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HIGHLIGHTS OF BSWG-5
WEDNESDAY, 19 AUGUST 1998

Delegates to BSWG-5 continued negotiating the biosafety protocol in a variety of groups. An afternoon Plenary convened to preliminarily adopt several Articles. Delegates also discussed LMOs and "products thereof" in an informal consultation.

PLENARY

During an afternoon Plenary, the SWG and CG Co-Chairs updated delegates on progress and delegates adopted several Articles. SWG-I has discussed Articles 4-8, 10 and 12-14, and will discuss Articles 3, 9 and 11 Thursday. Drafting groups have and are producing working papers on these articles. SWG-II has discussed Articles 15-27 plus 1 and 1 *bis*. The Co-Chairs are developing revised drafts based on the discussions. SWG-II has created one small group on Article 19. CG-I has drafted a working definition of LMO. CG-II recommended several articles for adoption or deletion, as contained in UNEP/CBD/BSWG/5/L.2-13. Delegates adopted Articles 29 (Conference of the Parties); 30 (Subsidiary Bodies and Mechanisms); 31 (Secretariat); 33 (Relationship with the Convention); 35 (Monitoring and Reporting); 37 (Signature); 40 (Entry into Force); 42 (Withdrawal); and Article 43 (Authentic Texts). They deleted Articles 32 (Jurisdictional Scope), 38 (Ratification, Acceptance or Approval) and 39 (Accession). CG-II is still discussing Articles 28, 35 *bis* and 41.

Chair Koester reminded delegates that while this represents almost one-fourth of the text, it does not represent one-fourth of the work.

SUB-WORKING GROUP I

On **Article 7** (Review of Decisions) many said paragraph one (Party who makes decision should have right to review its decision, particularly in light of new scientific information) was central to the article. Some added to this the concepts in paragraph two (someone affected by decision has right to review it). A few suggested merging paragraph three (exporting Parties may provide additional information relevant to review of import decision) with another paragraph or moving it to another article, particularly Article 12 (Risk Assessment). One delegate supported paragraph four (importing Party may review its decisions on any transfer, handling or use of LMOs into its country). A drafting group was formed.

Co-Chair Wint asked delegates to indicate whether **Article 8** (Notification of Transit) is necessary. Several delegates supported the provision. Some of those opposed to the text noted that other articles, particularly Articles 15 and 16 (Unintentional Transboundary Movements and Emergency Measures), addressed the issue. Co-Chair Wint asked interested delegates to consider shortening or moving the content to other articles.

Several speakers on **Article 10** (Subsequent Imports) said the initial decision to import, addressed in Article 6, could indicate a procedure for subsequent imports and obviate this Article. Some delegates supported the Article, particularly the third option: written notification is necessary and acknowledgement may indicate a new risk assessment will be undertaken. Another drafting group convened.

CG-I presented to SWG-I for comments its definition of LMO, which encompassed three distinct elements: LMO, living organism and modern biotechnology. CG-I suggested: a living organism is any biological entity capable of metabolic activity and also capable of replicating or transferring genetic material, including sterile organisms, viruses and viroids; LMO means any living organism that contains genetic material that has been modified by using modern biotechnology and the resulting genotype is [unlikely] [not known] to occur in nature and could confer traits novel to the organism; and modern biotechnology means *in vitro* [nucleic acid] technologies, other than traditional breeding and selection technologies, which overcome natural physiological reproductive or recombination barriers, to produce novel combinations of genetic material in living organisms. Co-Chair Van der Meer noted that bracketed language constituted disagreement over substance that must be resolved. He also noted CG-I's difficulty with defining "modern biotechnology," as it is constantly evolving. "Modern biotechnology" was purposefully qualified in the definition, and while some of the terms may seem self-evident, CG-I decided such terminology was necessary for clarity. Following discussion, SWG-I approved the definition for submission to Plenary.

SUB-WORKING GROUP II

On **Article 26** (Socio-Economic Considerations) many developing countries underscored that a protocol without socio-economic considerations would be unacceptable and supported text requesting Parties to: consider socio-economic impacts in risk assessment; incorporate strategies to prevent adverse socio-economic impacts; notify the exporting country of import substitution; protect the public from

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biotech monopolies; and protect public moral and socio-economic interests. Some delegates opposed addressing monopolies and free trade issues in this article. One developed country noted divergent understandings of socio-economic considerations and supported an option requesting consideration of impacts during risk assessment and research on such considerations. Some delegations expressed concern over trade protectionism and preferred either inclusion in the preamble or no reference.

