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WORKING GROUP HIGHLIGHTS: TUESDAY, 23 OCTOBER 2007

On Tuesday morning, the Working Group met in plenary and continued exchanging views on options for elements of rules and procedures on liability and redress. The plenary discussions focused on damage and administrative approaches. In the afternoon, two contact groups convened and continued the consideration of these issues.

ELABORATION OF OPTIONS FOR ELEMENTS OF RULES AND PROCEDURES REFERRED TO IN ARTICLE 27 OF THE PROTOCOL

DAMAGE: Co-Chair Lefeber explained that there was apparent consensus on the need to cover damage to the conservation and sustainable use of biological diversity, and therefore this was a natural starting point for considering damage. He said the general definition of damage would be discussed later and it would involve important choices such as whether to include "traditional damage."

Delegates indicated their preferred operational texts under three subsections in the Co-Chairs' synthesis and elaborated on their justifications.

On damage to conservation and sustainable use of biological diversity and its components, the EUROPEAN COMMUNITY (EC) highlighted the need to focus on this aspect of damage, and said damage to property would be covered to the extent it is related to damage to biodiversity. CANADA suggested only dealing with transboundary movements. NORWAY, with BRAZIL, COLOMBIA, SAINT LUCIA and MALAYSIA, questioned the need for a special emphasis on protected species and habitat. Recalling that Article 4 of the Protocol (Scope) takes into account risks to human health, BRAZIL and JAPAN suggested that these also be covered, with CANADA proposing they be limited to health problems resulting from damage to biodiversity. JAPAN stressed the cost of response as the only objective basis for measuring damage. MEXICO, supported by PARAGUAY, proposed deleting a reference to "needs and aspirations of future generations." ARGENTINA suggested reference to tangible and significant damage, that is permanent or long-term, and to link it to effects on conservation and sustainable use. GREENPEACE INTERNATIONAL emphasized that a comprehensive definition of damage could cover most of the elements discussed.

On the valuation of damage to conservation of biological diversity or environment, the EC, supported by MALAYSIA, stressed the need for a broad interpretation on the "cost of response measures," and for imposing a clear obligation on the operator for restoration. NEW ZEALAND stated that their preferred option also referred to "the cost of preventive measures." BRAZIL called for flexibility in choosing the method of valuation and COLOMBIA noted that definitions of valuation relate to the channeling of liability. MEXICO suggested covering costs of introducing equivalent components in the same, or in new, areas when it is not possible to rehabilitate an area. The WASHINGTON BIOTECHNOLOGY ACTION COUNCIL stressed the need for valuation of the actual loss.

On special measures in case of damage to centers of origin and centers of genetic diversity to be determined, the EC proposed addressing this issue during discussions on the concept of damage. NEW ZEALAND, CANADA, and NORWAY, opposed by CUBA, COLOMBIA, and SAINT LUCIA, said there was no need for special rules on this issue. MEXICO suggested that damage to centers of origin should take into account the special circumstances of these centers. The PHILIPPINES suggested adding a reference to an appropriate mechanism for valuation of such centers.

Co-Chair Nieto identified convergence amongst positions and proposed that some of the more comprehensive proposed operational texts would be used as the basis for consolidating the options in the contact group.

ADMINISTRATIVE APPROACHES: In addressing elements related to administrative approaches, Co-Chair Lefeber suggested using the term "administrative liability" as an alternative to "administrative approach." MALAYSIA and ECUADOR supported the alternative terminology, but BRAZIL and JAPAN expressed reservations. In summarizing, Co-Chair Lefeber indicated that both terms would be retained for further discussions.

JAPAN and the EC pointed to certain elements of the administrative approach requiring further elaboration. NEW ZEALAND stated that the administrative approach is in essence a legal approach, while MALAYSIA responded that administrative approaches simplify the procedure by allowing states to require the operator to take action through administrative rather than court procedures. CANADA elaborated that the competent national authority could require the operator to take appropriate measures to mitigate damage and that the government could also take the mitigation measures and be compensated if the operator fails to act.

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On administrative approaches based on allocation of costs of response measures and restoration measures, the EC cautioned against being too prescriptive, whereas SOUTH AFRICA and MALAYSIA favored inclusion of specific measures. NORWAY emphasized the need for legally binding language and the AFRICAN GROUP stressed that the operator should be primarily responsible for addressing incidents. SENEGAL noted that the African position had to be understood in the context of states authorizing transboundary movements of LMOs and the exporter being subject to control by the state. JAPAN highlighted the need to consider and accommodate differences in national legal systems, while SENEGAL and the PUBLIC RESEARCH AND REGULATION INITIATIVE (PRRI) stressed the role of international rules. COLOMBIA highlighted the need for practical rules and the role of states in preventing damage.

