



HIGHLIGHTS OF THE AD HOC GROUP ON LIABILITY AND REDRESS: WEDNESDAY, 25 MAY 2005

Delegates to the first meeting of the *Ad Hoc* Open-ended Working Group of Legal and Technical Experts on Liability and Redress in the context of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (CBD) met in Plenary throughout the day. In the morning, delegates heard opening remarks, addressed organizational issues and discussed a presentation on scientific analysis and risk assessment. In the afternoon, they discussed a presentation on State responsibility and international liability, and addressed scenarios, options, approaches and issues on liability and redress, for further consideration.

OPENING REMARKS AND ORGANIZATIONAL ISSUES

CBD Executive Secretary Hamdallah Zedan opened the meeting, noting that the preparatory meeting of the Technical Expert Group on liability and redress provided a solid base for discussions, and calling for creative approaches to strike a balance between maximizing benefits of, and providing protection against damage from, biotechnology developments.

Delegates elected René Lefebvre (the Netherlands) and Jimena Nieto Carrasco (Colombia) as Co-Chairs of the meeting, and Maria Mbengashe (South Africa) as the rapporteur. They adopted the agenda of the meeting and organization of work (UNEP/CBD/BS/WG-L&R/1/1 and Add.1) without amendment.

Co-Chair Carrasco presented the report of the meeting of the Technical Expert Group (UNEP/CBD/BS/WG-L&R/1/2), highlighting the lack of regional or international instruments specifically addressing liability for damage resulting from transboundary movements of LMOs.

The Secretariat introduced: a compilation of views on the scenarios identified by the Technical Expert Group (UNEP/CBD/BS/WG-L&R/1/INF/1 and Add.1); a note on the definition of biodiversity loss and on indicators for assessing progress towards the 2010 biodiversity target (UNEP/CBD/BS/WG-L&R/1/INF/2); a note on the status of third-party liability treaties (UNEP/CBD/BS/WG-L&R/1/INF/3); and information on relevant recent developments in international law (UNEP/CBD/BS/WG-L&R/1/INF/4). She highlighted relevant documents on risk assessment and management (UNEP/CBD/BS/COP-MOP/2/9) and on socioeconomic considerations (UNEP/CBD/BS/COP-MOP/2/12). She explained that the Secretariat would make available information recently submitted by insurance companies on the availability of financial security to cover liability resulting from the transboundary movement of LMOs. SWITZERLAND asked the Secretariat to make available the Swiss submission of a draft sub-protocol on liability and redress.

EGYPT regretted the absence of negotiator Tewolde Egziabher (Ethiopia) due to Canada's denial of a visa and stressed that host countries are required to facilitate, not hinder, participation. Executive Secretary Zedan informed delegates that the visa has been granted, following contacts with Canadian authorities.

PRESENTATIONS RELATING TO LIABILITY AND REDRESS

SCIENTIFIC ANALYSIS AND RISK ASSESSMENT: Muffy Koch (AgBios, Canada) and Piet van der Meer (Horizons, Belgium) presented an overview of the scientific analysis and assessment of risks resulting from transboundary movements of LMOs. Van der Meer noted that the objective of risk assessment is to identify and evaluate potential adverse effects of LMOs. He explained that it is generally a two-stage process, involving both the applicant intending to carry out the activity and the competent national authority ruling on the application. Koch described the mechanisms of transboundary movements, which can occur as a result of field trials or of general use, and which can be intentional or unintentional. She said that intentional transboundary movements can be legal or illegal, while unintentional movements can result from natural forces or human error. Van der Meer underscored that the determination of acceptable levels of risk is a cultural variable and depends on the release environment. After outlining the methodology and variables of risk assessment, he discussed the main pathways by which LMOs can cause damage, stressing the wide variation in terminology used by countries in assessing risks at different stages. They concluded that risk assessment is a scientifically sound methodical approach, carried out on a case-by-case and comparative basis, and stressed the need for transparency.

COLOMBIA and CAMEROON drew attention to the conditions of the receiving environment and asked about the relation between a field trial and risk assessment. The speakers noted that the Biosafety Protocol provides for a risk assessment to be carried out by the importing country before decision making, and that a field trial is part of the risk assessment, aiming to test the technology and gather information on the release environment. EGYPT observed that genes behave differently in different genomes and conditions. Participants discussed the use of Bt toxin in pesticides and genetically modified crops, with IRAN pointing to evidence of pathological effects of Bt toxin on mammals. Following a question by EGYPT regarding consideration of unexpected adverse effects, van der Meer noted that a key question in the liability debate would be whether adverse effects could have been foreseen.

INDIA noted the limited experience in assessing impacts on biodiversity, and stressed the importance of socioeconomic



considerations in developing countries. Responding to a question from MALI, the speakers defined confinement as preventing LMOs' dissemination and persistence in the environment, and their introduction into the food or feed chain, accompanied by a procedure for accidental release. JORDAN called for a simplified risk assessment to reduce costs for developing countries. The PHILIPPINES drew attention to the role of the public sector in developing biotechnology. The FEDERATION OF GERMAN SCIENTISTS noted the existence of various scientific approaches to risk management, while van der Meer referred to different terminologies rather than approaches.

STATE RESPONSIBILITY AND INTERNATIONAL LIABILITY: Dan Ogolla (Secretariat) described recent developments in State responsibility and international liability. He focused on the work of the International Law Commission (ILC), highlighting its articles on State responsibility. He explained that the conduct of private entities is not considered to be attributable to the State, and that forms of reparation could include restitution, compensation and satisfaction. He noted that the concept of international liability focuses on reparation of harm arising from acts not prohibited by international law. He outlined the ILC draft articles on preventing transboundary harm from hazardous activities and draft principles on the allocation of loss in the case of transboundary harm from hazardous activities.

