



HIGHLIGHTS OF THE *AD HOC* GROUP ON LIABILITY AND REDRESS: FRIDAY, 27 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 addressed the annex to the report of the meeting of the Technical Expert Group (UNEP/CBD/BS/WG-L&R/1/2) containing scenarios, options, approaches and issues for further consideration, and discussed the future work of the *Ad Hoc* Group. In the afternoon, they discussed and adopted the report of the meeting.

SCENARIOS, OPTIONS, APPROACHES AND ISSUES FOR FURTHER CONSIDERATION

CAPACITY BUILDING: Following a round of applause to welcome Tewolde Egziabher (Ethiopia), Co-Chair René Lefebvre opened discussions on a section on capacity building to be added to the annex. COLOMBIA, MALI, MALAYSIA, INDIA and many others acknowledged the importance of capacity building but warned that it should not replace or delay drafting an international regime on liability and redress. SENEGAL, supported by ALGERIA, noted that including a provision on capacity building might mitigate the strength of a liability and redress regime, and preferred amending Protocol Article 22 (Capacity Building). BRAZIL stressed the importance of capacity building for the future of the Biosafety Protocol, and, with ALGERIA, noted that capacity building will be taken up by COP/MOP-2.

Several countries emphasized the need for capacity building at systemic, institutional, financial, technological and individual levels. EL SALVADOR called for strengthening institutions and human resources. The UK, on behalf of the EU, stressed the importance of capacity building in assisting national regimes to implement international rules and procedures on liability and redress. COLOMBIA, CUBA and TANZANIA underscored the need for building the capacity of judicial institutions, CUBA and TANZANIA for building monitoring capacities, and JORDAN,

SYRIA and TANZANIA for building the capacity of customs agencies. INDIA also highlighted the training of shipping and segregation personnel.

UGANDA and SOUTH AFRICA said capacity building should be based on nationally identified needs and priorities. CUBA called for regional activities for capacity building and for south-south and north-south cooperation. INDIA supported exchanging best practices among countries and prioritizing exchange of expertise at the regional level. MEXICO stressed cooperation and exchange, in particular in developing national legislation to implement an international regime on liability and redress. SYRIA highlighted the role of NGOs and civil society in building capacity at the national level.

FUTURE WORK

NEW ZEALAND suggested developing a set of criteria or factors for assessing the effectiveness of possible liability rules. COLOMBIA, IRAN, INDIA, EGYPT, MALAYSIA and ALGERIA questioned the necessity of such a process. Drawing attention to the terms of reference of the *Ad Hoc* Group, MALAYSIA added that examination of general issues should not delay work on rules and procedures. AUSTRALIA, the US and CANADA stressed that assessing the effectiveness of any regime will contribute to the discussion. CANADA added that an effective regime structure is key to the availability of insurance. GREENPEACE drew attention to a legal paper focusing on liability for genetically modified organisms (GMOs) in New Zealand, concluding that there are significant difficulties relating to liability for damage from GMOs. Co-Chair Lefebvre proposed requesting governments to submit their views on assessment criteria.

Co-Chair Lefebvre identified documents to be made available for consideration at the next meeting of the *Ad Hoc* Group, including: General Assembly Resolution 56/82 of 2001 (Report of the 53rd session of the International Law Commission (ILC)); 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 report of the meeting of the Technical Expert Group on liability and redress under CBD Article 14.2 (liability and



redress); COP/MOP-2 decisions on risk assessment and risk management, and on socioeconomic considerations; information on financial security; and an update on relevant international law developments. The EU called for information on the concept of damage to biodiversity, including case studies, and for information on transnational procedures and institutions, including the Hague Conference on Private International Law.

CBD Executive Secretary Hamdallah Zedan outlined the indicative work plan of the *Ad Hoc* Group, funding considerations and the CBD calendar, stressing that the next meeting can only be held in February 2006, pending financial contributions. Many expressed appreciation for the funding received to enable participation of developing countries and countries with economies in transition, and called on governments in the position to do so to contribute. IRAN drew attention to the issue of denials of visas by Canada.

MALAYSIA, supported by NORWAY and the EU, suggested submitting proposals on draft text, to be synthesized by the Co-Chairs for discussion at the next meeting.

