



Earth Negotiations Bulletin

A Reporting Service for Environment and Development Negotiations

Vol. 9 No. 128

Published by the International Institute for Sustainable Development Wednesday, 6 October 1999

HIGHLIGHTS FROM THE EXPERTS' PANEL ON ACCESS AND BENEFIT-SHARING TUESDAY, 5 OCTOBER 1999

Experts met in a morning Plenary to hear reports on the outcomes of Monday's four working group discussions. Delegates then divided into two working groups, one considering access and benefit-sharing (ABS) for scientific and commercial purposes and the other addressing the review of legislation, administrative and policy measures and regulatory procedures and incentive measures.

Editor's Note: While participating experts are appointed by governments, they speak in their own capacities. For the purpose of brevity, experts' remarks are attributed by country in the following report.

PLENARY

Panel Co-Chair Martin Girsberger (Switzerland) called upon the Chairs of each of Monday's four working groups to present the findings of their deliberations. A.H. Zakri (Malaysia) presented the findings of the group on access and benefit-sharing arrangements for scientific and commercial purposes, explaining that the group focused on the following three issues: PIC, MAT and disclosure of country of origin. He added that it is important to be mindful of CBD interactions and conflicts with other international processes and existing networks, such as the FAO International Undertaking on Plant Genetic Resources, WTO and the TRIPs agreement.

Kerry ten Kate (UK) presented the outcomes of the group on the review of legislative, administrative and policy measures at national and regional levels. She said PIC, user measures, access legislation, IPR and *sui generis* systems were the main issues discussed. Other issues addressed included the roles of intermediaries, non-Parties and mechanisms for benefit-sharing, such as IPR, contracts and conservation. She added that many of these issues are interlinked and interact at international, national and local levels.

José Carlos Fernández Ugalde (Mexico) presented the outcomes of the group on the review of regulation procedures and incentive measures. He identified the following issues for discussion: development of a common understanding of concepts; mechanisms to complement national instruments with broader bilateral and multilateral instruments; the role of IPR and other trade measures in attaining the CBD's objective; establishment of a balance between national policy objectives and legislation to implement the CBD; and the evaluation of instruments to achieve specific objectives.

Estherine Lisinge Fotabong (Cameroon) presented the outcomes of the group on capacity building. She outlined the need for: developing specific capacities at different levels in both provider and user countries; developing international guidelines for housing collections and enforcing contractual agreements; developing a practical approach to capacity building through on-going initiatives, existing institutions, legislation and current arrangements for ABS; and establishing well informed national focal points for ABS. She also noted the need to identify the reasons for the lack of capacity building, particularly with regard to the lack of commitment and funding on the part of both developing and developed countries.

In the ensuing discussion, KENYA cautioned against generalizing developing countries as providers and developed countries as users and underscored that the development of regulatory regimes for ABS is not strictly a developing country issue. The US said such generalizations were inaccurate and noted its domestic work on access legislation. CAMEROON said the point of distinguishing between developed and developing countries as users and providers was to ensure developing countries' capacity building needs would be met. IUCN MESOAMERICA questioned whether experts had a common understanding of fair and equitable benefit-sharing and called for discussion of community rights and *sui generis* systems. The EU emphasized consideration of the practical implementation aspects of ABS agreements. FRIENDS OF THE EARTH underscored the need to discuss IPR in detail. ETHIOPIA called for accountability to ensure the proper use of genetic materials. SYRIA stressed regional cooperation for ABS. The COOK ISLANDS stressed the need for an international enforcement regime. JAMAICA stressed the need to consider capacity building needs under each substantive agenda item. ECUADOR urged stakeholder participation in national discussions on ABS. PERU underscored consideration of the relationship between IPR, ABS and community rights. After the general discussion, delegates deliberated on how the Panel would proceed and agreed to establish two working groups, with one group considering ABS for scientific and commercial purposes and the other addressing the review of legislation, administrative and policy measures and regulatory procedures and incentive measures. It was also agreed that both groups would address capacity building.

WORKING GROUPS

Access and Benefit-Sharing Arrangements for Scientific and Commercial Purposes: This group, chaired by A.H. Zakri (Malaysia), focused on aspects of MAT and benefit-sharing options

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and mechanisms. In discussions on lessons learned from negotiating MAT contracts, experts noted, *inter alia* that: reaching agreement is time consuming; resources can be lost when agreement is not achieved; most contracts are negotiated between companies and research institutions; contracts should take into account IPR, commercial use and benefit-sharing; and contracts must have legal certainty. One expert noted cases where MAT contracts have become invalid when governments deemed a research institute unauthorized to negotiate contracts on commercial use, and underscored the importance of having the authority to approve contracts. One expert called for making confidential information contained in contracts publicly available, while another identified PIC as a tool for awareness-raising and capacity building. It was noted that the scope of MAT must be broad enough to use derivatives of biological resources.

