

**SUMMARY OF THE FOURTH MEETING OF THE WORKING GROUP ON ACCESS AND BENEFIT-SHARING OF THE CONVENTION ON BIOLOGICAL DIVERSITY: 30 JANUARY - 3 FEBRUARY 2006**

The fourth meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met from 30 January to 3 February 2006, in Granada, Spain, immediately following the fourth meeting of the CBD *Ad Hoc* Open-ended Intersessional Working Group on Article 8(j) and related provisions. More than 450 participants attended the meeting, representing governments, UN agencies, intergovernmental and non-governmental organizations, indigenous and local community groups, academia and industry.

The Working Group on ABS was convened to continue negotiations on an international regime on ABS, as mandated by the seventh meeting of the Conference of the Parties (COP-7) to the CBD, in accordance with the terms of reference contained in an annex to Decision VII/19 on ABS. The Working Group also considered: other approaches to complement the Bonn Guidelines on ABS, including an international certificate of origin/source/legal provenance; and measures to support compliance with prior informed consent (PIC) of the party providing genetic resources and mutually agreed terms (MAT) on which access was granted. The Working Group postponed consideration of agenda items on the use of terms and indicators for ABS in the context of evaluation of progress in the implementation of the Convention's Strategic Plan. The recommendations of the Working Group will be submitted to CBD COP-8, to be held from 20-31 March 2006, in Curitiba, Brazil.

The meeting made some progress on the international regime, agreeing on a recommendation to the COP and a draft to serve as the basis for future negotiations. This draft, although bracketed almost in its entirety, contains a structure and core issues that may allow for a more formalized negotiation process to take place at COP-8 and beyond. However, deep divisions remain among the key players on issues such as: the need for a new instrument and whether it should contain legally binding elements; the inclusion of derivatives and products of genetic

resources; disclosure requirements in applications for intellectual property rights (IPRs); and the participation of indigenous and local communities in the ABS negotiations.

**A BRIEF HISTORY OF THE CBD AND ACCESS AND BENEFIT-SHARING**

The CBD, negotiated under the auspices of the UN Environment Programme, was opened for signature on 5 June 1992, and entered into force on 29 December 1993. There are currently 188 parties to the Convention, which 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.

Access to genetic resources, including facilitating access, PIC, MAT and benefit-sharing are addressed by CBD Article 15, with related articles referring to technology access and transfer (Article 16.3), and handling and distribution of benefits of biotechnology (Article 19).

COP-4 (May 1998, Bratislava, Slovakia) decided to establish a regionally balanced expert panel on ABS, whose composition and agenda were discussed at an intersessional meeting on the Operations of the Convention (June 1999, Montreal, Canada).

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The first meeting of the expert panel on ABS (October 1999, San José, Costa Rica) developed a set of recommendations including general conclusions and specific points on PIC, MAT, information needs and capacity building.

**COP-5:** At its fifth meeting (May 2000, Nairobi, Kenya), the COP established the Working Group on ABS to develop guidelines and other approaches on: PIC; MAT; participation of stakeholders; benefit-sharing mechanisms; and the preservation of traditional knowledge.

**ABS EP-2:** The second meeting of the expert panel on ABS (March 2001, Montreal, Canada) addressed user and provider experience in ABS processes; approaches for stakeholder involvement; and complementary options to address ABS within the CBD framework.

**ABS WG-1:** At its first meeting (October 2001, Bonn, Germany), the Working Group on ABS developed the draft Bonn guidelines on ABS and also: 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 the implementation of ABS arrangements.

**COP-6:** At its sixth meeting (April 2002, The Hague, the Netherlands), the COP adopted the Bonn Guidelines on ABS and also considered: other approaches, including capacity building; the role of IPRs in the implementation of ABS arrangements; and the relationship with the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO).

**WSSD:** In the Johannesburg Plan of Implementation, the UN World Summit on Sustainable Development (WSSD) (September 2002, Johannesburg, South Africa) called for negotiation, within the CBD framework, of an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources. The WSSD call was reaffirmed at the 57th session of the UN General Assembly (December 2002, New York) and the 2005 UN World Summit (September 2005, New York).

**MYPOW:** The Open-ended Intersessional Meeting on the Multi-Year Programme of Work for the CBD COP up to 2010 (March 2003, Montreal, Canada) recommended that the ABS Working Group consider the process, nature, scope, elements and modalities of an international regime on ABS.

**ABS WG-2:** At its second meeting (December 2003, Montreal, Canada), the ABS Working Group debated the process, nature, scope, elements and modalities of an international ABS regime, and also considered measures to ensure compliance with PIC and MAT, and capacity building.

**COP-7:** At its seventh meeting (February 2004, Kuala Lumpur, Malaysia), the COP adopted the Action Plan on capacity building for ABS, decided to mandate the ABS Working Group to negotiate an international ABS regime and agreed on the terms of reference for the negotiations.

**ABS WG-3:** At its third meeting (February 2005, Bangkok, Thailand), the ABS Working Group produced a document with several options for the design of an international regime on ABS. It also addressed: additional approaches to complement the Bonn Guidelines on ABS, such as an international certificate of origin/source/legal provenance; measures to ensure compliance with PIC and MAT; and options for indicators for ABS.

## REPORT OF THE MEETING

Suboh Mohd Yassin (Malaysia), on behalf of CBD COP President Dato' Seri Law Hieng Ding, opened the meeting on Monday, calling for significant progress in the negotiations on an international ABS regime before COP-8.

CBD Executive Secretary Ahmed Djoghlaflaf noted that the limited progress in operationalizing the benefit-sharing pillar of the Convention is generating legal uncertainty and impacts on long-term investment. He hoped that the meeting will be a breakthrough in forging a partnership with present and future providers and users of resources, to contribute to poverty eradication, peace and security.

Antonio Serrano, Spain's Secretary-General for Territory and Biodiversity, said a binding international regime on ABS would contribute to biodiversity conservation, poverty eradication and biotechnology development. Noting that the Bonn Guidelines and the gap analysis in existing ABS instruments tabled for the meeting represent a positive first step, he underscored the need to identify the scope and instruments of the future regime.