REPORT OF THE MEETING

Rapporteur Maria Mbengashe (South Africa) introduced the report of the meeting (UNEP/CBD/BS/WG-L&R/1/L.1) and an amended annex on options, approaches and issues for further consideration, including an appendix on scenarios (UNEP/CBD/BS/WG-L&R/1/L.1/Add.1). Co-Chair Lefeber presented the amendments to the annex, noting they reflect delegates' suggestions. He highlighted elaborations in sections on scope, damage, causation, channeling of liability, settlement of claims, non-Parties and choice of instrument, and the addition of new sections on use of terms and capacity building.

On options for defining the scope of damage arising from transboundary movements of living modified organisms (LMOs), TANZANIA proposed changing reference to "damage caused by" to "damage resulting from," to ensure consistency with Protocol Article 27 (Liability and Redress). AUSTRALIA and NEW ZEALAND, opposed by TANZANIA and IRAN, requested deletion of optional components on the geographical scope of damage referring to areas in control of non-Parties and to areas beyond the national jurisdiction or control of States. Delegates decided to retain the options.

On issues for further consideration relating to scope, NEW ZEALAND proposed an additional option limiting the scope of damage to the authorized use at the time of import and, with ARGENTINA, requested deletion of a reference to exclusive economic zones in relation to the determination of the point of import and export of LMOs.

On optional components for the definition of damage, delegates agreed on a proposal by NEW ZEALAND to postpone identification of sub-items of damage to biodiversity, thus deleting them from the annex. Regarding damage to conservation and sustainable use of biodiversity, MALAYSIA proposed adding reference to damage to biodiversity components. The UK proposed a footnote referring to CBD decision VII/30 (Strategic Plan: future evaluation of progress), with INDIA noting that this decision does not deal with biodiversity loss due to transgenic material. Co-Chair Lefeber suggested continuing discussions on this item at the next meeting. MALAYSIA also proposed: on

damage to environment, addition of biodiversity components; on damage to human health, reference to impairment of health; and on traditional damage, substitution of loss of income with economic loss.

On issues for further consideration with respect to valuation of damage, MALAYSIA proposed valuing not only damage to sustainable use of biodiversity, human health, socioeconomic and traditional damage, but also damage to the environment.

On channeling of liability, EGYPT proposed an additional option providing for no exemptions to strict liability. Following suggestions by SENEGAL and BRAZIL, delegates preferred referring to the establishment of a causal link rather than of a nexus of causality, as an option for a basis for channeling civil liability. On standing, delegates agreed to a reference to affected, rather than injured, persons.

On non-Parties, MALAYSIA suggested adding a reference to bilateral agreements containing minimum liability standards. Noting that the section on use of terms is without prejudice to the choice of instrument, delegates agreed to address the terms "use," "response measures," "restoration measures" and "reasonable." Regarding the choice of instrument, MALI, TRINIDAD AND TOBAGO and IRAN recorded their opposition to an option providing for no instrument.

Co-Chair Lefeber then called for comments on the conclusions of the *Ad Hoc* Group, contained in the report of the meeting. NEW ZEALAND questioned a reference requesting the Co-Chairs to prepare a working document for the Group's next meeting, suggesting that the Co-Chairs prepare a compilation of views instead. MALAYSIA, supported by many, reiterated its proposal for a working draft. Following discussion, Co-Chair Lefeber proposed language requesting the Co-Chairs to "synthesize" text proposed by Parties into a "working draft," with the understanding that it will not be selective.

Co-Chair Lefeber expressed satisfaction that the annex submitted by the Technical Expert Group, as built upon by the *Ad Hoc* Group, provides the basis for future work. He noted that important first steps have been made, but the way forward is long and difficult. He gavelled the meeting to a close at 7:25 pm.

IN THE CORRIDORS

As participants retired for the weekend, hopeful that the Co-Chairs will continue their able guidance in preparing a "fleshed-out" working draft, some were concerned that progress may be hindered by the distant scheduling of the next meeting of the *Ad Hoc* Group, due to the proliferation of CBD intersessional groups. Several delegation members worried that such a delay might put the legal and technical experts in a "tight spot," and that agreement might not be achieved within the original timeline, which provides for completion of the Group's work by 2007.

As COP/MOP-2 participants reconvene on Monday morning, socioeconomic considerations and capacity building are likely to receive again considerable attention. Handling, transport, packaging and identification of LMOs can be expected to be the focal point of discussions, particularly regarding detailed documentation requirements for commodities, while the need to ensure visas for all participants will probably remain in the spotlight.