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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&R/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 valuing damage to sustainable use. AUSTRALIA asked that valuation measures not impose onerous costs on States. The EDMONDS INSTITUTE highlighted cultural variations in valuing 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

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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.

CHANNELING OF LIABILITY: Co-Chair Lefeber invited participants to identify further options for channeling liability. The EU proposed adding an administrative approach based on allocation of the costs of response and reinstatement measures. Opposed by EGYPT, AUSTRALIA noted that State responsibility and, with the EU, State liability are not appropriate. CUBA, KENYA and COLOMBIA favored primary responsibility of the operator and residual State liability.

On civil liability, IRAN suggested the extent of damage as another factor, proposing strict liability for damage to centers of origin. ARGENTINA, CANADA and the US opposed considering LMOs as hazardous, favoring fault-based liability. The GLOBAL INDUSTRY COALITION proposed limiting operators' liability to risk identified by public authorities, with SENEGAL emphasizing the role of the producer in providing information for risk assessment. The INTERNATIONAL GRAIN TRADE COALITION called for limiting civil liability when there is reasonable diligence in avoiding damage. INDIA, CUBA and MALAYSIA favored strict liability. ECOROPA said that fault-based liability may give comparative advantage to non-Parties' citizens. The WASHINGTON BIOTECHNOLOGY ACTION COUNCIL and GREENPEACE preferred a strict liability regime, drawing attention to the lack of transparency and of traceability systems, and to the polluter-pays and precautionary principles.

Delegates then discussed possible exemptions to, or mitigation of, strict liability. MALAYSIA, supported by many and opposed by the EU, suggested deleting an exemption based on the permission of an activity by means of an applicable law or a specific authorization. LIBERIA and others questioned an exemption regarding activities not considered harmful according to the state of scientific and technical knowledge at the time they were carried out. The WASHINGTON BIOTECHNOLOGY ACTION COUNCIL observed that such exemption rewards the lack of research on LMOs' risks. As a compromise, COLOMBIA suggested two distinct lists of exemptions and mitigation aspects, and the EU proposed further consideration at the next meeting of the *Ad Hoc* Group.

On issues for further consideration regarding civil liability, NAMIBIA proposed adding options on apportionment of liability and, with UGANDA, on vicarious liability.

FINANCIAL SECURITY: Delegates discussed options for mechanisms of financial security, including modes of financial security and collective financial arrangements. MALAYSIA said that both are needed and, with COLOMBIA, proposed a fund based on contributions from the biotechnology industry. UGANDA stressed the need to define the circumstances under which a fund would take effect. SWITZERLAND said a fund is incompatible with the polluter pays principle, while MOROCCO recalled the principle's role for responsible operator behavior. CANADA cautioned that controversy over a fund may deter ratification and suggested seeking guidance from the insurance industry on regime options. NEW ZEALAND urged drawing on national experiences. SWITZERLAND suggested limiting guaranteed compensation to traditional damage. ECOROPA noted that, according to the precautionary principle, States should not embark in risks considered incalculable by insurance companies.

SETTLEMENT OF CLAIMS: Regarding settlement of claims, including inter-State and civil procedures, the EU suggested considering administrative procedures. GREENPEACE highlighted the need for a tribunal accessible to both States and private parties, and noted the potential for synergies with the International Tribunal for the Law of the Sea.

STANDING TO BRING CLAIMS: On types of damage, NEW ZEALAND and the EU proposed that standing for costs of response and reinstatement measures also be granted to the entity bearing the costs. On traditional damage, UGANDA and COTE D'IVOIRE suggested granting standing to persons or groups acting in the interest of affected persons, while NAMIBIA 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 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.