

Ref.: SCBD/BS/WDY/ps/71342

6 April 2010

NOTIFICATION
Text of a proposed supplementary protocol to the Cartagena Protocol on Biosafety

Madam/Sir,

In response to the requirement under Article 27 of the Biosafety Protocol, the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol (COP-MOP) established, at its first meeting held from 23 to 27 February 2004 in Kuala Lumpur, Malaysia, an Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress (decision BS-I/8). After holding five meetings, the Working Group accomplished its work in accordance with its terms of reference and submitted its final report to the fourth meeting of the COP-MOP that took place from 12 to 16 May 2008 in Bonn, Germany.

The fourth meeting of the COP-MOP noted with appreciation the work undertaken by the Working Group and decided (decision BS-IV/12) to establish a Group of Friends of the Co-Chairs with a mandate to further negotiate international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms on the basis of the annex attached to the decision.

The Group of Friends of the Co-Chairs has held two meetings to-date and has been working, *inter alia*, towards a legally binding instrument in the form of a supplementary protocol subject to final decision by the COP-MOP. At the conclusion of its second meeting held from 8 to 12 February 2010, the Group requested the Executive Secretary to communicate to Parties to the Protocol the text of a proposed supplementary protocol annexed to its report (UNEP/CBD/BS/GF-L&R/2/3), six months prior to the fifth meeting of the COP-MOP pursuant to paragraph 3 of Article 28 of the Convention on Biological Diversity.

Accordingly, I am pleased to communicate to you the text of the proposed supplementary protocol to the Cartagena Protocol on Biosafety attached herewith for your attention and appropriate action in view of the coming meeting of the COP-MOP from 11 to 15 October 2010 in Nagoya, Japan. At this meeting, the text will be further considered with a view to its adoption.

The text is also available in all other United Nations languages at the Secretariat's website at this link: <http://www.cbd.int/doc/?meeting=BSGFLR-02>

I would also like to use this opportunity to kindly remind Parties attending the fifth meeting of the COP-MOP to ensure that their representatives have the necessary credentials that allow them to participate in the adoption of the text of a treaty.

Please accept, Madam/Sir, the assurances of my highest consideration.

Ahmed Djoghlaf
Executive Secretary

Attachment

To: Cartagena Protocol on Biosafety (CPB) National focal points
CBD National Focal Points (where CPB focal points have not yet been designated)

Annex I

[SUPPLEMENTARY PROTOCOL ON [LIABILITY AND REDRESS FOR] DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF LIVING MODIFIED ORGANISMS TO THE CARTAGENA PROTOCOL ON BIOSAFETY]

The Parties to this Supplementary Protocol,

Being Parties to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, hereinafter referred to as “the Protocol”,

Recalling Article 27 of the Protocol,

Have agreed as follows:

Article 1 *

[The objective of this 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 biological diversity resulting from living modified organisms that finds its origin in transboundary movements.]

Article 2

1. The terms used in Article 2 of 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 on Biological Diversity serving as the meeting of the Parties to the Cartagena Protocol on Biosafety;

(b) “Convention” means the Convention on Biological Diversity;

(c) “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 national authority that takes into account any other human induced variation and natural variation; and

(ii) Is significant as set out in paragraph 3 below;

[(d) “Imminent threat of damage” is an occurrence or occurrences determined, on the basis of best available scientific and other relevant information, to be likely to result in damage if not addressed in a timely manner;]

[(e) “Incident” means any occurrence or series of occurrences, [originating [in][from] a transboundary movement of LMOs][having the same origin] that causes damage[or creates [a grave and] an imminent threat of causing damage];]

* This paragraph has neither been discussed nor negotiated.

(f) “Operator” [in relation to response measures] means any person in [direct or indirect] [operational] control of [the activity at the time of the incident causing damage resulting from the transboundary movement of living modified organisms][the living modified organism at the time that the condition giving rise to the damage arose] [and could include, as appropriate and as determined by domestic law, the permit holder, person who placed the living modified organism on the market, developer, producer, notifier, exporter, importer, carrier or supplier];

(g) “Protocol” means the Cartagena Protocol on Biosafety to the Convention on Biological Diversity;

(h) “Response measures” means reasonable actions, in the event of damage [or imminent threat of damage], to:

- (i) Avoid, minimize, contain or mitigate damage[, or take the necessary preventive measures in case of imminent threat of 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

1. This Supplementary Protocol applies to damage to the conservation and sustainable use of biological diversity, taking also into account risks to human health.