Delegates then elected Margarita Clemente (Spain) as Working Group Chair; Antonio Matamoros (Ecuador) as Rapporteur; and confirmed the COP Bureau as Bureau of the Working Group. They adopted the meeting's agenda (UNEP/CBD/WG-ABS/4/1) with an amendment to discuss indigenous and local community participation in the ABS regime negotiations. Regarding organization of work (UNEP/CBD/WG-ABS/4/1/Add.1), they agreed that a Committee of the Whole, to be chaired by Working Group Chair Clemente, would negotiate an international regime on ABS, with the understanding that contact or informal groups may be established as appropriate.

Delegates' opening statements focused on an international regime on ABS. Ethiopia, for Africa, stressed the need for a legally binding regime; Austria, on behalf of the European Union, suggested focusing on narrowing down the list of options on the regime developed at ABS-3; and Kiribati, for Asia and the Pacific, stressed the need for a coordination mechanism between the ABS and Article 8(j) Working Groups. Canada, for JUSSCANNZ (Japan, US, Switzerland, Canada, Australia, Norway and New Zealand), expressed their will to work towards a positive outcome; Venezuela, on behalf of the Latin America and Caribbean Group (GRULAC), stressed the regime requires binding elements; and India, for the Like-minded Megadiverse Countries (LMMC), emphasized the role of national legislation on access. The International Indigenous Forum on Biodiversity (IIFB) recommended that the regime reflect international human rights norms.

Then delegates heard the report on the outcomes of the fourth meeting of the Article 8(j) Working Group, as well as reports on the implementation of the Bonn Guidelines. Spain reported on the outcomes of the fourth meeting of the Article 8(j) Working Group. The EU and Norway called for expanding the mandate of the Article 8(j) Advisory Group to contribute to ABS negotiations. Many delegates reported on their national legislation implementing the Bonn Guidelines. Japan highlighted the completion of national guidelines on user measures to support compliance with PIC and MAT. Australia emphasized the importance of non-monetary benefit-sharing, offering to share its experiences in the development of a software-based tool

for registering access to genetic resources. Pakistan highlighted progress in identifying mobile indigenous communities as potential beneficiaries of an ABS regime.

Following the opening plenary, the Committee of the Whole met throughout the week, and a Friends of the Chair group met on Thursday, to negotiate an international regime on ABS. A contact group met on Thursday to address issues related to an international certificate of origin/source/legal provenance, and measures to ensure compliance with PIC and MAT. An informal group addressed the issue of indigenous participation in the negotiations of an ABS regime. The plenary reconvened on Friday afternoon to adopt the recommendations and the report of the meeting. This report summarizes discussions and recommendations on each agenda item.

### **INTERNATIONAL REGIME**

Delegates addressed the international regime on ABS from Monday to Friday, in the Committee of the Whole and in a Friends of the Chair group on Thursday. On Monday, delegates discussed the regime on the basis of ABS Recommendation 3/1, Annex I (UNEP/CBD/WG-ABS/4/2). They then discussed whether to use a proposal by the African Group, in the form of a protocol to the Convention, as a basis for negotiations, agreeing finally to work on the basis of a Chair's text. Chair Clemente presented a Chair's text (UNEP/CBD/WG-ABS/4/CRP.1) on Wednesday and a revised Chair's text (UNEP/CBD/WG-ABS/4/CRP.1/Rev.1) on Thursday, both of which were discussed in the Committee of the Whole and a Friends of the Chair group. On Friday, plenary adopted a recommendation to COP-8, including an annex on a draft international regime.

Deliberations are summarized on the basis of the documents they were held on. Discussions on the certificate of origin and PIC and MAT are included in the relevant sections of this report.

#### **ABS-3 OUTCOME DOCUMENT: General statements:**

The Committee of the Whole discussed elements and objectives of the international regime based on ABS Recommendation 3/1, Annex I, on Monday and Tuesday. On Monday, countries made general statements on their expectations for the regime.

Some countries, including Peru and Mexico, proposed a pragmatic approach, focusing the debate on practical mechanisms to operationalize benefit-sharing and on minimum binding instruments needed to complement the Bonn Guidelines, such as a certificate of origin and measures in user countries. Many developing countries also highlighted the need to include capacity building in the regime, to strengthen national ABS legislation and to prevent biopiracy. Several countries, including Grenada, Indonesia, South Africa and Egypt, supported a binding instrument, while the EU and Costa Rica favored a combination of binding and non-binding elements.

China and Switzerland proposed identifying the needs at the international level based on the completion of the gap analysis initiated at ABS-3. Switzerland also highlighted its proposal to the World Intellectual Property Organization (WIPO) on the determination of origin of genetic resources and traditional knowledge, and the need to work on a certificate of legal provenance. Others, including the EU, Australia and the Republic of Korea, highlighted the need to be consistent with existing international instruments.

**Elements of the regime:** In its preliminary comments on the elements of the regime, the EU stressed that equal attention should be devoted to both access and benefit-sharing including clear, transparent and cost-effective procedures to facilitate access. The EU also highlighted that elements relating to traditional knowledge should respect human rights, and the work of the WIPO on prior art. Norway also proposed access procedures that increase legal certainty on biodiversity uses, defining triggers for benefit-sharing, capacity building and technology transfer.

GRULAC prioritized: capacity building; traditional knowledge protection; financial mechanisms to guarantee the regime's implementation; and a certificate of legal provenance generated by countries of origin. Colombia clarified that while PIC is unilateral, benefit-sharing should not be voluntary but directly related to the conditions of access. Mexico and Costa Rica stated its commitment to facilitating access to genetic resources, while noting that access does not require an international instrument other than for providing certainty on its legal origin.

The LMMC said the regime should implement the CBD objectives and include benefit-sharing, compliance measures, a certificate of legal provenance, traditional knowledge protection, effective implementation and financial mechanisms; with Malaysia cautioning that facilitated access should be subject to the overriding principles of the CBD, including national sovereignty over genetic resources and access for environmentally sound uses. Egypt said that facilitated access must be linked to benefit-sharing on the basis of PIC and MAT, while Burkina Faso cautioned against references to facilitated access, and suggested instead using the CBD language relating to creating conditions to facilitate access to genetic resources. Many developing countries also highlighted that the regime should promote collaborative research, technology transfer, and compliance and enforcement mechanisms.

