Negotiating the Supplementary Protocol: A Co-Chairs' Perspective

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1. Introduction

"Some delegations reiterated longstanding positions, with some calling for no liability provisions and others characterizing 'zero' liability as unacceptable".[1]

On 15 October 2010, the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (Supplementary Protocol or SP) was adopted in Nagoya, Japan.[2] This was the culmination of a process that started with the adoption of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biosafety Protocol or CPB) in Montreal, Canada, on 29 January 2000. Pursuant to the Biosafety Protocol, "[t]he Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the ongoing processes in international law on these matters, and shall endeavour to complete this process within four years" (Article 27). This provision was a hard-fought compromise between states that pursued substantive provisions on liability and redress in the Biosafety Protocol and states that did not want to include any provisions on liability and redress in the Biosafety Protocol.[3]

The regulation of human-induced genetic mutations and the regulation of liability for damage resulting from such mutations are both contentious issues and mixed together susceptible of concocting a politically toxic potion. Doubts were expressed as to whether it would be possible to elaborate international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, at least not in the form of a legally binding instrument. Reference was made to the 'graveyard' of civil liability conventions in the context of multilateral environmental agreements. Several such conventions had been adopted in the years preceding the commencement of the work under the Biosafety Protocol, but these conventions were not likely to enter into force. In particular, the negotiations on the Basel Protocol on Liability and Compensation to

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[1] "Highlights from the Sixth Session of the Open-ended Ad Hoc Working Group on Biosafety (BSWG-6), Monday, 15 February 1999", *Earth Negotiations Bulletin*, Volume 09 Number 111, Tuesday, 16 February 1999.

[2] The authors would like to thank Mai Fujii, PhD Student at Kobe University, for the reconstruction of the negotiations in a factual paper to assist the co-chairs in refreshing their memories.

[3] On the negotiations of Article 27 of the Biosafety Protocol, see Kate Cook, "Liability: 'No Liability, No Protocol'," in Christoph Bail, Robert Falkner and Helen Marquard eds., *The Cartagena Protocol on Biosafety: Reconciling Trade in Biotechnology with Environment and Development?* (Earthscan Pub., 2002), pp. 371-384.

the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal had been long, difficult and cumbersome, and seasoned negotiators were dreading the prospect of another cycle of even longer, more difficult and more cumbersome negotiations. On the one side, it was argued that the harmonization of rules and procedures on civil liability had not been a successful enterprise, in particular pointing out that it had even not been possible in the European Union to harmonize domestic civil liability regimes. On the other side, it was argued that the incorporation of substantive provisions on liability and redress in the Biosafety Protocol had only been foregone on the understanding that a legally binding instrument would eventually be adopted and that such instrument would contain rules and procedures on civil liability. According to this view, there were ample and successful examples of civil liability conventions, in particular in the field of nuclear damage and oil pollution damage.

The Biosafety Protocol entered into force on 11 September 2003 and the first Conference of the Parties Serving as the Meeting of the Parties to the Biosafety Protocol was convened from 23 to 27 February 2004 in Kuala Lumpur, Malaysia. By that time, the preparatory work for the negotiations had already commenced. In the preceding years, the Intergovernmental Committee for the Cartagena Protocol on Biosafety met three times to prepare for the entry into force of the Biosafety Protocol, including the work on liability and redress. Amongst others, it had extended an invitation to convene a workshop on liability and redress.[4] Such a workshop was eventually convened from 2 to 4 December 2002 in Rome, Italy. At this workshop, the authors were elected as co-chairs. Their election had been arranged for by Xueman Wang, the officer in charge of the Secretariat of the Convention on Biological Diversity. She approached René Lefeber with whom she had worked during the Netherlands' Presidency of the Sixth Conference of the Parties of the United Nations Framework Convention on Climate Change. Together, they decided to approach Jimena Nieto Carrasco, with whom René had worked during the final stages of the negotiations of the Basel Protocol on Liability and Compensation and the Biosafety Protocol, to complete the team.

Although both authors were elected as co-chairs for the workshop in Rome, Jimena chose not sit on the podium in order to enable her to actively participate in the discussions from the floor during the day in order to better present the perspective of the developing countries that were not growing genetically modified crops at that time. But she worked with René and the Secretariat through the nights to prepare the report of the workshop. Preparing the report of the workshop proved to be one of the most difficult tasks in the process as the workshop started the discussion from scratch and the discussions had to be captured in the form of a narrative that would reflect all positions and issues raised. In addition, the co-chairs were pressed to develop scenario's on the basis of the discussions as some participants challenged the need for rules and procedures on liability and redress. These participants could not imagine any scenario's for which international rules and procedure might be

[4] Recommendation 3/1 (2002), *Liability and redress*, para. 5.

needed in the field of liability and redress for damage resulting from transboundary movements of living modified organisms.[5]

The workshop on liability and redress was a precursor for a long and windy process that started in earnest with the adoption of the mandate for the process at the first meeting of the parties to the Biosafety Protocol.[6] Pursuant to the mandate, one expert meeting would be convened to prepare the ground for the negotiations that would be conducted in an open-ended working group. Five meetings of the working group were planned to achieve the deadline provided for in Article 27 CPB, which is within four years from the adoption of mandate for the process. Although the meeting of the parties was only required to "endeavour" to meet the deadline, all efforts should be oriented to completing the process by 27 February 2008, including the acquisition of the necessary funds, for the organization of meetings as well as the participation of developing country participants in such meetings, that would not be covered by the core administrative budget of the Biosafety Protocol.

