



HIGHLIGHTS OF ABS WG-1 WEDNESDAY, 24 OCTOBER 2001

Delegates to the first meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) under the Convention on Biological Diversity (CBD) met in two Sub-Working Groups throughout the day. Sub-Working Group I (SWG-I) discussed a Chair's draft for international guidelines on ABS. Sub-Working Group II (SWG-II) discussed the role of intellectual property rights (IPR) in ABS arrangements, and a conference room paper on capacity building and approaches to ABS other than guidelines. Both Sub-Working Groups formed contact groups to assist their work.

SUB-WORKING GROUP I

SWG-I Chair Birthe Ivars (Norway) introduced UNEP/CBD/WG-ABS/1/SWG.I/CRP.1, on the Draft Guidelines.

GENERAL PROVISIONS: IRAN, on behalf of the G-77/CHINA, suggested new text stating that the guidelines: may serve as inputs when developing contracts and other arrangements under mutually agreed terms (MAT) for ABS; should not be construed as changing the Parties' rights and obligations; and may not substitute for national ABS legislation. On key features, BURKINA FASO requested definition of "voluntary nature" under use of terms. BRAZIL reserved on all key features and BOLIVIA opposed reference to other users and providers, pending agreement on the use of terms.

On scope, regarding exclusion of plant genetic resources covered by the International Undertaking (IU), the EC suggested language stating that the guidelines should be without prejudice to relevant legally binding international agreements, including the IU's ABS provisions, and preferred to address the issue under the relationship with international legal regimes. The G-77/CHINA supported deleting references to the IU, but SWITZERLAND objected. Delegates debated where to include the list of elements.

On objectives, MEXICO supported reference to safeguarding and guaranteeing fully the rights of local and indigenous communities. CANADA proposed language on ABS mechanisms that recognize the protection of traditional knowledge. MEXICO, supported by EL SALVADOR and POLAND on behalf of the Central and Eastern European countries (CEE), requested language on taxonomic research and the Global Taxonomy Initiative. The US proposed, and the G-77/CHINA opposed, deleting language on provision of financial resources to providing countries. The CEE suggested reference to providing monetary benefits to all stakeholders. Delegates also debated whether capacity building should guarantee effective implementation and/or negotiation of ABS arrangements.

The G-77/CHINA proposed deleting sections on the relationship with other CBD provisions and international legal regimes. BOLIVIA suggested that language on the relationship with the CBD could be contained in the preamble.

ROLES AND RESPONSIBILITIES OF USERS AND PROVIDERS:

The G-77/CHINA proposed replacing reference to users and providers in the title with reference to countries of origin, and deleting provisions on provider responsibilities and references to stakeholders. CAMEROON, CANADA, the EC and SWITZERLAND preferred clear differentiation between users' and providers' roles. BRAZIL clarified that users' responsibilities appear to be voluntary, while contracts are binding. ARGENTINA underscored that the guidelines have no legal implications for national access regimes. MEXICO stated that the guidelines should apply to the whole range of users and providers, not just Parties. BRAZIL said the section confuses countries of origin, users and providers. CUBA supported determining users and providers on a case-by-case basis. CANADA and COLOMBIA reiterated that many countries are both users and providers. SWITZERLAND stressed the importance of designating focal points and making this information available. The section was referred to a contact group for further discussion.

PARTICIPATION OF STAKEHOLDERS: The G-77/CHINA proposed this section be bracketed pending understanding of the concept of stakeholders. BRAZIL added that clarification is needed because different categories of stakeholders have different rights. However, CUBA highlighted existing work that clarifies possible categories of stakeholders. COLOMBIA recalled SWG-I's mandate to provide input to COP-6 on mutually acceptable ABS terms. The INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY (IIFB) stated that the guidelines disregard Decision V/16 and recommendations from the IIFB on PIC, right to self-determination and rights to land and territories, and declared they had no confidence in this process. The section was referred to a contact group for further discussion.

