



SUMMARY OF THE FIRST MEETING OF THE *AD HOC* OPEN-ENDED WORKING GROUP ON ACCESS AND BENEFIT-SHARING: 22-26 OCTOBER 2001

The first meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing under the Convention on Biological Diversity (CBD) was held at the International Congress Centre Bundeshaus in Bonn, Germany, from 22-26 October 2001. The Working Group was established by the CBD's fifth Conference of the Parties (COP) to develop guidelines and other approaches for access to genetic resources and benefit-sharing (ABS). Approximately 350 participants from 87 countries and 88 intergovernmental, non-governmental and industry organizations attended. During the meeting, delegates met in Plenary and two sub-working groups. Sub-Working Group I discussed the development of draft guidelines on ABS. Sub-Working Group II discussed an action plan for capacity building, approaches other than guidelines to ABS and the role of intellectual property rights (IPR) in the implementation of the ABS arrangements.

Delegates expressed general satisfaction that they were able to complete discussions on the bulk of the draft guidelines without the need for additional meetings, although outstanding issues on the use of terms, derivatives and annexes remain for COP-6 to resolve. On the issue of IPR and ABS, several delegates were pleasantly surprised at the detailed recommendations for further information and analysis on issues including disclosure of prior informed consent (PIC), the country of origin and use of traditional knowledge in patent applications. Discussions also produced the core elements for a plan of action on capacity building, which will likely be further addressed at an intersessional workshop. The Working Group's recommendations will be forwarded to the Working Group on Article 8(j) (4-8 February, 2002; Montreal, Canada) and CBD COP-6 (8-19 April 2002; The Hague, the Netherlands).

A BRIEF HISTORY OF THE PROCESS

The CBD, negotiated under the auspices of the United Nations Environment Programme (UNEP), was opened for signature on 5 June 1992, and entered into force on 29 December 1993. To date, 182 countries have ratified the Convention. The CBD's three objectives are 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. The Convention contains provisions on access to genetic resources and the sharing of benefits arising out of their use, which address both users and providers, contained in Articles 15 (Access to Genetic Resources), 16.3 (access to and transfer of technology that makes use of genetic resources), 19.1 (participation in biotechnological research on genetic resources) and 19.2 (access to results and benefits from biotechnologies).

COP-2: At its second meeting in Jakarta, Indonesia, in November 1995, the COP adopted Decision II/11, requesting the CBD Executive Secretary to further elaborate a survey of measures taken by governments to implement Article 15.

COP-3: At its third meeting in Buenos Aires, Argentina, in November 1996, the COP considered a compilation of views from Parties on possible options for developing national legislative, administrative or policy measures to implement Article 15. In Decision III/

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15, the COP urged governments to submit relevant information on possible elements for guidelines and other measures for the implementation of Article 15. Based on this and other COP-3 decisions, the CBD Executive Secretary called for case studies on ABS mechanisms to prepare a synthesis for COP-4.

COP-4: At its fourth meeting in Bratislava, Slovakia, in May 1998, the COP addressed matters related to benefit-sharing, including, *inter alia*: measures to promote and advance the distribution of benefits from biotechnology in accordance with Article 19 (Handling of Biotechnology and Distribution of its Benefits); and the compilation of Parties' views on possible options for developing national legislative, administrative or policy measures to implement Article 15. In Decision IV/8, the COP established a regionally balanced Panel of Experts on ABS, to be appointed by governments and composed of representatives from the private and public sectors, and indigenous and local communities. The Panel's mandate was to develop a common understanding of basic concepts and to explore options for ABS on mutually agreed terms (MAT), including guiding principles, guidelines and codes of best practices for ABS arrangements. In Decision IV/16, the COP decided to hold a preparatory discussion on access to genetic resources at the Intersessional Meeting on the Operations of the Convention (ISOC) to provide input into COP-5.

ISOC: The ISOC convened in Montreal, Canada, in June 1999, where delegates, *inter alia*: conducted preparatory discussions on ABS arrangements to provide guidance to COP-5; made recommendations for the preparation, composition and agenda of the Experts' Panel on ABS; and made recommendations for future work to develop a common appreciation of the relationship between IPR and relevant provisions of the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

ABS EP-1: The first Experts' Panel on ABS met in October 1999, in San José, Costa Rica. The meeting, co-hosted by the Governments of Costa Rica and Switzerland, focused on four items: ABS arrangements for scientific and commercial purposes; legislative, administrative and policy measures at the national and regional levels; regulatory procedures and incentive measures; and capacity building. Significant discussion revolved around issues of IPR and the use and terms of contractual ABS agreements. The Panel developed a set of recommendations, which included general conclusions and specific points on PIC, MAT, information needs and capacity building.

COP-5: At its fifth meeting in Nairobi, Kenya, in May 2000, the COP adopted Decision V/26, which established an *Ad Hoc* Open-ended Working Group to develop guidelines and other approaches on: PIC; MAT; roles, responsibilities and participation of stakeholders; aspects of *in situ* and *ex situ* conservation and sustainable use; mechanisms for benefit-sharing; and the preservation and maintenance of traditional knowledge. COP-5 also decided to reconvene the Experts' Panel on ABS to provide further input to the Working Group. Decision V/26 also addresses *ex situ* collections acquired prior to the CBD's entry into force, IPR and relevant provisions of the TRIPS Agreement.

ABS EP-2: The second Experts' Panel on ABS met in March 2001, in Montreal, Canada. The Panel produced a report and conclusions on: user and provider experience in ABS processes; approaches for stakeholder involvement in ABS processes; and complementary options to address ABS within the CBD's framework, including

possible elements for guidelines. The Panel's report and conclusions were forwarded as an input (UNEP/CBD/WG-ABS/1/2) into the first meeting of the Working Group on ABS.

ABS WG-1 REPORT

Reuben Olembo, on behalf of Noah Katana Ngala, COP-5 Bureau President and Minister of Environment and Natural Resources of the Republic of Kenya, opened the meeting. He highlighted developing countries' interests in ABS guidelines, especially for poverty reduction and sustainable development. He reviewed previous work by the Experts' Panel and the COP and noted Saudi Arabia's recent accession to the CBD.

Bärbel Dieckmann, Mayor of Bonn, welcomed participants and highlighted the city as a prime location for global dialogue on environmental issues. She noted that developing countries contain a large proportion of biodiversity and that developed countries have a duty to accept responsibilities toward them. Gila Altmann, Parliamentary State Secretary of the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, discussed the importance of biodiversity conservation in German environmental policy and highlighted national problems of environmental degradation. Stressing the value of global dialogue and partnerships in striving for global equity, she expressed hope for pragmatic solutions in the development of ABS guidelines.

Paul Chabeda, on behalf of UNEP Executive Director Klaus Töpfer, highlighted that ABS underscores the principle of equity in achieving the CBD's objectives. He also reviewed Decision V/26 establishing the Working Group and its mandate to develop guidelines and other approaches to ABS. CBD Executive Secretary Hamdallah Zedan thanked the Governments of Germany, Sweden and the UK for their financial support. He said the Working Group marks a new and crucial stage in the CBD process and that the ABS guidelines will be used to judge the Convention's effectiveness.

Olembo then introduced the agenda (UNEP/CBD/WG-ABS/1/1/Add.1/Rev.1), which was adopted without comment. Delegates elected Gila Altmann (Germany) and Mohamad bin Osman (Malaysia) as the meeting's Co-Chairs. They also approved the meeting's organization of work: Sub-Working Group I (SWG-I), chaired by Birthe Ivars (Norway), would address the development of draft international ABS guidelines; and Sub-Working Group II (SWG-II), chaired by Jorge Cabrera Medaglia (Costa Rica), would address other approaches, including an action plan for capacity building, and the role of IPR in the implementation of ABS arrangements. SWG-I Chair Medaglia then reported on the outcomes of the meetings of the Experts' Panels in Costa Rica (UNEP/CBD/COP/5/8) and Montreal (UNEP/CBD/ABS-WG/1/2).