2. Outline

> "[D]elegates attentively followed presentations on the scientific, technical and legal issues of liability and redress, with several expressing satisfaction with their content and quality".[7]

At the meeting of the Group of Legal and Technical Experts on Liability and Redress, which took place from 18 to 20 October 2004 in Montreal, Canada, the authors were again elected as co-chairs. At this meeting too, Jimena chose not to sit on the podium in order to be able to actively participate in the discussions. It would be the last opportunity for her to do so as developing countries informally expressed concerns that 'their' co-chair should be seen to assume responsibility for the process.

The co-chairs started the process by emphasizing that rules and procedures on liability and redress might contribute to the prevention of damage in addition to performing compensatory and corrective functions. However, in view of the regulations contained in the Biosafety Protocol, the rules and procedures on liability and redress to be designed should facilitate transboundary movements of living modified organisms and not be prohibitive for such movements. Appropriate rules and procedures could therefore only be developed after an in-depth exchange of views on the complex legal and technical issues involved.

Through such an in-depth exchange of views, the co-chairs sought to deflect the political interest in the matter, create a common knowledge base and find common ground for the ensuing negotiations. At the same time, the co-chairs were aware that

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[5] UNEP/CBD/BS/COP MOP/1/INF/8 (2003), *Report of the Workshop on Liability and Redress in the Context of the Cartagena Protocol on Biosafety*, Annex.
[6] Decision BS-I/8 (2004), *Establishment of an Open-Ended Ad Hoc Working Group of legal and technical experts on liability and redress in the context of the Protocol*.
[7] "Highlights of the Ad Hoc Group on Liability and Redress: Wednesday, 25 May 2005", *Earth Negotiations Bulletin*, Volume 9 Number 313, Thursday, 26 May 2005.

many participants would come to the negotiations without in-depth knowledge of either the legal and/or technical issues. It was therefore important to reserve ample time for technical presentations and discussions, and to avoid rushing into negotiations. The co-chairs wished to start from scratch and take it slow.

The first step in this process was to identify issues and options to address these issues for further discussion. The co-chairs invited the experts to raise issues they considered relevant for the development of rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms. They pursued and obtained agreement that all issues and options would be listed in an outline irrespective whether one or the other expert was of the view that an issue was not relevant, pertinent or legally sound. An example was the choice of instrument. The Biosafety Protocol called for a process with respect to "the appropriate elaboration of international rules and procedures" (Article 27 CPB). The view was expressed that the process might come to the conclusion that it would not be appropriate to elaborate any rules or procedures (zero option). This view was challenged as an interpretation of Article 27 CPB that was not in good faith. Under the agreed rules of engagement, however, the zero option would also be an option and had to be included in the outline.[8]

At the same time, it was understood that the agreed rules of engagement would militate against the incorporation of issues and options that were not listed at this initial stage of the process. It was therefore important for the co-chairs that administrative approaches based on allocation of costs of response measures and restoration measures would be included in the outline. This innovative approach to liability had only recently surfaced at the international level. States had not entrenched themselves in rigid positions with respect to this approach. Hence, it might be within the zone of possible agreement once properly introduced, discussed and understood. At the time, this administrative approach to liability, or regulatory liability, had been considered in the framework of the European Union and the Antarctic Treaty Consultative Meeting (ATCM). However, the negotiations in the ATCM had not yet been finalized; and, although the European Union had adopted a directive on environmental liability based on this approach, it did not have any experience with its application and refrained from introducing it as an option. The co-chairs drew meeting's attention to these developments and suggested to include administrative approaches to liability as an option in the outline.[9]

The outline prepared by the expert group would be submitted to the first meeting of the Ad Hoc Open-Ended Working Group of Legal and Technical Experts on Liability and Redress in the Context under the Cartagena Protocol on Biosafety. At the first

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[8] UNEP/CBD/BS/COP-MOP/2/11 (2005), *Report of the Open-Ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress under the Cartagena Protocol on Biosafety*, p. 17 (Option 6: No instrument).

[9] UNEP/CBD/BS/COP-MOP/2/11 (2005), *Report of the Open-Ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress under the Cartagena Protocol on Biosafety*, p. 12 (Section IV.A(d)).

meeting, the authors were elected as permanent co-chairs and would, henceforth, sit both on the podium. At the meeting, the agreement of the parties was procured on the outline, as revised by the working group, which would constitute the basis for the future work and, hence, the negotiations. In addition, to take the work forward, parties and observers were invited to develop and submit further options for the issues outlined and suggestions for the elaboration of the options into rules and procedures on liability and redress. The co-chairs were requested to synthesize these submissions.

