



HIGHLIGHTS OF ABS WG-1 THURSDAY, 25 OCTOBER 2001

Delegates to the first meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) under the Convention on Biological Diversity (CBD) met in a morning Plenary to hear reports from the two Sub-Working Groups and a report on the CBD's draft strategic plan. Sub-Working Group I (SWG-I) continued discussing the draft guidelines on ABS briefly in a morning session, and then convened a contact group, which continued deliberations throughout the day. Sub-Working Group II (SWG-II) discussed draft recommendations on the role of intellectual property rights (IPR) in ABS arrangements.

PLENARY

Co-Chair Mohamad bin Osman (Malaysia) opened the Plenary. SWG-I Chair Birthe Ivars (Norway) and SWG-II Chair Jorge Cabrera Medaglia (Costa Rica) reported on the progress of their Sub-Working Groups and items still remaining for discussion.

CBD Executive Secretary Hamdallah Zedan highlighted efforts, including a workshop in the Seychelles in May 2001, to develop a strategic plan for the CBD from 2002-2010. He noted that the Intersessional Meeting on the Strategic Plan, National Reports and Implementation of the CBD would consider the draft plan, which includes elements on: mission statement; vision; operational goals; action plans; and monitoring, reporting, assessment, review and communication. Zedan called for input on ABS issues.

SUB-WORKING GROUP I

The contact group chair reported on the results of Wednesday's meeting, drawing attention to a revised draft on roles and responsibilities in ABS pursuant to CBD Article 15, containing some outstanding brackets.

On endorsement or processing and approval of agreements by competent national authorities, IRAN, on behalf of the G-77/CHINA, called for deletion of "endorsement." The EC requested keeping the brackets. On two alternatives for the chapeau on responsibilities, the first one referring to Parties, in particular when they are countries of origin, and the second one to countries of origin that provide genetic resources, the G-77/CHINA preferred the second option. On "encouraging" or "ensuring" that commercialization should not prevent traditional use of genetic resources, the EC suggested, with HONDURAS and TANZANIA, that countries should "seek to ensure" that traditional use is not prevented. On review of decisions or establishment of mechanisms for review of decisions by stakeholders, the EC, with TANZANIA, suggested changing text to "establish mechanisms to ensure that decisions are made available to relevant stakeholders." On providers' responsibilities regarding supplying genetic resources when entitled, and not imposing discriminatory restrictions on access, BURKINA FASO, CAMEROON, GABON, NIGERIA, TANZANIA, TOGO and UGANDA called for deletion of the second responsibility.

CANADA supported differentiation of stakeholder types and proposed language on participation of indigenous and local communities in the ABS process. Regarding third parties, MEXICO proposed text on the need to allow exceptions in cases of taxonomic or scientific materials for non-commercial users. JAPAN proposed language on competent national authorities clarifying the relationship between national and local governments, as appropriate. Regarding user responsibilities, CHINA suggested language on promoting technology transfer to providing countries.

CONTACT GROUP: The contact group was reconvened and met throughout the afternoon to resolve outstanding issues.

On general provisions, delegates debated inclusion of derivatives and products of genetic resources in the scope of the guidelines and agreed to keep such references in brackets. They agreed to incorporate reference to relevant CBD provisions in the first paragraph of the document. Regarding objectives, delegates agreed to include language on contributing to the development by Parties of mechanisms and ABS regimes that recognize the protection of traditional knowledge in accordance with domestic laws and relevant international instruments.

On roles and responsibilities in ABS pursuant to CBD Article 15, delegates agreed to compromise text on promoting the provision of necessary financial resources to providing countries that are developing countries or countries with economies in transition. Following debate and informal consultations, delegates agreed to: processing of applications and approval of agreements by competent national authorities; referencing contracting Parties, which are countries of origin, or other Parties, with regard to responsibilities; seeking to ensure that commercialization and any other use should not prevent traditional use of genetic resources; establishing mechanisms to ensure that decisions are made available to relevant stakeholders; and, regarding providers' responsibilities, supplying genetic resources when entitled to do so, and striving to avoid arbitrary restrictions on access.

On participation of stakeholders, delegates agreed on facilitating the involvement of relevant stakeholders, including local and indigenous communities, while appropriate consultation arrangements, such as national consultation committees comprising relevant stakeholder representatives, should be made. It was also noted that special consultation arrangements may be appropriate for involving local and indigenous communities.

On steps in the ABS process, regarding prior informed consent (PIC), delegates debated references to "identified" stakeholders and Parties in provisions on obtaining genetic resources. Regarding *in situ* conditions, they agreed to text on competent national authorities granting PIC. Regarding *ex situ* collections, they agreed to reference the competent national authority and/or the body governing the collection. Regarding mutually agreed terms (MAT), delegates debated whether the guidelines should assist only Parties or Parties and stakeholders. Regarding PIC and a reference to Article 15.5, delegates agreed to incorporate CBD

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language. Regarding specification of use, delegates agreed to add language on consideration of the specific needs of taxonomic research and to delete language on MAT.

On other provisions, delegates agreed to reorganize the section's contents under headings of: accountability; monitoring and reporting; means for verification; dispute settlement; and remedies. Regarding accountability requirements, delegates agreed to delete market-based approaches and to address users as well as providers. Regarding guarantees, delegates agreed that the individual collector or the institution on whose behalf the collector is operating should be responsible and accountable for compliance. Delegates debated extensively on the nature and meaning of "voluntary" verification mechanisms, and agreed that they could be developed at the national level to ensure compliance with the CBD's ABS provisions and national legal instruments of the country of origin providing genetic resources. They also agreed to language on a system of certification that could serve as a means to verify the transparency of the process of national ABS. Regarding dispute settlement, delegates agreed that the use of sanctions, such as penalties set out in contract agreements, could be considered in cases of non-compliance with ABS agreements consistent with the CBD and national legal instruments of the country of origin. The group agreed that disputes should be solved in accordance with contractual arrangements and applicable law and practices.