The Plenary then heard a number of general statements on intersessional work by other bodies. The World Intellectual Property Organization (WIPO) reviewed work by the first session of its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (30 April to 3 May 2001; Geneva, Switzerland), which discussed: guide contractual practices and model IPR clauses for ABS arrangements; traditional knowledge; and cooperation with the CBD and the UN Food and Agricultural Organization (FAO).



The FAO provided an update on the negotiations of the International Undertaking (IU) (UNEP/CBD/WG-ABS/1/3 Annex II), as discussed by the sixth extraordinary session of the Commission on Genetic Resources for Food and Agriculture (24 June to 1 July 2001; Rome, Italy). He said that an Open-ended Working Group would convene prior to the FAO Conference from 30 October to 1 November to finalize pending items, including: definitions of “plant genetic resources for food and agriculture” (PGRFA) and “genetic material”; the patenting of genetic parts and components; the IU’s relationship with other international agreements; and the list of crops.

The UN Conference on Trade and Development (UNCTAD) reported on recent meetings on the role of traditional knowledge in trade and development, with specific regard to, *inter alia*: strategies for cooperation with WIPO and other relevant bodies; the BIOTRADE Initiative; and the development of country-specific capacity-building projects.

The International Indigenous Forum on Biodiversity (IIFB) presented the statement of its meeting held from 15-21 October 2001, emphasizing the links between indigenous peoples and biodiversity with specific reference to the role of women, and the collective rights of indigenous peoples. The IIFB’s recommendations addressed, *inter alia*, self-determination, PIC, relationships with other international legal regimes, capacity building, and equitable benefit-sharing.

A representative of the National Session of the Global Biodiversity Forum for Germany highlighted the results of its recent meeting from 19-21 October, noting the need to, *inter alia*: broaden ABS debates beyond commercial aspects to include conservation, sustainable use, the ecosystem approach and poverty alleviation; adopt measures regarding user responsibilities; ensure that IPR support the CBD’s objectives; and support development, implementation and monitoring of national ABS policies.

Belgium, on behalf of the EU, Iran, on behalf of the G-77/China, and Togo, on behalf of the African Group, then delivered regional statements.

SWG-I met from 22-26 October, and discussed the elements for draft guidelines on ABS. It formed two contact groups. The first met on 24 October to discuss roles and responsibilities, and the second met on 25 October to address outstanding issues in the draft guidelines. SWG-II met from 22-25 October, and discussed an action plan for capacity building, approaches other than guidelines to ABS and the role of IPR in implementing ABS arrangements. SWG-II formed two contact groups on IPR-related issues, which met on 24 October. The Plenary met on 25 October, to review the outputs of the Sub-Working Groups, and again on Friday, 26 October, to adopt the draft guidelines and final decisions.

The following summary reviews agenda items according to their order of discussion in the Sub-Working Groups, outlining the general deliberations on each item and providing brief summaries of the Working Group’s final outputs.

SUB-WORKING GROUP I

DRAFT BONN GUIDELINES ON ABS: On Monday, 22 October, the Secretariat introduced background document on the development of draft international guidelines on ABS (UNEP/CBD/WG-ABS/1/3), with sections on:

- key features;

- general provisions, including use of terms, scope, objectives, relationship with other CBD provisions and other international legal regimes;
- roles and responsibilities of users and providers, including national focal points, competent national authority, user responsibility and provider responsibility;
- participation of stakeholders, including establishment of a national consultative committee and promotion of stakeholder involvement;
- steps in the ABS process, including PIC and MAT; and
- other provisions, including monitoring of compliance, verification mechanisms in user countries, guarantees from the collector, sanctions and remedies for breach of terms of access, system of certification and dispute resolution.

Editor’s note: For purposes of summarizing the debate, the guidelines are considered section by section.

General Provisions: On Monday, 22 October, SWG-I Chair Ivars suggested following the structure in Annex I of UNEP/CBD/WG-ABS/1/3 and called for comments on the guidelines’ key features. Most delegates highlighted the guidelines’ voluntary nature. Cuba, Mexico and others noted that the guidelines should be general and not raise questions regarding national sovereignty, and Poland said that they should facilitate, not complicate, access to genetic resources. Peru said the guidelines’ role should be to assist action by all Parties, both providers and countries where genetic resources and associated traditional knowledge are used for commercial and scientific purposes.

The European Community (EC), supported by many, suggested adding two features: flexibility and evolutionary character. The G-77/China and others proposed addition of transparency.

Many developing countries stressed the need to define the guidelines’ scope to avoid interference with national decision making and drew attention to possible conflicts between the guidelines and national ABS legislation. Canada proposed adding the promotion of biodiversity’s conservation and sustainable use, and reflection of the interests and views of stakeholders. Greenpeace advocated that ABS principles should note that some IPR restrict or block access, and opposed “monopolistic rights of companies.” The Association Ixá Ca Vää for Indigenous Development and Information emphasized PIC at the local level, directed by indigenous and local communities and identifying roles of Parties and non-Parties. The World Wide Fund for Nature (WWF) opposed IPR that restrict access or local rights.

On Tuesday, 23 October, delegates agreed to defer discussion on the use of key terms. On the guidelines’ scope, the G-77/China suggested, *inter alia*, that all genetic resources except human genetic resources are covered. Australia, Canada, Switzerland and the US suggested exclusion of PGRFA covered by the IU. Tunisia suggested reference to genetic resources’ parts and genes. Delegates debated whether the scope should cover both pre- and post-CBD material and whether to delete some or all of the elements determining the scope.

On objectives, the G-77/China suggested deleting reference to non-discriminatory access frameworks, and the US, supported by Switzerland, suggested “transparent” frameworks. Many said that technology transfer should be promoted in the providing country. The EC and the G-77/China suggested ABS strategies as part of national biodiversity strategies. Switzerland, with others, called for reference to



stakeholders. Bolivia, Cuba and Tanzania called for promoting capacity building that is not confined to ABS. Colombia proposed language on strengthening the Clearing-House Mechanism (CHM) as a cooperation mechanism. Peru proposed new objectives on recognition of rights of indigenous and local communities and on food security, health security and cultural integrity.

On the relationship with other CBD provisions and work programmes, Thailand, on behalf of Asian countries, suggested deleting reference to the Global Taxonomy Initiative (GTI). On the relationship with other international legal regimes, the G-77/China, supported by the EC, proposed that application of guidelines be mutually supportive of relevant international instruments and the FAO's work on genetic resources, and take into account relevant WIPO's work. Brazil and China opposed reference to the IU, noting that it covers a specific list of crop genera and does not apply to ABS guidelines.

On Wednesday, 24 October, discussion took place on the basis of UNEP/CBD/WG-ABS/1/SWG.I/CRP.1, drafted by Chair Ivars. The G-77/China suggested new text stating that the guidelines: may serve as inputs when developing contracts and other arrangements under MAT for ABS; should not be construed as changing Parties' rights and obligations; and may not substitute for national ABS legislation. On key features, Burkina Faso requested definition of "voluntary nature" under use of terms. Brazil reserved on all key features, and Bolivia opposed reference to other users and providers, pending agreement on the use of terms.

On scope, delegates debated the exclusion of PGRFA covered by the IU. The EC suggested language stating that the guidelines should be without prejudice to relevant legally binding international agreements, including the IU's ABS provisions, and preferred to address the issue under the relationship with international legal regimes. The G-77/China supported, and Switzerland opposed, deleting references to the IU. Delegates also debated whether and where to include the list of elements, which would determine the scope.

On objectives, Mexico supported reference to safeguarding and guaranteeing fully the rights of local and indigenous communities. Canada proposed language on ABS mechanisms that recognize the protection of traditional knowledge.

Mexico, El Salvador and Poland, on behalf of the Central and Eastern European countries (CEE), requested language on taxonomic research and the GTI. The US proposed, and the G-77/China opposed, deleting language on provision of financial resources to providing countries. Delegates also debated whether capacity building should guarantee effective implementation and/or negotiation of ABS arrangements.

