

5th meeting of the Working Group on  
Liability and Redress under the Cartagena Protocol,  
21 January – 4 February 2008 (GSICS, Kobe, Japan)

**Summary Report of the First Session  
21 January 2008, 10:40 – 12:20**

1. Mr. Akiho SHIBATA from the delegation of the Netherlands as the chair of the Working Group on Liability and Redress under the Cartagena Protocols opened the Meeting at 10:40 on 21 January 2007.

**Agenda Item 2: Adoption of the agenda**

2. The Meeting adopted the agenda proposed by the Netherlands(GSICS/WG-L&R/5/1).

**Agenda Item 3: Schedule of the Meeting**

3. The Meeting adopted the Schedule of the Meeting, as reflected in the document GSICS/WG-L&R/5/1.

**Agenda Item 4: Elaboration of International Rules and Procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms**

**(a) General Statement**

4. The Chair invited the delegations to express general views on the issues before the working group.
5. Brazil (5/10), Cambodia (5/7), China (5/4), Ethiopia (5/8), Indonesia (5/2), Laos (5/6), Mexico (5/3), New Zealand (5/9), Norway (5/5), Slovenia on behalf of the European Community (5/12), South Africa (5/11) and Viet Nam (5/13) made general statements. Germany was not present. Japan did not submit a written statement, forfeiting the right to make the oral statement.

**(b) Negotiation on the Document: UNEP/CBD/BS/WG-L&R/4/L.1/Add.1 & Add.2**

6. The Chair proposed to discuss the issue of the Primary Compensation Scheme, Elements of Administrative Approach, referring to Section IV A of the Document and explaining there were three elements of administrative approach and the definitional element. He asked the delegations whether they had fundamental objection to these elements.
7. Cambodia commented that it preferred to keep these elements and had no fundamental objection.
8. No objection was made in the meeting so that the meeting reached a consensus to discuss the contents of the elements.

9. The Chair clarified the issues regarding the first element on the notification and suggested his text for discussion.
10. No delegation raised objection against the Chair's suggestion. South Africa, supported by Cambodia, Laos, Slovenia on behalf of EC and Viet Nam preferred the word "shall" because it would render the provision more effective. Slovenia added that the obligation imposed on the operators could arise either from national or international law. New Zealand, supported by Japan, preferred the word "should" in order to make a flexible scheme.
11. Japan preferred the operational text 3 in Add.1 because each state had its discretion on its domestic legislation. China disagreed, arguing that the operational text 3, which seemed to impose obligations on government, rather than on the private operators, and was not adequate as a regime for liability.
12. The Chair urged delegations to informally discuss his text further during lunch break. He also introduced three proposals on the rest of the elements to be discussed later. The session was closed at 12:25.

### Summary Report of the Second Session 21 January 2008, 13:25 – 15:00

13. The second session was opened at 13:25.
14. Ethiopia, announcing the informal discussion during the lunch break, introduced a revised text with brackets. New Zealand requested "promptly" be also inserted.
15. The Chair, summarizing the discussion, asked the delegates to consider the following text: *In the event of an incident that cause damage or threatens to cause damage, an operator [shall] [should] notify [immediately] [as soon as possible] [promptly] the competent authority of the incident.*
16. The Chair turned to the second element on the operator's obligations imposed by national law to take reasonable response and/or restoration measures.
17. South Africa on behalf of African States, supporting the Chair's text, proposed to insert the word "all" before "reasonable" so as to render the regime more effective. It also preferred the word "shall" and to keep "restoration measures." China, Laos, Indonesia and Slovenia supported the position. Slovenia, supported by China, proposed to add "in consultation with the competent authority."
18. Cambodia proposed to add "necessary" before the word "reasonable" and "and/or" before restoration measures. Vietnam did not agree to add "necessary." Laos supported adding "or" before restoration measures.
19. New Zealand expressed its support for the word "should." He also proposed to delete the phrase "or restore" from paragraph (b) because it was not helpful to use of the word "restore" in the define "restoration measures."
20. The Chair summarized the discussion, confirming that there was now agreement among the delegations to include restoration measures in this element. He then lifted the brackets around the restoration, adding the proposals from delegations, and suggested the following

text for further discussion: *In the event of an incident that cause damage or threatens to cause damage, an operator [shall] [should], in consultation with the competent authority, take all reasonable response and [or] restoration measures. (a) The response measures are actions to avoid, minimize and contain the damage. (b) The restoration measures are action to assess and reinstate through the introduction of original components of biological diversity, or if this is not possible, introduction of equivalent components on the same location, for the same use, or in another location for other types of use.*

