



## SUMMARY OF THE SECOND MEETING OF THE AD HOC OPEN-ENDED WORKING GROUP ON ACCESS AND BENEFIT-SHARING: 1-5 DECEMBER 2003

The second meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing of the Convention on Biological Diversity (CBD) met from 1-5 December 2003, in Montreal, Canada. Approximately 280 participants attended the meeting, representing 91 governments, as well as UN agencies, inter-governmental and non-governmental organizations (NGOs), indigenous and local community groups, academia and industry. Initially established by the fifth Conference of the Parties (COP) to the CBD to develop guidelines for, and other approaches to, access to genetic resources and benefit-sharing (ABS), the Working Group was reconvened by COP-6, following the adoption of the Bonn Guidelines on ABS, for the purpose of addressing use of terms, other approaches for implementing CBD ABS provisions, compliance measures with prior informed consent (PIC) and mutually agreed terms (MAT), capacity-building needs and experience gained with the Bonn Guidelines on ABS.

Delegates adopted six recommendations on: reports on experience with the Bonn Guidelines; the international regime on ABS; use of terms; other approaches, as set out in decision VI/24 B on other approaches for implementing the CBD ABS provisions; measures to ensure compliance with PIC and MAT; and capacity building. The Working Group's recommendations will be forwarded to CBD COP-7, which will be held from 9-20 February 2004, in Kuala Lumpur, Malaysia.

The meeting was charged with the significant task of paving the way for COP-7 negotiations on steps to develop an international ABS regime. Although much time and effort was devoted to debating the regime's process, nature, scope, elements and modalities, delegates admitted that a heavily bracketed text was the best that could be achieved at such an early stage. While discussions on an international regime overshadowed the other topics, delegates expressed satisfaction with the recommendation on compliance measures for PIC and MAT, which, although not clarifying the relationship with, and the role of, the World Intellectual Property Organization (WIPO) and leaving open the debate on an international certificate of origin or legal provenance, provides for steps to move forward. The recommendation on capacity building and

the expert workshop's draft action plan was also welcomed as concrete outcomes for the implementation of CBD ABS-related provisions.

### A BRIEF HISTORY OF THE PROCESS

The CBD, negotiated under the auspices of the United Nations Environment Programme (UNEP), was opened for signature on 5 June 1992, and entered into force on 29 December 1993. To date, there are 188 Parties to the Convention. The CBD aims to promote "the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources." Provisions on ABS are contained in Articles 15 (Access to Genetic Resources), 16.3 (access, to and transfer of, technology that makes use of genetic resources), 19.1 (participation in biotechnological research on genetic resources) and 19.2 (access to results and benefits from biotechnologies).

**COP-2 AND COP-3:** At its second meeting (Jakarta, Indonesia, November 1995), the COP considered a compilation of information on existing legislative, administrative and policy measures on ABS. COP-3 (Buenos Aires, Argentina, November 1996) addressed a compilation of Parties' views on options for developing national measures to implement Article 15.

**COP-4:** At its fourth meeting (Bratislava, Slovakia, May 1998), the COP addressed matters related to benefit-sharing, including measures to promote the distribution of benefits from

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biotechnology in accordance with Article 19 (Handling of Biotechnology and Distribution of its Benefits) and means to address the sharing of benefits arising from the use of genetic resources. The COP established a regionally balanced Experts' Panel on ABS, with the mandate to develop a common understanding of basic concepts and explore options for ABS.

**ISOC:** The Inter-Sessional Meeting on the Operations of the Convention (Montreal, Canada, June 1999) made recommendations for the composition and agenda of the Experts' Panel on ABS and for future work to develop a common understanding of the relationship between intellectual property rights (IPRs) and relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) of the World Trade Organization (WTO).

**FIRST MEETING OF THE EXPERTS' PANEL ON ABS:** The first meeting of the Experts' Panel on ABS (San José, Costa Rica, October 1999) focused on: ABS arrangements for scientific and commercial purposes; national and regional legislative, administrative and policy measures; regulatory procedures and incentive measures; and capacity building. Participants also discussed IPRs and the use and terms of contractual ABS arrangements. The Panel developed recommendations, which included general conclusions and specific points on PIC, MAT, information needs and capacity building.

**FIRST MEETING OF THE WORKING GROUP ON ARTICLE 8(J):** The first meeting of the Working Group on Article 8(j) (Seville, Spain, March 2000) considered elements for a work programme on Article 8(j), including: participatory mechanisms for indigenous and local communities; equitable benefit-sharing; legal elements; status and trends in relation to Article 8(j) and related provisions; traditional cultural practices for conservation and sustainable use; exchange and dissemination of information; and monitoring. The Working Group also addressed: the application and development of legal and other appropriate forms of protection for traditional knowledge; international cooperation among indigenous and local communities; and opportunities for collaboration and implementation of the work programme.

**COP-5:** At its fifth meeting (Nairobi, Kenya, May 2001), the COP established the *Ad Hoc* Open-ended Working Group on ABS to develop guidelines on and other approaches to: PIC; MAT; roles, responsibilities and participation of stakeholders; aspects of *in situ* and *ex situ* conservation and sustainable use; mechanisms for benefit-sharing; and the preservation and maintenance of traditional knowledge. COP-5 also decided to reconvene the Experts' Panel on ABS to provide input regarding user and provider experiences and stakeholder involvement.

**SECOND MEETING OF THE EXPERTS' PANEL:** The second meeting of the Experts' Panel on ABS (Montreal, Canada, March 2001) addressed: user and provider experience in ABS processes; stakeholder involvement; and complementary options to address ABS within the CBD framework, including possible elements for guidelines. Participants also recommended prioritizing capacity building for ABS.

**FIRST MEETING OF THE ABS WORKING GROUP:** At its first meeting (Bonn, Germany, October 2001), the Open-ended *Ad Hoc* Working Group on ABS developed the draft Bonn Guidelines on ABS, identified elements for a capacity-building action

plan, called for an open-ended workshop on capacity building for ABS, and considered the role of IPRs in implementation of ABS arrangements.

**SECOND MEETING OF THE WORKING GROUP ON ARTICLE 8(J):** The second meeting of the *Ad Hoc* Open-ended Inter-Sessional Working Group on CBD Article 8(j) on traditional knowledge and related provisions (Montreal, Canada, February 2002) considered progress on the implementation of the work programme on Article 8(j), and addressed, *inter alia*, the effectiveness of existing instruments impacting the protection of traditional knowledge, particularly IPRs.