The UK noted that primary State responsibility in the Convention on International Liability for Damage Caused by Space Objects confirms the international trend to channel liability to the operator, because States are the only entities operating space objects. INDIA suggested deciding whether to qualify LMOs as hazardous before determining which of the existing liability regimes can be used as a model.

Several delegates valued the distinction made by the ILC between State responsibility for wrongful acts and international liability for lawful acts, with COLOMBIA and FRANCE stressing translation difficulties. Co-Chair Lefebvre suggested making available to the next meeting of the *Ad Hoc* Group the text of General Assembly Resolution 56/82 of 2001 (report of the 53rd session of the ILC), and the ILC draft articles and principles regarding transboundary harm.

Co-Chair Lefebvre asked for comments on information regarding: damage to the conservation and use of biodiversity; socioeconomic damage; availability of financial security; treaties that provide for third-party liability and analysis of reasons why several of those have not entered into force; and relevant developments in international law. COLOMBIA said that the analysis of reasons why treaties providing for third-party liability did not enter into force should help to avoid repeating mistakes, and not deter discussions.

SCENARIOS, OPTIONS, APPROACHES AND ISSUES FOR FURTHER CONSIDERATION

Co-Chair Lefebvre drew attention to scenarios, options, approaches and issues for further consideration, contained in the annex to the report of the Technical Expert Group, and called for additional elements. TANZANIA said the scope of damage should include: transit, handling and use of LMOs; accidents and their effects; exporter and importer responsibilities; and areas beyond national jurisdiction. He called for capacity building to support national implementation, with Co-Chair Lefebvre suggesting an additional element in that regard. The WASHINGTON BIOTECHNOLOGY ACTION COUNCIL questioned a reference to illegal transboundary movements, and the Secretariat clarified that the reference reflects Protocol Article 25 (Illegal Transboundary Movements).

On scenarios and sub-scenarios identified in the annex, CHINA asked if transboundary movement from a Party to a non-Party is included, and GREENPEACE highlighted its report documenting such a case. INDIA called for including transit points. The EDMONDS INSTITUTE proposed inclusion of a scenario in which the origin of an LMO is unknown and

presumed to be from transboundary movement. ECOROPA acknowledged that the list was non-exhaustive and asked to widen the sub-scenarios. SWITZERLAND suggested the list of scenarios be left open and revisited.

On identifying damage, the GLOBAL INDUSTRY COALITION stressed the need to consider only damage to biodiversity, explaining that damage to organic crops is commercial and outside the scope of the Protocol. On channeling liability, MOROCCO sought clarification on private operators' liability. The GLOBAL INDUSTRY COALITION highlighted its submission on the application of civil law to the described scenarios.

Several delegates noted the difficulty of discussing scenarios in isolation from other annex elements, and Co-Chair Lefebvre called for comments on the scope of damage resulting from transboundary movements of LMOs, which involves a policy choice between two legally justifiable options: damage caused during shipment of LMOs; and damage caused during shipment, transit, handling and/or use of LMOs. SENEGAL proposed including transit in both options. Highlighting the need to assess the best reading of Article 27 (Liability and Redress) from a legal point of view, CANADA and ARGENTINA supported the first option, and AUSTRALIA stressed that handling and use are outside the scope of Protocol Article 27.

Many delegates supported the second option, with SWITZERLAND, SOUTH AFRICA, CAMEROON, MEXICO and KENYA suggesting inclusion of unintentional release. PARAGUAY called for including storage of LMOs. TRINIDAD AND TOBAGO and GRENADA preferred the term "carriage" to "shipment." EL SALVADOR drew attention to inappropriate use and illegal introduction of LMOs. The UK, on behalf of the EU, supported by many, suggested making activities in the second option conditional upon finding their origin in transboundary movements. CHINA noted that damages caused directly by shipment of LMOs seem very rare. Many delegates called for clarifying the language of the second option. The US proposed adding time limitations, with NEW ZEALAND adding limitations of geographical scope and authorized use. GREENPEACE drew attention to language on activities covered by the Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous for the Environment.

Co-Chair Lefebvre then called for comments on the optional components for the definition of damage. ANTIGUA AND BARBUDA suggested adding a component on reinstatement costs and COLOMBIA proposed including criteria for damage. Co-Chair Lefebvre reported on the Technical Expert Group's discussions on including both damage to the environment and damage to conservation and sustainable use of biodiversity. ZIMBABWE, SWITZERLAND, MALAYSIA, SENEGAL and UGANDA favored retaining both forms of damage, and VENEZUELA and EL SALVADOR proposed merging them. The EU, IRAN, COLOMBIA, CUBA, MEXICO, JORDAN, NEW ZEALAND and the PHILIPPINES supported retaining the reference to damage to biodiversity only.

Co-Chair Lefebvre said discussions would continue on Thursday.

IN THE CORRIDORS

Despite unease caused by the absence of several key participants who had not received their visas on time, delegates attentively followed presentations on the scientific, technical and legal issues of liability and redress, with several expressing satisfaction with their content and quality.

Nonetheless, some wondered whether the concerns over participation, and its impact on the negotiations' fairness and transparency, might yet affect next week's COP/MOP deliberations. Noting that damage done to the process might be considerable, they called on the Secretariat to improve its cooperation with the Canadian authorities.