3. Operational Text

> "The result was a highly technical, legal and conceptual discussion. Although one observer noted that this process did little to clarify the issues in any significant way, several others viewed this approach, along with the strong leadership from the Co-Chairs, as very useful, since it resulted in the formulation and collation of operational texts".[10]

What followed after the adoption of the outline was an uneventful, but important phase in the process. The working group worked diligently for several years and produced proposals for rules and procedures on liability and redress (operational text proposals) in between and during its meetings up to and including its fourth meeting. The co-chairs allowed ample time for regional and other groups to meet during the working group meetings, as these meetings were the only opportunity to coordinate positions for many participants. By that time, the negotiations did no longer attract much political attention.

The time had come for the co-chairs to provide their perspective on the potential outcome of the negotiation process. At the third meeting of the working group, at the informal request of several participants, they presented a blueprint for a decision of the meeting of the parties to the Biosafety Protocol.[11] This blueprint contains a matrix of the possible approaches to liability (state responsibility, state liability, civil liability, administrative approach) together with the issues identified in the outline (scope, damage, primary compensation scheme, supplementary compensation scheme, settlement of claims). The blueprint did not prejudge the discussion on the choice of instrument, but it provided the first indication that the rules and procedures could take the form of a mixture of binding and non-binding elements. At the fourth meeting of the working group, the co-chairs convened an informal brainstorming session to discuss the choice of instrument under the Chatham House Rule: Accordingly, participants were free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, was to be revealed. This enabled participants and co-chairs to

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[10] "Summary of the Second Meeting of the Open-ended *Ad Hoc* Working Group on Liability and Redress in the Context of Cartagena Protocol on Biosafety, 20-24 February 2006", *Earth Negotiations Bulletin*, Volume 9 Number 345, Monday, 27 February 2006.

[11] UNEP/CBD/BS/WG-L&R/3/3 (2007), *Report of the Open-Ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety on the Work of its Third Meeting*, Annex I.

speak freely and permitted the co-chairs to invite the working group to reflect on options for a hybrid instrument, that is an instrument with binding and non-binding elements.[12]

During and in between working group meetings, parties and observers were invited to develop and submit proposals for operational text to address the issues in the outline. The effective participation in the negotiations by observers, business and civil society alike, was facilitated through the granting of an opportunity to submit proposals and the reflection of all proposals, from parties and observers alike, without attribution in the working document. The co-chairs were tasked to synthesize operational text proposals in a single working document for the next meeting. At the request of some parties, the working document would not contain any attributions of the operational text proposals. These parties wished to contribute to the process, but indicated that they did not have a mandate to present proposals and would have to refrain from contributing if contributions were not anonymous. The anonymous presentation of proposals in the working documents prepared by the co-chairs had a positive impact on the consideration of proposals. Proposals were reviewed on their merits rather than their origin. This approach also enabled participants not to entrench themselves in their positions. The co-chairs, who still had a document with attributions in front of them, observed some smooth changes of positions.

At the second meeting of the working group, industry representatives (CropLife International) invited all participants to a reception. CropLife International had organized the reception to announce that the agro-biotechnology industry would not repeat the mistake it had made during the negotiations of the Biosafety Protocol. At that time, industry representatives opposed the development of an international instrument to regulate transboundary movements of living modified organisms, including in particular any liability and redress provisions. The active participation of the agro-biotechnology industry in the negotiations on liability and redress enabled informal dialogue to explore alternative solutions, including the option of self-regulation. In the field of liability and redress, examples of self-regulation existed with respect to oil pollution damage.[13] The co-chairs encouraged the private sector to consider such forms of self-regulation as they hoped that the establishment of an industry-wide fund could help advance the negotiations on a supplementary compensation scheme that would apply in the event damage is not, or not fully, redressed. Such scheme could, for example, be applicable in the event the source of damage cannot be identified, the liable person can avail himself of an exonerating or mitigating circumstance, liability is limited in amount or in time, or

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[12] UNEP/CBD/BS/WG-L&R/4/3 (2007), *Report of the Open-Ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety on the Work of Its Fourth Meeting*, para. 33.

[13] The Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP) and CRISTAL (Contract Regarding a Supplement to Tanker Liability of Oil Pollution (CRISTAL) became operational in 1968 and were ended in 1997; and 1974 Offshore Oil Pollution Agreement (OPOL) is operational since 1974.

the available financial security is insufficient to cover the damage. If, as developers of living modified organisms maintained, the release of biotechnology products on the market following a risk-assessment is safe, there was no reason to be afraid of liability. The co-chairs indicated that a confidence-building measure, such as the establishment of an industry-wide fund, might facilitate transboundary movements of living modified organisms into those countries that were not favorably disposed towards the use of modern biotechnology. If, however, a biotechnology product would cause damage to biological diversity in spite of the assessed risks, it would only be appropriate to be held accountable for the damage. CropLife International accepted the challenge and initiated discussions amongst its members to explore the design of such a confidence-building measure.