2. This Supplementary Protocol applies to damage resulting from transport, transit, handling and use of living modified organisms [and products thereof] provided that these [living modified organisms][activities] find their origin in a transboundary movement. The living modified organisms referred to are those:

- (a) Intended for direct use as food or feed, or for processing;
- (b) Destined for contained use;
- (c) Intended for intentional introduction into the environment.

3. With respect to intentional transboundary movements, this Supplementary Protocol applies to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 2.

4. 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.

Article 4 (adopted)

1. This Supplementary Protocol applies to damage that occurred in areas within the limits of the national jurisdiction of Parties resulting from activities as referred to in Article 3.

2. Parties may use criteria set out in their domestic law to address damage that occurs within the limits of their national jurisdiction.

3. Domestic law implementing this Supplementary Protocol shall also apply to damage resulting from the transboundary movements of living modified organisms from non-Parties.

Article 5 (adopted)

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.

Article 6 (adopted)

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

Article 7

1. A Party shall[, consistent with international obligations,] provide for response measures consistent with the provisions outlined below and shall implement them in accordance with its domestic law.

2. Parties shall require the operator, in the event of damage [or imminent threat of damage], subject to any requirements of the competent authority, to:

- (a) Immediately inform the competent authority;
- (b) Evaluate the damage [or imminent threat of damage]; and
- (c) Take appropriate response measures.

3. The competent authority shall:

- (a) Identify the operator which has caused the damage [or the imminent threat of damage];
- (b) Evaluate the damage and determine which response measures should be taken by the operator.

4. The competent authority may implement appropriate response measures including in particular when the operator has failed to do so.

5. The competent authority has the right to recover from the operator the costs and expenses of, and incidental to, the evaluation of the damage and the implementation of any such appropriate response measures. Parties may provide, in their domestic law, for other situations in which the operator may not be required to bear the costs and expenses.

6. Decisions of the competent authority requiring the operator to take response measures should be reasoned. Such decisions should be notified to the operator. Domestic law shall provide for remedies, including the opportunity for an 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.

Article 8 (adopted)

1. Parties may provide, in their domestic law, for the following exemptions:

- (a) Act of God or *force majeure*;
- (b) Act of war or civil unrest.

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

Article 9 (adopted)

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

Article 10 (adopted)

Parties may provide, in their domestic law, for relative and/or absolute time limits including for actions related to response measures and the commencement of the period to which a time limit applies.

Article 11 (adopted)

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

Article 12

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

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

Article 13

1. Parties shall provide, in their domestic law, for rules and procedures that address damage resulting from transboundary movements of living modified organisms. 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 laws, 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 [should][shall][may] assess whether their domestic law provides for adequate rules and procedures on civil liability for material or personal damage incidental to the damage as defined in Article 2, paragraph 2 (c), and consider:

(a) Applying their existing domestic laws, including where applicable general rules and procedures on civil liability;

(b) Applying or developing civil liability rules and procedures specifically for this purpose; or

(c) Applying or developing a combination of both.]¹

3. When developing rules and procedures as referred to in subparagraphs (b) or (c) of paragraph[s] 1 [or 2] above, Parties [should][shall][may], as appropriate, address, *inter alia*, the following elements:

(a) Damage;

(b) Standard of liability including strict or fault-based liability;

(c) Channelling of liability, where appropriate;

(d) Right to bring claims.

Article 14 (adopted)

The Conference of the Parties serving as the meeting of the Parties to the Protocol shall undertake a review of the effectiveness of this Supplementary Protocol five years after its entry into force and every five years thereafter, provided information requiring such a review has been made available by Parties. The review shall be undertaken in the context of the assessment and review of the Protocol as specified in Article 35 of the Protocol, unless otherwise decided by the Parties to this Supplementary Protocol. The first review shall include a review of the effectiveness of Article 13.

Article 15 (adopted)

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 (adopted)

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 (adopted)

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

Article 18 (adopted)

1. This Supplementary Protocol shall supplement the Protocol and shall neither modify nor amend the Protocol.

¹ The African Group reserves the right to re-visit the wording of this paragraph.

2. Nothing in this Supplementary Protocol shall derogate from 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 to this Supplementary Protocol.

Article 19

This Supplementary Protocol shall be open for signature at [...] by Parties to the Protocol from [...] to [...], and at the United Nations Headquarters in New York from [...] to [...].

Article 20 (adopted)

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 its entry into force pursuant to 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 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 21

[No reservations may be made to this Supplementary Protocol.]

Article 22 (adopted)

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

Article 23 (adopted)

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

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Supplementary Protocol.

DONE at [...] on this [...] day of [...] two thousand and [...].