

## WORKING GROUP HIGHLIGHTS: MONDAY, 17 MARCH 2008

The Working Group convened for its fifth day of negotiations in Cartagena de Indias, Colombia, on Monday. During the morning, delegates consulted in regional groups. In the afternoon delegates met in plenary to continue considering the core elements paper.

In the evening delegates convened in plenary and established a Friends of the Chair group to revise the core elements paper.

### PLENARY

**CORE ELEMENTS PAPER:** In the afternoon plenary, Co-Chair Lefeber invited comments from delegates on the core elements paper tabled by the Co-Chairs on Saturday. He reiterated that the paper is intended to provide guidance for negotiations on the basis of the revised working draft. A representative of six major agricultural biotechnology companies, announced they were considering entering into a “compact,” a mutually binding contractual obligation to cover actual damage to biodiversity, subject to proof of harm, and based on self-insurance schemes.

PALAU observed that the industry representative’s declaration of confidence in biotechnology products was justification for a strict liability standard, since it would only require proof of damage and not of negligence. LIBERIA urged industry to commit to compensation in cases should their products cause damage to human health.

SENEGAL pointed to difficulties in ascertaining the identity of persons in control of LMOs regarding the channeling of strict liability under the civil liability approach. Rejecting the proposal to develop voluntary guidelines on civil liability, Zambia, on behalf of the AFRICAN GROUP, underscored the need for a legally binding civil liability scheme combined with the proposed administrative approach. She stated that the core elements paper required revision to satisfy the needs of all parties, and suggested the COP/MOP provide further guidance. NEW ZEALAND supported civil liability based on guidelines, a fault-based liability standard, and a major role of industry. He expressed concern about the legally binding nature of the administrative approach and called for capacity building to focus on risk management.

Describing the core elements paper as a guide for negotiations without prejudice to their outcome, Mexico, on behalf of GRULAC, expressed concern that it introduced some novel elements and omitted others, previously considered. He recommended returning to negotiations in sub-working groups based on the revised working draft (UNEP/CBD/BS/WG-L&R/5/2/Rev.1). Expressing concerns that the core elements paper put the risks and burden of proof on the importing countries and users, NORWAY requested revision to ensure strict liability and provide additional protections prior to considering work on the core elements paper. INDIA requested that all elements be covered in a legally binding instrument ensuring strict liability. MALAYSIA stressed that redress should be available where damage is caused by an LMO and that the biotechnology industry stands to gain acceptance and credibility by working under an international arrangement. He made acceptance of the administrative approach subject to an appropriate definition of “operator” and mechanisms for recognition and enforcement of administrative decisions, and underscored the necessity of a legally binding regime on civil liability with strict liability to ensure redress.

**BASIS OF FURTHER WORK:** In the late afternoon in plenary, Lefeber tabled a COP/MOP “draft decision” containing in annexes, the operative texts connected to the options set out in the core elements paper.

ETHIOPIA emphasized the need to negotiate an internationally binding civil liability regime in addition to harmonizing divergent national import and export laws. He called for the inclusion of a liability standard and channeling of liability and some elements of residual state liability under the administrative approach, as well as widening the geographical scope. BANGLADESH called for including damage to health under the administrative approach, expressed appreciation to industry for commitment to compensation in cases of damage and underscored that complementary capacity building should be based on remediation, assessment and monitoring.

The EC and SWITZERLAND welcomed the core elements paper as a balanced package and encouraged delegates to find common ground regarding the elements to ensure conclusion of the process by COP/MOP 4, with the EC warning that they could not envision continuation of the process beyond that point.

ECOROPA asserted that the core elements paper is counterproductive to liability and redress and pointed to a lack of transparency in its preparation. She warned that victims pay the price of lowering standards from strict liability and the polluter pays principle to standards favoring producers. GREENPEACE warned that an administrative approach would not be workable without a strong supplementary compensation mechanism, covering damage resulting from unintentional movements of LMOs and damage to areas beyond national jurisdiction, and pointed to a voluntary fund in connection with a legally binding instrument.

PESTICIDE ACTION NETWORK noted that the core elements paper does not include points agreed to at previous meetings and was therefore a step back. She cautioned that a fault-based liability regime would be insufficient, inappropriate and would result in impunity for those causing damage.