4. Negotiating Text

> "Many [delegates] said they had arrived in Cartagena with clear instructions based on the revised working draft, setting out which cards they may, or may not trade. Those cards had been held tightly throughout the week and many were surprised to have some of those cards taken off the table, by virtue of the framework of the core elements paper. Others commented the paper served as 'shock therapy' and at least facilitated a showing of cards".[14]

By the fourth meeting of the working group, the compilation of operational text proposals covered 78 pages.[15] The time had come to weed out the proposals that did not make sense or were no longer supported by parties. By the end of the fourth meeting, the working document had been reduced to 51 pages.[16] It was pointed out that there was only one meeting of the working group left and that negotiations had not even started in earnest. It was true, we were running out of time. We knew it, but we could not say it.

From the start of the fifth meeting of the working group in Cartagena, Colombia, from 12 to 19 March 2008, the parties would have to be induced to commence the negotiations in earnest. The co-chairs had carefully planned the sequence of the meeting, starting on a Wednesday and running to the next Wednesday. At this meeting, they would introduce a Core Elements Paper that they had developed intersessionally. The introduction of the Core Elements Paper would be a matter of timing. At the start of the meeting, the co-chairs allowed for negotiations to take place in two contact groups meeting in parallel. It appeared, as expected, that not much progress could be made in the contact groups. The co-chairs made use of this time to invite parties and observers to confessionals. They sounded out red lines to assess whether the Core Elements Paper represented a zone of possible agreement.

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[14] "Working Group Highlights: Monday 17 March 2008", *Earth Negotiations Bulletin*, Volume 9 Number 433, Tuesday, 18 March 2008.
[15] UNEP/CBD/BS/WG-L&R/4/2 (2007), *Synthesis of Proposed Operational Texts on Approaches and Options Identified Pertaining to Liability and Redress in the Context of Article 27 of the Biosafety Protocol*.
[16] UNEP/CBD/BS/WG-L&R/4/3 (2007), *Report of the Open-Ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety on the Work of Its Fourth Meeting*, Annex II.

This state of affairs legitimized the introduction of the Core Elements Paper as adjusted on the basis of the negotiations and confessionals. It was introduced on Saturday to allow delegations time to reflect on it and contact their capitals. The co-chairs indicated that delegations could accept the Core Elements Paper in which case the negotiations would still be on track, reject it in which case the negotiations would collapse, or to negotiate its contents in which case there would still be a long way to go.

The Core Elements Paper struck a balance between the different positions that had been advanced in the working group.[17] It had become clear to the co-chairs over the years and from the confessionals that a legally binding instrument providing for civil liability was not within the zone of possible agreement. Hence, the only prospect for a legally binding instrument would be one providing for an administrative approach to liability. The proposed approach envisaged that a person involved in the chain of a living modified organism (from development via export and import to use) would be required to respond to damage caused by that organism (primary compensation scheme). Such an approach to liability is viable and appropriate for damage to public goods, such as biological diversity, but not for traditional damage, such as personal injury, property damage and economic loss. A civil liability regime is required to provide redress for these types of damage. To address traditional damage, the Core Elements Paper envisaged the establishment of guidance for parties to develop their domestic law.

It was also not within the zone of possible agreement to require the establishment and maintenance of financial security for unlimited liability, as such a requirement would erect a trade barrier and insurance coverage would not be available on the insurance market. This meant that there would be a risk that damage lies where it falls, unless such risk could be minimized through the creation of multiple layers of liability. Since several parties had rejected the establishment of a fund financed by the private sector, parties would have to finance a supplementary compensation scheme that would apply in the event damage is not, or not fully, redressed by the primary compensation scheme. For this reason, the Core Elements Paper envisaged a supplementary compensation scheme that would have to be financed by the parties to the Biosafety Protocol and would only be triggered in the event of damage not covered by the primary compensation scheme.

In the run up to the fifth meeting of the working group, the discussions among the members of CropLife International had come to fruition. It was important for the co-chairs that CropLife International would announce the private sector initiative before the introduction of the Core Elements Paper. The co-chairs hoped that the private sector initiative might make the Core Elements Paper more palatable; in particular, they hoped that parties would accept to finance a supplementary compensation scheme if damage was not, or not fully, covered by the primary compensation scheme and/or the private sector initiative. CropLife International

[17] For the Core Elements Paper, see the Annex in this Book.

announced the private sector initiative on Friday afternoon. Although the private sector initiative did not provide for a supplementary compensation scheme, it did overcome a serious disadvantage of the administrative approach to liability. The exercise of jurisdiction necessary to implement the administrative approach can only be based on the principle of territoriality. Hence, it would only enable the channeling of liability to a person within the territorial jurisdiction of the state of import, and not to a foreign developer or an exporter of a living modified organism. The private sector initiative overcomes this by channeling liability to the developer irrespective whether the developer has its primary or a subsidiary presence in the state of import. Pursuant to the initiative, each participating developer accepts liability for its products in a contractual mechanism that would be concluded between developers of agro-biotechnology products. A state would be a third-party beneficiary in the event of damage to biological diversity caused by such a product to an area within the limits of its national jurisdiction.

