



## ABS-3 HIGHLIGHTS: TUESDAY, 15 FEBRUARY 2005

Delegates to the third meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met in two sub-working groups throughout the day. Sub-Working Group I (SWG-I) initiated discussions on an international regime on ABS. Sub-Working Group II (SWG-II) addressed: the use of terms; other approaches to complement the Bonn Guidelines; measures to support compliance with prior informed consent (PIC) and mutually agreed terms (MAT); and options for indicators for ABS.

### SUB-WORKING GROUP I

**INTERNATIONAL REGIME:** The Secretariat presented an overview of existing international instruments and analysis of gaps (UNEP/CBD/WG-ABS/3/2), and views on the international regime submitted by Parties and stakeholders (UNEP/CBD/WG-ABS/3/3).

**Scope:** The Netherlands, on behalf of the EU, stated that the regime should comprise multiple instruments at different levels and, with NEW ZEALAND, NORWAY, CANADA and the REPUBLIC OF KOREA, supported completing a gap analysis as a prerequisite for defining the scope. Ethiopia, on behalf of the AFRICAN GROUP, opposed, with MALAYSIA saying that calls for further gap analysis are an attempt to delay discussions.

The AFRICAN GROUP and India, on behalf of the LIKE-MINDED MEGADIVERSE COUNTRIES (LMMC), stated that the scope is defined by Decision VII/19 on ABS.

The LMMC and EL SALVADOR stressed that the international regime must be legally binding and reinforce national legislation on access. They said the scope should include access to genetic resources, fair and equitable sharing of benefits arising from the use of genetic resources and their derivatives, and the protection of associated traditional knowledge. COSTA RICA suggested addressing the relation with other instruments, such as the International Treaty on Plant Genetic Resources for Food and Agriculture. PERU called for synergies and cooperation with the World Trade Organization, the World Intellectual Property Organization (WIPO) and the Food and Agriculture Organization.

The PHILIPPINES said the scope should cover all activities leading to commercial use. HAITI and TANZANIA proposed that the regime cover all biodiversity elements within the CBD jurisdictional scope. TANZANIA said it should ensure that benefits reach the poor.

MEXICO called for a focused regime based on a certificate of legal provenance. UKRAINE said that the regime should differentiate between genetic resources and genetic materials of potential value.

NORWAY said the regime should cover user country measures. BOTSWANA said the scope should include breeders' and farmers' rights. The BAHAMAS highlighted that the regime should allow prosecution beyond the limits of national jurisdiction.

The INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY (IIFB) emphasized human rights concerns and, with COSTA RICA, the need to consider the outcomes of the Working Group on Article 8(j).

SRI LANKA requested that the scope include national sovereignty, capacity building, and user and supplier commitments. SOUTH AFRICA underlined that a regime should ensure sustainable investments in biodiversity use, local conservation and poverty alleviation.

**Objectives:** SWITZERLAND proposed grouping the elements annexed to Decision VII/19 into clusters. The LMMC, EGYPT and GHANA said the regime should; prevent the continued misappropriation and misuse of genetic resources and their derivatives; ensure that benefits flow to countries of origin; protect the rights of indigenous and local communities over traditional knowledge; and reinforce national legislation. UGANDA said the regime should contribute to the Millennium Development Goals, particularly poverty eradication. The AFRICAN GROUP and FIJI, said the regime should consider rights and obligations of both users and providers, including countries of origin, countries where users reside, and indigenous and local communities.

The EU and CANADA stressed the need for an analysis of gaps and other instruments that relate to benefit-sharing. BOTSWANA, BRAZIL, MALAYSIA, HAITI, UGANDA, EGYPT and SOUTH AFRICA underlined that benefit-sharing is not addressed adequately in current international instruments. SOUTH AFRICA added that some existing instruments even undermine these objectives.

The PHILIPPINES, PALAU, COSTA RICA, PERU, NORWAY and the UN UNIVERSITY (UNU) said that the objective should include compliance and enforcement at the international level in support of national legislation. PERU called for rapid alert systems and consultation mechanisms for patent offices.

BOTSWANA noted the lack of a rights-based approach to benefit-sharing by indigenous and local communities, and the UN PERMANENT FORUM ON INDIGENOUS ISSUES said the regime should include benefit-sharing with indigenous peoples for the use of genetic resources, derivatives and products.

**Elements:** Delegates discussed how to structure the deliberations on elements, with some favoring prioritization and others clustering. HAITI, supported by many, suggested compiling country proposals on additional elements for further discussion. Delegates proposed measures to: prevent non-authorized use of genetic resources, their derivatives and



associated traditional knowledge; ensure compliance with national regulations for ABS, PIC, MAT and the protection of the rights of indigenous and local communities; mobilize resources for implementation, including capacity building; ensure the disclosure of origin/source/legal provenance in patent applications; and guarantee technology transfer to the country of origin. The EU and NORWAY suggested measures for collaborative research and environmentally sound uses of biodiversity. The INDIGENOUS WOMEN'S NETWORK ON BIODIVERSITY suggested measures to protect the rights of women as holders and protectors of genetic resources. Co-Chair Sem Shikongo (Namibia) said a co-Chairs' text will be prepared.

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

**USE OF TERMS:** The Secretariat introduced a document on the use of terms, definitions and/or glossary (UNEP/CBD/WG-ABS/3/4). Many said the discussion was premature, pending the outcome of deliberations on the international regime, and opposed the establishment of an expert group. BRAZIL and the GAMBIA underscored that definitions agreed under the CBD should not substitute those existing at the national level. COLOMBIA and LIBERIA cautioned against blindly importing definitions from other agreements. SWG-II co-Chair Berth Ivars (Norway) said the Secretariat will continue compiling information on existing national definitions.