GRULAC, Uganda and Egypt supported the inclusion of derivatives of genetic resources in the regime, while Australia opposed and the EU suggested further consideration of the issue.

The International Treaty on Plant Genetic for Food and Agriculture (ITPGRFA), the UN Conference on Trade and Development, WIPO, the International Union for the Protection of New Varieties of Plants (UPOV) and WTO reported on developments of relevance.

The IIFB and the UN Permanent Forum on Indigenous Issues (UNPFII) stressed that any instrument on ABS must conform with existing and emerging international law relating to indigenous rights; and that the recognition and protection of such rights should be a cross-cutting issue in the regime. Business representatives stressed that an international regime cannot replace national frameworks.

**Objectives:** Many developing countries proposed that the objectives of the regime should: seek to prevent the misappropriation of genetic resources and their derivatives; facilitate access for environmentally sound uses; support compliance with PIC, MAT and national legislation; protect traditional knowledge; and promote technology transfer, collaborative research and capacity building.

The EU, Australia, Canada and New Zealand prioritized facilitating access to genetic resources. Others supported focusing on the effective implementation of CBD Articles 15 (Access to Genetic Resources) and 8(j) (traditional knowledge) and the three objectives of the Convention; and promoting implementation and compliance, benefit-sharing, user rights and obligations, and rights of indigenous and local communities. Switzerland opposed references to misappropriation, with Japan proposing to create conditions to facilitate access to genetic resources for environmentally sound uses.

**CHAIR'S TEXT:** On Wednesday, Chair Clemente introduced a Chair's text containing sections on objectives, scope, ownership, accessing genetic resources, accessing traditional knowledge, benefit-sharing, certificate of origin, and other measures.

Africa, GRULAC and the LMMC welcomed the document as a starting point for negotiations, with GRULAC stressing international measures that complement national legislation, and identification of the country of origin in IPR applications. The LMMC added compliance with national legislation and mandatory user measures, while many others stressed balance between user and provider measures.

Other developing countries emphasized the importance of capacity building and compliance, technology transfer, access to justice, monitoring, a financial mechanism, training of indigenous and local communities to ensure their effective participation, compliance with PIC and MAT, and a certificate of source/origin/legal provenance. Mexico emphasized legal certainty for users and providers of biodiversity, and Argentina and Colombia called for strengthening the benefit-sharing components in the draft, while Uganda requested more clarity in the administrative structure and role of national authorities.

Noting that their views were not adequately reflected, developed countries expressed their concern that the Chair's text moved too quickly towards a legally binding regime and proposed discussing the scope and nature of the regime, the gap analysis and ensuring consistency with international obligations. China, Australia and Canada also proposed adding a section on "potential elements" and deleting the bracketed reference to a "legally binding" regime in the title of the Chair's text, while the EU stressed that the title must not prejudice the outcomes of negotiations.

Some questioned whether to use the Chair's text or merge it with the options forwarded by ABS-3. Delegates finally agreed to proceed with the Chair's text, without engaging in formal negotiations.

**Ownership:** Many delegates suggested deleting this entire section, arguing that the Bonn Guidelines do not refer to ownership. Others called for retaining it, with some calling for references to the ownership of indigenous and local communities over their genetic resources and associated traditional knowledge. El Salvador suggested refining the language drawing upon the Bonn Guidelines.

**Accessing Genetic Resources:** While some developing countries proposed deleting the entire section on access, Canada stressed that without text on access there will be no agreement on benefit-sharing, and Switzerland and Australia highlighted the need to focus on international measures on access to genetic resources.

Burkina Faso proposed ensuring access without imposing restrictions that run counter to the CBD objectives, and New Zealand opposed a reference to non-discriminatory access, stressing the discretion of countries to grant or deny access. Uganda and others emphasized that access should be subject to PIC of the country of origin in accordance with MAT, and that conditions for the transfer to successive users be determined by the country of origin. El Salvador and Mexico called for international measures to prevent illegal access, while Malaysia opposed a reference to the "facilitation" of access.

**Accessing Traditional Knowledge:** Many countries objected to the title of this section, with some proposing replacing it with "Recognition and protection of traditional knowledge"; and others with "Traditional knowledge associated with genetic resources." Australia opposed referring to the "protection of" traditional knowledge, noting that this is beyond the mandate of the Working Group, while Africa said the regime needs to reflect the provisions of Article 8(j) of the CBD.

Cuba, Peru and Brazil requested additional measures addressing traditional knowledge protection at the international level. Brazil, opposed by Canada, suggested references to compliance with PIC of indigenous and local communities in accordance with Article 8(j) and subject to national legislation, and to indigenous communities' rights to benefit-sharing.

Peru and Malaysia, opposed by Canada and Australia, requested reference to the establishment of *sui generis* systems, with Colombia and IIFB noting that these should be addressed by the Article 8(j) Working Group. Burkina Faso and India requested that all paragraphs in the section refer to elements of the international regime, rather than national legislation. New Zealand and Canada requested time for further consideration.

**Benefit-sharing:** Delegates discussed whether conditions for benefit-sharing should be stipulated primarily in national legislation or under the international regime, with Burkina Faso preferring the international option, New Zealand the national option, and Mexico a mix of both. Mexico and others said a certificate of legal origin could be used as a means to ensure compliance with PIC and MAT, and highlighted the need to explore alternative benefit-sharing obligations in the absence of specific access arrangements. Brazil and others proposed that the international regime facilitate access to, and ensure benefit-sharing from, results of research and development based on genetic resources and derivatives.

Uganda, Côte d'Ivoire, Kenya and Zambia requested prescriptive language on MAT. Delegates also discussed the role of the state in the oversight of MAT arrangements, with Côte d'Ivoire and Venezuela supporting such role, and Canada and Saint Lucia opposing. The IIFB expressed concern about state oversight and approval, noting that indigenous and local communities have the right to freely give or refuse their PIC.

