia.[531]

Switzerland

1. Proposes revising the guidelines on liability and redress in light of the UNEP draft guidelines for the development of national legislation on liability, response action and compensation for damage from activities dangerous to the environment.[532]
2. Supports Mexico and India.[533]

Report of FOCC 4 (UNEP/CBD/BS/GF-L&R/4/3, 11 October 2010)

11. The Group considered the consolidated text of draft guidelines on civil liability and redress contained in annex II, appendix I of document UNEP/CBD/BS/GF-L&R/4/2. It was recalled that the draft guidelines were developed by the Co-Chairs, following the request of the Group at its second meeting. Friends and observers provided comments on the draft guidelines which were then consolidated and made available as an annex to the report of the third meeting. The Group therefore noted the extensive work that had gone into the development of the draft guidelines. However, taking into account the Group's agreement at its first meeting to develop a legally binding

529 Notes FOCC 2.
530 Notes FOCC 4.
531 Notes FOCC 3.
532 ENB FOCC 2.
533 Notes FOCC 2.

supplementary protocol based on an administrative approach including a provision on civil liability which is now contained in Article 12 of the Supplementary Protocol, the Group agreed that it was not necessary to consider or elaborate the guidelines further. It was noted that this agreement does not affect any steps that may be taken in the future as regards the development of binding rules on civil liability for damage resulting from living modified organisms.

PART 4:

ADDITIONAL AND SUPPLEMENTARY COMPENSATION SCHEME

Additional and Supplementary Compensation Scheme

In the deliberation of this section, there were two types of supplementary compensation schemes envisaged. They were residual state liability and supplementary collective compensation arrangements.

Residual State liability

This is a form of a supplementary compensation scheme. The State is made liable to pay the damages in certain situations. One such situation is when the award of damages cannot be satisfied by the person held liable; or the person cannot be identified or the operator is unable to remedy the damage. The liability of the State will, usually, be in respect of claimants who are closely connected with it: nationals, or those who are domiciled or resident in that State. Note that delegates had already decided that there should be no primary State liability.[534]

Supplementary collective compensation arrangements

This is a compensation arrangement that is organized either collectively or by the private sector. It could be compulsory or voluntary. It could be established by the private sector or by an interested body such as the COP-MOP. The former approach could consist of a voluntary compensation scheme organized by the private sector through contractual agreements between willing biotechnology players.[535]

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[534] There were three options presented as at the WGLR 4, namely: primary State liability, residual State liability in combination with primary liability of the operator, and not State liability.

[535] Six major agricultural biotechnology companies have agreed to consider this

The arrangement could stipulate that the member contracting company responsible for the damage will compensate the person harmed based on the "polluter pays principle" after the damage is proven pursuant to criteria it establishes. It is not a fund but rather a form of self-insurance. The latter collective arrangement could be a mechanism under the COP-MOP based on contributions (voluntary or compulsory) from Parties to the Supplementary Protocol and others. The money collected could be disbursed to States where the damage occurred if that has not been or cannot be, otherwise redressed.

A separate fund could also be established. The money could come from either a combination of public and private funds or solely be privately funded by the biotechnology industry.[536] Contributions could be voluntary or mandatory. The fund could be created under the instrument or in response to the occurrence of an incident. The fund could be used to provide aid for access to justice to victims of the damage, as well as to pay for response and clean-up measures especially for large scale cases of contamination or other damage under the administrative approach. A fund could also serve as a supplementary source of compensation once all other liable parties' ability to pay is exhausted. It is particularly useful where the operator is unable to make the payment of the compensation awarded under the civil liability approach; or the compensation is not payable in full. Fund mechanisms have been created under both the 1969 Brussels International Convention on Civil Liability for Oil Pollution Damage

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arrangement to enter into contractual arrangements amongst themselves: BASF, Bayer CropScience, Dow AgroSciences, DuPont/Pioneer, Monsanto; Syngenta: Statement by Thomas Carrato of the Global Industry Coalition, Notes, WGLR5, 17 March 2008; CBD Report WGLR5, UNEP/CBD/BS/WG-L&R/5/L.1 (19 March 2008 Para 35 – 37, pp 6-7). The Compact became operational in 2010 (*www.croplife.org/the_compact*, visited at 30 December 2011).

536 Meeting Report WG-3, at Annex II, 61.

(CLC) and the Basel Convention on the Transboundary Movement of Hazardous Wastes.[537]

This issue was not considered at FOCC 1. At the end of FOCC 2, delegates decided to place the text in the COP-MOP decision rather than in the Supplementary Protocol. At FOCC 3, there remained three options under this issue. Finally, the text for the COP-MOP decision was finalized at FOCC 4, under which the COP/MOP will address situations where the costs of response measures have not been covered.

