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WORKING GROUP HIGHLIGHTS: WEDNESDAY, 24 OCTOBER 2007

On Wednesday morning and early afternoon, 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 addressed state responsibility, damage and the primary compensation scheme. In the afternoon and evening, sub-working groups convened and considered the definition of damage, administrative approaches and civil liability.

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

In the morning plenary, contact group chairs reported progress on discussions on damage and administrative approaches. After discussing the working methods, delegates agreed to mandate the groups to continue working as "sub-working groups." Co-Chair Lefeber announced that a brainstorming session on the choice of instrument would be held on Thursday evening with a limited amount of delegates. He clarified that there would be no negotiations or conclusions produced from the meeting.

STATE RESPONSIBILITY: Co-Chair Lefeber introduced a new draft operational text on state responsibility (UNEP/CBD/BS/WG-L&R/4/CRP.1) prepared by the Co-Chairs. He explained the choice of terms, namely: "rules and procedures" rather than "instrument" in order not to preclude outcomes; "states" rather than "contracting parties" since the latter term was ambiguous; and "responsibility of states for internationally wrongful acts," based on wording developed by the UN International Law Commission.

DAMAGE: Concerning the definition of damage, JAPAN called for an approach that addresses measurable and considerable damage to the conservation and sustainable use of biodiversity caused by transboundary movements of LMOs. Preferring the same operational text, SOUTH AFRICA suggested that the definition of damage be consistent with the scope of the Protocol. The EC emphasized that the notion of damage had already been fully addressed on Tuesday when discussing damage to the conservation and sustainable use of biodiversity, which is a broad notion in itself. Citing the Working Group's mandate, the US supported focusing on damage to biodiversity. MEXICO, supported by PANAMA, preferred a text encompassing damage to biodiversity and human health, while ARGENTINA favored a definition that does not extend to human health or traditional damage. NEW ZEALAND noted that international model laws could be useful concerning damage to biodiversity.

NORWAY indicated that Article 1 (objective), Article 4 (scope) and Article 27 (liability) of the Protocol required a broad definition of damage that includes human health effects independently. PALAU stressed that these Articles would not support the limits to the definition of damage some delegates had proposed, and SAINT LUCIA and INDIA emphasized that traditional damage should also be covered. CAMBODIA supported the view that the definition of damage should not be limited to the environment and human health, and the AFRICAN GROUP and COLOMBIA proposed that socio-economic damage also be covered. SENEGAL highlighted the importance of food safety to Africa and favored its inclusion. Recalling the negotiating history of the CBD and the Protocol, MALAYSIA agreed on the need for a broad definition and elaborated that it should encompass, *inter alia*, damage to the conservation and sustainable use of biodiversity; damage to human health, traditional damage; and also take into account socio-economic damage. He highlighted the relevance of the provisions and definitions of the CBD in defining damage to biodiversity.

Concerning valuation of damage, MEXICO stated that the text should be limited to valuation of damage to conservation and sustainable use of biodiversity, including human health. NEW ZEALAND and NORWAY indicated that valuation was already covered elsewhere and ARGENTINA, supported by MALAYSIA and JAPAN, proposed deleting the section.

Concerning causation, the EC, NORWAY, JAPAN and SOUTH AFRICA preferred establishing causation in accordance with domestic rules. CANADA, MEXICO, MALAYSIA and

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the US stressed the need for a clear causal link between damage and the transboundary movement of LMOs, and ARGENTINA said if damage cannot be clearly attributed, there should be no responsibility.

The AFRICAN GROUP emphasized that establishing causation can be challenging and proposed that in cases where multiple causes were possible, the presumption should be that the damage had been caused by LMOs.

In summarizing discussions, Co-Chair Nieto identified one group of delegates preferring limiting the definition of damage to damage to biodiversity and another one wanting to go beyond a limited definition. For the sub-working group on damage, she mandated the development of two separate options reflecting the broader and narrower definition.