Discussions on references to derivatives ensued, with El Salvador and the Third World Network supporting their inclusion, and Australia, Canada and New Zealand opposing. Namibia also requested stating that the recipient of genetic material shall not apply for IPR protection without the PIC of the provider country, while Australia, Canada and New Zealand opposed references to IPRs.

**Scope:** Canada opposed including equitable sharing of benefits and transfer of derivatives and products in the scope, while Australia proposed limiting the scope to the mandate of the CBD and this Working Group.

**REVISED CHAIR'S TEXT:** On Thursday, Chair Clemente submitted a revised Chair's text. The African Group, the LMMC and GRULAC welcomed the text, stressing their willingness to advance negotiations on an international ABS regime. The EU, Japan, Australia, Canada, New Zealand and Switzerland expressed their concern, noting that many of their submissions were not reflected in the text and insisting on bracketing it in its entirety, while some also stressed that the text should not use prescriptive language and some called for further discussion on the gap analysis.

Chair Clemente then established a Friends of the Chair group to discuss how to proceed with negotiations on the ABS regime, and adjourned the Committee of the Whole to allow for further deliberations in the Friends of the Chair group. On Friday, plenary adopted the document prepared by the Friends of the Chair group as a recommendation to COP-8.

**Recommendation:** In the final recommendation to COP-8, which includes an annex on the international regime on ABS (UNEP/CBD/WG-ABS/4/L.2), the Working Group recommends that COP-8: consider reconvening the Working Group on ABS and determine its work schedule so as to expedite the negotiation of an international regime; and request the Executive Secretary to prepare a final version of the gap analysis.

The annex to the recommendation contains text on an international regime on ABS, which is bracketed almost in its entirety, including sections on:

**Nature:** The agreed text states that the international regime could be composed of one or more instruments within a set of principles, norms and decision-making procedures legally-binding and/or non-binding.

**[Potential] objectives:** The section's bracketed text refers to:

- regulation or facilitation of access to genetic resources for environmentally sound uses;
- establishment of a mechanism to determine legal provenance;
- protecting, preserving or maintaining traditional knowledge and rights of indigenous and local communities subject to national legislations or international law;
- ensuring compliance with PIC in the context of MAT;
- preventing misappropriation and misuse of genetic resources, derivatives and associated traditional knowledge;
- ensuring compliance with PIC of provider countries and of indigenous and local communities;
- ensuring and enforcing the rights and obligations of users of genetic resources;
- ensuring mutual supportiveness with other international instruments; and
- promoting capacity building and technology transfer to developing countries.

**Scope:** The agreed text refers to access to genetic resources and fair and equitable sharing of the monetary and non-monetary benefits arising out of their utilization. The section's bracketed text refers to:

- derivatives and products;
- conditions to facilitate access;

- protection of, or respect for, traditional knowledge, innovations and practices associated to genetic resources;
- an exception for plant genetic resources under the ITPGRFA;
- mutual supportiveness with other relevant international instruments;
- an exception for human genetic resources; and
- compliance with national ABS legislation.

**[Potential] Elements [to be considered for inclusion in the international regime]/Access to genetic resources [and derivatives and products]:** The agreed text states that access procedures shall be clear, simple and transparent and provide legal certainty to different kinds of users and providers of genetic resources. The section also contains bracketed text on:

- sovereign rights of states over their genetic resources and their authority to determine access;
- conditioning access to benefit-sharing arrangements;
- subjecting derivatives and products, or specific uses to PIC;
- restrictions on the transfer of genetic resources by providers that are not countries of origin;
- genetic resources whose country of origin can not be established; and
- conditions for transfer to third parties within MAT.

**[Recognition and protection of] traditional knowledge associated with genetic resources [derivatives and products]:** The agreed text states that the international regime should be developed and implemented in accordance with Article 8(j) of the CBD. Bracketed text refers to:

- *sui generis* models or systems for the protection of traditional knowledge, innovations and practices associated to genetic resources;
- derivatives and products;
- subjecting rights of indigenous and local communities to national law and relevant international law;
- PIC of indigenous and local communities; and
- subjecting ABS arrangements on traditional knowledge to national legislation.

**Fair and equitable benefit-sharing:** The section contains bracketed text on:

- establishing minimum requirements for benefit-sharing in national legislations;
- inclusion of derivatives and products in MAT conditions;
- stipulation of MAT by the competent national authority of the provider country with active involvement of indigenous and local communities;
- inclusion of conditions regarding IPR applications in MAT;
- inclusion of provisions for benefit-sharing through the financial mechanism in the absence of access arrangements;
- beneficiaries of benefit-sharing where countries of origin cannot be identified;
- measures for benefit-sharing related to the results of research and development or technology development;
- differentiation of commercial and non-commercial uses;
- benefit-sharing clauses in MAT;
- directing benefits to the conservation and sustainable use of biodiversity in countries of origin of genetic resources; and
- alternatives to MAT.

**[Disclosure [of [legal provenance][origin][prior informed consent and benefit-sharing]]]:** This section is bracketed in its entirety, and includes text on:

- disclosure of country of origin or source in IPR applications relating to genetic resources derivatives and products and/or traditional knowledge;
- remedies for lack of compliance with disclosure of origin and PIC including IPR revocation, sharing and transfer; and
- sanctions for lack of compliance outside the field of patent law.

**[Certificate of origin][International certificate of [origin/source][legal provenance]]:** This section is bracketed in its entirety, and includes text on:

- establishment of an international certificate of origin/source/legal provenance to be issued by provider countries or countries of origin;
- legal utilization of traditional knowledge;
- derivatives and products;
- use of certificates as evidence of PIC and MAT arrangements, as a precondition for granting IPRs or as measures for complying with disclosure requirements;
- inclusion of the certificate in the international regime on ABS; and
- exploration of characteristics, costs and other implications of international certificates.

**Implementation, monitoring and reporting:** The bracketed text refers to implementation and monitoring measures.

**[Compliance and enforcement]:** This section is bracketed in its entirety and refers to:

- PIC requirements prior to patent applications;
- compliance with the country of origin's legislation on ABS when accessing or using genetic resources;
- compliance with PIC and MAT, including that of the country of origin, providers and indigenous and local communities;
- cooperative procedures and institutional mechanisms;
- measures to prevent misappropriation;
- user measures;
- collaboration among enforcement agencies;
- sanctions for non-compliance with the regime; and
- examples of misappropriation.

