HIGHLIGHTS OF THE AD HOC GROUP ON LIABILITY AND REDRESS: THURSDAY, 26 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. Delegates addressed the annex to the report of the meeting of the Technical Expert Group (UNEP/CBD/BS/WG-L&8/1/2) containing scenarios, options, approaches and issues for further consideration.

SCENARIOS, OPTIONS, APPROACHES AND ISSUES FOR FURTHER CONSIDERATION

COMPONENTS FOR THE DEFINITION OF DAMAGE:

Co-Chair René Lefeber (the Netherlands) called for comments on components of damage to the environment and damage to conservation and sustainable use of biodiversity. INDIA, ALGERIA, SENEGAL and ECOROPA suggested merging the two components, with ECOROPA stressing research on causation, and SENEGAL proposing a reference to exploitation of biodiversity.

SYRIA, MALI, UGANDA and BOTSWANA supported retaining reference to damage to the environment, with SYRIA and MALI expressing concern about damage to soil and water. EL SALVADOR suggested the inclusion of damage to natural productivity, structure, functioning and diversity of ecosystems, as referenced in COP Decision V/6 (Ecosystem Approach). TUNISIA proposed a reference to damage to organic agriculture. GREENPEACE said damage to biodiversity under the CBD means damage to variability, whereas damage to individual species should also be included.

AUSTRALIA and the INTERNATIONAL GRAIN TRADE COALITION preferred reference to damage to conservation and sustainable use of biodiversity, with AUSTRALIA proposing including a threshold for damage and criteria for defining damage. BRAZIL urged further discussion on defining damage and scope of liability.

Regarding damage to human health, many developing countries supported retaining the reference. The UK, on behalf of the EU, supported by COTE D’IVOIRE, noted that human health may be covered under traditional damage. The GLOBAL INDUSTRY COALITION argued that, under Protocol Article 4 (Scope), damage to health needs to arise from damage to biodiversity.

Regarding socioeconomic damage, especially in relation to indigenous and local communities, many delegates suggested retaining the reference, highlighting Protocol Article 26 (Socioeconomic Considerations). Drawing attention to the report of the Commission for Environmental Cooperation on the effects of transgenic maize in Mexico, MALAYSIA explained that socioeconomic damage encompasses damage to cultural, spiritual and moral values. ESTONIA referred to damage to cultural heritage and traditional lifestyles, and ZIMBABWE to loss of food security. BOTSWANA addressed the loss of farmers’ skills and independence. EGYPT emphasized socioeconomic damage resulting from disturbances in a society’s competitive structure. The EU, supported by many, drew attention to linkages with damage to sustainable use of biodiversity and traditional damage. SWITZERLAND and THAILAND stressed the need for a clear definition, and COLOMBIA suggested adding concepts of moral and cultural damage.

ARGENTINA said that socioeconomic damage is not within the Protocol’s scope. The US stressed that, according to Protocol Article 26, an impact on biodiversity needs to be established before socioeconomic considerations are taken into account. The GLOBAL INDUSTRY COALITION and the INTERNATIONAL GRAIN TRADE COALITION noted that Protocol Article 26 is limited to import decisions. The UNIVERSITY OF BERN stressed that a broad definition of damage may result in implementation problems at the national level, and that damage needs to be insurable for the regime to be operational.

On traditional damage, the EU highlighted the need to consider existing national legal systems. INDIA, MALAYSIA and UGANDA, opposed by ANTIGUA AND BARBUDA and GRENADA, supported retaining the components of traditional damage.

VALUATION OF DAMAGE TO BIODIVERSITY: On possible approaches to valuing damage to conservation and sustainable use of biodiversity, SENEGAL and ECOROPA stressed the need to encompass the full timeframe necessary for restoration. NORWAY called for guidance and criteria on valuing damage when complete restoration is impossible. The EU asked that valuation of damage to conservation be based on reasonable measures, and noted that different considerations may be appropriate for valuation to sustainable use.

AUSTRALIA asked that valuation measures not impose onerous costs on States. The EDMONDS INSTITUTE highlighted cultural variations in valuation damage, and VENEZUELA and MALAYSIA proposed using internationally recognized terms.

Regarding costs of reinstatement measures, GABON suggested referring to costs of site rehabilitation rather than of introduction of original components. On defining biodiversity...
loss, many delegates stressed the need for baselines and differentiating LMOs from other causes. Noting that assessment must include natural variation, CANADA requested the Secretariat to compile existing information. The US highlighted the complex causes of socioeconomic damage.

Many developing countries requested capacity building for baseline development, particularly in megadiverse countries, with UGANDA noting uncertainty about initial biodiversity levels. Stressing other means of assessing damage, COLOMBIA and PERU opposed baselines as a prerequisite for valuation. MALAYSIA added that proving a pre-existing situation in court does not require a baseline. SENEGAL observed that valuation must be conducted locally. ARGENTINA emphasized thresholds and reference points. GREENPEACE stressed that damage may be ongoing and become significant only over time.

Many delegates called for retaining a reference to the special situation of centers of origin and genetic diversity, arguing that they need increased protection from contamination.

CAUSATION: Co-Chair Lefeber noted that causation is not usually addressed in international agreements on liability but is an important issue of transboundary movement of LMOs. The EU suggested further consideration of the level of regulation at both international and domestic levels. The INTERNATIONAL GRAIN TRADE COALITION said that causation must be established by clear links to conduct and by proximate cause, with the burden of proof on the claimant and in the case of intrinsic risk of the LMO. ARGENTINA and other delegates supported extending standing to dependents. On damage to the environment and biodiversity, UGANDA highlighted the possibility for affected communities to raise claims. On damage to human health, GHANA and UGANDA suggested broadening standing from affected States to affected persons. ECOROPA, opposed by NEW ZEALAND and AUSTRALIA, suggested deleting an element on requiring direct involvement of origin. In LMO transboundary movement. EGYPT proposed further consideration of the level of involvement.

LIMITATIONS OF LIABILITY: MALAYSIA noted that limitations in amounts should be cross-referenced to financial security.

NON-PARTIES: Co-Chair Lefeber noted the possibility for Parties to agree on a common approach towards non-Parties. MALAYSIA and UGANDA suggested an obligation on Parties trading with non-Parties to enter into bilateral agreements to set minimum standards on liability and redress.

CHOICE OF INSTRUMENT: SENEGAL, supported by many, called for a legally-binding instrument. NEW ZEALAND, opposed by MALAYSIA, suggested that not having an instrument would be an option. The EU preferred a two-stage approach, including developing a non-binding instrument, evaluating its effects, and subsequently considering development of a legally-binding instrument. She also stressed capacity building as a means of realizing the objective. BRAZIL and EL SALVADOR suggested that all options be retained for further consideration.

IN THE CORRIDORS

As the Ad Hoc Group continued its methodical discussions of possible liability and redress elements, some delegates flagged the challenge of relying on insurance schemes to provide a financial security mechanism for risks arising from LMOs. Other participants noted that a broad scope and lack of a liability ceiling would discourage private insurers from offering coverage. They observed that, as in other liability regimes, the absence of financial security could become a major stumbling block for negotiations and entry into force of a possible legally-binding instrument. Nonetheless, some stressed that such difficulties should not deter negotiations, since innovations in the insurance sector historically follow the evolution of legal concepts for the protection of victims.