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WORKING GROUP HIGHLIGHTS: THURSDAY, 13 MARCH 2008

The fifth session of the Open-ended *Ad Hoc* Working Group of Legal and Technical Experts on Liability and Redress (WGLR 5) in the context of the Cartagena Protocol on Biosafety (hereafter, the Working Group) convened for its second day of negotiations in Cartagena de Indias, Colombia, on Thursday.

During the morning, afternoon and evening, delegates met in plenary to consider issues related to settlement of claims, damage and the primary and supplementary compensation scheme. In the late evening delegates convened in sub-working groups on settlement of claims and the primary compensation scheme.

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

SETTLEMENT OF CLAIMS: Co-Chair Lefeber opened discussions in plenary on the revised working draft (UNEP/CBD/BS/WG-L&R/5/2/Rev.1). Regarding inter-state procedures, the option on existing procedures with reference to Article 27 was supported by: Mexico, on behalf of GRULAC, the EC, NORWAY, and ETHIOPIA. JAPAN suggested deleting the section on inter-state procedures because they were already established under the CBD and strongly opposed any special procedures. Delegates agreed to delete the option on special procedures, and to retain operational texts under existing procedures.

On civil procedures, Co-Chair Lefeber outlined the options in the working draft namely: special provisions on private international law; an enabling clause on binding international law; and binding arbitration. Co-Chair Lefeber explained that binding arbitration contravenes national constitutions and implored delegates not to consider that option, and delegates agreed to delete it. CUBA, BANGLADESH, ECUADOR, PALAU, ETHIOPIA, MALAYSIA and NORWAY supported the option on special provisions on private international law. NORWAY acknowledged that private international law was covered in other conventions, but that damage to biodiversity is a special case, and MALAYSIA stressed the need to harmonize private international laws.

ARGENTINA, JAPAN, the EC, COLOMBIA, BRAZIL, INDIA, SENEGAL, the US and CANADA supported an enabling clause on binding international law. The US and the PERMANENT COURT OF ARBITRATION, noted that there might be a role for arbitration.

On administrative procedures, ETHIOPIA, JAPAN, ARGENTINA and SOUTH AFRICA supported operational text stating that parties provide administrative remedies as may be deemed necessary. JAPAN supported administrative remedies and, with CANADA, called for a flexible administrative approach at the national level. SENEGAL supported an alternative formulation with subparagraphs on: persons affected by damage taking actions; operators responding to requests; access to courts; and the right of review of decisions by operators.

Regarding a special tribunal the EC supported the operational text on resorting to special tribunals in specific cases where numerous people are affected. INDIA preferred also referring to civil/administrative procedures. Delegates agreed to retain the operational text on final and binding arbitration if agreed to by all parties, for integration in the other paragraphs.

Regarding standing/right to bring claims, the option on special provisions (directly affected persons or entities and class actions) was supported by ETHIOPIA, LIBERIA, ARGENTINA, BOLIVIA, CUBA, BANGLADESH, and MALAYSIA. The option on a domestic law approach was supported by: JAPAN, the EC, the PHILIPPINES, INDONESIA, BRAZIL, SENEGAL, SOUTH KOREA, NORWAY and the US. ETHIOPIA supported the option on special provisions (diplomatic protection) and the option on special provisions (only for directly affected persons and entities) was deleted.

DAMAGE: Regarding definition of damage, the subsection contains two options, the first containing narrower definitions of damage and the second broader definitions of damage. The narrower definition of damage was supported by JAPAN, NEW ZEALAND, CANADA, ARGENTINA and COLOMBIA, noting that risk to human health can be dealt with under other conventions. The broader definition of damage was supported by the EC, BRAZIL, MEXICO, PANAMA, CUBA, BOLIVIA, BANGLADESH, PALAU, SAINT LUCIA, SAINT VINCENT AND THE GRENADINES, INDIA, NORWAY and MALAYSIA. ETHIOPIA commented that the current operational texts all contain additional elements and said it would table a concise definition.

On valuation of damage to conservation of biological diversity, JAPAN, CANADA and ARGENTINA preferred the narrow operational text, that damage to conservation of biological diversity be valued only on the cost of restoration. The EC, PANAMA, INDIA, SAINT LUCIA, SAINT VINCENT AND THE GRENADINES, BOLIVIA, BANGLADESH and PALAU preferred the broader operational text listing various factors to be taken into account in valuing damage, with BRAZIL stressing the importance human health.

Mexico for GRULAC, supported by many, suggested combining the subsections on valuation of damage and on valuation of damage to sustainable use of biological diversity,

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and also making special mention of centers of origin. Regarding special measures in case of damage to centers of origin INDIA, MALAYSIA, BANGLADESH and BOLIVIA expressed preference for text that sets out monetary measures that issue from damage to centers of origin.

On causation, the option leaving the burden of proof with the claimant was supported by MEXICO, ARGENTINA and NEW ZEALAND. The option of placing the burden of proof on the respondent was supported by SAINT LUCIA and SAINT VINCENT AND THE GRENADINES, MALAYSIA, BANGLADESH, PALAU, CUBA, BOLIVIA and ETHIOPIA. ECUADOR, INDIA, NORWAY, the EC, CANADA and JAPAN supported leaving the issue subject to domestic law.

PRIMARY COMPENSATION SCHEME: Delegates first addressed elements of an administrative approach based on allocation of costs and response measures and restoration measures.

On the obligation on the operator to inform competent authorities of occurrence of damage, BRAZIL, MEXICO, ETHIOPIA, PALAU, PERU, NAMIBIA, NORWAY and others preferred language requiring the operator to immediately inform the competent authority. JAPAN preferred a formulation that parties "endeavor to require" the operator to report to the competent authority.

