LIABILITY WITH CLIPPED WINGS CANNOT FLY

Civil society organisations say NO to the Co-Chairs Core Elements Paper

Representatives of civil society bear in mind the impacts of international regimes at the national and local levels. Will they help or will they harm? Bearing in mind biodiversity and people on the ground CSOs discussed the Co-Chair's Core Elements Paper in conjunction with the proposals on the table in the Subworking Groups. The result of our analysis:
As it stands, the Core Elements Paper is counterproductive to liability and redress on the ground. Why?

From "Transparency" to "Divide and Rule Diplomacy"

The way in which negotiations have been managed during the past few days - and for all we know the past few months - have similarities with the "green room negotiations" of WTO. We need to return to a negotiating style that provides transparency and understanding for all party delegations on the full package they are agreeing on. This also will also public awareness and participation easier. Cartagena is not only the place that gave its name to our Protocol. It is also the place where, 9 years ago, many, many countries refused to be pressured to agree to a chair's text promoted on the basis of "take it or you will have nothing". In our context it does not bode well for the willingness of donor parties to contribute to a meaningful supplementary COP-MOP mechanism (Piece C.2.b) if they even refuse to fund additional meetings if that should be needed. If this is shown to have to be the case Austria is called upon to offer another "Vienna Setting" and other donor parties should pay respect to the Protocol and its Article 27 by paying for further meetings.

From "international legally-binding instrument" to "legally-artistic piecemeal of Annexes stating the obvious mostly at the domestic level"

Piece A does not do more than state the obvious, i.e. that Parties to the Convention have to promote all three objectives to the Convention, including response and restoration. However, compensation and redress, central to any legally binding part of a real international liability regime, are not even mentioned. The text is prestructured in a way that further elaboration of scope and standing can have no major impact and may be purely academic exercises.
The fault-based approach is an already established least common denominator. The Core Elements Paper (Piece B) adds nothing new there. It may, however, have a very destructive implicit political impact on those countries who have established or intend to establish strict liability rules in the context of LMOs. They will be put under heavy national and international political pressure to lower this important standard. Victims are paying the price of damage, anyway. It takes decisive legislation to get to the polluter. Global trade is expanding. Therefore, victims at the lower end of the asymetrical balance of power and money need strict liability and the reversal of the burden of proof at the international level. Pieces B, C and D are dumped into annexes of unclear content and interrelationship. D only states the obvious on capacity-building in a Protocol that has an article on liability.

From "Cornerstone of the Protocol" to "Undefined References to Convention Language"

From the outset of the negotiations of the Biosafety Protocol civil society organisations wore buttons stating: No Liability, No Biosafety. The present text does not perform the task of fitting the rules and procedures on liability and redress into the chorus of the other articles of the Protocol. It is naïve to assume that timing does not have a major diplomatic impact. Leaving health, socio-eonomic considerations, unintended and illegal transboundary transfer out of the package prejudges the later outcome. No respect is being paid to the work that went into the elaboration of the Protocol. The language favoured in the Core Elements paper

returns to CBD language as if the Protocol did not exist. “Damage to the conservation of biological diversity” instead of “damage to biodiversity” sounds like “damage to the health care system” when we really have to address “damages to health”. Does “damage to sustainable use of biological diversity” imply that you have to prove your use was sustainable? This language establishes a very high legal barrier. Intentionally or unintentionally? Everyone will understand if some countries who cannot fit a meaningful Supplementary Protocol into their national rules will not ratify. They should, however, not stand in the way of a all those parties that state that they need it urgently to protect their biodiversity and their people.

From “polluter-pays-principle” to

“importing state-carries the burden-principle”

The present proposals for the administrative approach (Piece A) places the primary burden on importing countries. Many of these do not have the technical and financial capacities to carry that burden successfully. A mechanism is needed so that the voices of the affected communities will be heard, because they carry the basic burden..

“polluters-donate at their own discretion-principle”

In the past, voluntary guidelines were offered if a legally binding agreement was seriously under way. If the private sector should agrees to a supplementary compensation scheme this can be taken as an indication that the negotiations are very close to establishing a useful legally-binding liability regime. Participants working in, for and/or in favour of biotechnology interests clearly stated in the negotiations “that no damage occurred”, that they want to consider “damage to biodiversity only”, and that “only cases where a baseline is established by the National Competent Authority should be considered”. There is no country that has established baselines for all their ecosystems, including soil ecosystems. The costs for creating the precondition to acces the proposed funding mechanism (Piece C.2.a) could be forbiddingly high. Even if the money should be there it probably cannot be effectively accessed and may be a fund in name only. It would be unacceptable that countries suffering damage should have to go hat in hand to the polluters, unacceptable that industry should judge whether there is damage, what is the extent of that damage, and whether it should be compensated. It is unacceptable that there is privatization of an international legal regime.

Chairs and party delegates, we rely on you:

DO UNCLIP THE WINGS OF THE LIABILITY REGIME, SO THAT IT CAN FLY.

Cartagena, 17th March, 2008

Ecoropa, on behalf of Civil Society Organisations present at this meeting