**COP-6:** At its sixth meeting (The Hague, the Netherlands, April 2002), the COP adopted the Bonn Guidelines on ABS. The Guidelines aim to assist governments and other stakeholders in establishing legislative, administrative or policy measures on ABS and in negotiating ABS contractual arrangements. Delegates decided to reconvene the Working Group on ABS to give advice to the COP on: use of terms, definitions and/or glossary; other approaches as set out in decision VI/24 B on other approaches for implementing the CBD ABS provisions; measures to support compliance with PIC and MAT; consideration of any available reports or progress reports; and capacity-building needs. The COP also addressed IPRs as they relate to ABS, and invited Parties to encourage the disclosure of the country of origin of genetic resources and traditional knowledge in related IPR applications.

**WSSD:** The Johannesburg Plan of Implementation, adopted at the World Summit on Sustainable Development (WSSD) in Johannesburg, South Africa, in September 2002, calls for the wide implementation of, and continued work by, CBD Parties on the Bonn Guidelines (paragraph 44(n)). It further calls for action to "negotiate, within the framework of the CBD, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources" (paragraph 44(o)).

**UNGA-57:** At its 57th session, the UN General Assembly (New York, US, December 2002) reaffirmed the WSSD commitment to negotiate an international regime on benefit-sharing, and invited the CBD COP to take appropriate steps in this regard, in resolution 57/260.

**MYPOW:** The Open-ended Inter-Sessional Meeting on the Multi-Year Programme of Work of the COP up to 2010 (Montreal, Canada, March 2003) adopted recommendations on, *inter alia*, legal and socioeconomic aspects of technology transfer and cooperation, and the WSSD outcomes as they relate to the CBD process. The Meeting invited submission of views on the process, nature, scope, elements and modalities of an international regime on ABS, and recommended that the Working Group on ABS address these issues at its second meeting, in its consideration of other approaches.

## REPORT OF THE MEETING

On Monday, 1 December, Hans Hoogeveen (the Netherlands), CBD COP President and Working Group Chair, opened the meeting, highlighting the need to identify clear terms of reference for negotiating an international regime on ABS, and calling on delegates to build on the spirit of compromise that led to the adoption of the Bonn Guidelines on ABS.



CBD Executive Secretary Hamdallah Zedan noted that ABS is of particular significance to developing countries, and emphasized links with traditional knowledge, IPRs and trade.

Nehemiah Rotich, on behalf of UNEP Executive Director Klaus Töpfer, stressed the need for benefit-sharing for biodiversity conservation in developing countries, and encouraged delegates to initiate actions for capacity building for ABS.

WIPO highlighted its technical study on disclosure requirements (UNEP/CBD/WG-ABS/2/INF/4), stressing that it does not represent WIPO official policy. He drew attention to the expanded mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), which should focus on international aspects of intellectual property and genetic resources, traditional knowledge and folklore, and not exclude the development of an international regime.

The UN Food and Agriculture Organization (FAO) highlighted the adoption and key features of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR), expressing hope that the ITPGR will enter into force in the first half of 2004.

Delegates then adopted the agenda (UNEP/CBD/WG-ABS/2/1) and approved the establishment of two sub-working groups, as proposed in the annotated agenda (UNEP/CBD/WG-ABS/2/1/Add.1/Rev.1). They elected Ines Verleye (Belgium) as Chair of Sub-Working Group I (SWG-I) and Dush Deepak Verma (India) as Chair of Sub-Working Group II (SWG-II). A brief Plenary convened daily to review progress. On Thursday, Plenary elected Diann Black Layne (Antigua and Barbuda) as the meeting's rapporteur, and heard a statement from the UN Permanent Forum on Indigenous Issues.

The sub-working groups met from Tuesday to Thursday. SWG-I addressed: the process, nature, scope, elements and modalities of an international ABS regime; reports on experience with the Bonn Guidelines; use of terms; and other approaches assisting implementation of CBD provisions on ABS. SWG-II considered measures to support compliance with PIC and MAT, and capacity-building needs. A Friends of the Chair group was established on the international ABS regime. On Friday, the closing Plenary adopted recommendations to the COP, as well as the sub-working groups' and the meeting's reports.

This report summarizes the Plenary and sub-working groups' discussions and recommendations on each agenda item.

## PLENARY

**REPORTS ON EXPERIENCE GAINED WITH THE BONN GUIDELINES:** On Monday, the Plenary heard reports on experience gained with the Bonn Guidelines. China noted its success in exchanging agricultural crop genetic material based on PIC and, with Kenya and Jordan, emphasized capacity building as a prerequisite for developing and implementing legislation. China and Argentina stressed challenges faced by countries that are both providers and users of genetic resources. Brazil noted that the Guidelines do not secure the rights of provider countries and indigenous communities.

Japan highlighted its bioindustry's capacity-building programmes in developing countries and, with Canada and Switzerland, workshops to promote the Guidelines' implementation.

Noting activities of its national expert group to monitor the Guidelines' implementation, Norway described efforts to update its ABS legislation and amend its patent law to include PIC.

The European Community (EC) drew attention to its biodiversity strategy and an upcoming Communication on the implementation of the Guidelines, and noted industry's lack of awareness. France described studies on the state of its ABS legislation and measures for PIC and MAT, and highlighted information-sharing initiatives through the French Biodiversity Clearing-House.

El Salvador announced the establishment of national measures for access and underscored regional harmonization efforts. Bangladesh and Costa Rica noted use of the Guidelines in developing national biodiversity legislation, and Jamaica explained its use in establishing a register of material transfer agreements (MTAs). Costa Rica underlined experiences on benefit-sharing in bioprospecting activities. Egypt stressed amendment of its IPR legislation, with inclusion of PIC and requirements on disclosure of origin. Pakistan, Uganda and Ethiopia described the development of draft national legislation on ABS, with Pakistan noting measures on community rights. Namibia stressed the need to increase awareness and mainstream the Guidelines within national legislation.

Australia mentioned its internal agreement, which, *inter alia*, determines the scope and modality of actions to apply the Guidelines. Belgium shared its experience on ABS relating to microbial resources. The Netherlands described its national platform for codes of conduct, MTAs and information exchange. Denmark highlighted an amendment to its patent law to require the disclosure of origin. Sweden reported a lack of awareness of the Guidelines among its research institutions.

The UK stressed its undertaking of a two-stage review of the Guidelines, development of a policy framework, and establishment of a Commission on IPRs. Canada emphasized the need for further research, and said ABS regimes should, *inter alia*, address stakeholders' interests and indigenous participation. Uganda identified challenges, including lack of capacity, negotiating different types of benefits, and addressing non-compliance. Spain highlighted its Inter-ministerial Coordination Committee to address ABS and develop a draft MTA. Haiti stressed the need for work on IPRs and legal clarification of ABS-related concepts.

The Southeast Asia Regional Initiatives for Community Empowerment (SEARICE) stressed the usefulness of the Bonn Guidelines for the establishment of the Framework on ABS of the Association of South East Asian Nations, and called upon delegates to recognize indigenous rights in developing legislation and managing ABS initiatives.