21. The Chair turned to the third element on the discretion of the government to take response and/or restoration measures when the operators do not take such actions.
22. South Africa supported the Chair's proposal.
23. Japan proposed to delete this element as a whole because each state had its discretionary power on domestic law and the element seemed to be incompatible with it. China, Cambodia and Laos supported the deletion. New Zealand agreed that this element should be left to the domestic law, but as a reminder for the government, it might be necessary.
24. Viet Nam and Slovenia disagree to the deletion, saying that it is only a discretion for the government and emphasized the necessity of element 3. Ethiopia reminded the delegations that, at the beginning of the session, all participants had already agreed to having three elements.
25. The Chair summarized the discussion and, since the existence of the element 3 itself was disputed, he had put the whole text in brackets, and asked the delegations to consider further: *[In the event that the operator does not take the required measures as provided in ( ) above, the competent authority may take reasonable response and restoration measures, and may recover the costs and expenses of the taking of any such measures from the operator.]*
26. The Chair then moved to the next issue: the definition of operator. The Chair clarified the issues to be considered: (a) whether to specify the operators by their names, or the operators as having control over the activity when the incident causing the damage occurs, and (b) whether to adopt the same definition in the civil liability scheme. He invited the delegations to express their views.
27. China was in favor to specify the operators by names. Cambodia and New Zealand supported the Chinese position. Laos stated that other activities could be added.
28. Viet Nam reminded that the definition of "exporter" and "importer" were already provided in the Protocol and other activities were to be included in them.
29. Slovenia preferred the general provision as to the perception of the operator in the traditional sense as the entity in control of the particular activity.
30. The Chair summarized the discussion and proposed to discuss this issue in broader context. There was an agreement to have a same definition of "operator" for both the administrative approach and civil liability scheme.
31. The Chair then moved to Section VI C under Settlement of Claims, and proposed to delete this section. No objection was expressed from the delegations and the section IV, C was deleted by consensus.

32. The Chair then moved to the next issue, Section VI, B on Civil Liability. Relating to Subsection 1 “standard of liability and channeling of liability,” the Chair explained the characteristics of “strict liability” and “fault liability” in relation to “limitation of liability” and then proposed to base the negotiation on Option 2: “mitigated strict liability.” He invited the delegations to express their views.
33. Norway, supported by Cambodia, expressed its preference for “strict liability.” Slovenia, South Africa, China, New Zealand supported the proposal from the Chair. Japan and Brazil were in favor of Option 3: “fault liability.” According to Brazil, the LMOs were not ultra-hazardous material and the “fault liability” was compatible with the balance reflected in the Protocol.
34. The Chair recalled the mandate to adopt the instrument at this meeting and emphasized that, overcoming the philosophical difference of views on the danger of LMOs, the instrument must be flexible enough to be acceptable to all Parties. In this sense, he stressed that the text of Option 2 was indeed flexible enough to accommodate different views.
35. Viet Nam agreed with the Chair and pointed out that trans-boundary movement of LMOs was the center of the issue and the scheme of liability had to duly take it into account.
36. The Chair requested the delegations favoring strict liability to work out one text for Option 1. He asked Norway to lead the informal contacts among those delegations favoring the strict liability and requested Norway to submit a text by 25 January 2008.
37. The Chair then moved to Section Abis Bbis Additional Elements: Subsection 1 on Exemptions to or mitigation of strict liability. Based on the listing as reflected in Option 1 operational text 1, he invited delegations to express objections to having those listed reasonings as exemptions.
38. No objections were raised as to exemption (a) on force majeure, (b) on act of war or civil unrest, (d) activities taken in compliance with compulsory measures issued by a competent authority cause the damage, Viet Nam objected to (c) on intervention by a third party is responsible for causing the damage, and Ethiopia disagreed to (e) on activities causing the damage were taken in accordance with permission of an activity by means of an applicable law or a specific authorization issued to the operator. These were bracketed.
39. Cambodia did not accept the Chair’s suggestion to delete the concept reflected in Option 2, operational text 2 subparagraph (b) on situations that would not be regarded as force majeure.
40. Slovenia proposed to include new element of exemption: “*an activity not considered likely to cause environmental damage...*” listed in the option 3, operational text 3, para 2 (b). This element was entitled (f). Ethiopia proposed to put (f) in brackets.
41. China proposed to include new element that “*if the damage was partly caused by victims, strict liability applies.*” This element was entitled (g).
42. The Chair then moved to Section VII “complementary capacity-building measures.” Ethiopia, Viet Nam, South Africa, China, Brazil, Mexico, Laos expressed their great interests in this issue.
43. China stressed that assistance of developing countries was international obligation. Laos, Mexico, South Africa emphasized their need for external assistance. Ethiopia claimed that

none of the texts in this section was specific enough hence new text had to be made. Viet Nam draw attention to para.2, Article 2 of the Cartagena Protocol which might require the parties to afford assistance to certain developing countries.

44. The Chair suggested to hold further informal discussions on this issue among interested delegations and requested Ethiopia to lead this discussion. The Chair remind the delegations of the next session's items, and closed the session at 15:00.

END