On Monday, several parties indicated that they could accept the Core Elements Paper as the basis for the removal of operational text proposals. Other parties neither accepted nor rejected the Core Elements Paper in full, but wished to negotiate its contents before using it as a basis to remove operational text proposals. It was, however, not realistic to expect progress on substance if the process would not be adjusted to the new phase in the work of the working group. It would no longer be practicable to allow all parties and observers to participate on an equal footing in the negotiations if progress was to be made. Pressed by time and the need to make progress, it was decided to establish a group of friends of the co-chairs that would represent the different negotiation positions. The agreed rules of engagement allowed for representatives of one group to rotate at the negotiation table to participate in the discussion of a particular issue, provided that at any time no more than the maximum number of representatives of that group would participate. This restricted setting, in which the final text was eventually agreed, reflects a one of the challenges of contemporary international environmental lawmaking which has been described by Akiho Shibata as “how to balance the legitimacy claim of global participation and the effectiveness claim of actually creating necessary and effective norms in timely manner”.[18]

Up to the fifth meeting of the working group, the G77 and China met to coordinate positions of developing countries. Although the members of the G77 and China held fundamentally different views on genetic modification, which had become visible during the negotiations of the Biosafety Protocol, liability and redress involved a financial component that might enable the group to identify and pursue common objectives along a North-South divide. However, the meeting of the G77 and China at which the Core Elements Paper was discussed would prove to be their last in this process. The G77 and China could not agree on a common position as its members

[18] Akiho Shibata, International Environmental Lawmaking in the First decade of the Twenty-First Century: The Form and Process, *Japanese Yearbook of International Law*, Vol. 54 (2011), pp. 28-61, at [...].

held fundamentally different views on many elements of the Core Elements Paper. As a result, the Core Elements Paper drove the group definitely apart. The meeting to discuss the Core Elements Paper would be the last meeting of the G77 and China during the process. This had a profound impact on the negotiation process. The predictable bipolar divide that had hitherto facilitated environmental negotiations at the global level turned into a cluttered multipolar pool from which different coalitions emerged at different stages of the process adding a new dimension to an already complicated negotiation process.

The negotiations on the Core Elements Paper commenced on Tuesday morning and would continue until the early hours of the next morning. Representatives from various observers also stayed up all night, "guarding" the entrance of the room and adding to the sense of urgency amongst the negotiators in the room. By the next morning, the Core Elements Paper had served its purpose. Agreement on an element was immediately implemented in the working document by the removal of operational text proposals that were not in accordance with such element. It resulted in the further reduction of the working document to 27 pages.[19] At last, the working group had produced a basis for the negotiations, but the negotiations on the remaining operational text proposals had yet to start and the deadline for the completion of the negotiations was approaching. In fact, the deadline of 27 February 2008 had already lapsed by the time of the fifth meeting of the working group, which was convened from 12 to 19 March 2008. Since the next meeting of the parties to the Biosafety Protocol had been scheduled for 12 to 16 May 2008, there was some extra time. However, at the fifth meeting of the working group, it could not be resolved whether the outcome of the negotiations would consist of a legally binding instrument or not, and whether this instrument would contain international rules and procedures on civil liability for traditional damage. In other words, some fundamental decisions on the legal nature and scope of the rules and procedures had yet to be taken.

At the fifth meeting of the working group, a group of like-minded friends of civil liability was established. This was a sizeable group of eventually 82 parties.[20] The group consisted of developing country parties as well as some developed country parties, but several developing country parties from Asia and Latin America were not part of it. This group insisted on addressing civil liability in a legally binding instrument. Although the group recognized that a comprehensive civil liability regime was not likely to emerge from the negotiations, it indicated that nothing would emerge from the negotiations if a legally binding instrument providing for the administrative approach to liability would not include one provision on civil

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[19] UNEP/CBD/BS/WG-L&R/5/3 (2008), *Report of the Open-Ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety on the Work of Its Fifth Meeting*, Annex II.

[20] Gurdial Singh Nijar, Sarah Lawson-Stopps and Gan Pei Fern, *Liability and Redress under the Cartagena Protocol on Biosafety, A Record of Negotiations for Developing International Rules*, Volume 1, Annex I, p. 399.

liability. However, at that time, the adoption of a legally binding instrument had yet not been agreed either.