**INTERNATIONAL ABS REGIME:** On Monday afternoon, the Plenary heard general views on an international ABS regime. Mexico, on behalf of the Like-Minded Megadiverse Countries (LMMC), underlined that the regime should promote compliance with PIC according to MAT, address certification of the provenance of genetic resources, and balance the regulatory burden on user and provider countries. Argentina, Brazil, Costa Rica and Tanzania stressed the need to include provisions on monitoring, compliance, dispute settlement, and capacity building, and to protect local and indigenous communities' rights. Tanzania, supported by many, further emphasized the need to guarantee the rights of the countries of origin and reinforce, rather than substitute, their legislation.



Several countries emphasized the need for technical and financial support to develop and implement national legislation. Jamaica noted difficulties in monitoring and enforcing contract-based regimes. Canada and others called for indigenous and local communities' involvement. Japan warned against excessive ABS regulation, and called for developing a common understanding regarding the situation between providers and users.

Many said the regime should be legally binding, with Colombia and Namibia noting that national legislation is not sufficient to ensure compliance with ABS. Uganda, on behalf of the African Group, with Jordan, stressed the need to take into account the special needs of developing countries. Malaysia said the regime should address illegal transboundary movements of genetic resources. Algeria supported including products derived from genetic resources.

Italy, on behalf of the EC Member States and acceding countries (EU), said the analysis of the effectiveness of, and synergies among, existing instruments should be considered. Australia and Switzerland recalled that the regime should build on the TRIPs Agreement, the ITPGR and ongoing work within WIPO, rather than establish a new treaty. Canada, New Zealand and the Republic of Korea supported implementing the Bonn Guidelines and sharing experience before negotiating a binding international regime.

Norway proposed that COP-7 extend the mandate of the ABS Working Group to identify and analyze gaps in the implementation of the Guidelines. Noting the Biosafety Protocol experience, Egypt supported the negotiation of a protocol on ABS.

Calling for indigenous consultation at all levels, the International Indigenous Forum on Biodiversity (IIFB) stressed: indigenous rights over their knowledge; links between indigenous knowledge and biodiversity; indigenous customary laws and cultural heritage; and equity in benefit-sharing.

The International Chamber of Commerce cautioned against an international regime that would discourage countries from developing national legal frameworks, and recommended that countries be given more time to implement the Guidelines.

The Edmonds Institute stressed the need to discuss ABS in the context of biodiversity conservation. Instituto SocioAmbiental supported the development of a code of ethics to legitimize PIC.

On Tuesday, Working Group Chair Hoozeveld presented a Chair's text for further discussion in SWG-I, which included: a recommendation that COP-7 request the ABS Working Group to elaborate and negotiate an international regime as soon as possible; and terms of reference regarding the nature, scope, elements and modalities of the regime.

### **SUB-WORKING GROUP I**

**INTERNATIONAL ABS REGIME:** SWG-I delegates discussed an international ABS regime on Wednesday and Thursday.

On Wednesday, SWG-I Chair Verleye invited comments on the Chair's text on an international ABS regime, clarifying that the Working Group was mandated to draft recommendations on terms of reference for negotiating the regime.

Cuba requested referring to the Bonn Guidelines and acknowledging difficulties in their implementation. The EC and the LMMC proposed reference to the CBD objectives. The EU suggested

preambular reference to the Millennium Development Goals. Jamaica called for reflecting concerns over the ABS Working Group's mandate and not prejudging the regime's nature.

The LMMC, opposed by Canada and others, asked for deleting preambular paragraphs: recognizing that Parties and stakeholders may be both users and providers; and recognizing the need for balance between user and provider responsibilities. Canada, supported by Switzerland, proposed referring to recommendations from the Working Group on Article 8(j), and, opposed by the LMMC, the possible need for further analysis and strengthening of elements of relevant existing regimes. Cuba called for emphasizing the inclusive nature of the regime, beyond national and regional perspectives.

Burkina Faso called for establishing an expert group to develop a text to be negotiated by the ABS Working Group, while the LMMC requested a specific working group to negotiate a legally binding regime, taking into account the rights of the countries of origin.

The LMMC proposed that the ABS Working Group convene twice a year. Noting budgetary constraints, the EC said the ABS Working Group should meet "as soon as practicable."

Regarding the scope of the regime, the EC, supported by El Salvador, proposed clarifying that the regime should cover both access and benefit-sharing, and requested adding reference to the conservation and sustainable use of biodiversity.

On elements of the regime, Liberia and Japan called for both provider and user measures. Jamaica favored an international certificate of country of origin or country providing genetic resources. Cuba proposed addressing genetic resources not subject to national sovereignty. Tanzania and Namibia proposed noting the transboundary distribution of some genetic resources.

The LMMC opposed references to: existing instruments; countries of origin, provider countries and indigenous and local communities, in text on provisions to ensure compliance with national legislation; and, with Algeria, a code of ethics. The LMMC supported referring to an international certificate of legal provenance of genetic resources, derivatives and associated traditional knowledge.

On Thursday, the Secretariat introduced a revised Chair's text.

The African Group and the LMMC, opposed by Canada, the EU and Australia, requested deleting language recognizing that some Parties and stakeholders are both users and providers. The LMMC and Tanzania proposed, and delegates agreed, to delete wording on ensuring balance between users' and providers' responsibilities. The EC supported language on fair and equitable benefit-sharing and sovereign rights over natural resources, provided language on facilitating access was retained. The LMMC and others favored deleting wording on facilitating access.

On the negotiation process, the African Group and the LMMC proposed, and delegates agreed, to delete a recommendation to create an expert group. Canada and the Coordinating Body of the Indigenous Organizations of the Amazon Basin emphasized indigenous participation and the need to collaborate with the Article 8(j) Working Group.



On the terms of reference for negotiating the regime, the EC, Canada, Cuba and Jamaica supported a separate section on the process, proposing an analysis of existing ABS instruments, experience with implementation, and gaps. The section remained bracketed.

The LMMC and the African Group, opposed by the EC and Australia, requested deletion of the section on the nature of the regime. Delegates agreed with a US suggestion to reword language for consistency with CBD Article 22 (Relationship with Other International Conventions). The IIFB stressed the need to refer to customary law and traditional cultural practices. The section remained bracketed.

On the scope of the regime, the EC, Australia, the African Group, China, and the Republic of Korea proposed wording based on Article 9 of the Bonn Guidelines (Scope), stating that the regime should facilitate access and promote and safeguard fair and equitable benefit-sharing. The LMMC and the African Group agreed, provided reference is made to derivatives. The LMMC opposed references to facilitating research, implementation of the CBD objectives, the functioning of the regime, and stakeholder participation. This section remained bracketed.

