



# Earth Negotiations Bulletin

ExCOP  
#5

A Reporting Service for Environment and Development Negotiations

ExCOP On-Line at <http://www.iisd.ca/biodiv/excop/>

Vol. 9 No. 136

Published by the International Institute for Sustainable Development

Friday, 28 January 2000

## EXCOP HIGHLIGHTS THURSDAY, 27 JANUARY 2000

Delegates to the resumed session of the first Extraordinary Meeting of the Conference of the Parties (ExCOP) for the Adoption of the Protocol on Biosafety to the CBD continued informal discussions on scope and commodities through Wednesday night and into Thursday morning. The contact group on Articles 31 (Relationship with Other International Agreements) and 22 (Non-discrimination) met in the morning, and then in afternoon and evening sessions to start considering the precautionary principle. Delegates met in the "Vienna setting" at 1:00 pm and 10:00 pm to hear reports of the ongoing consultations.

### CONTACT GROUP ON ARTICLES 31 AND 22

In a morning session, Chair Ambassador Philémon Yang (Cameroun) invited the negotiating groups to work on language expressing the outcome of Wednesday's discussions. Two groups argued that further consideration of the issues was needed before working on any text, while two others stressed their readiness to discuss existing proposals, namely Chair Mayr's non-paper and Chair Yang's draft text. One group expressed preference for Chair Mayr's non-paper.

### VIENNA SETTING

ExCOP President Juan Mayr opened the "Vienna setting," at 1:00 pm, and expressed his excitement as the protocol negotiations approach the last minute of the last hour of the last day. He requested all in attendance to stand, clasp hands, and to ponder how to move the process forward. He then asked the contact group Chairs to report on the status of their negotiations. Chair Yang of the contact group on Articles 31 and 22, reported that consultations continued on the basis of preambular language proposed in the Chair's draft text.

John Herity (Canada), Co-Chair of the contact group on scope and commodities, reported that some legal drafting issues had arisen in Article 4 (Scope), which could be readily addressed. He noted another issue requiring resolution regarding the acknowledgment of a state's right to allow or prohibit the transit of LMOs. Co-Chair François Pythoud (Switzerland) reported on the status of Articles 15 (Handling, Transport, Packaging and Transportation) and 8 *bis* (decision procedure for LMO-FFPs). On Article 15, he said conceptual agreement had almost been achieved. In the same article, groups had

agreed to a differentiated approach to accompanying documentation for LMOs, and in principle to identifying LMO-FFPs. He noted that they had yet to agree on the specific elements for identification.

Pythoud reported that the location of a new article regarding the decision procedure for LMO-FFPs could be determined soon. He listed a number of issues in the article that remained unresolved, including: the decision procedure for countries without domestic regulatory frameworks; implicit consent; and reference to the precautionary approach as specified in Article 8.7 of the ExCOP draft report (UNEP/CBD/ExCOP/1/L.2/Rev.1). He said he would continue bilateral and multilateral consultations with negotiating groups to resolve the remaining problems.

Chair Mayr asked negotiating groups to comment on existing proposals addressing the precautionary principle in relation to Articles 31, 22 and alternative preambular language on those articles. The Miami Group supported deleting Article 22 and retaining Article 31. The EU stated that Chair Mayr's non-paper presents the most balanced formulation, and supported deleting Article 31 and retaining Article 22. He stressed that a formulation within Chair Yang's preambular text is a rephrasing of Article 31 without exception for cases that might threaten biodiversity. The CEE noted problems with a formulation of the savings clause in the contact group's draft text, which requires a more balanced approach. The Like-Minded Group noted its support for deleting Articles 31 and 22, and preference for preambular language contained in the non-paper.