**Access to justice:** This section is bracketed in its entirety and refers to measures to facilitate or ensure access to justice by providers and users.

**Dispute settlement mechanism:** This section is bracketed in its entirety and refers to the establishment of a dispute settlement mechanism or the application of the CBD's provisions on dispute settlement.

**Financial mechanism:** This section is bracketed in its entirety and refers to the establishment of a financial mechanism for the international regime.

**Capacity building [and technology transfer]:** This section has agreed text on capacity building in developing countries for the implementation of the regime, and bracketed clauses on technology transfer.

**[Institutional support]:** This section has agreed text on the promotion of sound research using genetic resources and traditional knowledge including taxonomic research, and bracketed text on existing non-legislative international measures that support or promote implementation of Articles 15, 8(j) and the three CBD objectives.

**[Non Parties]:** The final section of the annex contains only a bracketed title, with no further text.

## CERTIFICATE OF ORIGIN/SOURCE/LEGAL PROVENANCE

The certificate of origin/source/legal provenance (UNEP/CBD/WG-ABS/4/4) was addressed in the Committee of the Whole on Tuesday and Wednesday, and in a contact group co-chaired by François Pythoud (Switzerland) and Consolata Kiragu (Kenya) on Thursday. On Friday morning, the Committee was presented with a draft recommendation, including an annexed list of the certificate's potential rationale, needs, objectives, characteristics and implementation challenges. Contact group Co-Chair Kiragu highlighted remaining brackets in the annexed list. The draft recommendation was approved by the Committee with editorial corrections, and adopted by the closing plenary without further amendments.

Discussions initially focused on the nature of the certificate. Mexico, supported by many, said a certificate should provide an international instrument to trace genetic resources across the entire reach of CBD obligations, and have clear triggers to activate disclosure requirements. Norway said a certificate should verify compliance with the CBD and national access legislation. Brazil supported a certificate of legal provenance of genetic resources, derivatives and traditional knowledge issued by the country of origin, in accordance with nationally defined requirements, internationally recognized by the international ABS regime. The EU said an international certificate could be a key component of an international ABS regime, and cautioning against a "one size fits all" certificate, proposed referring to an "internationally recognized" certificate rather than to "international certificates," as agreed in ABS-3. Non-party and industry observers preferred voluntary certification schemes to an international binding one. After informal consultations, delegates agreed to retain references to an "international certificate."

The debate then centered on future steps for the consideration of an international certificate of origin/source/legal provenance. Australia, Japan, New Zealand and the EU prioritized further studies on potential benefits, practical aspects and costs. Mexico, supported by others, suggested convening an *ad hoc* technical expert group (AHTEG), to develop a set of options on features and costs. Norway also highlighted the need for continued discussions on user measures to enforce certification systems. Delegates then debated whether the COP should "decide to establish," or "consider establishing" an AHTEG; and whether to establish an AHTEG or a regionally balanced panel of experts, and its composition and mandate. Several delegates stressed the need for setting a clear timeframe for the AHTEG to report to ABS-5. Delegates eventually agreed to recommend that COP-8 decide to establish a regionally-balanced AHTEG to elaborate possible options for the form and intent, practicability, feasibility and costs of certificates to achieve the objectives of Articles 15 (Access to Genetic Resources) and 8(j) (traditional knowledge).

**Recommendation:** In the recommendation on the international certificate of origin/source/legal provenance (UNEP/CBD/WG-ABS/4/L.3), the Working Group recommends that COP-8:

- decide to establish a regionally balanced AHTEG, consisting of party-nominated experts, to elaborate possible options for the form, intent, practicability, feasibility and costs for achieving the objectives of Articles 15 and 8(j) of an international certificate of origin/source/legal provenance, to report to ABS-5; and

- invite parties, governments, international organizations, indigenous and local communities and relevant stakeholders including the private sector to undertake further work, as an input for the AHTEG, including consideration of certificate models based on the list annexed to the recommendation.

The annex contains a list of: potential rationale, needs and objectives; desirable characteristics/features; and implementation challenges, including costs and legislative implications of an international certificate of origin/source/legal provenance as a possible element of the international regime on ABS. In the annex, text remains bracketed on:

- whether the international certificate may be one means, if required/applicable under national law, to comply with disclosure requirements in IPR applications, or if it could be one means to comply with disclosure requirements in IPR applications, if national legislation so requires;
- minimum checkpoints among the potential features of the international certificate;
- the need for an international legal framework recognizing internationally that certificates issued by countries of origin/provider countries including countries of origin to certify compliance with national access legislation;
- limits of “one size fits all” approaches;
- challenges associated with extracts/derivatives of genetic resources;
- existence of national access and use legislation as a precondition for the operation and enforcement of the certificate system;
- need for practical implementation studies in different countries and sectors; and
- interface with/the exclusion from the proposed certificate requirements of the standard material transfer agreement under the multilateral system of the ITPGRFA.

#### **MEASURES TO ENSURE COMPLIANCE WITH PIC AND MAT**

Delegates discussed measures to ensure compliance with PIC and MAT (UNEP/CBD/WG-ABS/4/5 and INF/1, 2, 5 and 6) from Tuesday to Thursday in the Committee of the Whole and in a contact group on Thursday. The recommendation was approved by the Committee and adopted in plenary on Friday.

During general discussions in the Committee of the Whole, some developed countries highlighted voluntary guidelines and codes of conduct to promote compliance with the Bonn Guidelines and PIC, while many developing countries called for international measures to guarantee compliance with PIC, MAT, national ABS legislation and CBD provisions, and for transparency in patent applications and disclosure of origin. Several GRULAC countries proposed: binding compliance measures; periodic monitoring, including evaluation systems and auditing; and user measures to prevent misappropriation and ensure compliance with PIC of indigenous and local communities and of countries of origin.

The EU and several other delegations reported on their submissions on disclosure of origin in IPR applications to other forums like WIPO and the WTO TRIPS Council. Japan, Switzerland and Thailand, opposed by Colombia and Brazil, preferred discussing disclosure of origin in other forums.

