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

Draft Summary Report of the Third Session

28 January 2008, 10:40-12:00

1. The Meeting resumed at 10:40 on 28 January 2008. The Chair invited Norway to report on the informal contacts to prepare one text that accommodated the views of all those delegations that support the "strict liability" for civil liability regime under the instrument. The Chair also invited Ethiopia to report on the informal contacts on the Supplementary Capacity Building Measures (Chapter VII).

2. Cambodia stated that its statement made during the first and second sessions were tentative ones and its position had not been fixed yet, and the delegation would prepare a revised document (GSICS/WG-L&R/5/7). Indonesia stated that it had changed its position on the issues under Section IV-B and now supported fault-based liability.

3. Ethiopia reported that the agreement was reached among Ethiopia, China, Laos, Mexico, Slovenia and Vietnam and South Africa on the possible texts for the Supplementary Capacity-Building Measures, even though there was a divergent view on which organ would manage the fund. Because some delegations were not yet prepared to submit an official proposal, this report was taken note of orally. Ethiopia further made its own proposal on the same issue as reflected in the document (GSICS/WG-L&R/5/19). Cambodia supported the agreement reached among the seven delegations.

4. The Chair expressed its gratitude to Ethiopia its efforts to draft one text which could garner support from many delegations and requested Ethiopia to make further efforts to gain more support from other delegations which were not involved in this process, with a view to adopt a text by consensus.

5. Japan stressed that while it did appreciate the importance of capacity-building measures, it was not in a position to accept the proposal from Ethiopia on a new fund. Japan further claimed that financial mechanism had to be based on Art.22 of the Cartagena Protocol and that necessity of establishing a new fund must be further clarified. Supporting Japan, New Zealand questioned the necessity for establishing a new fund, and expressed its preference for operational text 2 under Chapter VII.

6. The Chair summarized the discussion and urged the delegations to reach an agreement on this issue, and requested Ethiopia to continue to have informal contacts with other delegations and report to the Chair by 1 February.

7. Norway, reporting on the informal discussion, stated that even though a unified agreement was not gained, the participants agreed to propose two new operational texts (GSICS/WG-L&R/5/16, and GSICS/WG-L&R/5/17). The Chair requested Norway to continue the discussion to come to one single text for strict liability and report to the Chair by 1 February.

8. The Chair then presented his non-paper on "Chair's Schematic Outline of the Instrument," and explained that the delegations should now have the overall picture of the instrument and start thinking about compromises. The paper was received favorably by the delegations and the Chair reminded the delegations that he would refer to this non-paper time to time.

9. He, then, asked the Secretariat the status of the summary report of previous meeting (GSICS/WG-L&R/5/14). The Secretariat reported that no comment was made and that the finalized summary report was circulated as official document. Cambodia and Ethiopia made statements.

10. The Chair moved to the topic of "settlement of claims" under civil liability regime (Section VI B and E) and invited the delegations to make comments on the issue of "civil procedure" and "standing/ right to bring claims."

11. South Africa commented that it preferred operational text 1 with an amendment to subparagraph 4 with a view to simplify the wording: "*No claims for compensation shall be made otherwise than in accordance with the Protocol.*" Ethiopia also supported operational text 1 because it was the most comprehensive and simplest, with clarity in light of other civil liability treaties' provisions.

12. Slovenia preferred to address the settlement of claims at domestic level and preferred operational text 3. Slovenia continued that as for dispute between operators/importers and victims, a civil procedure was suitable and an administrative procedure was suitable for compensation for environmental damages. Lastly, Slovenia referred to the possibility to use special tribunals such as the Permanent Court of Arbitration and its Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment. New Zealand supported Slovenia, saying that the procedures for settlement of disputes should be regulated under domestic law.

13. As to standing/right to bring claims, South Africa expressed its support for operational text 1 with some amendments. In subparagraph 2, full stop after the word damage in the third line and delete (a) to (d); and delete subparagraph 4 on burden of proof, as it would be regulated by domestic law. Ethiopia supported the proposal from South Africa and stated that right to bring claim had to be as wider as possible. Laos, while supporting operational text 1, proposed to add, in subparagraph 1,the phrase *"intentional or unintentional transboundary movement of LMOs*" after the words "illegal traffic". Cambodia also supported operational text 1 because, in Cambodia's view, the provisions on these matters should be as detailed as possible.

14. Slovenia expressed its preference for operational text 3 and described the EC Environmental Liability Directive, saying that the competent public authority was responsible for implementation of its liability scheme and natural and legal persons were not, in principle, afforded right to sue polluters directly.

15. Japan pointed out that the issues under discussion were under the purview of private international law, and they should best be dealt with in the Hague Conference. Japan therefore favored these sections on civil procedures and standing to be deleted.

16. The Chair summarized the discussion and, referring to his non-paper, the division was whether delegations would like to have elaborate provisions on those issues under Chapter VI B and E, or they would like those issues to be left for domestic laws of each Party, adding that the private international law was also domestic law. The Chair requested delegations to informally discuss the merits and demerits of either of these two approaches, focusing on operational texts 1 and 3 under Section VI B and operational texts 1 and 3 under Section VI E.

17. The Chair moved to the next issue, the Section V A on Residual State liability. The Chair invited the delegations to comment on this issue.

18. China proposed to delete sub-section A, "residual state liability" and to create a joint fund under Sub-section B on Supplementary Collective Compensation Arrangement, as reflected in the document jointly submitted by China and Slovenia (GSICS/WG-L&R/5/15). New Zealand stated that states were not involved in LMO activities and supported the deletion. Slovenia, while recognizing the possibility of state responsibility for wrongful acts, stated that state liability was not foreseen in Article 27 of the Protocol, was in contradiction to the polluter pays principle, and suggested that the concerns be taken up in Subsection B on Supplementary Collective Compensation Arrangement. Norway supported the position of Slovenia. Indonesia and Brazil expressed their support for China and agreed to delete the sub-section A on state residual liability.

19. Vietnam opposed to the deletion of state residual liability, arguing that liability of states were recognized under general international law, that the issue here was only residual state liability for cases the compensation was not made or inadequate, and that such liability should not be imposed on developing countries. Cambodia, supporting Vietnam, argued for the necessity of residual state liability so as to render the rules effective and stated, with regard to the establishment of new fund, that the bio-industry and countries exporting LMOs had to financially support it. Ethiopia stated that supplementary collective compensation arrangement would be necessary especially in the case that no liable person could be identified.

20. Due to time constraints, Japan was not given the opportunity to speak. The Chair urged the delegations on both sides to discuss the issue further in order to close the gap.

21. The Chair moved to the issue of "Supplementary compensation arrangements" under Section V B. He invited the delegations to make comments.

22. Slovenia expressed its preference for operational text 1 with amendments: the word "the fund" in paras.1 and 2 be changed to "process".

23. New Zealand commented that it was still too early to discuss this issue.

24. Japan pointed out that the idea of "fault liability" is contrary to that of "supplementary collective compensation arrangement" and disagreed to include "the arrangement" into the instrument. Hence, Japan proposed to delete the section.

25. Ethiopia supported operational text 1 and claimed that the text had to be the basis of argument in the meeting.

26. Vietnam stressed the necessity of supplementary compensation funds for responding to damages and opposed to delete the section.

27. The Chair summarized the discussion, requested the delegations to continue informal discussions, to draft texts that could be the basis of consensus, and submit those texts by 1 February to the Chair. The meeting was suspended at 12:00.

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