On **Article 27** (Liability and Compensation) several developed countries preferred no provision, especially in view of similar discussions spanning decades in other fora. One noted the discussion's theoretical level, as risks posed by LMOs are not comparable to oil spills or nuclear disasters. He further noted LMOs will not be forced on importers and national legislation should be used after appropriate AIA and risk assessments. One delegate preferred no provision, citing duplication with CBD Article 14.2 on liability and redress. Many developing countries supported the Article, stating that arguments regarding time and complexity were unacceptable. One delegate noted the absurdity of extended discussions on regulatory issues to ensure safety without consideration of the consequences of accidents. Delegates supported including, *inter alia*, civil liability, state liability, compensation fund, prescription of liability and role of chance/*force majeur*. Some delegates favored discussing liability and compensation at the first MOP. One country proposed including such considerations under general principles.

A representative of the "open-ended reflection group" on **Article 19** (Information Sharing/Biosafety Clearing-house (CH)) reported agreement that: a CH is a means through which information is made available; it provides access to information; certain information is provided by Parties; and the CH shall operate from day one. Discussions are ongoing.

On **Article 1** (Objectives) several delegates recommended waiting for Plenary discussions on "products thereof." Many developing countries favored including language on socioeconomic welfare, human and animal health, LMOs and "products thereof." One country requested elements on: responsibility sharing between importers/exporters; cooperation among Parties; conservation, sustainable use and risks to human health; and the protocol's basis in information exchange. Some opposed inclusion of human health and "products thereof," which extend beyond the protocol's mandate in CBD Article 19 and Decision II/5. Other delegates recommended that the Article be short, avoid restating operative sections and reference the precautionary principle.

Several countries suggested streamlining **Article 1 *bis*** (General Obligations) to avoid restating provisions of the protocol. Many countries supported a general call for Parties to take all necessary measures to comply with the protocol's provisions. Various delegates requested retaining or incorporating text on: avoiding trade restrictions; transit states; commitment to scientific rigor; transparency; and illegal trafic. One delegation favored deleting the article. Another said the article consisted primarily of reservations and proposed renaming it. Some delegates suggested revisiting it to avoid duplication of provisions. The Co-Chairs will produce a revised draft.

CONTACT GROUP I

Delegates reviewed definitions of LMO, living organism and modern biotechnology they had drafted and began considering which of the nineteen annexes to discuss first. The Co-Chairs asked delegations to submit, by Wednesday evening, lists of the annexes they are developing.

CONTACT GROUP II

A small group within CG-II met and developed an option zero and a bracketed option for Article 35 *bis* (Compliance), which will be discussed by CG-II on Friday. Article 28 (Financial Mechanism and Resources) will be discussed Monday.

CONSULTATION ON "PRODUCTS THEREOF"

Chair Koester introduced the discussion of "products thereof," suggesting that delegates address the meaning of "products thereof," the concerns raised by them, and ways of addressing them under the protocol. One speaker said that products are often made from the body of a LMO and thus contain components of that body, such as DNA fragments, leaving the possibility for reproduction. One delegation said "products thereof" should include chemicals, proteins and DNA fragments produced by LMOs. One delegate noted that many products of LMOs are living in their own right and that non-living or non-viable organisms are not a threat to biodiversity. Another stressed that a LMO must be capable of propagation or multiplication without human intervention, that "products thereof" are not capable of propagation and that the protocol must be limited to LMOs. Another noted that vectors could propagate traits of non-living modified organisms. Several delegations supported the description of "product thereof" put forth by the Secretariat (UNEP/CBD/BSWG/5/Inf.3) and recalled the protocol's focus on LMOs that interact with biodiverstiy.

Several developed countries stressed that the scope not be extended to include products of LMOs. One delegation said including "products thereof" would go beyond the protocol's mandate and detract from the objective of conserving biodiversity. Another stressed that risk assessment should include assessment of the LMO as well as its genetic material and products. One delegate said that if a process of purification or verification could ensure a product does not contain self-reproducing traits or novel traits from an LMO, then "products thereof" would not be necessary. One speaker used the example of a snake bite to illustrate the complexity of the topic and asked if it is the product of a snake, the venom (i.e. "product thereof"), or the snake itself (i.e. LMO) that kills and whether the venom is considered living. One developing country said it failed to see how products of LMOs could be ignored when considering LMOs.

IN THE CORRIDORS

Some delegates indicated they are pleasantly surprised at the sense of urgency apparent this early in the session. Compared to previous sessions, where delegates remained steadfast to country positions, many acknowledged that the time for compromise was at hand as delegates shift from discussing options to negotiating actual elements of the protocol. Reflecting on polarizing positions on "products thereof," trade issues, and liability and compensation, some started to wonder what the larger bargaining chips of such a compromise will be.

THINGS TO LOOK FOR

SUB-WORKING GROUPS: SWG-I is expected to meet at 10:00 am to consider Articles 3, 9 and 11. SWG-II is expected to meet at 10:00 am to review Co-Chairs' draft text on articles 15/16 and 18.

CONTACT GROUPS: CG-I is expected to discuss the definition of LMO, "products thereof" and relevant articles, including 2, 3, 12 and 13. Results will be forwarded to SWG-I with a deadline of Friday evening. CG-II is not expected to meet until Friday.