New Zealand requested further studies on the feasibility, cost and practicality of international measures to ensure compliance with PIC and MAT, while Canada noted the need to ensure a common understanding on the implications of PIC for both providers and users of traditional knowledge.

In the contact group, delegates discussed, without reaching consensus, whether the CBD is the appropriate forum to address disclosure of origin in IPR applications. The resulting draft recommendation prepared by the contact group, containing several bracketed sections, was approved without discussion in the Committee of the Whole on Friday morning and adopted in plenary on Friday afternoon.

**Recommendation:** In the recommendation (UNEP/CBD/WG-ABS/4/L.4), the ABS Working Group recommends that COP-8:

- invite parties and relevant stakeholders to continue taking appropriate and practical measures to support compliance with PIC of parties providing genetic resources, including countries of origin, and MAT on which access was granted;
- invite relevant organizations, the list of which remains in brackets, to address and/or continue their work on disclosure requirements in IPR applications, taking into account the need to ensure that this work does not run counter to the CBD’s objectives (the clause also contains a bracketed reference to such work not prejudging the negotiations of the international ABS regime); and
- request ABS-5 to further consider measures to ensure compliance with PIC and MAT, including disclosure of origin/source/legal provenance.

A paragraph requesting the Executive Secretary to renew CBD’s request for accreditation as an observer at the WTO TRIPS Council remains in brackets. The recommendation also contains bracketed references to:

- derivatives, products and associated traditional knowledge;
- the terms of Article 16.2 (facilitated access) and 16.5 (patents and IPRs) and COP Decision VII/19 D (international regime on ABS);
- disclosure being one of the possible elements of an international regime on ABS; and
- discussions on disclosure of origin in IPR applications in the framework of the WTO Doha round.

#### **USE OF TERMS**

On Friday morning, Chair Clemente introduced the agenda item on use of terms, definitions and/or glossary (UNEP/CBD/WG-ABS/4/7). She suggested, and delegates agreed, that the Working Group defer consideration of the issue until the negotiation of an ABS regime reaches a more advanced stage. Plenary confirmed such postponement, which will be reflected in the report of the meeting.

#### **INDICATORS FOR ABS**

On Friday morning, Chair Clemente introduced the agenda item on indicators for ABS in the context of evaluation of progress in the implementation of the Strategic Plan (UNEP/CBD/WG-ABS/4/6). She proposed, and delegates agreed, that the Working Group postpone consideration of the issue to allow for further submission of information by parties. Plenary adopted a recommendation on Friday afternoon.

**Recommendation:** In the recommendation (UNEP/CBD/WG-ABS/4/L.5), the Working Group recommends that COP-8: request ABS-5 to further address the issue; and invite parties and others to submit their views to the Executive Secretary, for a compilation to be made available at ABS-5.

### **CLOSING PLENARY**

On Friday afternoon, Working Group Chair Clemente convened the closing plenary session.

Norway reported that informal consultations on the participation of indigenous and local communities reached an agreement that participation should be strengthened within the existing rules of procedure. The EU proposed that the Working Group adopt a recommendation on continuing to support indigenous and local participation through, among others, urging the Working Group Chair to invite indigenous representatives to participate in informal groups; and providing them with timely and adequate opportunities to participate in the debate. The Secretariat clarified the rules of procedure with regard to submission of proposals, noting that proposals should be submitted one day before their consideration and be available in all CBD working languages, unless there is a consensus on the proposal or it is a matter of urgency. The EU said the proposal was tabled as a matter of urgency. Chair Clemente suspended the meeting to allow for consultations on the EU proposal on indigenous participation.

When the plenary resumed, the IIFB welcomed the EU proposal, and called on parties to reaffirm the mandate given to the Article 8(j) Working Group in COP Decision VII/19 D, which calls for collaboration between the Article 8(j) and ABS Working Groups in the elaboration of an international regime on ABS. Argentina, Venezuela and Mexico objected to the unilateral and last-minute submission of the EU proposal, with Mexico reiterating its support to include indigenous representatives on national delegations. Supporting the EU proposal, Norway expressed disappointment at the lack of agreement on indigenous participation in the negotiations of an international ABS regime. The EU explained that the proposal builds upon ABS-3 discussions, and requested to have it reflected verbatim in the report of the meeting and considered at COP-8.

Canada then requested verbatim inclusion in the report of another proposal for COP-8 to: continue to support the participation of mandated indigenous communities during the negotiations of the regime on issues related to genetic resources and associated traditional knowledge, in accordance with the rules of procedure; encourage increased participation of indigenous representatives in official delegations; request Chairs to allow for indigenous representatives' interventions on issues of specific concern to their communities; and request the Secretariat to provide administrative support to indigenous representatives subject to availability of funds. The IIFB requested that their proposal on this matter, presented at ABS-3, be also reconsidered at COP-8.

Rapporteur Matamoros submitted the report of the meeting (UNEP/CBD/WG-ABS/4/L.1), which was adopted with minor editorial amendments. Delegates also adopted a tribute to the Government and people of Spain (UNEP/CBD/WG-ABS/4/L.6) by acclamation.

CBD Executive Secretary Ahmed Djoghlaflaf asked delegates to observe a minute of silence for those who had perished in the naval disaster in the Red Sea. Recalling his message to the citizens of the world to keep up the promise of reversing the rate of biodiversity loss by 2010, he urged delegates to show determination to advance CBD implementation.

Brazil said the meeting produced a well-organized and structured basis to fulfill the mandate of the Working Group to negotiate an international regime on ABS. Commending the work of Chair Clemente and the opening address by Spain's Minister of Environment Cristina Narbona during the Article 8(j) Working Group meeting the previous week, he said Spain's voice has been crucial in moving the ABS process forward.