Regarding the obligation of the operator to take response and restoration measures in the case of damage, SOUTH AFRICA, INDIA, BRAZIL, MALAYSIA, MEXICO, SOUTH KOREA, ETHIOPIA and others supported language requiring the operator to assess and evaluate the damage and to implement measures to eliminate the source and remedy the effects.

On the discretion of States to take response measures, the EC and MALAYSIA supported language that the competent authorities should establish which operator caused the damage and undertake remedial measures themselves, and INDIA, CANADA, NORWAY, EGYPT and others, supported language on the competent authority recovering costs from the operator. JAPAN preferred a formulation allowing the competent authority more discretion.

Regarding the term "operator," the EC suggested using the International Law Commission's definition and delegates agreed to review this.

Under standard of liability, strict liability was supported by the EC, INDIA, MEXICO, NORWAY, ECUADOR, PALAU, BRAZIL, the AFRICAN GROUP, MALAYSIA, CUBA and BANGLADESH. Mitigated strict liability was supported by INDIA, SENEGAL, NEW ZEALAND and SOUTH AFRICA. Fault-based liability was supported by the PHILIPPINES, JAPAN, PARAGUAY and ARGENTINA.

On the provision of interim relief, INDIA, COLOMBIA, ARGENTINA and the AFRICAN GROUP preferred that interim relief be granted by a competent court only in case of imminent, significant and likely irreversible damage. The EC, the PHILIPPINES, SOUTH AFRICA, MALAYSIA and PARAGUAY supported operational text stating that any competent court or tribunal may issue an injunction or declaration, or take such measure as appropriate in respect of damage. BRAZIL and NEW ZEALAND suggested deleting reference to interim relief.

On exemptions to, or mitigation of, strict liability the AFRICAN GROUP, PARAGUAY, CHINA and ARGENTINA supported the option listing exemptions to strict liability. BRAZIL and NORWAY supported the option on mitigation of strict liability. ECUADOR and the EC supported the option on exemptions to, and mitigation of, strict liability.

On recourse against a third party by the person who is liable on the basis of strict liability, the EC supported operational text on not prejudicing any right of recourse by the operator/importer against the exporter. MEXICO, PARAGUAY, ECUADOR and CHINA supported operational text that does not limit any right of recourse. JAPAN suggested deleting this section.

On joint and several liability or apportionment of liability, BRAZIL, COLOMBIA, CHINA, INDIA, the EC and the AFRICAN GROUP supported joint and several liability, while ARGENTINA and PARAGUAY supported apportionment of liability.

On limitation of liability, there were provisions under limitation in time and limitation in amount. The AFRICAN GROUP, MEXICO, BRAZIL, COLOMBIA, the EC, CHINA, INDIA and ARGENTINA supported provisions on relative time limits. The EC, INDIA and CHINA also supported an absolute time limit. While the AFRICAN GROUP, MEXICO and ECUADOR preferred unlimited liability, BRAZIL, ARGENTINA, and the EC, preferred limited liability.

On coverage of liability, NORWAY supported the option on compulsory financial security. ARGENTINA, COLOMBIA, the EC, INDIA and JAPAN supported the option on voluntary financial security.

SUPPLEMENTARY COMPENSATION SCHEME: Regarding residual state liability, the AFRICAN GROUP, INDIA, CUBA and BANGLADESH supported placing primary liability with the operator, with residual State liability for damage resulting from transboundary movement of LMOs. COLOMBIA and the REPUBLIC of KOREA supported making the State liable where the person is a national and unable to fully meet compensation for damages. The EC, CHINA, JAPAN, PALAU, MEXICO and ECUADOR, opposed by NORWAY, proposed deletion of the section on residual state liability.

On supplementary collective compensation arrangements, the AFRICAN GROUP and CHINA favored the operational text where compensation under the Protocol does not cover the costs of damage. INDIA and the REPUBLIC OF KOREA supported operational text on additional/supplementary funding mechanisms to ensure appropriate payments for damage. COLOMBIA, MALAYSIA, BANGLADESH, PALAU, INDONESIA and CUBA supported operational text on preventive, mitigating, restoring and reinstating measures. The EC and JAPAN supported a no provision option.

SUB-WORKING GROUPS

SETTLEMENT OF CLAIMS: Jürg Bally (Switzerland) and Reynaldo Ebora (the Philippines) co-chaired the sub-working group. Regarding inter-state procedures, delegates agreed to maintain the operational text that sets out that CBD Article 27 applies *mutatis mutandis* as one option and no text as a second option, pending the outcome of the overall negotiations. Delegates agreed to delete the option on compulsory settlement of disputes.

PRIMARY COMPENSATION SCHEME: Jane Bulmer (UK) and Dire Tladi (South Africa) co-chaired the sub-working group. After a preliminary exchange of views, negotiation began on the standard of liability and channeling of liability. Delegates worked to consolidate two operational texts on national law obligation on the operator to inform competent authorities of the occurrence of damage.

IN THE CORRIDORS

At the close of the second day in vibrant Cartagena, the mood inside the meeting was, in contrast, slightly sedentary. Whilst some delegates complained that the day's work on streamlining the text was "back to the working method of Montreal" others felt that the "final reading" provided the best possible text to begin the negotiations. Emerging from sub-working group sessions late in the evening, many said significant differences of opinion remained, and pondered on which issues consensus could be built. Those who arrived in Cartagena with an appetite to negotiate left feeling hungry and said they hoped that tomorrow would provide a feast [of brackets].