

## ABS 5 HIGHLIGHTS: TUESDAY, 9 OCTOBER 2007

Delegates to the fifth meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met all day in plenary and addressed elements of an international regime on ABS relating to fair and equitable benefit-sharing, access to genetic resources (GR), compliance with prior informed consent (PIC) and mutually agreed terms (MAT), and an internationally recognized certificate of origin/source/legal provenance.

### INTERNATIONAL REGIME ON ABS

#### FAIR AND EQUITABLE BENEFIT-SHARING:

Discussions continued on fair and equitable benefit-sharing with JAPAN and the REPUBLIC OF KOREA stressing the importance of flexibility in any international regime. CHILE called on ABS 5 to define derivatives; expressed support for a binding regime, especially regarding fair and equitable benefit-sharing; and, with CHINA, GRENADA and UGANDA, reiterated that the Annex to decision VIII/4 A should form the basis for negotiations. GRENADA said the regime should also cover marine GR. UGANDA called for ensuring benefit-sharing with marginalized groups within indigenous communities, especially women and children.

MALAYSIA, for the LIKE-MINDED MEGADIVERSE COUNTRIES (LMMC), explained that the regime must include minimum benefit-sharing standards to prevent dilution of benefits in cases where countries lack capacity to implement national ABS legislation, and noted that such provisions should not compromise their sovereign rights to determine ABS measures. The PHILIPPINES added that international minimum standards will strengthen developing country positions in negotiations with multi-national corporations. The EU called for developing sectoral approaches to MAT between users and providers.

Calling for full participation in the regime's negotiations, the LATIN AMERICAN, PACIFIC and AFRICAN INDIGENOUS CAUCUSES stressed the link between GR and traditional knowledge (TK). The PACIFIC and AFRICAN INDIGENOUS CAUCUSES also called for: benefit-sharing regarding GR and TK accessed at *ex-situ* collections; conformity with customary laws and practices; and inclusion of non-monetary benefits, such as access to medicines derived from GR and TK.

AUSTRALIA cautioned against prescribing a mandatory list of benefits since it would be unworkable and undermine national sovereignty.

**ACCESS TO GENETIC RESOURCES:** The LMMC, supported by Namibia, for the AFRICAN GROUP, PERU, and ST. LUCIA, said that states have sovereign rights over their own genetic resources and derivatives and stressed that the authority to determine access should rest with national governments. He also suggested that while access to genetic resources is regularly granted, the conditions for benefit-sharing remain to be articulated and should accordingly be the focus of the international regime. The EU noted that an international regime would enable implementation of ABS by overcoming legal uncertainty and enhancing compliance with PIC and MAT. She emphasized that international minimum requirements on access constitute a key element of the international regime.

COSTA RICA emphasized that the international regime should provide guidance on governing access in the absence of national provisions. SOUTH AFRICA stressed complementarity between international and national regulation. BRAZIL called for enhancing international action and coordination in establishing the regime while respecting sovereign rights of states. MEXICO stressed that national PIC and compliance with national laws should be a precondition for access.

ARGENTINA urged specification of geographic origin and, with the INTERNATIONAL PROPERTY OWNERS ASSOCIATION, a clear definition of derivatives. The AFRICAN GROUP, with BRAZIL, suggested categorizing research based on the stated intent of the researcher, and taking into account that this may change over time. SWITZERLAND and AUSTRALIA also underscored the distinction between scientific and commercial research purposes, with SWITZERLAND calling for an accelerated process for the former and a mechanism to provide traceability of the resources.

THAILAND proposed a monitoring mechanism requiring parties to report access applications submitted to competent national authorities. HAITI and GRENADA emphasized problems facing many countries regarding control and regulation of access and called for a holistic approach to implementing PIC and MAT.

CANADA highlighted tools relating to access, including model contracts and sectoral approaches that address standardization and minimum requirements. AUSTRALIA emphasized that an ABS system should provide legal certainty and administrative simplicity and be cost effective. He supported minimum standards for access regarding procedure and administration issues noting that these should not undermine national property rights. The US urged increased transparency in national patrimony laws to facilitate collaboration and associated

benefits. The ARCTIC INDIGENOUS CAUCUS underscored that there can be no access to GR and TK without respect and recognition of indigenous rights as enshrined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and called for any access measures to be subject to PIC of indigenous peoples.

The INTERNATIONAL FORUM OF LOCAL COMMUNITIES requested participation in ABS discussions, and stressed that national legislation must guarantee local people's rights to natural resources. The INTERNATIONAL CENTRE FOR INSECT PHYSIOLOGY AND ECOLOGY (ICIPE) noted the success of biological control in Africa and its conformity with IPRs. The THIRD WORLD NETWORK stressed the need for equity and fairness in ABS as highlighted by the absence of benefits flowing to countries that provided avian virus samples for vaccine research. The PACIFIC and RUSSIAN INDIGENOUS CAUCUSES noted their concerns regarding marine genetic resources and protection of indigenous peoples' rights to access for cultural purposes. The ASIAN INDIGENOUS CAUCUS suggested including a reference to the UNDRIP in the Annex.