Regarding the precautionary principle, the Miami Group stated that Article 8.7 should be deleted, given references in the Preamble, Article 1 (Objective) and Annex II (Risk Assessment). He stressed the need to address the principle's relation to other agreements and science-based risk assessment. The EU, Compromise Group, CEE and Like-Minded Group supported language on the precautionary principle in Article 8.7. The EU stressed that, while decisions should be based on science-based risk assessment and non-arbitrariness, governments should have the sovereign right to take decisions to avert irreversible damage. The Compromise Group stressed that the principle must be applicable to the protocol's procedures, and recommended that the mandate of the contact group on Articles 31 and 22 be expanded to address Article 8.7 with the proviso that discussions

This issue of the *Earth Negotiations Bulletin* © <enb@iisd.org> is written and edited by Changbo Bai <changbo@sprint.ca>, Stas Burgiel <stas@iisd.org>, Leanne Burney <leanne@iisd.org>, Jessica Suplie <suplie@pik-potsdam.de> and Elsa Tsioumani <elsat@law.auth.gr>, with input by Aarti Gupta <aarti\_gupta@harvard.edu>. The Editor is Pamela Chasek, Ph.D. <pam@iisd.org> and the Managing Editor is Langston James "Kimo" Goree <kimo@iisd.org>. Logistics co-ordinated by P.J. Goldfeder <pjgold14@aol.com>. Digital editing by Ken Tong <k80@interlog.com>. The Sustaining Donors of the *Bulletin* are The Netherlands Ministry of Foreign Affairs, the Government of Canada (through CIDA), the United States (through USAID), the Swiss Agency for Environment, Forests and Landscape, the United Kingdom Department for International Development (DFID) and the European Commission (DG-XI.) General Support for the *Bulletin* during 2000 is provided by the Government of Australia, the German Federal Ministry of Environment (BMU) and the German Federal Ministry of Development Cooperation (BMZ), the Danish Ministry of Foreign Affairs, the Ministry of Environment of Austria, the Ministries of Foreign Affairs and Environment of Norway, the Ministry of Foreign Affairs and Ministry of Environment of Finland, the Government of Sweden, the United Nations Development Programme, the Global Environment Facility. The *Bulletin* can be contacted by e-mail at <enb@iisd.org> and at tel: +1-212-644-0204; fax: +1-212-644-0206. IISD can be contacted by e-mail at <info@iisd.ca> and at 161 Portage Avenue East, 6th Floor, Winnipeg, Manitoba R3B 0Y4, Canada. The opinions expressed in the *Earth Negotiations Bulletin* are those of the authors and do not necessarily reflect the views of IISD and other funders. Excerpts from the *Earth Negotiations Bulletin* may be used in non-commercial publications only and only with appropriate academic citation. For permission to use this material in commercial publications, contact the Managing Editor. Electronic versions of the *Bulletin* are sent to e-mail distribution lists and can be found on the Linkages WWW server at <http://www.iisd.ca/linkages/>. The satellite image was taken above Montreal (c) 2000 The Living Earth, Inc. <http://livingearth.com>. For information on the *Earth Negotiations Bulletin*, send e-mail to <enb@iisd.org>.



focus on practical solutions. The Like-Minded Group stated that referring to the precautionary principle solely in a preambular reference would be unacceptable.

Chair Mayr then expanded the mandate of the contact group on Articles 31 and 22 to consider Article 8.7 on the precautionary principle, and suggested that Pythoud serve as Co-Chair with Ambassador Yang. He asked that the negotiating groups have their approaches in written form and requested text for review for the evening's "Vienna setting."

Chair Mayr then asked the negotiating groups to list items outside of the core clusters that needed further consideration. The Miami Group listed Articles 2.2, 11, 12, 13.3, 13.4, 21, 23 and 24. The Like-Minded Group cited Articles 11.3, 11.4, 12 and 18. The EU requested limiting discussion to Articles 21, 23 and 24, mentioned in paragraph 52 on outstanding items of the ExCOP draft report. The Compromise Group added that it was not convenient to start discussion on concepts already agreed upon. Chair Mayr suggested that negotiations focus on the core issues, while informal consultations conducted by Ambassador Beat Nobs (Switzerland) take place on Articles including 21, 23 and 24.