On the elements of the regime, the EC and the IIFB supported, and the LMMC and the African Group opposed, listing existing ABS-related instruments and processes. Delegates agreed to include as elements: ensuring fair and equitable benefit-sharing from the results of research; and recognizing and protecting the rights of indigenous and local communities over their traditional knowledge. Delegates disagreed on references to monitoring, compliance, enforcement, and dispute settlement mechanisms.

On the modalities of the regime, the EC opposed including the type of instruments among the modalities to be decided by COP-7. While delegates did not reach agreement on a timeframe and providing full support for indigenous participation, they agreed to promote participation of all relevant stakeholders. SWG-I delegates agreed to forward the amended bracketed Chair's text to Plenary.

On Friday, in the closing Plenary, delegates discussed bracketed text on, *inter alia*: preambular reference to the work of intergovernmental organizations; scope of the regime; certificates; and disclosure. Brazil, Australia and the EC underscored the lack of discussion in both sub-working groups on certification.

Delegates agreed that COP-7 should mandate the ABS Working Group to negotiate and elaborate the regime, and adopted the recommendation with minor amendments

**Recommendation:** The final recommendation (UNEP/CBD/WG-ABS/2/L.7) recalls:

- the WSSD Plan of Implementation's call for negotiating an international ABS regime within the framework of the CBD and promoting wide implementation of, and continued work on, the Bonn Guidelines;
- the UNGA resolution inviting the COP to take appropriate steps to negotiate an international ABS regime;
- the MYPOW recommendation to consider the process, nature, scope, elements and modalities of an international ABS regime; and,
- the Millennium Development Goals and the potential role of ABS in poverty eradication and environmental sustainability.

The recommendation also:

- notes the Bonn Guidelines and the work carried out by the Article 8(j) Working Group;
- takes into account relevant CBD provisions;
- reaffirms the commitment by Parties, subject to national legislation, to respect, preserve and maintain traditional knowledge and promote their wider application with the approval and involvement of the holders of such knowledge, and encourage equitable benefit-sharing; and,
- advises that the ABS Working Group has identified possible components of an international regime, without prejudging the outcome.

Brackets remain around preambular text reaffirming:

- that fair and equitable benefit-sharing is one of the CBD objectives;
- the sovereign rights of States over their natural resources and that the authority to determine access to genetic resources rests with governments and is subject to national legislation; and,
- Parties' commitment in CBD Article 15.2 to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to CBD objectives.

Brackets also remain in text recognizing:

- the contribution to ABS of international biodiversity-related agreements, such as the ITPGR;
- that Parties and stakeholders may be both users and providers of genetic resources; and,
- that the regime should be transparent, practicable, non-discriminatory, expeditious and flexible, and support generation of environmental, social and economic benefits to both users and providers, as well as being supportive to national legislative, administrative and policy measures, and mutually supportive with rights and obligations under other international and regional agreements.

A note regarding the need for further analysis of existing legal instruments and regimes relating to ABS and experience gained in their implementation, including gaps and their consequences, is also bracketed.

Preambular clauses regarding: ABS-related work carried out by other relevant international intergovernmental organizations, such as the FAO, WIPO, the WTO and regional organizations; the need for mutual supportiveness; and recognizing that work in these other organizations may form part of the international ABS regime, remained bracketed.

On the ABS Working Group's mandate to negotiate, brackets remain on whether this negotiation should be "as soon as possible," aim to implement the CBD's objectives, take into account the 2010 target to significantly reduce the rate of biodiversity loss, and aim to adopt a legally binding instrument to effectively protect and guarantee the rights of countries of origin of genetic resources.

Regarding the terms of reference, delegates did not agree on whether the negotiations shall be based on an examination of possible features of the regime on the basis of whether they are currently part of existing instruments, require further analysis and/or need strengthening.



The sections on the process and the nature of the regime remain bracketed in their entirety. Regarding the nature of the regime, sub-brackets remain on whether the regime should:

- be legally-binding and/or non-binding;
- support generation of social, cultural, economic and environmental benefits to both users and providers;
- support national legislative, administrative and policy measures;
- take into account customary law and traditional cultural practices of indigenous and local communities;
- be consistent with Article 22 of the Convention (Relationship with Other Conventions); and,
- be composed of one or more instruments within a set of principles, norms, rules and decision-making procedures.

On the scope of the regime, delegates did not agree on whether it “could” or “should” “cover” or “facilitate” ABS and include the products and derivatives of genetic resources.

Delegates agreed that the regime could include the following elements:

- ensuring fair and equitable sharing of benefits from the results of research and development and the benefits arising from the commercial and other utilization of genetic resources;
- recognizing and protecting indigenous communities’ rights over their traditional knowledge subject to their country’s national legislation;
- capacity-building measures based on country needs;
- benefit-sharing measures including monetary and non-monetary benefits, and effective technology transfer and cooperation so as to support the generation of social, economic and environmental benefits; and,
- means to support the implementation of the international regime within the CBD framework.

On the elements that could be included in the regime, brackets remain around a list of some of the relevant existing instruments and processes. Elements relating to countries of origin, user measures, certificates, and disclosure of country of origin remain bracketed since there was insufficient time to address them in SWG-I. Further, the Working Group retained brackets on:

- whether collaborative scientific research be encouraged or also facilitated;
- the transboundary nature of the distribution of some genetic resources and associated traditional knowledge;
- a code of ethics, code of conduct, or PIC models, addressing benefit-sharing with indigenous and local communities;
- monitoring, compliance and enforcement mechanisms, dispute settlement and/or arbitration mechanisms, and any other features determined necessary to achieve the objectives of the ABS regime.

Delegates agreed to recommend that COP-7 decide on the timeframe and other modalities for the negotiation, that the COP mandate the ABS Working Group to negotiate and elaborate the international regime on ABS, and that the participation of all relevant stakeholders, including NGOs and the private sector, and indigenous and local communities, be promoted.

Recommendations that COP-7 decide on the type of instruments, and that the ABS Working Group be convened: as soon as practicable; or as soon as possible, at least twice a year at a minimum, remain bracketed.

The Working Group also retained brackets on text:

- recommending that the international regime be elaborated in collaboration with the FAO, the WTO, WIPO, the Union for the Protection of New Varieties of Plants, and relevant regional agreements; and
- encouraging Parties, Governments, international organizations and all relevant stakeholders to provide the ways and means to facilitate efficient participation of indigenous and local communities in the development of an international regime.

**REPORTS ON EXPERIENCE GAINED WITH THE BONN GUIDELINES:** SWG-I delegates heard reports on experience gained with the Bonn Guidelines on Tuesday and Thursday.