PRIMARY COMPENSATION SCHEME: In discussing civil liability in the afternoon plenary, CANADA and NEW ZEALAND favored a fault-based approach. SOUTH AFRICA also expressed support for fault-based liability, but stated he could support strict liability where warranted by science. INDIA preferred a combination of strict and fault-based liability. The US stressed that LMOs are not ultra-hazardous and favored fault-based liability.

MALAYSIA indicated that the liability standard is a policy choice and in practice, strict liability is not confined to ultra-hazardous activities. GREENPEACE INTERNATIONAL stressed that LMOs can cause significant damage and it would be "unjust and inappropriate" to make the claimant shoulder the burden of proof of fault or negligence. CHINA noted that many operators are multinational corporations and it is sometimes difficult to trace liability from subsidiaries to the parent corporation. The EC preferred continuing discussions on the standard and channeling of liability in the sub-working group.

The PRRI said it believes that administrative regimes rather than civil liability regimes are appropriate for biodiversity because LMOs are not inherently hazardous. FRIENDS OF THE EARTH said that research has not sufficiently established that LMOs are not hazardous, and the WASHINGTON BIOTECHNOLOGY ACTION COUNCIL noted that research has been underfunded and is therefore inconclusive.

On channeling liability, NORWAY stressed operational control as a central element.

Delegates agreed to continue the consideration of the standard and channeling of liability in the sub-working group on administrative approaches. In response suggestions from the EC, MALAYSIA and the LATIN AMERICAN AND CARIBBEAN GROUP, the Co-Chairs agreed to prepare a consolidated text for the sub-working group.

SUB-WORKING GROUPS

DAMAGE: Meeting in the afternoon and evening, the sub-working group discussed valuation of damage to the conservation of biodiversity. Delegates combined text from five operational texts, covering: valuation of damage to environment; conservation and sustainable use of biological diversity; compensation; and restoration issues. Some delegates preferred concise text rather than unwieldy compilations. Chair Bally recalled the mandate of the sub-working group to consolidate a variety of concepts and approaches in a comprehensive text and reach consensus on it. Following extensive discussion, delegates decided this approach would not be feasible and valuation, restoration and reintroduction of components were retained as separate points. As of late Wednesday evening, delegates continued addressing general and specific aspects of damage.

ADMINISTRATIVE APPROACHES AND CIVIL LIABILITY: Meeting in the afternoon and evening, the sub-working group on administrative approaches worked to further streamline operational texts on the five relevant elements identified the previous day. Delegates spent most of the afternoon discussing the first element. On obligations imposed by national law on the operator to inform competent authorities of damage, they focused on merging text and added to language on competent authorities being informed of damage "or imminent threat of damage." Their views diverged on the definition of damage, with some parties favoring the inclusion of specific, bracketed language, and others cautioning this would prejudge the outcome of the sub-working group on damage. In the evening, delegates considered operational texts on the remaining four elements. They agreed to focus on possible deletions and assessing whether text is properly placed, rather than merging and modifying the texts.

Late on Wednesday evening, the sub-working group on administrative approaches began addressing issues related to civil liability. The discussions were based on a working document by the Co-Chairs, streamlining different options according to discussions in the morning plenary. The document included three options on the standard of liability including: strict liability; mitigated strict liability; and fault liability. Delegates worked late into the night in an attempt to streamline the text by further consolidating duplicative language.

IN THE CORRIDORS

As the Montreal weather cooled outside, the atmosphere inside was also discernibly chillier as the Working Group moved through its third day. Many delegates observed that as they had dived deeper into the substantive debate, divergent views were increasingly evident. Some wondered if consensus on the elements discussed to date could be reached this week, while others saw a clear strategy to keep options on the table until a later stage in the negotiations, when even more contentious points such as the nature of the regime will be addressed. One delegate sighed: "The differences over the definition of damage most definitely will not be solved here." Another delegate hoped for a miracle prior to the next meeting. More prosaically, delegates continued to be committed and worked diligently into the late evening on damage and civil liability. One optimistic delegate proffered: "Deep as some of the divides are, we're still making surprisingly good progress."