At the fourth meeting of the parties to the Biosafety Protocol in Bonn, Germany, from 12 to 16 May 2008, a contact group was established with a composition that was almost identical to the group of the friends of the co-chairs established at the fifth meeting of the working group. In this contact group, the questions that parties had dodged for so long finally had to be answered. For this purpose, the co-chairs formulated two interlinked questions which were to be answered sequentially: (a) "Is there an objection to work towards a legally binding instrument on an administrative approach?"; and (b) "Is there an objection to work towards including in such legally binding instrument one article on civil liability?". A negative response to any of these two questions would result in the break-down of the negotiations. Yet, two parties provided a negative response to the first question, namely Paraguay and Peru. Since many parties indicated, further to a third question of the co-chairs, that they would not agree to work exclusively towards a non-legally binding instrument, the co-chairs suspended the meeting of the contact group and invited Paraguay and Peru to bilateral meetings with the co-chairs to assess whether their concerns could be accommodated. It appeared that these countries had been led to belief that an affirmative answer to the first question meant that they would be bound by the instrument without the need for them to express their consent to be bound in accordance with the law of treaties. After it had been clarified that the instrument would include provisions on the expression of consent to be bound, the contact group was resumed, the same question was presented, and there were no more negative responses. The co-chairs proceeded to the second question which resulted in one negative response, namely from Japan. Japan indicated that there would not be much point in meeting with the co-chairs; it wished to directly engage with the like-minded friends of civil liability in a bilateral meeting facilitated with the co-chairs as facilitators. Japan indicated at this meeting that it was willing to work towards a legally binding instrument on an administrative approach with an article on civil liability, provided that such an article left it at the discretion of parties to develop a domestic civil liability regime. Although this could not be agreed, it was agreed that such a discretionary approach would be reflected in the negotiation text alongside a mandatory approach proposed by the like-minded friends of civil liability. When this agreement was introduced in the contact group, two delegations asked for a time-out to consult their capitals, and these parties should, apparently, not have remained silent when the second question was posed. At this late juncture, if these parties would not go along with the consensus, the negotiations would collapse and the blame would fall on them. Under this pressure, the delegations concerned obtained consent from their capitals. The negotiations could move forward, but time had run out to complete them in Bonn. Since the question of the choice of instrument had been resolved, parties agreed to continue the negotiations with the aim of completing them at the next meeting of the parties in 2010 in Nagoya, Japan. For this purpose, the Group of the Friends of the Co-Chairs Concerning Liability and Redress in the Context of the Cartagena Protocol on

Biosafety was established.[21] Up to this point, the co-chairs had been scrambling for money to convene meetings, but now the process was finally heading towards a successful outcome the parties were scrambling for the honor to host a meeting!

5. Outcome

> "[O]ne delegate said the last few days had resembled a poker game, with parties gambling on other players declaring their hands before them. [...] many are wondering who holds the cards, and whether any single party is willing to go for broke."[22]

Although it had been agreed in Bonn to include a provision on civil liability in a legally binding instrument providing for an administrative approach to liability, the contents of that provision had yet to be agreed. The European Union had agreed to such a provision in Bonn on its understanding that it could be formulated in a non-binding manner. The like-minded friends of civil liability were, however, not going to be satisfied with such a Pyrrhic victory. The ensuing confrontation at the meeting in Putrajaya, Malaysia, from 8 to 12 February 2010, between the like-minded friends and the European Union was gruesome and brought the negotiations on the brink of collapse. The co-chairs had to resort to convening long meetings in closed sessions to overcome the crisis. The result is a provision which is formulated in a binding manner, yet of a procedural nature (Article 12.2 SP). Accordingly, parties must provide for adequate rules and procedures in their domestic law on civil liability for specified types of traditional damage associated with damage to biological diversity. The content of the domestic law is thus completely left at the discretion to the parties, provided that the rules and procedures are "adequate". The need to assess the effectiveness of this provision is explicitly mentioned in the provision on the assessment and review of the Supplementary Protocol (Article 13 SP). Resigning to this outcome, the like-minded friends forewent the development of guidance for rules and procedures in domestic law on civil liability and, hence, what would be "adequate".

At the next meeting from 15 to 19 June 2010 in Kuala Lumpur, Malaysia, the major controversy concerned the application of the Supplementary Protocol to imminent threats of damage. Several developing country parties opposed such an application. These parties were concerned that any discretion to decide whether there is a threat and whether that threat is imminent might be abused. Considerable economic losses might be incurred following the unwarranted closure of borders for transboundary movements of living modified organisms, notably perishable agricultural crops. In particular, the resulting delays might impact on land-locked states as such crops are predominantly shipped in bulk by rail, road or inland navigation vessels. In the end, it was agreed to limit the number of references to “sufficient likelihood of damage” in to text of the Supplementary Protocol to one operative provision (Article 5.3) and one recital in the Preamble (fourth recital). Furthermore, a party applying response

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[21] Decision BS-IV/12 (2008), *Liability and redress under the Cartagena Protocol on Biosafety*, para. 1.
[22] "COP/MOP 4 Highlights: Thursday, 15 May 2008", *Earth Negotiations Bulletin*, Volume 9 Number 440, Friday, 16 May 2008.

measures on the basis of a sufficient likelihood of damage will have to demonstrate that such application is science-based.

The end game of the negotiations in October 2010 in Nagoya, Japan, involved two South-South confrontations. These confrontations related to the establishment of financial security and the application of the Supplementary Protocol to products of living modified organisms. As for the establishment of financial security, the discussion was no longer about the introduction of an obligation to require financial security in the Supplementary Protocol, but the attribution of a right to parties to require financial security at the point of import of a living modified organism. It was argued that the introduction of such a requirement by a party in domestic law might conflict with the obligations of that party under international trade law. Such a conflict might arise if the import of a living modified organism did not involve a risk that could justify such a trade-related environmental measure. However, if such a measure can be justified in particular circumstances, the absence of a provision related to financial security in the Supplementary Protocol might be interpreted as an agreement not to attribute a right to parties to require financial security. The parties concerned took the matter in their own hands and resolved it in a bilateral meeting without any assistance of the co-chairs, and presented their solution to the group of the friends of the co-chairs. Accordingly, parties would "retain" the right to provide, in their domestic law, for financial security (Article 10 SP). This provision could neither be interpreted as the attribution of a new right to a party nor as removing existing rights from a party under international law.