STEPS IN THE ABS PROCESS: CANADA, the EC, SWITZERLAND and the US expressed general satisfaction with the text. On PIC, CANADA suggested alternative text on obtaining PIC and approval of indigenous and local communities, respecting their legal rights on genetic resources and associated traditional knowledge. On MAT, the EC highlighted a list of items for standardized material transfer agreements and suggested it be annexed to the guidelines. Regarding transfer of genetic resources to third parties, POLAND suggested exclusion of taxonomic and systematic research not related to commercialization. Regarding monetary benefits, JAPAN requested bracketing reference to fees paid to trust funds supporting biodiversity conservation, and the EC requested bracketing taxation.

OTHER PROVISIONS: The G-77/CHINA made a number of comments on the basis of UNEP/CBD/WG-ABS/1/3, proposing, *inter alia*, compliance with the provisions of the CBD and national legal instruments of the country of origin. TOGO suggested that national competent authorities formulate systems of certification to allow implementation or verification of the guidelines. MEXICO proposed that Parties find appropriate mechanisms

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to verify the legal origin of materials. On the basis of CRP.1, the EC suggested that disputes arising in mutually agreed arrangements should be solved in accordance with contractual arrangements on benefit-sharing and applicable law.

In the afternoon, delegates responded to a revised CRP.1. JAPAN, with THAILAND and the US, proposed deleting suggested paragraphs on: voluntary means for verification; institutional guarantees for compliance; market-based approaches; sanctions; and remedies for breach of terms. Several developing countries opposed deletion. CANADA supported only deleting the paragraph on remedies for breach of terms, while the EC, MEXICO, SWITZERLAND and others supported a compromise omitting reference to national authorities. On dispute resolution, IRAN and the US preferred the option specifying resolution according to national or international law, while CANADA, the EC and THAILAND preferred specifying relevant contractual arrangements.

A contact group met late into the night to address roles and responsibilities of users and providers. Participants addressed, *inter alia*, delineating responsibilities of countries of origin and of users and providers, and accommodating specific reference to countries of origin.

SUB-WORKING GROUP II

THE ROLE OF IPR IN ABS ARRANGEMENTS: The Secretariat introduced document UNEP/CBD/WG-ABS/1/4. SWG-I José Cabrera Medaglia (Costa Rica) requested that delegates focus on the role of IPR in PIC, ABS arrangements and traditional knowledge. WIPO reviewed the agenda of the second meeting of its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. PERU noted that indigenous participation within this Committee has been limited. Several delegations supported further collaboration with WIPO. CANADA proposed an *ad hoc* working group to establish priorities and strengthen relationships with WIPO. MEXICO stated that CBD objectives should not be subordinated to other fora. GERMANY stated that ongoing work should be mutually supportive.

Several delegates highlighted the importance of sharing experiences on IPR and ABS. Some suggested IPR as a tool to support the CBD's objectives and for triggering commercial benefit-sharing, and others noted that IPR can support benefit-sharing through monetary benefits, technology transfer and information exchange. The EC proposed developing model intellectual property clauses for contractual agreements. PERU noted that IPR may impede access to genetic resources, scientific research, farmers' rights to seed varieties and market concentration.

Several countries supported requirements for disclosure of the country of origin and evidence of PIC in patent applications. THAILAND suggested that such requirements be introduced into TRIPS Article 27.3(b), whereas the EC and BIOTECHNOLOGY INDUSTRY ORGANIZATION (BIO) suggested they be voluntary. DENMARK noted that its national IPR system contains an obligation on disclosure. BIO and THAILAND called for further study on evidence of PIC in patent applications. BIO also noted that formal requirements would shift litigation on PIC to courts in the US, Germany and Japan, and proposed using reporting on patent applications. The US said since only a small percentage of patents are commercialized, it would be a burden on patent examiners to review every patent application for compliance. Some participants noted that patent applications on specific genetic resources often contain information on their geographical origin. PERU supported an internationally recognized system of certification, MAT and PIC, and suggested assistance to monitor patent application processes. The US noted mechanisms for re-examination of potentially "bad" patents. THAILAND noted that assessment of prior art in patent applications can improve transparency. The GERMAN NGO FORUM ON ENVIRONMENT AND DEVELOPMENT said that disclosure of geographic origin and PIC are important in preventing biopiracy and called for consistency of national IPR laws with the CBD.