The EU stated that the international regime must enable, promote and facilitate proper implementation of access-related obligations and highlighted the close link between access and compliance. AUSTRALIA offered to provide details on its domestic provisions that regulate access for non-commercial research. The INTERNATIONAL FEDERATION OF PHARMACEUTICAL MANUFACTURERS AND ASSOCIATIONS stated that overly restrictive conditions on access would lead to a reduction in benefits accruing to all stakeholders.

**COMPLIANCE: General statements:** Co-Chair Casas opened discussions on compliance calling for programmatic statements and specific comments on the sub-item on measures to support compliance with PIC and MAT. Noting that effectiveness of compliance measures will determine effectiveness of the regime, the AFRICAN GROUP called for a clear identification of actions that constitute misappropriation and appropriate sanctions.

ARGENTINA noted that it could not comment on its preferred compliance mechanisms prior to the negotiation of the regime's components, including whether it will be legally binding. PERU called for a monitoring mechanism to ensure compliance, and BRAZIL said the regime should provide remedies and sanctions for breaches thereof.

The AMERICAN BIOINDUSTRY ALLIANCE outlined concerns regarding additional mandatory disclosure obligations, conflicting claims over GR and TK, and concerns regarding non-discrimination in terms of access and compliance. The LATIN AMERICAN INDIGENOUS CAUCUS said that any international regime should have provisions for the settlement of disputes arising over transboundary GRs.

**Measures to support compliance with PIC and MAT:** The LMMC, PAKISTAN, and CUBA requested strict compliance and disclosure of the source and country of origin and evidence that PIC and benefit-sharing requirements have been met in patent applications. BRAZIL and PAKISTAN said the international regime should ensure that parties enact national legislation to facilitate implementation of PIC and MAT and take measures to combat misappropriation.

The AFRICAN GROUP requested that the regime include readily applicable provisions on PIC and MAT, and measures to ensure that PIC is given by provider countries, countries of origin and indigenous and local communities where applicable. CUBA suggested a clearing-house mechanism to monitor compliance with PIC and MAT. INDIA said national legislation

must provide remedies for non-compliance. THAILAND said compliance with PIC should be legally binding. NORWAY stressed the importance of user measures and, with THAILAND, pointed to their submissions to the WTO TRIPS Council on disclosure of origin. NEW ZEALAND, AUSTRALIA, CANADA, JAPAN and the US said disclosure requirements in patent applications should be addressed under WIPO or the WTO TRIPS Council rather than under the CBD. BRAZIL and HAITI opposed, with BRAZIL recalling CBD provisions on ensuring that IPRs are supportive of and do not run counter to the CBD's objectives.

NEW ZEALAND stressed the need for awareness of existing tools and options to ensure compliance with PIC and MAT. AUSTRALIA, CANADA and the US supported contract-based compliance systems, with AUSTRALIA supporting the development of model contracts. The EU emphasized that ABS under MAT is already addressed by private international legal contracts and noted that model material transfer agreements could enhance compliance. She also called for ABS negotiations to elaborate an international definition of misappropriation.

The PACIFIC INDIGENOUS CAUCUS called for independent legal and technical advice to indigenous communities when negotiating PIC and MAT. WIPO reported on its work relating to intellectual property and GR and TK, highlighting policy-relevant information provided through patent systems and TK protection. ARGENTINA noted a lack of understanding among parties about work carried out under WIPO and WTO.

The NORTH AMERICAN and ARCTIC INDIGENOUS CAUCUSES stressed that PIC is subject to indigenous customary law and international human rights law, and that contracts must take these systems into account.

**International certificate of origin/source/legal provenance:** The AFRICAN GROUP: noted difficulties with monitoring compliance; said that disclosure and certificates are two distinct concepts; and requested clarification on who will be required to obtain certificates, when presentation is required, monitoring arrangements, and sanctions for non-compliance. UGANDA added that: certification should be a mandatory and simple process that incorporates TK. SWITZERLAND underscored the rationale for a certificate, including its role in identifying the source of GR; ensuring PIC has been obtained; facilitating the implementation of MAT under contracts; and facilitating international standardization.

At the end of the afternoon, GERMANY provided details for CBD COP 9 which will be held from 19-30 May 2008 in Bonn, Germany.

### IN THE CORRIDORS

On Tuesday, rumors circulated about the possible formation of a new "mega-coalition" involving the LMMC, the EU and possibly the African Group and other G77/China members who all favor a strong international regime. Referencing growing areas of convergence between the EU and LMMC in both formal interventions and informal regional consultations, several LMMC delegates expressed their optimism that significant progress would be achieved. Others were more skeptical, noting that convergence may be likely on some regime elements but far less so on others. Another delegate noted that, irrespective of complete convergence, any coalition of that size would surely increase pressure on those countries who have been arguing that negotiating a substantive international ABS regime is premature.