India, on behalf of the LMMC, expressed its satisfaction with the outcome document, noting it could be used as a basis for negotiations. Mongolia, for Asia and the Pacific, expressed disappointment with those parties who questioned the appropriateness of the mandate of the Working Group to negotiate an international regime on ABS, and called for closer linkages between the Article 8(j) and ABS Working Groups. The Russian Federation lamented the absence of parties from Central and Eastern Europe due to lack of financial resources. The EU expressed disappointment with the rejection of its proposal on indigenous participation, and said it will pursue its attempt at COP-8. Venezuela, for GRULAC, highlighted adoption of a draft document for negotiation as a major step forward in the negotiation of an international ABS regime. Switzerland drew attention to the first International Technical Conference on Animal Genetic Resources to be held in Interlaken, Switzerland, in September 2007. The US called for on-the-ground implementation of all the CBD goals and for partnerships among stakeholders. The IIFB lamented their limited participation in the ABS Working Group, stressing that the outcome document on the international regime does not reflect the recognition of indigenous peoples' rights over their lands, natural resources and traditional knowledge. The International Chamber of Commerce expressed the private sector's support for a future ABS environment to meet the needs of all stakeholders.

Chair Clemente thanked delegates for the fruitful discussions, noting that bracketed text is useful to highlight options that need further reflection. She gavelled the meeting to a close at 6:57 pm.

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

Delegates to ABS-4 came to Granada equipped with new information resulting from the gap analysis mandated by ABS-3 in Bangkok, and yet burdened with even more questions as to the design of an international regime on ABS. Several had somewhat modest expectations, noting that the text from ABS-3 contained "too many options on too many things" to allow the start of "serious negotiations." Some even worried that ABS-4 would create a "monster" – an overloaded text that would make further deliberations almost impossible. The early submission by the African Group of a draft protocol, and the short text prepared by Chair Clemente as a guide for discussion during the week helped in dissipating these concerns. A unified text, although not acceptable to many, prompted delegates to clarify their positions on many of the issues to be addressed by the international regime.

The novelty for the CBD of conducting deliberations in a Committee of the Whole, thus avoiding breaking up into sub-working groups, and the dynamic approach of the Chair also contributed to intensifying the debate. While some insisted that they were not engaging in formal negotiations at this stage, but instead were “exchanging views” on the matter, others regarded the outcome – a heavily bracketed, yet structured, text – as a solid basis for launching negotiations.

This analysis will focus on the progress achieved in the negotiations for an international regime on ABS, looking at the negotiating positions, mechanisms under consideration and relationship with other international processes.

### **NEGOTIATING POSITIONS – AN UPDATE ON THE RACE BETWEEN TORTOISES AND HARES**

In many regards, delegates’ positions and expectations for ABS-4 confirmed the impression that the negotiation of the international ABS regime resembles a race between “tortoises” and “hares.” The hares, represented by the members of the Like-minded Megadiverse Countries (LMMC), the Latin American and Caribbean Group (GRULAC) and the African Group, came to the meeting ready and willing to start negotiating. With a common vision of a strong regime, they were quick to accept the text presented by Chair Clemente as a way forward and pushed for this text to serve as the basis for negotiations, even though they regarded it as largely “Eurocentric.” The tortoises, as represented by the EU, Switzerland and Norway, were taken aback by the unexpected presentation of the Chair’s text and, even if it may have reflected many of their positions, were not prepared to run with it. Yet other tortoises, like Australia, Japan, New Zealand and Canada, simply did not think this was the right time to start the race.

The ability of the LMMC, GRULAC and the African Group to coordinate and generate momentum in the discussions was to a large extent due to their converging opinions regarding a legally binding regime, although their views were more divergent on other issues. Parties seeing themselves predominantly as providers of genetic resources, like Brazil, expressed their preference for a regime with the widest possible scope, focused on channeling benefits to countries of origin, including those arising from the use of derivatives and products of genetic resources. This was indeed the case for many – but not all – members of the LMMC, GRULAC and the African Group, as some with fast-growing research and development capacity, like Mexico, favored a narrower scope.

This desire for a strong regime met a powerful, yet polyphonic opposition from developed countries. Some, like Australia, Japan and Canada, made it clear that they were not convinced of the need for a new international instrument at this stage, and in any case, favored one with a narrow scope without any reference to derivatives. Others, such as the EU, Norway and Switzerland, preferred leaving options open. In the case of the EU, this was interpreted by many as a signal that a common position is not yet developed, since its members diverge in their views about the potential benefits/impacts of a binding ABS regime. Some, like Spain, publicly declared their preference for a binding regime, while others expressed their caution about any moves in this regard, and as a result, the EU was unable to present alternative proposals and maintained a “defensive” position.

However, when discussions moved into more substantive aspects, like the creation of mechanisms to establish the legality of acquisition of genetic resources, such as a certificate of origin, source or legal provenance, and the institutional relationships with other forums where these issues are addressed, some developed countries, like the EU and Switzerland, showed they may well be ahead in the race.

### **INSTITUTIONAL RELATIONSHIPS – MULTIPLE TRACKS**

Discussions on the mechanisms to make any international regime “workable” focused on the creation of a certificate of origin, source or legal provenance and the establishment of disclosure requirements in intellectual property rights (IPR) applications. These issues inherently relate to the relationship of the future regime with existing international agreements and processes, like the International Treaty on Plant Genetic for Food and Agriculture (ITPGRFA), the World Trade Organization’s Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), and the World Intellectual Property Organization (WIPO).

After a presentation by Mexico on the possible design of a certificate system, user countries highlighted several complex issues to be addressed if these certificates are to be used in IPR applications, and noted existing efforts to establish such rules at the international level, including Switzerland’s proposed amendment to WIPO’s Patent Cooperation Treaty, India’s initiative to call for amendment of the TRIPS Agreement to allow for disclosure requirements, and the EU’s support for a requirement to disclose the origin or source of genetic resources under both TRIPS and WIPO.

Provider countries, including Brazil and India, highlighted not only the need to disclose the origin of resources in IPR applications, but also to confirm compliance with prior informed consent, mutually agreed terms and national regulations in the country of origin as a means to ensure that benefits reach the community level. These issues were highly controversial and remained bracketed in their entirety in the final draft, although delegates did agree to convene a technical group of experts to seek some clarity into the feasibility and possible form of an international certificate of origin, source or legal provenance.