The G-77/China proposed deleting sections on the relationship with other CBD provisions and international legal regimes. Bolivia suggested that language on the relationship with CBD provisions could be contained in the preamble.

On Thursday, 25 October, delegates discussed outstanding issues in a contact group chaired by SWG-I Chair Ivars. Delegates debated inclusion of derivatives and products of genetic resources in the scope of the guidelines and finally agreed to keep such references in brackets. They agreed to incorporate reference to relevant CBD provisions in the first operative clause of the document. On objectives, dele-

gates 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.

Final Text: The general provisions of the draft Bonn guidelines (UNEP/CBD/WG-ABS/1/L.4) include sections on: key features; use of terms; scope; relationship with relevant international regimes; and objectives.

Regarding key features, it is recognized that the guidelines: may serve as inputs when developing legislative, administrative or policy measures on ABS with reference to CBD Articles 8(j), 10(c), 15, 16 and 19, and contracts and other arrangements under MAT for ABS; shall not be construed as changing Parties' rights and obligations under the CBD; and are not intended to substitute for ABS national legislation. It is agreed that the guidelines were prepared with a view to ensuring they are voluntary, easy to use, practical, acceptable, complementary, an evolutionary approach, flexible and transparent.

Regarding use of terms, the terms as defined in CBD Article 2 shall apply to the guidelines. The following terms remain bracketed to be defined: access to genetic resources; benefit-sharing; commercialization; derivatives; provider; user; stakeholder; *ex situ* collection; and voluntary nature.

Regarding scope, the guidelines cover all genetic resources and associated traditional knowledge, innovations and practices covered by the CBD, and benefits arising from their use, with the exclusion of human genetic resources. Reference to the derivatives and products of the resources included in the guidelines' scope remains bracketed.

Regarding the relationship with relevant international regimes, the guidelines' application should be coherent with and mutually supportive of relevant international agreements and institutions, without prejudice to the ABS provisions of the IU, and taking into account relevant work by WIPO, and existing national ABS legislation and agreements.

Objectives include:

- conservation and sustainable use of biodiversity;
- providing Parties and stakeholders with a transparent framework to facilitate ABS;
- providing guidance to Parties in the development of ABS regimes;
- informing the practices and approaches of stakeholders;
- providing capacity building for the negotiation and implementation of ABS arrangements;
- promoting awareness of CBD implementation;
- promoting financial resources to providing countries that are developing countries or countries with economies in transition;
- strengthening the CHM as a cooperation mechanism;
- contributing to the development of regimes that recognize the protection of traditional knowledge, innovations and practices of indigenous and local communities;
- contributing to poverty alleviation and supporting human food security, health and cultural integrity;
- facilitating taxonomic research as specified in the GTI; and
- assisting Parties in developing an ABS strategy, which may be part of their national biodiversity strategy and action plan.



Roles and Responsibilities: On Tuesday, 23 October, Chair Ivars called for comments on roles and responsibilities of users and providers on the basis of UNEP/CBD/WG-ABS/1/3. On national focal points, Cuba, supported by many, proposed deleting language stating that the national ABS focal point should also be the CBD focal point. The EC and Thailand said that focal points should be communicated to the CHM.

On competent national authorities, delegates debated language on the legal power of the national authority to grant PIC. The G-77/China suggested requiring applicants to provide evidence of national registration in home countries. The EC and Peru called for participatory mechanisms at the national level.

On users' and providers' responsibilities, Cuba, supported by the G-77/China, questioned references to documentation of terms under which the genetic resources were acquired. Canada called for consistency with Article 8(j) and noted that many countries are both users and providers. Switzerland, supported by the EC and Mexico, said that users' responsibilities should be more practical and specific. El Salvador called for clarification in cases where the country of origin of the genetic resource is not the provider.

On Wednesday, 24 October, discussion in SWG-I was held on the basis of UNEP/CBD/WG-ABS/SWG.I/CRP.1. The G-77/China proposed replacing reference to users and providers in the title with reference to countries of origin, and deleting provisions on provider responsibilities and references to stakeholders. Cameroon, Canada, the EC and Switzerland preferred clear differentiation between users' and providers' roles. Brazil clarified that users' responsibilities appear to be voluntary, while contracts are binding. Argentina underscored that the guidelines have no legal implications for national access regimes. Mexico stated that the guidelines should apply to the whole range of users and providers, not just Parties. Brazil said the section confuses countries of origin, users and providers. Cuba supported determining users and providers on a case-by-case basis. Canada and Colombia reiterated that many countries are both users and providers.

A contact group, chaired by Jorge Soberón-Mainero (Mexico), met late into the night to continue negotiations. It addressed, *inter alia*: the section's title; delineating responsibilities of countries of origin and of users and providers; accommodating specific reference to countries of origin; and references to stakeholders.

On Thursday, 25 October, contact group Chair Soberón-Mainero reported on the results of the meeting to SWG-I, highlighting a revised draft on roles and responsibilities in ABS pursuant to CBD Article 15, with some outstanding brackets.

Delegates debated, *inter alia*: endorsement or processing and approval of agreements by competent national authorities; 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; review of decisions or establishment of mechanisms for review of decisions by stakeholders; and providers' responsibilities regarding supplying genetic resources when entitled, and not imposing discriminatory restrictions on access, with many developing countries calling for deletion of the second responsibility.

Canada supported differentiation of stakeholder types and proposed language on participation of indigenous and local communities in the steps of the ABS process. Regarding third parties, Mexico proposed text on allowing exceptions for taxonomic or scientific materials for non-commercial users. Regarding user responsibilities, China suggested language on promoting technology transfer to providing countries.

During contact group discussions chaired by Ivars, 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 that are countries of origin or other Parties, with regard to responsibilities;
- seeking to ensure that commercialization and any other use of genetic resources should not prevent traditional use;
- 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.

Final Text: The section on roles and responsibilities in ABS pursuant to CBD Article 15 (UNEP/CBD/WG-ABS/1/L.4) includes sub-headings on: national focal point; competent national authority(ies); and responsibilities.

Regarding the national focal point, each Party should designate one national focal point for ABS and make such information available through the CHM. The focal point should inform applicants on procedures for PIC and MAT and on competent national authorities and relevant stakeholders.

Competent national authorities may be responsible for granting access and advising on:

- the negotiating process;
- requirements for obtaining PIC and entering into MAT;
- monitoring and evaluation, and implementation/enforcement of ABS agreements;
- processing of applications and approval of agreements;
- the conservation and sustainable use of accessed genetic resources; and
- mechanisms for the effective participation of stakeholders, in particular indigenous and local communities.

The legal power to grant PIC may be delegated to other entities. A footnote states that the term "stakeholders" needs to be clarified.

Regarding responsibilities, the text recognizes that Parties and stakeholders may be both users and providers, and lists roles and responsibilities for each. Parties that are countries of origin of genetic resources, or other Parties that have acquired the genetic resources in accordance with the CBD, should:

- be encouraged to review their policies to ensure compliance with CBD Article 15;
- be encouraged to report on access applications through the CHM;
- seek to ensure that commercialization and any other use of genetic resources should not prevent traditional use;



- ensure that their roles and responsibilities are fulfilled in a clear, objective and transparent manner;
- ensure that all stakeholders consider the environmental consequences of access activities; and
- establish mechanisms to ensure that their decisions are made available to relevant stakeholders, particularly indigenous and local communities.

In the implementation of MAT, users should:

- seek PIC;
- respect the practices of indigenous and local communities and respond to their requests for additional information;
- only use genetic resources for purposes consistent with the terms and conditions under which they were acquired;
- ensure that other uses only take place after new PIC and MAT are given;
- maintain all relevant data regarding the genetic resources;
- endeavor to carry out use in and with the participation of the providing country;
- honor any terms and conditions regarding the acquired material when supplying genetic resources to third parties and establish special terms to facilitate taxonomic research for non-commercial purposes; and
- ensure the fair and equitable sharing of benefits, including technology transfer to providing countries, arising from the commercialization or other use of genetic resources.