Experts discussed lessons learned in MAT arrangements and contractual approaches. One noted that while agreements should be negotiated by partners, points of reference are needed to provide information to these partners. Another said contracts should spell out clear rules, and indigenous and local communities should be involved and have access to information. Experts noted that PIC should be analyzed as a tool for conservation. It was emphasized that the Panel's mandate omits consideration of local communities and that discussions should be reviewed and evaluated. One observer noted that many contracts fail to serve as a source of information due to their lack of public accessibility. Another expert explained the private sector's role and stated that competition poses limitations to information disclosure. It was suggested that patent applications could mark the point when scientific research becomes commercial research. One expert said any kind of access will lead to benefit, either monetary or non-monetary, and benefit-sharing must be ensured in any case. The need for standardized procedures of MAT was emphasized. Experts also emphasized: differentiation between commercial and research uses; balance between transparency and confidentiality; and technology transfer and capacity building for genetic resource assessment.

On benefit-sharing, experts emphasized the importance of defining what benefits are to be shared and who will receive them. One expert underscored the need to develop agreements between governments and indigenous peoples. While experts stressed the need to distinguish between contracts for commercial or scientific purposes, others noted difficulties in determining when research will result in commercial use and possible benefits. One expert highlighted efforts toward establishing a model contract to facilitate agreements. Another highlighted positive aspects of scientific institutions serving as intermediaries, noting that they provide negotiating abilities and legal knowledge.

In reviewing lessons learned in benefit-sharing, one expert emphasized the need for local involvement to ensure effective arrangements. It was suggested that recommendations to the COP refer to and draw conclusions from previous decisions and the range of publications providing information on benefit-sharing mechanisms. One participant recalled COP-3 Decision III/8 on the need for new and improved measures for benefit-sharing. Another said that milestone payments should be considered as an important element of benefit-sharing that could provide flexibility and trust.

Others emphasized: new mechanisms for benefit-sharing; sharing of non-economic benefits such as research capacity and technology transfer; and respect for local communities and enhancement of their negotiation capacities.

Review of Legislative, Administrative and Policy Measures and of Regulatory Procedures and Incentive Measures: This group, chaired by Lev Kalakoutskii (Russian Federation), further discussed the review of legislative, administrative and policy measures at national and regional levels and the review of regulatory procedures and incentive measures. Participants were invited to build on the group's previous discussions and to focus on the issues at hand, partic-

ularly key recommendations with regard to PIC. The discussion was structured according to the following three categories: the substance of PIC; procedures with regard to national focal points, the CBD Clearinghouse Mechanism and the role of other institutions; and supporting measures at the international level. Experts devoted significant discussion to the meaning and requirements of PIC. One stressed the need to focus on clearer goals and objectives and on conclusions from lessons learned. He also noted the importance of considering PIC within the larger context of CBD objectives.

One expert highlighted the trade-offs involved in different levels of consent, noting that the authority to provide access to genetic resources lies with governments, although national legislation often gives ownership of genetic resources to individuals and institutions below the government level. Other experts highlighted the wide diversity of exchanges of genetic resources and the need to distinguish between different users. One emphasized that the issue of consent must include complete understanding of information before entering into an agreement and must recognize potential negative impacts associated with consent. Others noted the difficulty in determining the value of final products before and after negotiations, while one expert added that the risk of uncertainty in regard to the valuation of PIC is often related to scientific and technological developments.

Many delegates expressed the need for flexibility at the national level in establishing legislation in order to deal with changing values. The EU's practice of using blanket legislation and block exemptions to create specific regulations for different groups were cited as a possible model to explore. One expert noted the importance of developing national strategies before enacting legislation, while another concluded that national access legislation should allow for the future creation of a multilateral system for access to genetic resources. He also added that PIC procedures should be tailored for different uses.

Experts highlighted the need for flexibility and clarity when regulating ABS. Some emphasized the need to simplify and decentralize access procedures, citing such examples as the code of conduct between academic institutions in the Philippines, and the Mosaic Project on microbial genetic resources, which distinguishes between different access categories (emergency, commercial and non-commercial uses). Experts also stressed the importance of intermediaries to assist national institutions in developing PIC. It was suggested that the implementation of an interim institution for ABS could be useful.

Participants underlined the importance of establishing national focal points and involving indigenous and local communities in the PIC process. One expert added that well-defined national focal points should help indigenous peoples gain information on accessing financial mechanisms such as the GEF.

IN THE CORRIDORS

Disagreement on procedural matters continued to dominate discussions in Plenary and working groups, as well as in the corridors, demonstrating differences regarding the appropriate scope and mandate of the Panel. Some participants expressed concern that a failure to address key issues such as capacity building, IPR and economic matters would stymie real progress on the ABS issue. Others expressed reluctance to address these politically charged issues, which they thought could polarize discussions and preclude a productive Panel outcome.

THINGS TO LOOK FOR TODAY

PLENARY: Plenary will convene at 10:00 am to hear reports on the working groups' progress.

WORKING GROUPS: Following Plenary, the two working groups will reconvene to continue consideration of benefit-sharing and PIC.