On Tuesday, the Secretariat drew attention to the compilation of submissions on ABS (UNEP/CBD/WG-ABS/2/INF/1). The EC, Germany and Canada noted awareness-raising activities regarding users’ obligations. The EC highlighted ongoing discussions on a stand-alone disclosure requirement and certification schemes. Ireland noted its review of the state and use of genetic resources, and supported strong user measures.

Germany and Norway stressed amendments to their patent legislation to include disclosure of origin, with Germany noting that the requirement would not affect the granting of patents. Iran said a group of specialists is identifying needs regarding ABS, prioritized benefit-sharing over access, and called for enhancing regional and international cooperation on ABS. Norway and the Gambia said they are developing ABS legislation, and Denmark described the Greenlandic Home Rule Authority’s proposed ABS regime. South Africa said its upcoming biodiversity legislation will provide for export permits for genetic resources. Chile noted its efforts to regulate bioprospecting. Turkey said its ABS legislation includes provisions on PIC, MAT and MTA.

On Thursday, delegates approved a Chair’s text on reports on experience with the Bonn Guidelines, encouraging Parties to further submit information on relevant experiences, following amendments including: a proposal by the African Group to recognize constraints encountered by some developing countries to fully utilize the Guidelines; and an invitation to Parties, governments, indigenous and local communities and other stakeholders to continue promoting implementation of the voluntary Bonn Guidelines.

On Friday, the closing Plenary adopted the final recommendation, with a minor amendment.

**Recommendation:** In the final document (UNEP/CBD/WG-ABS/2/L.4), the ABS Working Group: recalls the evolutionary character of the Bonn Guidelines on ABS; recognizes their useful contribution to the development of national regimes and contractual arrangements for ABS and to the implementation of the CBD objectives; and recognizes some developing countries’ constraints due to inadequate capacity to fully utilize the Guidelines.

It also recommends that the COP:

- note the need for further experience in the implementation of the Guidelines;
- invite relevant parties to continue to promote the wide imple-



mentation of the voluntary Guidelines;

- encourage all relevant parties to submit information on relevant experience and lessons learned in the implementation of the Guidelines; and
- request the Executive Secretary to make this information available through appropriate means, including the Clearing-House Mechanism (CHM).

**USE OF TERMS:** SWG-I discussed the use of terms on Tuesday and Thursday.

On Tuesday, the Secretariat presented documents on the use of terms (UNEP/CBD/WG-ABS/2/2 Section II, INF/1 and UNEP/CBD/COP-6/INF/40). Jamaica and the African Group said definitions will assist in drafting ABS legislation. Australia, the EC and others said discussions on the use of terms should not prejudice negotiations on an international regime. Algeria suggested revisiting the issue once the international regime is in place. China suggested incorporating work on terms within the negotiating process for an international ABS regime.

The EU suggested that the Secretariat compile a glossary of terms by COP-8. Brazil and others called for establishing an expert group on the use of terms after COP-7. Brazil and the Tulalip Tribes supported a definitions' glossary as a basis for developing a common understanding.

Following concerns expressed over representation and financial issues associated with convening an expert group, several delegates supported the UK and US proposals to conduct electronic consultations and use the CHM. Canada and the Association Ixa Ca Vaa for Indigenous Development and Information called for indigenous peoples' involvement in the consultations. The African Group and Antigua and Barbuda noted difficulties for some countries and indigenous communities to contribute electronically to the debate. Saint Lucia suggested that ABS focal points coordinate input from stakeholders. Brazil suggested that COP-7 mandate the ABS Working Group to decide on the way forward, and Canada said the decision on convening an expert group would depend on the output of COP-7 regarding an ABS regime. Switzerland recommended using existing CBD structures.

On Thursday, delegates approved a Chair's text, following amendments proposed by the African Group to note the need to examine other relevant terms not defined in the CBD, and by the Gambia to note difficulties faced by some developing countries regarding information technologies.

On Friday, the closing Plenary adopted the final recommendation without amendment.

**Recommendation:** In the final document (UNEP/CBD/WG-ABS/2/L.5), the Working Group notes that a number of other relevant terms not defined in the CBD may need to be examined, and refers to the difficulties faced by some developing countries with respect to information technology and related infrastructure.

It recommends that the COP:

- invite all relevant parties to submit to the Executive Secretary information on existing national definitions of the terms: access to genetic resources, benefit-sharing, commercialization, derivatives, provider, user, stakeholder, *ex situ* collection, and voluntary nature; and views on whether additional terms, such as arbitrary restrictions, need to be considered;

- request ABS national focal points to facilitate the process of gathering and submitting relevant information to the Secretariat, taking into account consultations with indigenous and local communities; and,
- request the Executive Secretary to gather and compile this information, distribute it through the CHM and submit it to the next meeting of the ABS Working Group, for further examination of the issue of use of terms not defined in the CBD, including the possible establishment of an expert group to determine the need for definitions or a glossary.

**OTHER APPROACHES FOR IMPLEMENTING THE CBD ABS PROVISIONS:** SWG-I discussed other approaches, as set out in decision VI/24 B (Other approaches for implementing the CBD ABS provisions) on Tuesday, Thursday and Friday.

On Tuesday, the Secretariat introduced its overview of other approaches to complement the Bonn Guidelines and assist countries in ABS implementation (UNEP/CBD/WG-ABS/2/2 Section III). Several delegates noted positive experience with bilateral and regional approaches, and ABS-related codes of conduct. Jamaica expressed interest in adopting a code of ethics. Brazil, El Salvador, Jamaica and others supported Mexico's proposal for an international certificate of provenance, and Japan called for a study of its cost-effectiveness. Acknowledging the merits of certificates, the US warned against increased costs and delays.

Argentina underlined the difficulty of assessing these approaches' efficacy, and Canada stressed the need for further study to identify gaps warranting adaptation of current approaches. China requested the CBD Secretariat to provide a further compilation of existing arrangements and approaches.

On Thursday, delegates approved a Chair's text on other approaches with the understanding that reference to an international certificate of origin be consistent with wording adopted by SWG-II. Options as to whether submissions on additional approaches be disseminated through the CHM or be transmitted to the ABS Working Group for further consideration of the issue remained bracketed.

On Friday, the closing Plenary discussed the draft recommendation (UNEP/CBD/WG-ABS/2/L.6). Canada and the UK suggested harmonizing references to Parties, governments, international organizations, indigenous and local communities and all relevant stakeholders. Colombia suggested acknowledging that other existing approaches could be considered to complement the Bonn Guidelines and are useful tools in assisting implementation of CBD ABS provisions of the CBD. Colombia also suggested, and delegates agreed to language on the two bracketed alternatives with respect to further work, inviting all relevant parties to submit information to be compiled by the Executive Secretary and disseminated through the CHM for the consideration of the ABS Working Group. Delegates adopted the document as amended.