The PRRI stressed that the administrative approach provides quick remedies without court action. GREENPEACE INTERNATIONAL called for a more precise definition of "operator" and recommended including prevention, remedies and a compensation fund.

In summarizing the discussions, Co-Chair Lefeber identified convergence on the concept of the administrative approach, despite divergence in delegates' preferences for specific operational texts.

Regarding texts addressing possible factors to determine the standard of liability and identification of the liable person, the EC, NORWAY, MALAYSIA, NEW ZEALAND and CANADA suggested deleting them. In summarizing, Co-Chair Lefeber said the texts would be retained and discussed in relation to civil liability, but they would not be considered separately in the consolidated negotiating text.

The EC, supported by NORWAY, CANADA, NEW ZEALAND and others, suggested there was no need for general guidance on limitation to the authorization at the time of import of the LMOs. As the issues were also addressed elsewhere in the Co-Chairs' synthesis, delegates agreed to delete the text.

After discussing working procedures, parties agreed to establish a contact group chaired by Jürg Bally (Switzerland) focusing on damage and another one chaired by Jane Bulmer (United Kingdom) focusing on administrative approaches.

CONTACT GROUPS

DAMAGE: The contact group on damage considered a "working document" containing the relevant sections of the Co-Chairs' synthesis. Chair Bally suggested, and delegates agreed, that text on valuation be set aside for later discussion and the group concentrate on definitions. As mandated by plenary, the contact group used the most comprehensive operational text on damage to conservation and sustainable use of biological diversity and integrated parts of other operational paragraphs, including: references to the definition of biodiversity in Article 2 of the CBD; and socio-economic considerations arising from damage to biological diversity consistent with Article 26 of the Protocol. In favor of a streamlined text, some delegates warned against creating one single paragraph that contained a lot of detail and proposed keeping some separate options. Some developing country delegates proposed deleting a specific reference to protected species and habitats, whereas a number of developed countries favored retaining it. Chair Bally suggested integrating text from other options on "significant and serious damage" and "scientifically established baselines" into the main text. Delegates agreed to the consolidated text with additions taken from other paragraphs, and added a note setting out that some parties would have preferred retaining separate options and a more concise text.

ADMINISTRATIVE APPROACHES: Chair Bulmer stressed the group's mandate to streamline and consolidate text, and focused discussion on five elements, identified by the morning plenary.

On the first element, focusing on the obligations of the operator, some parties favored defining both the operator's general obligations and specific obligations to rectify damage. Others stressed the need for a clear definition of the term "operator."

On the second element, concerning an obligation in national law for the operator to inform the competent authority about damage to biodiversity, many delegates supported comprehensive language requiring the operator to immediately inform the competent authority and assess and evaluate the damage. In summarizing, Chair Bulmer identified the need to address two types of notification, namely damage occurred and imminent threat of damage.

On the third element, relating to an obligation in national law for the operator to take restoration and response measures, some delegates stressed the concept of "reasonable response measures," while others emphasized the importance of restoration that goes beyond "response." Some delegates also identified the need to address the concept of "baseline," and a group of developed countries explained that the third element involved a mixture of obligations to prevent, control and minimize damage.

Concerning the fourth element, involving an obligation by the state to take reparation and restoration measures if operator has failed to do so, delegates discussed, *inter alia*, whether this obligation was limited to the measures that should have been taken by the operator. Chair Bulmer identified convergence among parties that national authorities would have discretion concerning reparation and restoration measures.

Regarding the fifth element, concerning the recovery by the state of the costs of reparation and restoration measures from the operator, discussions illuminated divergent views, with some participants preferring cost recovery to be obligatory and others preferring for it to be at the discretion of governments. Views also diverged on the amount of cost to be recovered, with some participants favoring total amounts and others "reasonable" amounts.

Delegates also briefly discussed the incorporation of preventive measures on transport, handling and use, and the possibility of affected individuals taking measures to recover costs from the operator.

IN THE CORRIDORS

As delegates trudged in from the cold rain outside, many were pleasantly surprised to find increased convergence of views and a warm atmosphere inside. Some commented that they had expected more divergence as this was the first time damage to biodiversity had been discussed under an international liability regime. Others expressed concern, however, that some of the momentum gained in plenary may have been lost when proposals were not immediately integrated but were instead passed on to the contact groups for consolidation. One participant also complained that some delegations seemed overly attached to certain textual proposals at this early stage, fearing that this could point to delays and difficulties in the days ahead. Many delegates, however, were excited that contact groups had been established and the "nitty gritty" work had begun.