As for the final outstanding issue, the application of the Supplementary Protocol to products of living modified organisms, the civilized disagreement on the matter turned vicious when some participants started to doubt and question whether mutual respect was expressed. Several participants were no longer on speaking terms in the meeting and also not in the margins of the meeting. The co-chairs invited these participants to a meeting to clear the air in order to move, gradually, to resolving the substantive matter. The Biosafety Protocol applies to transboundary movements of living modified organisms, but not to transboundary movements of products of living modified organisms. However, the annex to the Biosafety Protocol on risk assessment makes reference to "risks associated with living modified organisms or products thereof".[23] The controversy turned on the question whether damage caused by products of living modified organisms was "damage resulting from transboundary movements of living modified organisms" (Article 27 CPB). The co-chairs were called on to provide an interpretation of the text of the Supplementary Protocol if the references to products of living modified organisms were to be removed. They advised that parties would not be prevented from applying the Supplementary Protocol to damage caused by products of living modified organisms, provided that a causal link is established between the damage and the living modified organism in question. This interpretation enabled the removal of the references to products of living modified organisms from the text of

[23] For the full text, see Annex III, para. 5.

the Supplementary Protocol on the understanding that such interpretation would be reflected in the report of the meeting of the parties.[24] Although not all parties wished to subscribe to the co-chairs' interpretation, none of them wished to challenge it either. Eventually, it was agreed to disagree on the matter and thus leave it at the discretion of parties to apply the Supplementary Protocol to damage caused by products of living modified organisms.

Following the resolution of these two outstanding issues, the meeting of the parties to the Biosafety Protocol adopted, on 15 October 2010, the decision on liability and redress that includes the Supplementary Protocol. Although it is common practice to name a treaty after the place where it is adopted, as a tribute to the host state, exceptions have been made to this practice. For example, the Biosafety Protocol, which was adopted in Montreal, was named after Cartagena to honor the host of the penultimate meeting and to recognize the role played by the Minister of the Environment of Colombia, Juan Mayr Maldonado. The negotiations could not be completed at that meeting, but it had been a critical step towards the adoption of the Biosafety Protocol. An exception was acceptable in this case, because Montreal is the seat of the Secretariat of the Convention on Biological Diversity and the default meeting venue. Since the Supplementary Protocol would be adopted in Nagoya that had offered to host the fifth meeting of the parties to the Biosafety Protocol, the co-chairs wished to pay tribute to the host city Nagoya by giving the Supplementary Protocol its name. However, the co-chairs also wished to acknowledge the role of Malaysia in the process. Malaysia had hosted the meeting where the mandate of the process was adopted (in 2004) as well as two meetings of the Group of the Friends of the Co-Chairs Concerning Liability and Redress in the Context of the Cartagena Protocol on Biosafety (in 2010). The result is unusual, yet not unprecedented.

Following its announcement at the fifth meeting of the working group, the private sector initiative had met with fierce criticism from civil society, some parties as well as other sectors of industry, in particular the grain traders, small and medium enterprises, and the public research sector. The co-chairs had not anticipated the extent and intensity of this criticism. The proposed contractual mechanism would not be but a complementary instrument to the international rules and procedures on liability and redress in the field of for damage resulting from transboundary movements of living modified organism. However, it appeared from the criticism that the complex contractual mechanism was initially not fully understood. In particular, concerns were expressed that it might become an alternative to those rules and procedures. The criticism eventually became an incentive for CropLife International to engage civil society, parties and other sectors of industry in the further development of the initiative. CropLife International organized regional dialogues for which invitations were extended to parties, civil society and other sectors of industry. The dialogues provided a platform to raise questions and

[24] UNEP/CBD/BS/COP-MOP/5/17 (2010), *Report of the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity Serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety*, para. 133; see also the Annex in this Book.

provide advice to CropLife International. The co-chairs were invited to facilitate the dialogues.[25] The dialogues resulted in numerous amendments of the proposed contractual mechanism. These amendments would not accommodate all criticism, as there were red lines for industry that could not crossed, including the provisions related to exemptions, financial limits, and time limits. The contractual mechanism for response in the event of damage to biological diversity caused by the release of a living modified organism (Compact) became operational in 2010 before the Supplementary Protocol was adopted.[26] The decision on liability and redress, adopted by the fifth meeting of the parties to the Biosafety Protocol, makes reference to it in the preamble. It notes "initiatives by the private sector concerning recourse in the event of damage to biological diversity caused by living modified organisms".[27]

6. Toolbox

"One smiling delegate attributed the general lack and lag of response to jetlag, sleep deprivation and/or celebratory *sake*. Was finishing Liability a liability?"[28]

The adoption of the Supplementary Protocol was the culmination of a multi-year international negotiation process that involved many stakeholders. Multiple factors contributed to the successful outcome of the process. At different stages of the process, different factors were at work and all factors are interdependent. In our view, the following factors were decisive.