**Recommendation:** In the final document (UNEP/CBD/WG-ABS/2/L.6), the Working Group:

- acknowledges that existing other approaches could be considered to complement the Bonn Guidelines; and
- stresses the need to further examine other approaches, such as interregional and bilateral arrangements, as well as an international certificate of legal provenance/origin/source.

It recommends that the COP:



- invite all relevant parties to submit their views and information on additional approaches, including codes of ethics, to the Secretariat;
- request the Executive Secretary to further compile information on existing complementary measures and approaches, and implementation experiences, and to disseminate such information through the CHM; and,
- request the ABS Working Group to further consider the issue of additional approaches on the basis of a report prepared by the Executive Secretary.

### **SUB-WORKING GROUP II**

**COMPLIANCE MEASURES FOR PIC AND MAT:** SWG-II delegates discussed compliance measures for PIC and MAT from Tuesday to Thursday.

On Tuesday, the Secretariat introduced documents on compliance measures for PIC and MAT (UNEP/CBD/WG-ABS/2/2 Section IV), including IPRs (UNEP/CBD/WG-ABS/2/3 and INF/2). WIPO presented its technical study on disclosure requirements related to genetic resources and traditional knowledge (UNEP/CBD/WG-ABS/2/INF/4), stressing the need for collaboration between the CBD and WIPO's IGC.

Barbados drew attention to import/export regulations based on the experience of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The LMMC supported an internationally recognized certificate of legal provenance. The FAO noted discussions on compliance within the ITPGR framework, and suggested that delegates identify the ITPGR's Multilateral System as an origin of genetic resources, in any system of declaration of country of origin. The EU described measures on: a network of ABS focal points; corporate social responsibility; consideration of disclosure of origin in patent legislation; and discussions on a stand-alone disclosure requirement. Canada called for more information on compliance measures, and the UK on implementation of CBD Article 15 (Access to Genetic Resources).

Care Earth India stressed the need for PIC of local communities, and Friends of the Earth International stated that communities must hold control over their resources. The IIFB suggested establishing an indigenous experts' committee on ABS.

On Wednesday, SWG-II Chair Verma presented a Chair's text on compliance measures. Colombia and Brazil said compliance measures should address not only PIC and MAT, but also national legislation. Colombia proposed referring to monitoring activities and access to justice in case of breach of user country legislation. The EU stressed ensuring consistency with CBD language, proposed recognizing written or oral traditional knowledge as prior art in patent law, and recommended requesting the Executive Secretary to undertake further analysis of existing practices and trends regarding commercial and other utilization of genetic resources and benefit generation.

Mexico and Brazil noted that the suggested international certificate of legal provenance differs from a certificate of legal origin. The EU proposed retaining the terms "disclosure of origin/source/legal provenance," to allow for consistency with language agreed upon in SWG-I.

While Colombia and Brazil stressed the need to refer to the PIC of the country of origin, rather than of the provider Party, the EU drew attention to CBD Article 2 (Use of Terms) referring to Parties providing genetic resources. Chair Verma said the CBD definition covers countries of origin.

Regarding incentive measures to encourage users to comply with PIC and MAT, Brazil suggested referring to certification schemes, and the EU insisted that certification schemes be voluntary.

On other compliance measures, Brazil and Canada opposed language on the development of contractual agreements. The EU, opposed by Jordan, suggested that contractual agreements apply to different user groups and different genetic resources.

Delegates debated language on recognizing written or oral traditional knowledge as prior art, without reaching agreement. Brazil supported the reference, while Australia, Canada, Switzerland and Japan opposed it, noting that the issue does not relate to compliance with PIC.

Regarding language inviting Parties to facilitate PIC of indigenous and local communities, Canada supported PIC required by national legislation. The IIFB recalled that COP decision V/16 requires Parties to guarantee local and indigenous communities' rights over their traditional knowledge and establish national mechanisms in accordance with customary law.

Switzerland suggested that the ABS Working Group take into account discussions in relevant fora when considering issues relating to disclosure of country of origin. Australia proposed, and delegates agreed, to include language on measures which preserve and promote legal certainty for users regarding access conditions.

Language requesting the ABS Working Group to consider issues relating to disclosure of origin in IPR applications remained bracketed.

On Thursday, delegates considered a conference room paper (CRP), which reflected Wednesday's discussions. Mexico presented a proposal resulting from informal consultations, on: cooperation with WIPO; an international certificate of origin/source/legal provenance; and disclosure of origin. Regarding cooperation with WIPO, Brazil stressed that addressing biodiversity-related IPRs lies within the CBD's mandate. Chair Verma suggested referring to COP decision VI/20 (Cooperation with other organizations, initiatives and conventions), which recognizes the CBD's leading role in biodiversity issues.

Regarding bracketed references to the PIC of, or benefit-sharing with, Contracting Parties providing genetic resources, Brazil supported reference to countries of origin. Others objected, highlighting relevant CBD language and definitions. Delegates agreed on compromise language referring to the PIC of Contracting Parties, including countries of origin, in accordance with CBD Articles 2 (Definitions) and 15.3 (genetic resources provided by a Contracting Party), and indigenous and local communities providing associated traditional knowledge.

On incentive measures to encourage users to comply with national legislation, delegates agreed to reference voluntary certification schemes. Delegates also agreed on language inviting Parties to recognize that written or oral traditional knowledge should be considered as prior art. Brackets remained regarding: the ABS Working Group addressing issues related to disclosure of origin





and an international certificate of origin/source/legal provenance, and transmitting the results to WIPO; and inviting WIPO to address the interrelation between access and disclosure requirements in IPR applications. SWG-II approved the CRP as amended and bracketed.

On Friday, the closing Plenary adopted the final recommendation with a minor modification and the remaining brackets.

**Recommendation:** In the final text (UNEP/CBD/WG-ABS/2/L.3), the Working Group notes relevant provisions of the Convention, national and regional initiatives, and ongoing activities in WIPO, the WTO TRIPs Council and the FAO Commission on Genetic Resources for Food and Agriculture. It recommends that COP-7 invite Parties to:

- continue taking measures to support compliance with PIC and MAT, including information exchange between users and providers, incentive measures to encourage users to comply with national legislation, contractual agreements, aspects related to import/export of genetic resources, access to justice, administrative and judicial remedies and monitoring;
- recognize that written or oral traditional knowledge may constitute prior art; and
- establish national mechanisms to ensure compliance, when required by domestic law, with the PIC of indigenous and local communities.

It requests the Executive Secretary to gather information, undertake further analysis and make the information available at the Working Group's next meeting, regarding, *inter alia*: measures to ensure compliance with national legislation, PIC and MAT; existing measures and international legal instruments; the extent and level of unauthorized access and misappropriation of genetic resources; national and international remedies regarding non-compliance; and measures to promote legal certainty for users over the conditions of access and use.