**OTHER APPROACHES:** The Secretariat introduced a document on other approaches, including an international certificate of origin/source/legal provenance (UNEP/CBD/WG-ABS/3/5).

Regarding national measures to support compliance with PIC, TURKEY urged Parties to ensure full participation of provider countries in research and development activities. The PHILIPPINES outlined national approaches, including indigenous community protocols based on free PIC, and measures taken by local governments. SWITZERLAND drew attention to the ABS Management Tool Project, which is applicable to all stages of genetic resource use and is intended to provide guidance to both providers and users.

MEXICO called for an in-depth technical analysis for designing a practical and cost-effective certificate. The LMMC said the certificate should be a standardized code accompanying biological material and its derivatives. BRAZIL said the certificate should ensure that access complies with national legislation of the country of origin. COLOMBIA said it should serve the objectives of the international regime and support benefit-sharing and, with MALAYSIA, underscored the need for clarification of terms.

The EU said that a certification system should be accommodated within intellectual property rights (IPR) law, and be flexible, cost-effective and realistic. JAPAN called for further considering cost-effectiveness and analyzing Parties' views. NEW ZEALAND and CANADA supported further work on the system's functionality, effectiveness, viability and cost, with CANADA calling for consultations with indigenous communities, stakeholders and industry sectors. NORWAY noted that a certificate of origin could facilitate enforcement of disclosure requirements in the patent application process. The UNU drew attention to its study on a certificate of origin (UNEP/CBD/WG-ABS/3/INF/5).

The IIFB expressed reservations regarding certification of traditional knowledge and stressed that national authorities should not have the right to regulate access to indigenous peoples' traditional knowledge without their free PIC. The LMMC emphasized the importance of involving and empowering indigenous and local communities in PIC negotiations. MEXICO added that traditional knowledge should not be part of the initial concept of a certificate.

Co-Chair Ivars acknowledged a general call for further elaboration of the concept of a certificate.

**MEASURES FOR COMPLIANCE WITH PIC AND MAT:** The Secretariat introduced an analysis of measures to ensure compliance with PIC and MAT (UNEP/CBD/WG-

ABS/3/5). SWITZERLAND outlined its proposal to amend WIPO's Patent Cooperation Treaty. Reporting on amendments to its patent law, NORWAY noted that national measures are not sufficient to address the issue.

The EU stressed the need for information on the implementation of the Bonn Guidelines by provider countries. JAPAN and CANADA called for further analysis on the extent of biopiracy. JAPAN suggested deferring discussions on mandatory disclosure requirements pending publication of the WIPO report. Stressing that CBD and the TRIPS Agreement are mutually supportive, AUSTRALIA said measures should be easy to implement and have minimal impact on current IPR systems. The US stated that disclosure requirements in the patent system do not guarantee benefit-sharing, while a contract between the user and the provider does, and cautioned against duplicating ongoing work under WIPO.

LIBERIA and others cautioned against using principles based on WIPO agreements, and stressed considering codes of conduct to support compliance with MAT. THAILAND urged sharing of experiences on PIC and MAT implementation through the Clearing-House Mechanism. BRAZIL and the THIRD WORLD NETWORK called for studying developing country proposals on disclosure requirements in the TRIPS Council. The IIFB emphasized indigenous peoples' right to free PIC and called for creating community structures to support it.

Co-Chair Ivars said a draft recommendation will be prepared.

**INDICATORS FOR ABS:** The Secretariat introduced possible options for indicators for ABS, in the framework of the evaluation of progress in the implementation of the Strategic Plan (UNEP/CBD/WG-ABS/3/6). TURKEY, supported by GABON and LIBERIA, opposed using the number of patents as an indicator. The EU favored focusing on process-oriented indicators and requested the Secretariat to prepare a document based on Parties' submissions for consideration at ABS-4. MALAYSIA and the IIFB suggested consideration of both process- and outcome-oriented indicators. CHINA and the GAMBIA stressed the need to include countries' capacity-building level as an indicator, and THAILAND urged sharing information on developing national ABS strategies. LIBERIA and BRAZIL opposed including an indicator on "foreign" users, saying that the legal framework should not be discriminatory.

BRAZIL proposed several possible outcome-oriented indicators, including the number of: accessions made with PIC; authorized access permits; and technologies that use genetic resources. SOUTH AFRICA, supported by COLOMBIA, highlighted specific indicators for benefit-sharing, and proposed including the number of benefit-sharing agreements, collaborative research activities, and awareness raising programmes, as possible indicators.

CANADA suggested that the development of indicators in the ABS context not be considered at this stage. The EU and BRAZIL proposed that Parties provide their views and information on possible options for indicators for ABS to the Secretariat prior to ABS-4.

MEXICO and COLOMBIA drew attention to the need for further elaboration of the goal related to benefit-sharing in the framework of the 2010 target, discussed during SBSTTA-10.

#### **IN THE CORRIDORS**

SWG-I delegates struggled to come to grips with the analysis of gaps in existing international instruments and the objective of ABS negotiations. One delegate referred to the gap analysis as "analysis paralysis," while another suggested that it might be a matter of gaps in common understanding rather than uncertainty regarding the gaps in the international legal system. Several noted, however, that the co-Chairs' text to be presented on Wednesday may trigger intense, but hopefully fruitful, negotiations.

SWG-II, on the other hand, impressed many with expeditious consideration of all agenda items, leaving some wondering whether this signaled extreme efficiency or, to some extent, lack of interest in issues beyond the ABS regime.