The role of plant genetic resources for food and agriculture in the future ABS regime was another source of controversy, as most agricultural countries (both developed and developing) prefer to deal with this issue in the specialized ITPGRFA and the International Union for the Protection of New Varieties of Plants (UPOV) forums, rather than under the CBD. Some state that leaving the “seeds” out of the regime would greatly simplify the work ahead, particularly after the years of effort put into negotiating the ITPGRFA in harmony with the CBD. Others, particularly countries of origin, oppose references to this FAO treaty, fearing that the principle of “facilitated access” under the ITPGRFA applicable to the exchange of genetic resources would compromise outcomes of discussions on access in the ABS negotiations.

This rich exchange of views on mechanisms and relationships with other forums suggest that discussions on the regime are “getting serious.” Several participants also emphasized that coordination among multiple processes will be key to ensure

an effective regime. The race, therefore, is not happening on just one track, and both hares and tortoises need to be aware of timing to coordinate their positions in various forums.

**WARMING UP FOR CURITIBA**

With a busy calendar ahead, most notably the CBD COP-8 in March 2006, the regular sessions of the TRIPS Council, and the WTO consultative process on the CBD-TRIPS relationship whose progress will be reviewed by 31 July 2006, hares and tortoises will have several opportunities to make their positions heard, clear obstacles and run ahead of the pack.

ABS-4 has certainly not allowed delegates to circumvent difficult negotiation stages, as initially hoped by those eager to lay the foundations for a “Granada protocol on access and benefit-sharing” by the end of the week. However, having moved beyond the results from ABS-3, ABS-4 deliberations succeeded in setting a clear track ahead for formal negotiations. The challenges include building more coherent negotiating groups, aligning internal positions and engaging in formalized negotiations.

While the LMMC, GRULAC and the African Group seem to have consolidated their individual positions, and aligned themselves within their groups, this alliance is not yet cemented and may show cracks once substantive discussions on the regime’s scope commence. User countries, on the other side, may have a harder time achieving common views, but once they do, their presumably more profound and consolidated position on substantive issues may render them stronger players in the end.

With excitement building up ahead of COP-8 in Curitiba only six weeks away, the ABS process is poised to become one of the highlights of the meeting. Many hope that going back to the Convention’s birthplace in Brazil will serve as a platform for finally launching fully-fledged negotiations on ABS thereby realizing the third objective of the CBD.

**UPCOMING MEETINGS**

**UN WORKING GROUP ON MARINE BIODIVERSITY**

**BEYOND NATIONAL JURISDICTION:** The meeting of the UN *Ad Hoc* Open-ended Working Group on Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction will meet from 13-17 February 2006, at UN headquarters in New York. For more information, contact: Division for Ocean Affairs and the Law of the Sea; tel: +1-212-963-3962; fax: +1-212-963-5847; e-mail: doalos@un.org; internet: <http://www.un.org/Depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm>

**UNFF-6:** The sixth session of the UN Forum on Forests will be held from 13-24 February 2006, at UN headquarters in New York. This meeting will seek to reach conclusion on issues that were not resolved at UNFF-5. For more information, contact: Elisabeth Barsk-Rundquist, UNFF Secretariat; tel: +1-212-963-3262; fax: +1-917-367-3186; e-mail: barsk-rundquist@un.org; internet: <http://www.un.org/esa/forests>

**STAKEHOLDER MEETING ON BIODIVERSITY FOR FOOD AND NUTRITION:** This meeting will be held from 16-17 February 2006, in Rome, Italy. It is organized by the International Plant Genetic Resources Institute (IPGRI), in collaboration with the CBD Secretariat and the UN Food and Agriculture Organization. For more information, contact: Annie

Huie, IPGRI; tel: +39-06-61-18285; fax: +39-06-61-979661; e-mail: [a.huie@cgiar.org](mailto:a.huie@cgiar.org); internet: <http://www.ipgri.cgiar.org/Events/nutrition.htm>

**SECOND MEETING OF THE WORKING GROUP ON LIABILITY AND REDRESS IN THE CONTEXT OF THE BIOSAFETY PROTOCOL:**

The second meeting of the *Ad Hoc* Open-ended Working Group on Liability and Redress in the context of the Cartagena Protocol on Biosafety will meet from 20-24 February 2006, in Montreal, Canada. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@biodiv.org](mailto:secretariat@biodiv.org); internet: <http://www.biodiv.org/doc/meeting.aspx?mtg=BSWGLR-02>

**MEETING OF THE IMOSEB INTERNATIONAL STEERING COMMITTEE:**

The first meeting of the International Steering Committee of the consultative process towards an International Mechanism of Science Expertise on Biodiversity will be held on 21-22 February 2006, in Paris, France. For more information, contact: Didier Babin, IMoSEB; tel: +33-4-6759-3743; e-mail: [didier.babin@imoseb.net](mailto:didier.babin@imoseb.net); internet: [http://www.imoseb.net/international\\_steering\\_committee](http://www.imoseb.net/international_steering_committee)

**BIOSAFETY COP/MOP-3:** The third meeting of the Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety will take place from 13-17 March 2006, in Curitiba, Brazil. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@biodiv.org](mailto:secretariat@biodiv.org); internet: <http://www.biodiv.org/doc/meeting.aspx?mtg=MOP-03>

**EXPERT WORKSHOP ON PROTECTED AREAS:** This workshop will be held on 17-18 March 2006, in Curitiba, Brazil. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@biodiv.org](mailto:secretariat@biodiv.org); internet: <http://www.biodiv.org/doc/meeting.aspx?mtg=002335>

**CBD COP-8:** The eighth meeting of the CBD Conference of the Parties will take place from 20-31 March 2006, in Curitiba, Brazil. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@biodiv.org](mailto:secretariat@biodiv.org); internet: <http://www.biodiv.org/doc/meeting.aspx?mtg=COP-08>

**GLOSSARY**

ABS	Access to genetic resources and benefit-sharing
AHTEG	<i>Ad Hoc</i> Technical Expert Group
CBD	Convention on Biological Diversity
COP	Conference of the Parties
IIFB	International Indigenous Forum on Biodiversity
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
IPRs	Intellectual property rights
LMMC	Like-minded Megadiverse Countries
MAT	Mutually agreed terms
PIC	Prior informed consent
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Organization
WTO	World Trade Organization