SUB-WORKING GROUP II

IPR, ABS AND PIC: SWG-II considered a draft recommendation from the contact group addressing ABS and PIC. In the preamble, regarding text on the mutual supportiveness of the CBD and relevant international instruments on IPR, the US, with the EU, proposed deleting reference to achieving the CBD's objectives and ABS. THAILAND proposed, and others agreed, to delete only the reference to CBD objectives. COLOMBIA proposed, and delegates agreed, to insert a reference to CBD Article 16.5. The BIOTECHNOLOGY INDUSTRY ORGANIZATION (BIO) and the US proposed deleting a reference to IPR constraining access and limiting scientific research. COLOMBIA, the EU and PERU disagreed, noting that it balances another preambular provision on recognizing IPRs' potential contributions. The EU also proposed reference to inappropriate granting of patents. After informal consultations, the group agreed to delete "limiting" with regard to scientific research.

On recognizing the use of genetic resources and traditional knowledge, the US proposed encouraging the creation and use of traditional knowledge databases to assist in identification of prior art. CANADA, COLOMBIA and MEXICO disagreed, highlighting potential problems with control over and protection of traditional knowledge and arguing that there may be other more appropriate mechanisms. COLOMBIA suggested that the issue be further studied. CANADA proposed, and delegates agreed, to new preambular text noting the importance of contracting approaches. Delegates also agreed to move text on recording contributions to inventions to the preamble, while disagreeing over text referring to the source of genetic resources that originate or are employed in biotechnological inventions. After informal consultations, language was revised to refer to disclosure of the country of origin or geographical origin.

Regarding an invitation to encourage disclosure of the use and country of origin of genetic resources in applications for IPR, BIO requested that applicants, not governments, be requested to encourage disclosure. The GERMAN NGO FORUM ON ENVIRONMENT AND DEVELOPMENT stated that disclosure should be obligatory. The EU and GERMANY called for clarification of several references to the "use" of genetic resources. After informal discussions, such references were reformulated to clarify the relation of genetic resources to countries of origin and traditional knowledge.

Regarding recommendations on areas requiring further information and analysis, BIO sought clarification of the requirements for disclosure of the country of origin and PIC with regard to listed elements on consistency with international legal obligations and efficacy in the examination of patent applications. CANADA

proposed that the point on patent applications should also address re-examination of patents granted. Delegates expressed concern regarding institutional responsibility for information gathering activities. CANADA, supported by COLOMBIA, proposed ensuring tasks are carried out by relevant competent authorities such as WIPO and the Working Group on Article 8(j). Most delegates supported a role for WIPO, while COLOMBIA cautioned against relinquishing authority over issues within the Working Group's mandate. After informal consultations, delegates agreed on a formulation for requesting information gathering and analysis on a series of points related to IPR and ABS by the CBD Executive Secretary, assisted by other institutions such as WIPO and through the Working Group on Article 8(j). The group also agreed to text inviting WIPO to prepare a technical study on disclosure of country of origin, traditional knowledge and PIC in patent applications consistent with the obligations of WIPO-administered treaties.

PERU requested reference to the UN Commission on Human Rights in an indicative list of international organizations invited to provide input. At the suggestion of COLOMBIA and the EU, the group agreed that the COP should encourage WIPO, as opposed to Parties, to work on developing model intellectual property clauses. CANADA proposed a provision on compiling information on legal mechanisms for resolving contractual disputes taking into account the nature of legal systems and contracting approaches, which was accepted with minor changes.

IPR AND TRADITIONAL KNOWLEDGE: SWG-2 then discussed a draft recommendation from the contact group. Several editorial changes were made to preambular and operational paragraphs. Regarding a provision inviting reports from WIPO on its deliberations relevant to ABS and traditional knowledge, delegates agreed that reporting should be ongoing and not limited to COP-6. Delegates also debated language on "inviting" vs. "urging" WIPO to perform such activities and upon the EU's suggestion, agreed to use "urge."

The EU suggested shifting part of a bracketed provision on *sui generis* systems to the preamble, stating that they may need to be reinforced by international action. The EU also proposed reformulating the remainder of the provision to recognize WIPO's work on international models and recommend that WIPO consider collaborative projects to protect traditional knowledge. This was agreed following a brief debate. Delegates also agreed that information compiled on principles, mechanisms and procedures for obtaining PIC from indigenous and local communities should be made available through the CHM.

IN THE CORRIDORS

A runaway contact group session from SWG-I found delegates involved in protracted debates on the finer points of competent national authorities, voluntary verification and stakeholders. While some expressed frustration over perceived attempts to stall the proceedings (in hope of another meeting?), the group succeeded in resolving most of the outstanding issues in the Draft Guidelines in time for a nice evening in Bonn.

On the other side of the conference complex, SWG-II delegates were generally satisfied with an early close to discussions on IPR, especially with concrete activities for examining issues related to traditional knowledge and identification of a potential path forward for future CBD discussions. Some noted the outstanding challenge, potentially for the Working Group on Article 8(j), of grappling with the question of how to protect traditional knowledge, including its assessment in prior art for patent applications, without fundamentally compromising the interests and rights of indigenous and local communities over their knowledge.

THINGS TO LOOK FOR

SUB-WORKING GROUP I: SWG-I will meet at 10:00 am to approve the draft guidelines from the contact group's discussions.

PLENARY: Plenary will meet following the conclusion of SWG-I to consider other matters and adopt reports from the Sub-Working Groups.