Brackets remain regarding:

- a request that the ABS Working Group address issues related to an international certificate of origin/source/legal provenance;
- a request that the ABS Working Group identify issues related to the disclosure of origin of genetic resources and traditional knowledge in IPR applications, and transmit the results to WIPO;
- an invitation to WIPO to address the interrelation of access and disclosure requirements in IPR applications, while recognizing the leading role of the CBD in international biodiversity issues, and prepare a report for submission to CBD COP-8; and
- a preambular reference noting the extended mandate of WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

**CAPACITY BUILDING FOR ABS:** SWG-II delegates discussed capacity building on Tuesday and Thursday.

On Tuesday afternoon, the Secretariat introduced the document on capacity building for the implementation of the Bonn Guidelines (UNEP/CBD/WG-ABS/2/2 Section V) and the report of the Expert Workshop, including a draft action plan (UNEP/CBD/ABS/EW-CB/1/3).

The EU stressed the need for synergies and coordination with initiatives of indigenous and local communities. The Global Environment Facility (GEF) emphasized that funding for capacity-building projects will be made available. Noting that no responsibilities or measures are identified in the draft, Colombia, Brazil and Senegal asked that it be referred to as "guidelines" rather than "action plan."

While Brazil proposed extending discussions on capacity building to include the international ABS regime, Senegal and Niger stressed that this would postpone action on capacity building. China suggested including experience-sharing, long-term planning, training and education. Pakistan emphasized capacity building for local and regional institutions and, with Yemen, stressed links with the implementation of the Biosafety Protocol.

Canada, supported by the IIFB, highlighted that assessment, inventory and monitoring of genetic resources and traditional knowledge should be upon invitation by indigenous people. Argentina and Mexico said the action plan lacks focus on implementation in developing countries. Norway reported on the Trondheim Conference on technology transfer and capacity building, held in June 2003. The UN University highlighted the importance of coordinated international capacity-building programmes to develop national access laws and facilitate contract negotiations.

On Thursday, Chair Verma presented a Chair's text. Delegates agreed that implementing an international ABS regime could require additional capacity building. On elements to be considered when reviewing the draft action plan, Brazil suggested language on taking into consideration national legislation. The EU stressed identification of responsibilities, needs and contributions of various key actors. Delegates agreed with Australia's suggestion to add a paragraph on capacity building to identify opportunities for benefits that promote the conservation and development of new and existing sustainable uses of biodiversity. Delegates also included a preambular reference to the draft work programme on technology transfer agreed upon at the ninth meeting of the Subsidiary Body on Scientific, Technical and Technological Advice, as suggested by the EU.

The GEF clarified that projects should be country-driven and based on national priorities. Rejecting a proposal by the African Group to refer specifically to biotechnology, delegates agreed on language on capacity building regarding technology transfer to enable provider countries to participate in benefit-sharing arrangements when granting access permits. SWG-II approved the text as amended.

On Friday, the closing Plenary adopted the final recommendation without amendment.

**Recommendation:** In the final text (UNEP/CBD/WG-ABS/2/L.2), the Working Group recommends that COP-7 take note of, and further review, the draft action plan on capacity building for ABS, taking into consideration a number of elements, including:

- the concerns and prior approval of indigenous and local communities regarding inventories of traditional knowledge and capacity-building activities;
- coordination with relevant programmes and action plans; and
- capacity building to identify opportunities for biodiversity conservation and the development of new and existing sustainable uses of biodiversity.



The Working Group also recommends that COP-7:

- reiterate its guidance to the GEF to provide financial resources for country-driven projects;
- urge Parties to provide financial and technical assistance;
- consider further ways and means of involving other relevant funding bodies;
- encourage Parties to provide for the full and effective participation of indigenous and local communities; and,
- request measures to facilitate information-exchange through the CHM.

### **CLOSING PLENARY**

On Friday morning, ABS Working Group Chair Hooegeven opened the closing Plenary. SWG-I Chair Verleye and SWG-II Chair Verma presented their sub-working groups' reports. Delegates adopted the report of SWG-I (UNEP/CBD/WG-ABS/2/L.1/Add.1) with a minor amendment, and the report of SWG-II (UNEP/CBD/WG-ABS/2/L.1/Add.2) without amendment. Switzerland noted that evening sub-working groups' sessions were held without interpretation, and requested the Bureau to provide information on the availability of interpretation for future meetings. Rapporteur Diann Black Layne presented the draft report of the meeting (UNEP/CBD/WG-ABS/2/L.1), which was adopted with an amendment, proposed by Mexico, stating that the Working Group identified a clear need for an international ABS regime.

Uganda, on behalf of the African Group, Mexico on behalf of the LMMC, the EU, Nepal, on behalf of the Asian Group, Egypt, Lithuania, Jordan, Palau, Canada and Colombia expressed their appreciation and gratitude to the organizers of the meeting, highlighting progress made and expressing hope that the fruitful negotiations on an international ABS regime will continue at COP-7. Malaysia invited delegates to COP-7.

The US raised concern that many recommendations are not consistent with CBD language, such as references to, *inter alia*: countries of origin; derivatives and products; and the modalities of a certificate of origin. The IIFB called for a code of ethics on ABS and recognition of indigenous communities' right to deny access to genetic resources and traditional knowledge for commercial use. An NGO coalition representative noted the lack of clear commitment to a legally binding international regime.

CBD Executive Secretary Zedan expressed his appreciation for the work done towards the implementation of the CBD's third objective. Working Group Chair Hooegeven thanked participants and organizers, and closed the meeting at 1:45 pm.

### **A BRIEF ANALYSIS OF THE MEETING**

Delegates at the second meeting of the Working Group on Access and Benefit-sharing (ABS) of the Convention on Biodiversity (CBD) certainly did not foresee an easy ride upon arrival in Montreal. However, discussions on an international ABS regime, as mandated by the World Summit on Sustainable Development (WSSD), and compliance measures proved trickier than expected.

The Working Group was faced with an unfavorable context, including the as yet limited implementation of the Bonn Guidelines, ongoing ABS-related work in other fora, and many Parties' high, and sometimes misled, expectations that negotiations for an international regime would begin at this meeting. The meeting's

outcomes may appear to reflect the lowest common denominator, with a heavily bracketed recommendation on the international ABS regime, and mere calls for further work on use of terms and other approaches to implementation of ABS-related provisions. Nevertheless, small but concrete steps were made in the areas of capacity building, compliance measures and, to some extent, the international regime for ABS. One significant aspect of the meeting was that it set the tone for COP-7 and confirmed the negotiating dynamics between the Group of Like-Minded Megadiverse Countries (LMMC) and the European Union (EU).