Providers should only supply genetic resources and/or traditional knowledge when entitled to do so and strive to avoid imposition of arbitrary restrictions on access.

Participation of Stakeholders: On Tuesday, 23 October, Chair Ivars called for comments on stakeholders' participation on the basis of UNEP/CBD/WG-ABS/1/3. Bolivia and Peru said representatives of those directly involved, including indigenous communities, should form the consultative committee.

On Wednesday, 24 October, discussion was held on the basis of UNEP/CBD/WG-ABS/SWG.I/CRP.1. The G-77/China proposed bracketing this section pending clarification of the concept of stakeholders. Brazil added that this is necessary because different categories of stakeholders have different rights. However, Cuba highlighted existing work that clarifies possible categories of stakeholders. The IIFB declared they had no confidence in this process, as the guidelines disregard Decision V/16, their recommendations on PIC and the right to self-determination and rights to land and territories.

On Thursday, 25 October, during contact group discussions, delegates agreed on text stating that appropriate consultation arrangements, such as national consultation committees comprising relevant stakeholder representatives, should be made to facilitate the involvement of relevant stakeholders, including local and indigenous communities.

On Friday, 26 October, SWG-I Chair Ivars introduced document UNEP/CBD/WG-ABS/1/SWG.I/CRP.1/Rev.2 and the section was agreed with some rearrangement of provisions.

Final Text: The section on participation of stakeholders (UNEP/CBD/WG-ABS/1/L.4) recognizes that:

- involvement of relevant stakeholders is essential;
- their involvement can only be determined on a case-by-case basis;

- relevant stakeholders should be consulted in each step of the process;
- appropriate consultative arrangements, such as national consultative committees, should be made to facilitate the involvement of relevant stakeholders, including local and indigenous communities; and
- the involvement of relevant stakeholders should be promoted by providing information and support for capacity building.

Steps in the ABS Process: This section outlines the overall strategy and steps in the ABS process, and discussions focused mainly on specific provisions under the headings of PIC and MAT.

Prior Informed Consent: On Tuesday, 23 October, SWG-I discussed UNEP/CBD/WG-ABS/1/3. Australia, El Salvador and the EU emphasized that PIC should be subject to national legislation. Regarding basic principles, Venezuela proposed deleting references to restrictions based on objective criteria and, with opposition from Australia, to different levels of government. The US said that restrictions on access should be transparent. Poland proposed including minimum costs of handling, and said that *ex situ* collections should not be subject to national sovereignty. Bolivia and Brazil stated that no distinction is needed between *in situ* and *ex situ* collections with regard to the competent authority granting PIC. Canada highlighted the importance of identifying PIC elements, and the EC proposed adding transparency and non-discrimination to the list. The G-77/China proposed language stating that any intended change of use, including transfer to third parties, shall require a new PIC agreement. WWF and the IIFB emphasized the importance of PIC to indigenous and local communities and their participation in decision-making.

On Wednesday, 24 October, SWG-I considered UNEP/CBD/WG-ABS/1/SWG.I/CRP.1. Canada suggested alternative text on obtaining PIC and approval of indigenous and local communities, respecting their legal rights on genetic resources and associated traditional knowledge.

On Thursday, 25 October, the contact group chaired by Ivars discussed UNEP/CBD/WG-ABS/1/SWG.I/CRP.1/Rev.1. Delegates debated references to "identified" stakeholders and Parties in provisions on obtaining genetic resources. Regarding *in situ* conditions, delegates agreed to text stating that competent national authorities would grant PIC. Regarding *ex situ* collections, they agreed to reference the competent national authority and/or the body governing the collection.

Mutually Agreed Terms: On Tuesday, 23 October, SWG-I offered comments on UNEP/CBD/WG-ABS/1/3. Japan supported stipulating timeframes of benefit-sharing on a case-by-case basis. The G-77/China preferred deleting language on negotiation of reasonable timeframes and called for clarification of "contributions to local economies" as a non-monetary benefit. Cameroon proposed patents as a benefit-sharing mechanism. The EU suggested specifying benefits in an annex. Canada highlighted multiple implications of rights and concessional and preferential terms. The IIFB called for empowering local communities to revitalize traditional knowledge.

On Wednesday, 24 October, SWG-I considered UNEP/CBD/WG-ABS/1/SWG.I/CRP.1. The EC suggested that a list of items for standardized material transfer agreements (MTAs) be placed in an annex. Regarding transfer of genetic resources to third parties, Poland



suggested exclusion of taxonomic and systematic research not related to commercialization. Regarding monetary benefits, Japan requested bracketing reference to fees paid to trust funds supporting biodiversity conservation, and the EC requested bracketing taxation.

On Thursday, 25 October, a contact group chaired by Ivars discussed UNEP/CBD/WG-ABS/SWG.I/CRP.1/Rev.1, debating 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 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.

Final Text: The draft Bonn Guidelines (UNEP/CBD/WG-ABS/1/L.4) states that ABS systems should be based on an overall strategy at the country or regional level and should aim at the conservation and sustainable use of biological diversity. Steps may include research and development as well as commercialization. It notes that CBD Article 15 recognizes the sovereign rights of States over their natural resources and that according to Article 15.5 access to genetic resources is subject to the PIC of the Contracting Party providing such resources, unless otherwise determined by that Party.

Regarding PIC, it recognizes basic principles, including: legal certainty; minimum cost; transparent restrictions based on legal grounds; and consent of competent relevant national authority(ies) and indigenous and local communities, as appropriate to the circumstance and subject to domestic law. PIC elements may include: competent authority(ies) granting or providing for evidence of PIC; timing and deadlines; specification of use; conditions for obtaining PIC; mechanism for consultation of relevant stakeholders; and process. The text states that PIC for access to *in situ* collections shall be obtained from competent national authority(ies), and that PIC for access to *ex situ* collections shall be obtained from competent national authorities and/or the body governing the collection. It notes that PIC may be required by different levels of government in accordance with national legislation, that national procedures should facilitate involvement of all relevant stakeholders, and that PIC should be obtained from indigenous and local communities in accordance with traditional practices, national access policies and subject to domestic laws. Regarding specification of use, it notes that PIC is required for transfer to third parties or change of use, and recognizes specific needs of taxonomic and systematic research.

Regarding MAT, the text references CBD Article 15.7 in noting that the Guidelines should assist Parties and stakeholders in the development of MAT to ensure fair and equitable benefit-sharing. It outlines principles, elements and an indicative list of typical MAT, which includes, *inter alia*: a bracketed reference to type and quantity of derivatives and products, recognition of the sovereign rights of the country of origin, a reference to the exception of taxonomic and systematic research not related to commercialization in cases of transfer to third parties, and recognition of whether respect for customary use of biological resources in accordance with traditional practices has been protected and encouraged. It also outlines types, timing and distribution of benefits and mechanisms for benefit-sharing. Types of monetary and non-monetary benefits are listed in Annex I. Suggested MTA elements are detailed in Annex II, including introductory, ABS and legal provisions. Both annexes contain footnotes stating that they were not discussed by SWG-I and will be discussed at COP-6.

Other Provisions: This section addresses incentives for implementation of the draft guidelines, accountability in implementing ABS arrangements, national monitoring and reporting, means for verification, settlement of disputes, and remedies.

On Tuesday, 23 October, SWG-I discussed UNEP/CBD/WG-ABS/1/3. Delegates noted that some prescriptive statements contained in the section contradict the guidelines' voluntary nature. Switzerland called for a mechanism to guarantee monitoring of implementation, stressing a certification system. Canada said implementation mechanisms should focus on incentives, and that compliance, sanctions, remedies and dispute resolution should refer to contracts only.