#### **CONTACT GROUP ON ARTICLES 31, 22 AND 8.7**

The contact group met again in the afternoon to continue discussions with an expanded mandate to address Article 8.7 on the precautionary principle. The negotiating groups commented on the concept and operationalization of the precautionary approach using text contained in the ExCOP draft report. One group stated that the advanced informed agreement procedure forms the core of the protocol and that the precautionary principle, as part of the decision procedure, must not be confined to preambular language, but should be adequately reflected in the operational part of the protocol. Another group suggested that the precautionary principle is sufficiently reflected in Article 1. One group stated that reference to "adverse effect" was unclear as well as the basis on which an importing country could prohibit an import. The representative further stated that any measure taken by the importing country should be subject to a review process within a reasonable period of time and when scientific certainty is available. One group pointed out that scientific consensus is rarely achieved.

A proposal suggesting new language for Article 8.7 was submitted and used as the basis for discussion. The text included two sections: one on the precautionary approach regarding import of LMOs, and the other on review of actions taken by the Party of import in case of availability of additional scientific information.

Chair Yang suggested a line-by-line analysis of the provision on the precautionary approach. One group noted concern over the concept in this paragraph. Intensive discussion addressed two issues: the basis on which a Party of import would be allowed to prohibit import of LMOs; and the criteria for a solid scientific basis to trigger an importing Party to take actions against the import of LMOs. On the first issue, one group preferred the notion of scientific information, while others preferred the notion of scientific certainty. Several proposals in response to both notions were tabled and discussed, but no consensus was reached. With regard to the second issue, some groups stated that scientific certainty should be specified according to the nature and extent of the effect caused by the import of LMOs. Other groups said it had to be specified in the territory of the Party of import.

After a break, the Chair presented a draft text for Article 8.7 summarizing the discussions. Negotiating groups agreed to delete language on the review of action by the Party of import from the previous proposal. The draft text suggests two options regarding the precautionary approach. One states Parties of import may have to take decisions on the import of LMOs even in the absence of scientific certainty. The second option generally states that lack of scientific certainty shall not prevent the Party of import from taking a decision. Delegates discussed references to two other provisions in the Article on approving or prohibiting import of LMOs. The meeting was adjourned and the two options remained for further discussion.

#### **VIENNA SETTING**

Mayr opened the "Vienna setting" at 10:00 pm and invited reports on Articles 31, 22 and 8.7 and other outstanding issues. Chair Yang reported that the contact group deliberating the precautionary principle was considering two options: language presented by one group and wording derived from consultations among groups. He said they did not have time to address Articles 31 and 22.

Ambassador Nobs said he had conducted successful informal meetings. He stated that all issues had been approached on the basis that groups would not reopen conceptual discussions, and solutions would be limited to solvable problems. Solutions were identified for Articles 12 (Risk Assessment), 13.4 (Risk Management) and 23 (Illegal Transboundary Movement). Outstanding issues include Articles 21 (Non-parties), 11 (Multilateral, Bilateral and Regional Agreements) and 24 (Socio-economic Considerations).

Mayr noted that the outstanding issues appeared to be political and that groups needed to see the differences in the context of the entire text. He requested Co-Chairs Yang and Pythoud and Ambassador Nobs to continue clarifying the remaining issues and requested clean text by 2:00 am. He indicated that he would continue consultations on the protocol's text for presentation at the 10:00 am "Vienna setting" on Friday.

#### **CONTACT GROUP ON ARTICLES 31, 22 AND 8.7**

Delegates continued their discussions on Articles 31 and 22. After extended discussion they arrived at two bracketed options for each of the following: mutual supportiveness with other international agreements; and compatibility with other international agreements. A final provision noting the intention not to create a hierarchy with other international agreements was also bracketed.

#### **IN THE CORRIDORS**

With Chair Mayr's mandate to craft text for final adoption at 10:00 am on Friday, delegates pondered whether this bordered on the possible or the impossible. Others noted the behind-the-scenes progress of informal consultations on the list of outstanding issues, as well as unusually heavy inter-floor elevator activity in the Delta Hotel throughout the night. Elsewhere in the corridors, some participants drew attention to disagreements over the article on multilateral, bilateral and regional agreements, wondering if a backdoor lay therein.

#### **THINGS TO LOOK FOR TODAY**

**VIENNA SETTING:** The Vienna setting will reconvene at 10:00 am in the Delta Hotel to consider a consolidated text of the protocol.