This analysis will focus on discussions on the international ABS regime and compliance measures, and will make an attempt to chart a map for COP-7 and beyond.

### **SHARING OF VIEWS - FIRST STEPS TOWARDS AN INTERNATIONAL REGIME FOR ACCESS AND SHARING OF BENEFITS**

Since its adoption by the WSSD, the mandate to negotiate an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources within the CBD framework, has been well received by Parties. The mandate was expanded by the Inter-Sessional Meeting on the Multi-Year Programme of Work of the COP up to 2010 (MYPOW) in March 2003, to also include access to genetic resources.

Although, from the outset, the MYPOW's mandate to the ABS Working Group to "consider the process, nature, scope, elements and modalities of an international regime on access to genetic resources and benefit-sharing" and provide advice to COP-7 was clear, several delegates came to Montreal ready to start negotiating the regime. While merely delineating the parameters for the negotiations left some delegates frustrated, neither the LMMC nor the EU appeared ready to let go of their share of the pie. EU countries have prioritized the implementation of the Bonn Guidelines, and were eager to hear progress reports on their implementation, and address compliance measures. Yet, several delegates were frustrated by dwelling on implementation experience. They perceived this as an unnecessary delay of, and a blow to, discussions on the yet-to-be developed international ABS regime, remarking that COP-7's heavy agenda will leave little time for in-depth discussions on the issue. The LMMC and, to a lesser extent, the African Group, proved particularly adamant to get down to business on the international regime, and were determined to redress the balance between access and benefit-sharing. The LMMC's lukewarm reaction to the Bonn Guidelines contrasted with their heated desire to develop a legally binding regime that would not only require the adoption of measures by user and provider countries, promote certification, operationalize benefit-sharing, and ensure the international respect of national sovereignty over natural resources, but also address derivatives and include dispute settlement mechanisms. Mandating the ABS Working Group to negotiate the regime was one of the few areas of agreement.

Ultimately, whatever the outcome of the debate in Kuala Lumpur, an international regime can, at best, set minimum standards, leaving countries the leeway to adopt stricter domestic measures. Placed by the WSSD under the aegis of sustainable development, ABS is now recognized as a tool for poverty alleviation and environmental sustainability through the monetary and,



more importantly, the non-monetary benefits that can be gained in exchange for access to potentially valuable resources. This explains why the benefit-sharing aspect of the regime is the driving force behind many Parties' passionate stance.

In this respect, debates during the week have confirmed that the time has come for the CBD to tackle implementation of its third objective, namely equitable benefit-sharing, and, in doing so, draw upon ongoing work in other fora.

### **THE CHALLENGE OF COMPLYING, THE ART OF COOPERATING**

The role of the World Intellectual Property Organization (WIPO), specifically the work of its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), was arguably the stickiest point of the discussions on measures to ensure compliance with the prior informed consent (PIC) of the provider Party and the mutually agreed terms (MAT) according to which access is granted. With complex issues on the agenda, such as the disclosure of origin of genetic resources and associated traditional knowledge in IPR applications, one could think that CBD delegates would welcome WIPO's expertise. However, there are divergent approaches to IPR issues in various national and regional contexts, ranging from a lack of a requirement to disclose origin to a mandatory requirement, and the relationship between the CBD and bodies addressing IPRs, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) of the World Trade Organization (WTO), remains unclear. As a result, many developing country participants objected to strengthening collaboration with WIPO. The same delegates made sure that the CBD's leading role was reflected in the text, ensuring further discussion of ABS-related disclosure requirements in an environmental, rather than an IPR forum. Expressing concerns that their interests would not be adequately addressed in the confines of an IPR context, they bracketed all references to WIPO. The recently renewed but unclear mandate of WIPO's IGC, as well as the current state of discussions in IPR-related bodies creates uncertainty and can only add to these concerns.

Nonetheless addressing unauthorized access requires not only compliance with PIC and MAT, but also readiness to reconsider fundamental requirements of national and international IPR systems. Action is required in both environmental and IPR arenas. To that effect, the Swiss proposal to amend WIPO's Patent Cooperation Treaty allowing for an enhanced disclosure requirement may have an impact on the ABS discussions under the CBD, by promoting harmonization across the two fora. At the same time, the European Community's forthcoming communication aiming to initiate a dialogue, within the EU, on the possibility of a mandatory disclosure requirement in patent applications was lauded by NGOs, as it indicates readiness to reconsider crucial issues related to both IPRs and ABS, and could possibly signal a major policy shift.

### **THE START OF A LONG WINDING ROAD**

The closing Plenary's cheerful atmosphere and the round of applause that greeted the adoption of the recommendation on the international regime on ABS bear testimony to the satisfaction of delegates at the meeting. However, implementing the Bonn Guidelines is proving difficult enough, and engaging in negotiations for

an international ABS regime will certainly prove to be challenging. Indeed, this will require building upon limited experience with ABS and, most importantly, tackling complex issues that arguably lie within other fora's mandates, including WIPO and the WTO. Reiteration of the WSSD mandate by the UN General Assembly has increased pressure on CBD Parties to negotiate an international ABS regime, despite some Parties' prior reluctance to do so. Considering the constructive spirit that has prevailed so far, and recalling the biosafety experience, one cannot but hope that COP-7 will live up to expectations, and avoid leaving CBD's third objective by the wayside.

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

#### **THIRD MEETING OF THE *AD HOC* OPEN-ENDED INTER-SESSIONAL WORKING GROUP ON CBD**

**ARTICLE 8(J):** This meeting begins today and will be held through 12 December 2003, in Montreal, Canada. The meeting will review progress in the implementation of the work programme on Article 8(j) and related provisions, and the integration of relevant tasks of the work programme into the thematic areas of the CBD. The Working Group will also consider a composite report on the status and trends regarding the knowledge, innovations and practices of indigenous and local communities, and draft guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. Other topics for discussion include participatory and communication mechanisms for the effective involvement of indigenous and local communities in matters related to the objectives of Article 8(j), and elements for a *sui generis* system for the protection of indigenous and local communities' knowledge, innovations and practices.

**Opening Ceremony:** An opening ceremony, performed by the Mohawk community, will be held at 9:30 am outside the Plenary Hall of the International Civil Aviation Organization.

**Plenary:** Plenary will convene at 10:00 am to address organizational matters and hear progress reports on the implementation of the programme of work on Article 8(j), and the integration of relevant tasks of the work programme into the thematic areas of the CBD.

**Sub-Working Group I:** SWG-I will meet at 3:00 pm in Room I to start considering the composite report on the status and trends.

**Sub-Working Group II:** SWG-II will meet at 3:00 pm in Room II to begin discussions on *sui generis* systems for the protection of the knowledge, innovations and practices of indigenous and local communities.

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