On Wednesday, 24 October, SWG-I offered comments on both UNEP/CBD/WG-ABS/1/3 and UNEP/CBD/WG-ABS/1/SWG.I/CRP.1. Discussion focused on issues of verification and certification mechanisms. The G-77/China stressed compliance with CBD provisions and national legal instruments of the country of origin. Togo suggested that national competent authorities formulate certification systems to allow implementation or verification of the guidelines. Mexico proposed that Parties develop appropriate mechanisms to verify the legal origin of materials. The EC suggested that disputes arising in mutually agreed arrangements should be solved in accordance with contractual arrangements on benefit-sharing and applicable law.

In the afternoon, delegates responded to a revised UNEP/CBD/WG-ABS/1/SWG.I/CRP.1 based on the morning's discussion. Japan, Thailand and the US proposed, and a number of developing countries opposed, deleting paragraphs on: voluntary means for verification; institutional guarantees for compliance; market-based approaches; sanctions; and remedies for breach of terms. Canada supported deleting only the paragraph on remedies for breach of terms, while the EC, Mexico, Switzerland and others supported a compromise omitting reference to national authorities. On dispute resolution, Iran and the US preferred specifying resolution according to national or international law, while Canada, the EC and Thailand preferred specifying relevant contractual arrangements.

On Thursday, 25 October, a contact group chaired by Ivars met to resolve outstanding issues. 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 the nature and meaning of "voluntary" verification mechanisms, and agreed that these 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 certification system that could assist in verifying the transparency 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 laws and practices.



Final Text: The draft Bonn Guidelines (UNEP/CBD/WG-ABS/1/L.4) identify incentive measures for implementation, including: removal of perverse incentives that may act as obstacles, economic and regulatory instruments, valuation methods, and creation and use of markets.

Regarding accountability in implementing ABS, the text states that to promote accountability, Parties may consider establishing requirements regarding reporting and disclosure of information, and that the individual collector or institution on whose behalf the collector is operating should, where appropriate, be responsible and accountable for the compliance of the collector.

Regarding national monitoring and reporting, it states that this may include: whether the use of genetic resources is in compliance with ABS terms; research and development process; and applications for patents and other IPR relating to the material supplied. The provision states that the involvement of relevant stakeholders, in particular indigenous and local communities, in the development and implementation of ABS arrangements, can play an important role in facilitating the monitoring of compliance.

Regarding means for verification, it states that voluntary verification mechanisms could be developed at the national level to ensure compliance with ABS provisions of the CBD and national and legal instruments of the country of origin providing the genetic resources, and that a voluntary certification system could serve as a means to verify the transparency of the ABS process and certify compliance with ABS provisions of the CBD.

Regarding settlement of disputes between providers and users, it notes that they should be solved in accordance with the relevant contractual ABS arrangements and the applicable laws and practices. It suggests use of sanctions, such as penalty fees set out in contractual arrangements, in cases of non-compliance.

Regarding remedies, it proposes that Parties may take appropriate effective and proportionate measures for violations of national legislative, administrative or policy measures implementing the ABS provisions of the CBD, including requirements related to PIC and MAT. Finally, this section contains a footnote stating that while the Working Group agreed in principle with this text, there was insufficient time to consider it fully.

SUB-WORKING GROUP II

CAPACITY BUILDING: On Monday, 22 October, SWG-II Chair Medaglia introduced the agenda item on other approaches and the development of an action plan for capacity building, referring to background document UNEP/CBD/WG-ABS/1/3 and the report of the second Panel of Experts on ABS (UNEP/CBD/WG-ABS/1/2). UNEP/CBD/WG-ABS/1/3 identifies as key capacity building needs: assessment and inventory of biological resources; contract negotiation skills; legal drafting skills for ABS; and means for protection of traditional knowledge.

Chair Medaglia suggested that SWG-II could either complete a detailed plan of action or indicate the main elements of such a plan. Colombia supported development of a plan of action, whereas Canada, Malaysia and the Russian Federation preferred developing a framework to be elaborated in the future. Regarding key capacity-building needs, several countries noted ongoing national activities and called for the use of case studies. Delegates highlighted, *inter alia*: contract

negotiation; user obligations; scientific and technical cooperation for users and suppliers; use of available information systems; information handling; human resources; regulatory mechanisms that enable monitoring and follow-up to protect local communities' rights; and national biodiversity and taxonomic assessments. Delegates also called for evaluation of existing capacities and inventories of national legislative measures.

Canada emphasized the requirements of national focal points, competent authorities and others involved in policy development and national self-assessment processes. Haiti and the UK called for addressing capacity needs in national planning processes. Senegal stressed work at the subregional level. Several delegates supported access to funding mechanisms, including the Global Environment Facility (GEF), and continued financial support.

There was some discussion on information needs, with the EU and Canada highlighting information sharing under the CHM. Several delegates suggested the workshop on biosafety capacity building as a model. The EU stated that capacity building should be demand-driven and, with Algeria, Colombia and Zambia, called for greater cooperation with complementary initiatives and institutions. Several delegates called for private sector involvement in capacity building, particularly in information management, technology transfer, development of MAT, collaborative research, and work with indigenous and local communities. Many delegates underscored the importance of capacity building for indigenous and local communities, particularly in information sharing, means to protect traditional knowledge, and participation in decision-making processes. Indigenous representatives highlighted the need for, *inter alia*: identification of best practices for developing national legislation and *sui generis* systems; and recognition of capacity building in supporting indigenous peoples' rights. The IIFB also noted that traditional knowledge systems require different approaches for their definition and assessment.

On Tuesday, 23 October, delegates discussed a Chair's draft text reflecting earlier discussion. Regarding the preamble, on the request for an expert workshop, delegates discussed timing vis-à-vis COP-6 and other CBD meetings, mandate, participation and funding. Haiti and Senegal proposed it be open-ended to allow for full participation by developing countries, and Canada proposed participation by relevant international and intergovernmental organizations, NGOs and indigenous representatives. The IIFB highlighted the importance of considering Article 8(j).

Regarding key areas, Mexico, with Antigua and Barbuda and Colombia, recommended that language on institution building emphasize their strengthening over their formation. Regarding assessment, inventory and monitoring of biological resources, delegates proposed references to Decisions IV/1(a), V/9 and the GTI. Thailand proposed reference to inventories of traditional knowledge. On valuation of genetic resources and market information, UNCTAD proposed reference to production and marketing strategies. Regarding inventories of existing legislative measures and development of legislation, Colombia proposed reference to case studies and pilot projects. Regarding information systems and management, the Czech Republic proposed reference to the CHM. Regarding public education and awareness, Saint Lucia proposed deleting reference to the private sector. Regarding means to protect traditional knowledge, several delegates highlighted the need for coordination with the Working



Group on Article 8(j). Antigua and Barbuda and Madagascar highlighted the need to address monitoring and evaluation mechanisms, as well as indicators. IUCN proposed the use of indicators at all stages of the ABS process.

Regarding processes, on identification of capacity needs Haiti proposed a reference to “measures” and Germany to awareness raising. Regarding integration of capacity building within national biodiversity strategies, the EU suggested reference to other related initiatives and strategies. Regarding identification of existing capacity-building initiatives, delegates discussed capacity building at different geographic levels. Canada suggested the text should clarify at what level the initiatives are carried out. Colombia and Brazil highlighted different needs at different levels and between users and providers; suggested adding local, national, subregional and regional levels; and gave priority to national sources. Canada proposed reference to the GEF guidelines for self-assessment, and Algeria suggested including the private sector. The IIFB called for specific reference to indigenous and local communities in text on other stakeholders. Haiti proposed a new paragraph on the establishment of indicators for monitoring capacity-building implementation.

Regarding means of implementation, Colombia proposed reference to scientific and technical cooperation with respect to the CHM. UNCTAD proposed identification of best practices through workshops. Regarding model agreements and codes of conduct, delegates agreed to terminology on sectors, uses and users. Regarding stakeholder involvement, Germany proposed reference to the work programme on Article 8(j). An indigenous representative proposed that participation be “full and effective.” On a roster of experts, Canada called for clarity on its formation and an indigenous representative highlighted the need to include expertise on traditional knowledge. Costa Rica and the EU proposed an element referring to national focal points and competent authorities. Haiti suggested reference to south-south cooperation.