# Earth Negotiations Bulletin

ExCOP  
#5

A Reporting Service for Environment and Development Negotiations

ExCOP On-Line at <http://www.iisd.ca/biodiv/excop/>

Vol. 9 No. 136

Published by the International Institute for Sustainable Development

Friday, 28 January 2000

## EXCOP HIGHLIGHTS THURSDAY, 27 JANUARY 2000

Delegates to the resumed session of the first Extraordinary Meeting of the Conference of the Parties (ExCOP) for the Adoption of the Protocol on Biosafety to the CBD continued informal discussions on scope and commodities through Wednesday night and into Thursday morning. The contact group on Articles 31 (Relationship with Other International Agreements) and 22 (Non-discrimination) met in the morning, and then in afternoon and evening sessions to start considering the precautionary principle. Delegates met in the "Vienna setting" at 1:00 pm and 10:00 pm to hear reports of the ongoing consultations.

### CONTACT GROUP ON ARTICLES 31 AND 22

In a morning session, Chair Ambassador Philémon Yang (Cameeroon) invited the negotiating groups to work on language expressing the outcome of Wednesday's discussions. Two groups argued that further consideration of the issues was needed before working on any text, while two others stressed their readiness to discuss existing proposals, namely Chair Mayr's non-paper and Chair Yang's draft text. One group expressed preference for Chair Mayr's non-paper.

### VIENNA SETTING

ExCOP President Juan Mayr opened the "Vienna setting," at 1:00 pm, and expressed his excitement as the protocol negotiations approach the last minute of the last hour of the last day. He requested all in attendance to stand, clasp hands, and to ponder how to move the process forward. He then asked the contact group Chairs to report on the status of their negotiations. Chair Yang of the contact group on Articles 31 and 22, reported that consultations continued on the basis of preambular language proposed in the Chair's draft text.

John Herity (Canada), Co-Chair of the contact group on scope and commodities, reported that some legal drafting issues had arisen in Article 4 (Scope), which could be readily addressed. He noted another issue requiring resolution regarding the acknowledgment of a state's right to allow or prohibit the transit of LMOs. Co-Chair François Pythoud (Switzerland) reported on the status of Articles 15 (Handling, Transport, Packaging and Transportation) and 8 *bis* (decision procedure for LMO-FFPs). On Article 15, he said conceptual agreement had almost been achieved. In the same article, groups had

agreed to a differentiated approach to accompanying documentation for LMOs, and in principle to identifying LMO-FFPs. He noted that they had yet to agree on the specific elements for identification.

Pythoud reported that the location of a new article regarding the decision procedure for LMO-FFPs could be determined soon. He listed a number of issues in the article that remained unresolved, including: the decision procedure for countries without domestic regulatory frameworks; implicit consent; and reference to the precautionary approach as specified in Article 8.7 of the ExCOP draft report (UNEP/CBD/ExCOP/1/L.2/Rev.1). He said he would continue bilateral and multilateral consultations with negotiating groups to resolve the remaining problems.

Chair Mayr asked negotiating groups to comment on existing proposals addressing the precautionary principle in relation to Articles 31, 22 and alternative preambular language on those articles. The Miami Group supported deleting Article 22 and retaining Article 31. The EU stated that Chair Mayr's non-paper presents the most balanced formulation, and supported deleting Article 31 and retaining Article 22. He stressed that a formulation within Chair Yang's preambular text is a rephrasing of Article 31 without exception for cases that might threaten biodiversity. The CEE noted problems with a formulation of the savings clause in the contact group's draft text, which requires a more balanced approach. The Like-Minded Group noted its support for deleting Articles 31 and 22, and preference for preambular language contained in the non-paper.