PERU, LESOTHO and THAILAND noted that IPR may not be appropriate for protecting traditional knowledge, especially with regard to criteria of novelty, inventiveness and utility, as well as timeframes. COLOMBIA and THAILAND called for the development of *sui generis* regimes for protecting traditional knowledge. The EC proposed an international model for legal protection of traditional knowledge. The US recommended that WIPO address *sui generis* approaches and supported a register of traditional knowledge. PERU suggested examining use of licensing, trade secrets and indications of geographic origin. COLOMBIA noted the need to inform communities and ensure their capacity to take part in decision making. UNCTAD referred to its recent expert meeting on traditional knowledge, which recommended, *inter alia*, exchange of information on national systems and exploration of internationally recognized *sui generis* systems.

Chair Medaglia then formed two contact groups on PIC and benefit-sharing, and on traditional knowledge. The contact group on PIC and benefit-sharing discussed, *inter alia*: the voluntary vs. mandatory nature and legality of including country of origin and PIC in patent applications; certification systems; prior art and traditional knowledge, especially regarding written and oral evidence; means to address abusive patents; and how IPR support or impede the CBD's objectives. The contact group on traditional knowledge discussed, *inter alia*: relevant work of and CBD relations with WIPO, UNCTAD, WTO and other international bodies; *sui generis* and other systems, including conventional IPR; participation of indigenous and local communities; databases; and case studies.

CAPACITY BUILDING: SWG-II then discussed a revised draft on capacity building and other approaches (UNEP/CBD/WG-ABS/SWG.II/CRP.1). Regarding key areas for capacity building, THAILAND proposed reference to traditional knowledge with regard to assessment, inventory and monitoring activities. BRAZIL and the UK proposed that support for scientific and technical areas, including technology transfer, should focus on access to and use of genetic resources. Regarding processes, MALAYSIA called for prioritization of capacity-building areas at the local, national, sub-regional and regional levels. Under means of implementation, TUNISIA, with BRAZIL, supported reference to development of appropriate national framework legislation. With these and other minor changes, the text was accepted. At the EC's request, Chair Medaglia indicated he would draft terms of reference for the workshop on capacity building. The text on other approaches was accepted without discussion.

IN THE CORRIDORS

As text in the draft guidelines was bracketed on stakeholders and roles and responsibilities of users and providers, some participants harkened back to actions by one delegation to curtail indigenous participation at COP-4. As this raised visible rifts within the G-77/China, a few speculated that "confusion" on the meaning of stakeholders may be a red herring as other political factors come to the fore.

Meanwhile, the discussion on IPR held few surprises with regard to positions that have been roundly expressed in other fora. Some highlighted increasing problems on working within fuzzy boundaries (e.g., work under ABS vs. Article 8(j)), potentially overlapping institutional mandates (e.g., CBD, UNCTAD and WIPO) and the scope of *sui generis* systems vis-à-vis TRIPS Article 27.3(b) to address plant protection as well as traditional knowledge.

THINGS TO LOOK FOR

PLENARY: Plenary will meet at 10:00 am to hear reports from the Sub-Working Groups.

SUB-WORKING GROUP I: SWG-I will meet at 10:30 am in the Plenary hall to review a Chair's revised draft on the draft guidelines and discuss the outcome of the contact group on user/provider responsibilities.

SUB-WORKING GROUP II: SWG-II will meet at 10:30 am in the Wasserwerk Building to discuss a joint report from the contact groups on the role of IPR in implementing ABS arrangements.