Regarding coordination, delegates discussed language on providing voluntary submissions through the CHM or in national reports. The EU supported both, whereas Brazil and Colombia opposed reference to national reports. UNCTAD proposed reference to submissions by international organizations. Delegates recognize the need for further work on the use of indicators.

On Wednesday, 25 October, delegates briefly discussed a revised draft UNEP/CBD/WG-ABS/SWG.II/CRP.1. Regarding key areas for capacity building, Thailand proposed reference to traditional knowledge with regard to assessment, inventory and monitoring activities. Brazil and the UK proposed that support for scientific and technical areas, including technology transfer, should focus on access to and use of genetic resources. Regarding processes, Malaysia called for prioritization of capacity-building measures at the local, national, subregional and regional levels. Regarding means of implementation, Tunisia and Brazil supported reference to development of appropriate national framework legislation. With these and other minor changes, the text was accepted.

Draft Decision: The final text (UNEP/CBD/WG-ABS/1/L.2) contains a preamble which, *inter alia*: recalls relevant sections of CBD Decision V/26(A); notes the importance of information and the work of the second Panel of Experts on ABS; and recognizes ABS as part of an overall strategy for conservation and sustainable use. The draft

decision, *inter alia*: requests that the CBD Executive Secretary, in consultation with the COP, convene an open-ended expert workshop on capacity building for ABS; invites Parties, governments and others to submit to the CBD Executive Secretary information on capacity-building needs, priorities and existing initiatives; and recommends a roster of experts on ABS.

An annex of draft elements for the action plan outlines its objective, key areas, processes, means of implementation, and coordination. The plan’s objective is to facilitate and support the development and strengthening of capacities for the effective implementation of CBD provisions relating to ABS at the local, national, regional and international levels, by providing a framework for identifying country and stakeholder needs, mechanisms of implementation and sources of funding.

The key areas requiring capacity building include:

- institutional strengthening;
- assessment, inventory and monitoring of biological resources;
- inventory of existing legislative measures and *sui generis* systems;
- information systems;
- strengthening capacities of indigenous and local communities for participation in decision making;
- education and awareness;
- funding and resource management;
- contract negotiation skills for all stakeholders;
- means for protecting traditional knowledge; and
- instruments and indicators for monitoring.

Under processes, the plan identifies, *inter alia*:

- awareness raising and identification of capacity needs;
- integration of capacity building within national biodiversity strategies;
- prioritization of key areas; and
- identification of existing capacity-building initiatives.

The section on means of implementation provides for a range of mechanisms including, *inter alia*:

- scientific and technical cooperation among Parties;
- dissemination of case studies and best practices;
- development of model agreements;
- the GTI;
- GEF funding;
- private sector participation; and
- use of the roster of experts.

The section on coordination provides for: information and coordination to avoid duplication; encouragement of voluntary submissions by Parties, governments and international organizations; and consideration of including information on capacity building in national reports.

OTHER APPROACHES: On Tuesday, 23 October, Chair Medaglia introduced the relevant section of document UNEP/CBD/WG-ABS/1/3 on approaches to ABS other than guidelines, which include codes of conduct, model agreements, indicators, capacity building and information exchange. Several countries stated that such approaches were more appropriate for discussion by SWG-I. Chair Medaglia said that SWG-II would simply acknowledge other approaches.

Draft Decision: The draft decision (UNEP/CBD/WG-ABS/1/L.2), *inter alia*, recalls relevant elements of COP Decision V/26(A) and the report of the second Panel of Experts on ABS, and recognizes



the existence of other complementary measures such as voluntary codes of conduct, model agreements and indicators. It recommends that the CBD Executive Secretary compile information on existing complementary measures and approaches, and on experiences with their implementation.

THE ROLE OF IPR IN ABS ARRANGEMENTS: On Wednesday, 24 October, SWG-II held a general discussion on the role of IPR in ABS arrangements. The Secretariat introduced document UNEP/CBD/WG-ABS/1/4, which addresses IPR-related issues regarding PIC, traditional knowledge, ABS arrangements, scope, prior art, and monitoring, as well relevant developments in other fora. Delegates heard a report on the work of WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore and discussed issues regarding further collaboration. Peru noted that indigenous participation within this Committee has been limited, and Mexico warned against subordinating CBD objectives to other fora.

Delegates highlighted use of IPR in achieving the CBD's objectives, triggering commercial benefit-sharing, and facilitating technology transfer and information exchange. Peru noted that IPR may impede access to genetic resources, scientific research, farmers' rights to seed varieties and market concentration. Several countries supported requirements for disclosure of the country of origin and evidence of PIC in patent applications. Thailand suggested that such requirements be introduced into TRIPS Article 27.3(b), whereas the EC and Biotechnology Industry Organization (BIO) suggested they be voluntary. BIO and the US highlighted potential negative impacts and the burden of making such commitments obligatory. Some participants also noted that patent applications on specific genetic resources often contain information on their geographical origin. The German NGO Forum on Environment and Development said that disclosure of geographic origin and PIC are important in preventing biopiracy.

Peru supported an internationally recognized system of certification, MAT and PIC, and suggested assistance to monitor patent application processes. The US noted mechanisms for re-examination of inappropriately granted patents. Thailand noted that assessment of prior art in patent applications can improve transparency. The EC proposed developing model intellectual property clauses for contractual agreements.

Regarding traditional knowledge, some countries noted that IPR may not be appropriate for its protection, especially regarding use of patent criteria for novelty, inventiveness and utility. Colombia and Thailand called for development of *sui generis* regimes, while the US recommended that WIPO address such approaches. Delegates also proposed exploring use of, *inter alia*, licensing, trade secrets, indications of geographic origin, registers of traditional knowledge, and an international model for legal protection of traditional knowledge. UNCTAD referred to its recent expert meeting on traditional knowledge, which recommended, *inter alia*, exchange of information on national systems and exploration of internationally recognized *sui generis* systems.

Chair Medaglia then formed two contact groups on PIC and ABS, and on traditional knowledge.

PIC and ABS: The contact group on PIC and ABS, chaired by Brendan Tobin (Peru), convened on Wednesday, 24 October, and discussed, *inter alia*: the voluntary vs. mandatory nature and legality of including country of origin and PIC in patent applications; certification systems; prior art and traditional knowledge, especially regarding written and oral evidence; means to address inappropriately granted patents; and how IPR support or impede the CBD's objectives. It developed a draft decision for consideration by SWG-II.

On Thursday, 25 October, SWG-II considered the draft decision. Several textual modifications were made to clarify text and reorder provisions. In the preamble, delegates made minor revisions to text on the mutual supportiveness of the CBD and relevant international instruments on IPR. Colombia proposed, and delegates agreed, to insert a reference to CBD Article 16.5. BIO and the US proposed deleting a reference to IPR constraining access and limiting scientific research, to which Colombia, the EU and Peru disagreed, noting that it balances another preambular provision on recognizing the potential contributions of IPR. 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. Delegates also discussed an invitation to encourage disclosure of the use and country of origin of genetic resources, including whether it should apply to governments or patent applicants. Only minor editorial changes were made.

Regarding recommendations on areas requiring further information and analysis, Canada proposed that a point on patent applications should also address re-examination of patents granted. Delegates also expressed concern regarding institutional responsibility between the CBD and WIPO for information-gathering activities, which was clarified in terms of areas where WIPO would assist the CBD Executive Secretary and areas where WIPO would be urged to provide input. 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.

Traditional Knowledge: The contact group on traditional knowledge, chaired by John Herity (Canada), convened on Wednesday, 24 October, and discussed, *inter alia*: relevant work of and CBD relations with WIPO, UNCTAD, WTO and other international bodies; *sui generis* and other systems, including conventional IPR; participation of indigenous and local communities; databases; and case studies.