- *Election of leaders of the process.* When a chair informs participants of a meeting that he is in their hands, the participants should beware of an imminent change in the way the meeting is conducted. The chair is responsible for conducting the meeting and the orderly conduct of the meeting is a prerequisite for progress on substance. A meeting benefits from electing a seasoned negotiator as a chair, but progress on substance will be more expeditious if the chair knows the subject-matter. To share the responsibility and to represent different interest groups in the negotiations, there is merit in electing co-chairs, preferably one from a developed and one from a developing country, even though two chairs cannot represent all interests. Although it could be agreed to elect (new) co-chairs at every meeting, continuity, in particular between meetings, militates in favor of the election of co-chairs on a permanent basis. Yet, more often than not, you will have spent your co-chairs by the end of the process as a result of the unpopular decisions they have to take to move the process forward.

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[25] Dialogues were held in Asia (Singapore in January 2009 and the Philippines in January 2010), America (Costa Rica in June 2009), Europe (Belgium in November 2009), and Africa (Kenya in August 2010).
[26] For the text of the Compact, as amended on 18 September 2012, see www.biodiversitycompact.org.
[27] Decision BS-V/11 (2010), *International rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms,* Preamble.
[28] "COP/MOP 5 Highlights, Monday, 11 October 2010", *Earth Negotiations Bulletin*, Volume 09 Number 529, Tuesday, 12 October 2010.

- *Deflection of (too much) political interest in the process*. The negotiations on liability and redress in the context of the Biosafety Protocol were susceptible of attracting political attention. A high political profile of negotiations is not likely to contribute to the creation of an atmosphere that is conducive for the discussion of technical and legal aspects, let alone for the development and evolution of instructions that provide sufficient flexibility for participants to explore alternative solutions. Given the level of political interest at the time of the adoption of the Biosafety Protocol, it was imperative to deflect political interest in the process. At the end of the process, the co-chairs were wondering whether they had been too successful, as there did not seem to be much political interest in the outcome of the negotiations.
- *Creation of a common knowledge base*. In the initial stages of negotiations, there should be ample opportunity to present and exchange information. This will not only strengthen the knowledge of participants, but also contribute to the mutual understanding of different perspectives and the creation of internal jargon of the microcosmos that each negotiation community is. Provided that parties continue to be represented by the same people, at least a critical mass of them, over the years, this will avoid unnecessary confusion and irritation in subsequent stages of the negotiations.
- *Allowing for effective participation of observers*. International agreements are adopted by states. Yet, it may well be the observers, including non-state actors, who will have to work the outcomes. They usually have thorough knowledge of technical aspects and often a realistic perspective on the implementation of the outcomes. Negotiations will therefore benefit from the effective participation of observers, and this may also prevent agitated participants lamenting that diplomats do not know what they are talking about. All participants need to understand the evolution of the negotiations and the negotiating text, and the best way is to allow them to observe the negotiations and, where possible, to participate in the negotiations.
- *Managing time*. A deadline for the completion of negotiations provides focus, but it makes time a scarce commodity. Negotiators on tight schedules from all over the world get together to meet for a set, limited number of days -- the days of international conferences lasting for months is long gone. Meetings are expensive and it is important to make the most of them -- international labor standards on working time are violated, and healthy eating and sleeping habits ignored. Yet, the process must allow for presenting and exchanging information, regional coordination, effective participation of observers, explaining and testing positions, and finding solutions. In this pressure cooker, it is the responsibility of the chair to manage time, process and people. It is up to the chair to transmit a sense of direction and urgency to negotiators, without with chaos can erupt at any time. However, lack of patience will only move the negotiations backward. You got to go through the motions.
- *Investing in social capital*. Throughout the negotiation process, it is important to accumulate social capital, that is establishing and maintaining networks within the negotiating community, building trust between participants (it's a lot about

people), and developing and enforcing norms governing the negotiations (rules of engagement). Besides the formal rules of procedure, numerous additional rules of engagement, appropriate for the stage of the process, must be deployed to move the process forward. Such informal rules, more often than not proposed by the chair, are agreed by all, but have to be enforced by the chair. The respect for such rules depends on the trust in the chair.

- *Building consensus*. Pursuant to its rules of procedure, the meeting of the parties to the Biosafety Protocol is required to adopt most of its decisions by consensus. The process of achieving consensus takes time, as it involves the demonstration that certain proposals will eventually meet with a formal objection. It must first be understood what the reasons are for such a position and then such position will need to be tested, in particular when it becomes clear that such position is not or no longer supported by other parties. There is often more than one way that leads to Rome (or, in this case, from Rome). Taking time to explore alternative routes may lead to solutions that accommodate national interests or, at least, not impair such interests. Furthermore, when it is visible that one party is showing flexibility, other parties will be more inclined and more pressured to show some flexibility as well. Slowly, but surely parties will assume ownership of the evolving negotiating text. Such ownership is even more important than achieving consensus as only true ownership will enhance the probability that the instrument will enter into force and attract broad participation. As of 1 July 2013, 13 states and the European Union have expressed their consent to be bound to the Supplementary Protocol. Although there are still 27 to go, there is, in the minds of the co-chairs, no doubt that the Supplementary Protocol will enter into force.