Regarding the precautionary principle, the Miami Group stated that Article 8.7 should be deleted, given references in the Preamble, Article 1 (Objective) and Annex II (Risk Assessment). He stressed the need to address the principle's relation to other agreements and science-based risk assessment. The EU, Compromise Group, CEE and Like-Minded Group supported language on the precautionary principle in Article 8.7. The EU stressed that, while decisions should be based on science-based risk assessment and non-arbitrariness, governments should have the sovereign right to take decisions to avert irreversible damage. The Compromise Group stressed that the principle must be applicable to the protocol's procedures, and recommended that the mandate of the contact group on Articles 31 and 22 be expanded to address Article 8.7 with the proviso that discussions

This issue of the *Earth Negotiations Bulletin* © <enb@iisd.org> is written and edited by Changbo Bai <changbo@sprint.ca>, Stas Burgiel <stas@iisd.org>, Leanne Burney <leanne@iisd.org>, Jessica Suplie <suplie@pik-potsdam.de> and Elsa Tsioumani <elsat@law.auth.gr>, with input by Aarti Gupta <aarti\_gupta@harvard.edu>. The Editor is Pamela Chasek, Ph.D. <pam@iisd.org> and the Managing Editor is Langston James "Kimo" Goree <kimo@iisd.org>. Logistics co-ordinated by P.J. Goldfeder <pjgold14@aol.com>. Digital editing by Ken Tong <k8o@interlog.com>. The Sustaining Donors of the *Bulletin* are The Netherlands Ministry of Foreign Affairs, the Government of Canada (through CIDA), the United States (through USAID), the Swiss Agency for Environment, Forests and Landscape, the United Kingdom Department for International Development (DFID) and the European Commission (DG-XI.) General Support for the *Bulletin* during 2000 is provided by the Government of Australia, the German Federal Ministry of Environment (BMU) and the German Federal Ministry of Development Cooperation (BMZ), the Danish Ministry of Foreign Affairs, the Ministry of Environment of Austria, the Ministries of Foreign Affairs and Environment of Norway, the Ministry of Foreign Affairs and Ministry of Environment of Finland, the Government of Sweden, the United Nations Development Programme, the Global Environment Facility. The *Bulletin* can be contacted by e-mail at <enb@iisd.org> and at tel: +1-212-644-0204; fax: +1-212-644-0206. IISD can be contacted by e-mail at <info@iisd.ca> and at 161 Portage Avenue East, 6th Floor, Winnipeg, Manitoba R3B 0Y4, Canada. The opinions expressed in the *Earth Negotiations Bulletin* are those of the authors and do not necessarily reflect the views of IISD and other funders. Excerpts from the *Earth Negotiations Bulletin* may be used in non-commercial publications only and only with appropriate academic citation. For permission to use this material in commercial publications, contact the Managing Editor. Electronic versions of the *Bulletin* are sent to e-mail distribution lists and can be found on the Linkages WWW server at <http://www.iisd.ca/linkages/>. The satellite image was taken above Montreal (c) 2000 The Living Earth, Inc. <http://livingearth.com>. For information on the *Earth Negotiations Bulletin*, send e-mail to <enb@iisd.org>.



focus on practical solutions. The Like-Minded Group stated that referring to the precautionary principle solely in a preambular reference would be unacceptable.

Chair Mayr then expanded the mandate of the contact group on Articles 31 and 22 to consider Article 8.7 on the precautionary principle, and suggested that Pythoud serve as Co-Chair with Ambassador Yang. He asked that the negotiating groups have their approaches in written form and requested text for review for the evening's "Vienna setting."

Chair Mayr then asked the negotiating groups to list items outside of the core clusters that needed further consideration. The Miami Group listed Articles 2.2, 11, 12, 13.3, 13.4, 21, 23 and 24. The Like-Minded Group cited Articles 11.3, 11.4, 12 and 18. The EU requested limiting discussion to Articles 21, 23 and 24, mentioned in paragraph 52 on outstanding items of the ExCOP draft report. The Compromise Group added that it was not convenient to start discussion on concepts already agreed upon. Chair Mayr suggested that negotiations focus on the core issues, while informal consultations conducted by Ambassador Beat Nobs (Switzerland) take place on Articles including 21, 23 and 24.