In the evening plenary, Co-Chair Nieto requested delegates' comments on whether they preferred to proceed on the basis of the revised working draft or the core elements paper. A number of groups stated their support for the working draft, including: GRULAC; Ethiopia for the AFRICAN GROUP, stating that working in the sub-working groups had been constructive; BANGLADESH; and Malaysia for G-77/CHINA underscoring that the process was moving towards a legally binding instrument. JAPAN supported using the core elements paper and NEW ZEALAND cautioned against returning to the revised working document, explaining the sub-working groups had been unable to engage on substance. In an effort to break the deadlock, the EC suggested bilateral and interregional consultations.

#### **DISCUSSION ON FRIENDS OF THE CHAIR GROUP:**

Highlighting that the process had reached its "critical point," SWITZERLAND, supported by NORWAY and the EC, proposed a Friends of the Chair group convene to explore possible ways to proceed. MALAYSIA, supported by EGYPT and SENEGAL, agreed, and added that the group must address parties' comments and concerns on the core elements paper. JAPAN cautioned against "restarting the negotiations" and favored working on the basis of the core elements, but PANAMA rejected this suggestion, underscoring the need to proceed in the sub-working groups on the basis of the revised working draft.

Lefebvre requested delegates to consider whether a Friends of the Chair group should be established, its mandate and composition.

The AFRICAN GROUP welcomed a Friends of the Chair group, and underscored that all delegates' views should be given equal weight. MALAYSIA welcomed a "full and frank" discussion and, supported by CHINA, suggested the Co-Chairs determine the group's composition. GRULAC proposed the group be mandated to work on the core elements paper as well as the working document. The EC and NEW ZEALAND, supported establishment of the group, and JAPAN, whilst supporting the proposal, called for a clearer mandate.

The Co-Chairs then proposed mandating the group to work on the basis of the core elements paper, taking into account that certain elements had been left out. They proposed that the group be composed of: Switzerland; Japan; Norway; New

Zealand; Malaysia; China; India; the Philippines; two EU representatives and four representatives from both the African Group and GRULAC. Lefebvre explained that representatives could be rotated and additional representatives could attend the negotiations, but only the authorized number of representatives could intervene.

Delegates discussed the mandate of the group. GRULAC stated that the basic working document had to remain the revised working draft and that the elements necessary to work on the core elements should be taken from it, opposed by NEW ZEALAND who preferred working on the basis of the core elements paper. Reminding delegates of the need to find a balance between diverging positions, SWITZERLAND proposed starting from the core elements paper with the understanding that single elements could be changed. The EC suggested mandating the Friends of the Chair group to simply discuss the way forward for the process, opposed by BRAZIL who stressed the need to discuss substance and that the group should improve the Co-Chair's proposal based on the revised working draft. MALAYSIA and EGYPT warned against replicating the work of the sub-working groups, and wanted the group to focus on core elements. CHINA said the group should be able to redesign the pieces constituting the core elements. NORWAY supported use of the core elements paper with the possibility to amend it and Lefebvre set out the mandate of the working group accordingly.

#### **FRIENDS OF THE CHAIR GROUP**

In the late evening, delegates convened for the first meeting of the Friends of the Chair group. SWITZERLAND suggested and delegates agreed to reconvene at 8am Tuesday.

#### **IN THE CORRIDORS**

Delegates resumed the meeting refreshed, with vivid images of Colombian biodiversity in their minds, and the interests of their farmers and other stakeholders close at heart. Many said they had arrived in Cartagena with clear instructions based on the revised working draft, setting out which cards they may, or may not trade. Those cards had been held tightly throughout the week and many were surprised to have some of those cards taken off the table, by virtue of the framework of the core elements paper. Others commented the paper served as "shock therapy" and at least facilitated a showing of cards.

Lack of agreement on the substance of the paper precipitated the urgency and the realization that it was "one minute before 12" to achieve progress at this meeting. By the end of the evening, delegates had arranged to hedge their bets, agreeing to use the core elements paper as the basis of negotiation in a Friends of the Chair group, but with the understanding that those elements could be changed. Whilst some looked forward to serious negotiations on Tuesday morning and remained poker faced about what they would be prepared to give up for a successful outcome, one delegate joked that the Friends of the Chair group adjournment was "the first thing that we have all agreed upon."