On Thursday, 25 October, SWG-II discussed a draft decision from the contact group. 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. Following a brief debate, delegates agreed to EU suggestions to: shift part of a bracketed provision on *sui generis* systems to the preamble, stating that they may need to be reinforced by international action; and reformulate the remainder of the provision to recognize WIPO's work on international models and recommend that WIPO consider collaborative projects to protect traditional knowledge. Dele-



gates 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.

Draft Decision: The draft decisions related to IPR on PIC and ABS and on traditional knowledge were integrated into UNEP/CBD/WG-ABS/1/L.3, which was adopted in the closing Plenary on Friday, 26 October, without discussion. The preamble to the decision notes and recognizes, *inter alia*:

- relevant ongoing work by WIPO and other relevant international bodies;
- the importance of contracting approaches;
- national requirements for disclosure of country of origin or geographical origin and PIC for IPR applications in some countries;
- the potential utility of such disclosures through regulatory means, such as product approval application and certification procedures;
- possible need for reinforcement of *sui generis* systems by international action;
- IPR as supportive of, or in some cases constraining, access to genetic resources and scientific research;
- the need to ensure that the CBD and relevant international IPR instruments are mutually supportive regarding ABS;
- disclosure of use of genetic resources and traditional knowledge in IPR applications may assist patent examiners in identifying prior art; and
- the distinction between States' rights over genetic resources and rights over traditional knowledge associated with such resources.

The draft decision recommends that the COP invite Parties to encourage the disclosure of the country of origin and traditional knowledge in IPR applications, where an invention makes use of such resources or knowledge. It recommends that the CBD Executive Secretary, with the help of other international organizations such as WIPO and through the Working Group on Article 8(j), undertake further information gathering and analysis on, *inter alia*:

- IPRs' impact on access and scientific research;
- the role of customary law and practices regarding the protection of genetic resources and traditional knowledge;
- consistency of requirements for disclosure of country of origin and PIC with international legal obligations;
- efficacy of country of origin and PIC disclosures in assisting examination of patent applications and re-examinations, as well as in monitoring compliance with access provisions;
- feasibility of an international certificate of origin system as evidence of PIC and MAT; and
- the role of oral evidence of prior art in patent examinations.

It also requests the CBD Executive Secretary to compile information on legal mechanisms for resolving contractual disputes domestically and internationally, and on the principles, legal mechanisms and procedures for obtaining PIC of indigenous and local communities under national access regimes.

It notes the need for information on disclosure requirements in patent applications with regard to the country of origin of genetic resources, traditional knowledge and evidence of PIC, and recom-

mends that the COP invite WIPO to prepare a study on relevant methods consistent with the treaties it administers. It further calls for submissions from governments and other relevant international and regional institutions (e.g., FAO, UNCTAD, the WTO and the UN Commission on Human Rights) on the issues referenced in the decision's information-gathering activities. It also urges WIPO to provide relevant information on its work on traditional knowledge and ABS, and encourages rapid progress in its development of model intellectual property clauses for contractual agreements on MAT.

CLOSING PLENARY

Chair bin Osman opened the closing Plenary, noting that the meeting's report would include three annexes: the development of the draft Bonn Guidelines; the development of an action plan for capacity building; and the role of IPR in the implementation of ABS arrangements. SWG-I Chair Ivars and Brendan Tobin, on behalf of SWG-II Chair Medaglia, presented the results of the Sub-Working Groups for adoption, as included in documents UNEP/CBD/WG-ABS/1/L.2-4. Delegates then adopted the draft guidelines and decisions without significant comment.

The German NGO Forum on Environment and Development, on behalf of a number of NGOs, stressed, *inter alia*, that the guidelines should not be used to facilitate access in countries without national ABS legislation; and that the ABS process should recognize indigenous rights to PIC. He also called upon Parties to: prevent IPR that might restrict access; support disclosure of geographic origin in patent applications; develop community-based measures to protect traditional knowledge; and ensure the CBD's objectives are not subordinated to the WTO and regional trade agreements.

The IIFB underscored the recognition of the existence and rights of indigenous peoples as the fundamental precondition for progress on ABS, and called for capacity building among Parties to respect such rights with regard to existing and emerging international agreements. The IIFB also requested that the report of the recent IIFB meeting be appended to the report of the Working Group.

Under the agenda item on Other Matters, the Netherlands highlighted preparations for COP-6 to be held in The Hague. Esko Jaakkola (Finland) then introduced the report of the meeting (UNEP/CBD/WG-ABS/1/L.1), which was adopted with one minor edit. The Plenary also paid tribute to the Government and people of Germany for hosting the meeting (UNEP/CBD/WG-ABS/1/L.5).

Co-Chair Altmann thanked all the delegates, the Sub-Working Group and contact group Chairs and the Secretariat, and praised the spirit of cooperation and readiness for compromise during negotiations. Iran, on behalf of G-77/China, Slovenia, on behalf of CEE, Togo, on behalf of the African Group, Belgium, on behalf of the EU, and Thailand, on behalf of the Asian countries, gave closing statements. The IIFB thanked the Secretariat and the Government of Germany for their assistance. CBD Executive Secretary Hamdallah Zedan welcomed the accomplishment of the Bonn guidelines on ABS as a concrete measure to make the CBD's third objective a reality.

Ruben Olembo then officially closed the meeting at 1:45 pm.



A BRIEF ANALYSIS OF ABS WG-1

Over the course of the week, the Working Group on Access and Benefit-sharing grappled with the arduous task of culling input from two Experts' Panels and numerous COP discussions on access and benefit-sharing and shaping it into a politically acceptable set of guidelines. Despite their explicitly voluntary nature, the meeting encountered resistance from numerous sides, as countries feared the guidelines could impede national legislation and practices on use of genetic resources. In this regard, issues of stakeholders, discrimination, derivatives and differentiation between user and provider obligations arose as sticking points within the debate. The meeting also faced the important challenge of addressing sensitive IPR issues, such as PIC, disclosures of countries of origin and traditional knowledge. Many were pleased that the group was able to address specifics and provide a politically-balanced recommendation without getting caught in the all-too-familiar IPR debates repeated in other fora. In addition, capacity building proved a relatively benign topic of discussion, one that has certainly benefited from similar discussions in other areas, such as biosafety.

This brief analysis of the Working Group will focus on the draft guidelines, IPR and capacity building. It will examine both the political dimension of the interests at stake, as well as the more procedural dynamics relating to the negotiations and relations with other related processes. The analysis will conclude with some thoughts about the next steps for finalizing the draft guidelines, as well as the major hurdles that ABS issues still face under the Convention.

GUIDELINES

Despite, or perhaps due to, intense negotiations that endured late into several evenings, most expressed general satisfaction with the results achieved on the draft Bonn guidelines. The issues of scope, providers' responsibilities, means for verification and stakeholders kept a contact group involved in prolonged but essentially enlightening debates. The result was the definition of a generic set of international guidelines that could prescribe ABS frameworks.

Countries of origin were strongly opposed to language on non-discrimination among nationals and non-nationals in access, and finally agreed to "strive to avoid imposition of arbitrary restrictions." While one delegate expressed surprise over such clear intention to discriminate, others noted that the access arena has nothing to do with issues of discrimination in trade, stressed that there is nothing wrong with assisting national development, and called attention to Article 15 language on national sovereignty. It is certain that national sovereignty provides the cornerstone of future ABS systems under the CBD, and countries of origin have an interest to keep this point as clear as possible.

The issue of derivatives and products of genetic resources remains unresolved, mirroring similar disagreements over whether the IU's definition of PGRFA includes parts and components. A list of terms fell off the agenda for discussion, seemingly due to a lack of time, and prompted several delegates to express concern as these definitions are at the core of developing ABS regimes.