Delegates' Positions

African Group

Supports the text stating that where a claim for damages has not been satisfied by an operator, the unsatisfied portion of that claim shall be fulfilled by the State where the operator is domiciled or resident.[538]

Brazil

1. Commenting on residual state liability, says that these should already be covered by domestic laws.
2. Says that collective compensation arrangements should not be something that is mandatory, especially for developing countries. This will create additional burden to developing countries.[539]
3. Prefers not to have any text referring to supplementary compensation scheme.[540]

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[537] This paragraph has been taken from Nijar, G.S., et al (2008), *Liability and Redress under the Cartagena Protocol on Biosafety*, Kuala Lumpur: CEBLAW.

[538] Notes FOCC 4.

[539] Notes FOCC 2.

[540] Notes FOCC 4.

Colombia

Proposes language in the Decision stating "*Encourages* the establishment of public or private supplementary compensation schemes to ensure adequate and prompt compensation where the costs of response measures to redress damage to the conservation and sustainable use of biological diversity have not been fully redressed by response measures as defined in the Supplementary Protocol".[541]

Ecuador

Prefers its deletion.[542]

India

Supports the text stating that where a claim for damages has not been satisfied by an operator, the unsatisfied portion of that claim shall be fulfilled by the State where the operator is domiciled or resident.[543]

Japan

Prefers not to have any text referring to supplementary compensation scheme because it suggests that there is risk inherent to LMOs.[544]

Malaysia

1. Proposes text stating that Parties shall consider who should contribute to such supplementary collective compensation arrangements. Rationale: liability and redress Supplementary Protocol should be a comprehensive regime, ensuring redress is provided comprehensively and as an alternative in the situation where the operator is not able to clean up the damage. The

[541] Notes FOCC 4.
[542] Notes FOCC 2.
[543] Notes FOCC 4.
[544] Notes FOCC 4.

proposal leaves the countries to decide when the principles can be applied.[545]

2. Supports the text stating that where a claim for damages has not been satisfied by an operator, the unsatisfied portion of that claim shall be fulfilled by the State where the operator is domiciled or resident.[546]

Mexico

1. Opposes strongly residual state liability and proposes the deletion of all text.[547]
2. On supplementary collective compensation arrangements, prefers its deletion because it is not correct to invite governments to contribute to setting up this scheme. Instead, the primary compensation scheme should be revised and improved if it is not sufficient.[548]

New Zealand

Prefers not to have any text referring to supplementary compensation scheme because it suggests that there is risk inherent to LMOs.[549]

Norway

1. Agrees with Mexico.[550]
2. Supports the text stating that where a claim for damages has not been satisfied by an operator, the unsatisfied portion of that claim shall be fulfilled by the State where the operator is domiciled or resident.[551]

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[545] Notes FOCC 2.
[546] Notes FOCC 4.
[547] Notes FOCC 1.
[548] Notes FOCC 2.
[549] Notes FOCC 4.
[550] Notes FOCC 2.
[551] Notes FOCC 4.

Paraguay

Prefers not to have any text referring to supplementary compensation scheme.[552]

Decision BS-V/11: ***International rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms***

B. ADDITIONAL AND SUPPLEMENTARY COMPENSATION MEASURES

7. *Decides* that, where the costs of response measures as provided for in the Supplementary Protocol have not been covered, such a situation may be addressed by additional and supplementary compensation measures;
8. *Decides* that the measures referred to in paragraph 7 above may include arrangements to be addressed by the Conference of the Parties serving as the meeting of the Parties;

[552] Notes FOCC 4.

"A unique treasure for academic research of the negotiations"

Rene Lefeber & Jimena Nieto, Co-Chairs of the Working Group

This publication completes the record of the negotiations leading up to the adoption of the Nagoya-KL Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety. Volume 1 recorded the negotiations from the inception and negotiation of the Cartagena Protocol on Biosafety and at the six Working Group meetings held from February 2005 until March 2008; and the proceedings of the meetings held during the COP-MOP 4 in Bonn, Germany in May 2008.

This present volume 2 records the negotiations from after COP-MOP 4 until the adoption of the Supplementary Protocol at Nagoya, Japan in 2010. It follows the same format as volume 1. It provides a snapshot of each element that was negotiated; the options proposed under each element; and the positions taken by the delegates and other participants: non-parties, NGOs, industry and others.

These 2 volumes represent the preparatory work, and the circumstances of the conclusion, of the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety that was finally adopted on 15 October 2010.

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