#### **CONTACT GROUP ON ARTICLES 31, 22 AND 8.7**

The contact group met again in the afternoon to continue discussions with an expanded mandate to address Article 8.7 on the precautionary principle. The negotiating groups commented on the concept and operationalization of the precautionary approach using text contained in the ExCOP draft report. One group stated that the advanced informed agreement procedure forms the core of the protocol and that the precautionary principle, as part of the decision procedure, must not be confined to preambular language, but should be adequately reflected in the operational part of the protocol. Another group suggested that the precautionary principle is sufficiently reflected in Article 1. One group stated that reference to "adverse effect" was unclear as well as the basis on which an importing country could prohibit an import. The representative further stated that any measure taken by the importing country should be subject to a review process within a reasonable period of time and when scientific certainty is available. One group pointed out that scientific consensus is rarely achieved.

A proposal suggesting new language for Article 8.7 was submitted and used as the basis for discussion. The text included two sections: one on the precautionary approach regarding import of LMOs, and the other on review of actions taken by the Party of import in case of availability of additional scientific information.

Chair Yang suggested a line-by-line analysis of the provision on the precautionary approach. One group noted concern over the concept in this paragraph. Intensive discussion addressed two issues: the basis on which a Party of import would be allowed to prohibit import of LMOs; and the criteria for a solid scientific basis to trigger an importing Party to take actions against the import of LMOs. On the first issue, one group preferred the notion of scientific information, while others preferred the notion of scientific certainty. Several proposals in response to both notions were tabled and discussed, but no consensus was reached. With regard to the second issue, some groups stated that scientific certainty should be specified according to the nature and extent of the effect caused by the import of LMOs. Other groups said it had to be specified in the territory of the Party of import.

After a break, the Chair presented a draft text for Article 8.7 summarizing the discussions. Negotiating groups agreed to delete language on the review of action by the Party of import from the previous proposal. The draft text suggests two options regarding the precautionary approach. One states Parties of import may have to take decisions on the import of LMOs even in the absence of scientific certainty. The second option generally states that lack of scientific certainty shall not prevent the Party of import from taking a decision. Delegates discussed references to two other provisions in the Article on approving or prohibiting import of LMOs. The meeting was adjourned and the two options remained for further discussion.

#### **VIENNA SETTING**

Mayr opened the "Vienna setting" at 10:00 pm and invited reports on Articles 31, 22 and 8.7 and other outstanding issues. Chair Yang reported that the contact group deliberating the precautionary principle was considering two options: language presented by one group and wording derived from consultations among groups. He said they did not have time to address Articles 31 and 22.

Ambassador Nobs said he had conducted successful informal meetings. He stated that all issues had been approached on the basis that groups would not reopen conceptual discussions, and solutions would be limited to solvable problems. Solutions were identified for Articles 12 (Risk Assessment), 13.4 (Risk Management) and 23 (Illegal Transboundary Movement). Outstanding issues include Articles 21 (Non-parties), 11 (Multilateral, Bilateral and Regional Agreements) and 24 (Socio-economic Considerations).

Mayr noted that the outstanding issues appeared to be political and that groups needed to see the differences in the context of the entire text. He requested Co-Chairs Yang and Pythoud and Ambassador Nobs to continue clarifying the remaining issues and requested clean text by 2:00 am. He indicated that he would continue consultations on the protocol's text for presentation at the 10:00 am "Vienna setting" on Friday.

#### **CONTACT GROUP ON ARTICLES 31, 22 AND 8.7**

Delegates continued their discussions on Articles 31 and 22. After extended discussion they arrived at two bracketed options for each of the following: mutual supportiveness with other international agreements; and compatibility with other international agreements. A final provision noting the intention not to create a hierarchy with other international agreements was also bracketed.

#### **IN THE CORRIDORS**

With Chair Mayr's mandate to craft text for final adoption at 10:00 am on Friday, delegates pondered whether this bordered on the possible or the impossible. Others noted the behind-the-scenes progress of informal consultations on the list of outstanding issues, as well as unusually heavy inter-floor elevator activity in the Delta Hotel throughout the night. Elsewhere in the corridors, some participants drew attention to disagreements over the article on multilateral, bilateral and regional agreements, wondering if a backdoor lay therein.

#### **THINGS TO LOOK FOR TODAY**

**VIENNA SETTING:** The Vienna setting will reconvene at 10:00 am in the Delta Hotel to consider a consolidated text of the protocol.