Indigenous issues were prominent, and after protests from the IIFB that their recommendations were being ignored, several countries, Canada in particular, worked to integrate language that would address the needs of local and indigenous communities throughout the text.

Part of the difficulty with negotiating the guidelines involves the need to allow for great diversity in the target audiences. Developing an indicative list of principles or areas for guidance for a wide range of actors, including "countries of origin that are also providers," user countries and organizations, as well as other stakeholders, proved to be arduous and problematic. Some delegates apparently found it difficult to acknowledge that circumstances can differ greatly among countries, which largely reflect divergences among their legal systems. The challenge is to develop guidelines potentially useful to all. Tensions between providers and users and issues of legal provenance arose throughout discussions on roles and responsibilities, PIC and MAT. Some commented that SWG-II's rapid dismissal of discussions on other approaches further complicated the issue, as codes of conduct or model agreements could be targeted to specific stakeholder and user groups.

As one delegate said at the beginning of the week, the guidelines should facilitate, not complicate, access. Inflexible political positions could result in a useless patchwork of language that will be ignored. Among reminders that the guidelines are voluntary, those with national interests in mind sometimes had to concede in order to include provisions intended to assist all those involved in ABS and guarantee that the guidelines would be attractive and sufficiently practical to ensure implementation.

Despite mid-week grumblings about lack of progress on the guidelines, it is a positive sign that most delegates agreed that they had succeeded in finding well-balanced language.

INTELLECTUAL PROPERTY RIGHTS

The Working Group's discussions on IPR issues reached a greater level of detail than in most other CBD discussions. Deliberations on patenting processes addressed proposals for including information on the source of origin for genetic resources or evidence of PIC for the use of traditional knowledge, which have surfaced within the TRIPS Council. While the legality of such measures was again questioned, illustrative points arose on general practices for including information on unique genetic resources in patent applications, use of prior art in patent examinations, as well as the opportunities and difficulties for addressing inappropriately granted patents.

Overall, delegates expressed satisfaction with the text, highlighting that recognition of the need to look at disclosure of country of origin or use of traditional knowledge in patent applications is a significant step, even if voluntary. One delegate said that this finally establishes a firm ground for the CBD in a process, which to date has generated little but general calls for information gathering.

Regarding traditional knowledge, some delegates highlighted particular difficulties with finding a balance between making information on the innovations and practices of indigenous and local communities known in patent examinations while preserving their rights in, and control over, such knowledge. Related discussions on *sui generis* systems elicited further complications, as terminological confusion arose over the use of these systems to protect plant varieties, as per TRIPS, versus traditional knowledge. One participant highlighted that knowledge of indigenous and local communities encompasses elements of agricultural biodiversity and plant varieties, and ultimately requires consideration of both TRIPS and CBD obligations. It remains to be seen how the Working Group on Article 8(j) can further



contribute to this process by looking at issues of community registers, knowledge databases and self-defined mechanisms for the protection of indigenous and local communities.

Discussions also relied heavily on input from WIPO. Many delegates recognized the fundamental need to integrate the work of the CBD and WIPO, along with that of UNCTAD and others, with due respect for the specific mandates of each institution. This meeting was the first step in the process of familiarizing many participants with the work of other groups and defining a process that must be further facilitated to ensure broader debate beyond exclusive links between Secretariats. Finally, the IU was frequently a topic of conversation as delegates pondered the fate and potential ramifications of the concurrent negotiations on the IU's outstanding issues.

CAPACITY BUILDING

The discussions on the action plan for capacity building flowed relatively smoothly, especially as delegates drew from experiences on the issue from other areas of the CBD. Many highlighted the recent workshop on capacity building for the Cartagena Protocol on Biosafety, which made significant progress on identifying specific capacity needs. Others also highlighted the urgency of developing a concrete action plan, with associated links to work on Article 8(j), lest ongoing work by the GEF on biosafety overshadow necessary work towards implementing the CBD's third objective. In this regard, pilot projects on countries establishing ABS frameworks, involving stakeholder consultation processes and issues related to the protection of traditional knowledge, were highlighted as a potential first step towards the overall process of enhancing Parties' abilities to implement their CBD obligations.

NEXT STEPS

While delegates welcomed progress made, some highlighted that this process is still at the policy, and therefore hypothetical, level and that the challenge remains to implement effective and transparent ABS frameworks at the national level. In this regard, a few participants lamented that more information was not provided on the particular obstacles already encountered within existing attempts to implement national ABS legislation, as this could ultimately be one of the most beneficial tools for those countries still initiating the process. Noting that the focus of such efforts is on developing and provider countries, several delegates underscored the potential utility of publicizing existing or potential practices and protocols that user groups, such as life science companies or botanic gardens, employ in their ABS activities.

Ultimately, as expressed by one delegate, the process needs to take the next big step moving from the intergovernmental arena and its associated political posturing to the level of concrete exchange on access to and sharing of genetic resources from the forests, fields and waters. For now, the results of the meeting will be forwarded to the Working Group on Article 8(j), scheduled for February 2002, and to COP-6 in April 2002. Hopefully, COP-6 will be able to finalize the Bonn Guidelines and set out the next steps toward their use at all levels.

THINGS TO LOOK FOR BEFORE COP-6

IU AND FAO GOVERNING BODIES: An Open-ended Working Group on the IU will take place parallel to the 121st Session of the FAO Council, which will meet from 30 October to 1 November 2001. The 31st FAO Conference, which is expected to adopt the final text of the IU, is scheduled for 2-13 November 2001. For more information, contact: Mieko Ikegame, Unit for Cooperation with External Partners, FAO; tel: +39-06-5705-4706; e-mail: meiko.ikegame@fao.org; Internet: <http://www.fao.org/events/index.asp>

SEVENTH MEETING OF THE CBD'S SUBSIDIARY BODY FOR SCIENTIFIC, TECHNICAL AND TECHNOLOGICAL ADVICE: CBD SBSTTA-7 will meet from 12-16 November 2001, in Montreal, Canada. For more information, contact: CBD Secretariat, Montreal, Canada; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; Internet: <http://www.biodiv.org>

OPEN-ENDED INTERSESSIONAL MEETING ON THE STRATEGIC PLAN, NATIONAL REPORTS AND THE IMPLEMENTATION OF THE CBD: This meeting will take place from 19-21 November 2001, in Montreal, Canada. For more information, contact: CBD Secretariat, Montreal, Canada; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; Internet: <http://www.biodiv.org>

AD HOC WORKING GROUP ON THE INTERLINKAGES BETWEEN BIOLOGICAL DIVERSITY AND CLIMATE CHANGE: This meeting will take place from 26-30 November 2001, in Helsinki, Finland. For more information, contact: CBD Secretariat, Montreal, Canada; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; Internet: <http://www.biodiv.org>

SECOND SESSION OF WIPO'S INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE: The second session of the World Intellectual Property Organization's Intergovernmental Committee will meet from 10-14 December 2001, in Geneva, Switzerland. For more information, contact: Francis Gurry, Assistant Director-General of WIPO; tel: +41-22-338-9428, e-mail: francis.gurry@wipo.int; Internet: http://www.wipo.org/eng/meetings/2001/igc/index_2.htm

AD HOC INTERSESSIONAL WORKING GROUP ON CBD ARTICLE 8(j): This meeting is scheduled to take place from 4-8 February 2002, in Montreal, Canada. For more information, contact: CBD Secretariat, Montreal, Canada; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; Internet: <http://www.biodiv.org>

SIXTH CONFERENCE OF THE PARTIES TO THE CONVENTION ON BIODIVERSITY & CARTAGENA PROTOCOL MOP-1 or ICCP-3: CBD COP-6 will take place from 8-26 April 2002, in The Hague, the Netherlands. This gathering will also serve as the first Meeting of the Parties (MOP-1) or the third Intergovernmental Committee on the Cartagena Protocol (ICCP-3). For more information, contact: CBD Secretariat, Montreal, Canada; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; Internet: <http://www.biodiv.org>