



ABS WG-2 HIGHLIGHTS WEDNESDAY, 3 DECEMBER 2003

Delegates to the second meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing of the Convention on Biological Diversity (CBD) held regional consultations in the morning. Sub-Working Group I (SWG-I) met in the afternoon to consider a Chair's text on the international regime on access and benefit-sharing (ABS). Sub-Working Group II (SWG-II) met in afternoon and evening sessions to address a Chair's text on compliance measures for prior informed consent (PIC) and mutually agreed terms (MAT). A brief Plenary met in late afternoon to review progress.

SUB-WORKING GROUP I

INTERNATIONAL REGIME ON ABS: SWG-I Chair Ines Verleye (Belgium) invited comments on the Chair's text on an international ABS regime. Delegates debated whether the text should compile views or propose draft recommendations. BRAZIL, COLOMBIA, MEXICO and UGANDA supported drafting recommendations, while Italy, on behalf of the EC Member States and acceding countries (EU) and others proposed submitting views for preparation of a text to be negotiated at COP-7. Chair Verleye clarified that the Working Group was mandated to draft recommendations on terms of reference for negotiating a regime.

Mexico, on behalf of the LIKE-MINDED MEGADIVERSE COUNTRIES (LMMC) stressed the need to guarantee protection of their peoples' rights. CUBA requested referring to the Bonn Guidelines as a reference point for negotiating the regime, and acknowledging difficulties in their implementation. JAMAICA called for reflecting concerns over the ABS Working Group's mandate and for not prejudging the regime's nature. URUGUAY requested better acknowledging the usefulness of the International Treaty on Plant Genetic Resources for Food and Agriculture. The US called for consistency with CBD language. Noting the potential for coercion when seeking consent, the INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY (IIFB) called for emphasizing that PIC be free. AUSTRALIA proposed highlighting that identifying the components of the terms of reference does not relate to their merits. The LMMC, opposed by CANADA, CUBA and others, asked for deleting preambular paragraphs: recognizing that Parties and stakeholders may be both users and providers; recognizing the need for balance between user and provider

responsibilities; and noting a need for further analysis of existing instruments and regimes. BURKINA FASO called for establishing an expert group to develop a text to be negotiated by the ABS Working Group.

HAITI requested reference to the 2010 target to significantly reduce the rate of biodiversity loss. The EUROPEAN COMMUNITY (EC) and the LMMC proposed reference to the CBD objectives. The EU suggested preambular reference to the Millennium Development Goals and, with AUSTRALIA, JAMAICA and NORWAY, added language on the process for establishing the regime. CANADA, supported by SWITZERLAND, proposed inserting a chapeau referring to the CBD framework, the Bonn Guidelines and recommendations from the Working Group on Article 8(j), and the possible need for further analysis and strengthening of elements of relevant existing regimes. The IIFB asked for collaboration with the Working Group on Article 8(j).

The LMMC proposed that the COP request the Executive Secretary to make necessary arrangements for the ABS Working Group to convene twice a year. Noting budgetary constraints, the EC asked that the ABS Working Group be requested to meet "as soon as practicable."

Nature: CUBA called for emphasizing the inclusive nature of the regime, beyond national and regional perspectives. HAITI stressed the need to clarify whether the regime would build on, or be composed of, existing ABS-related instruments. The LMMC requested recommending COP-7 to establish a specific working group to negotiate a legally binding regime, taking into account the rights of the countries of origin.

CANADA proposed merging the items on nature and scope. The EC proposed including reference to sets of norms, rules and decision-making procedures in text noting that the regime be composed of one or more instruments.

Scope: The EU, supported by NAMIBIA, requested using CBD Article 15.7 language (benefit-sharing) in text on facilitating research. TANZANIA stressed that research should be collaborative. The LMMC and NORWAY requested removing reference to genetic resources' products, with NORWAY also opposing reference to derivatives. CANADA and NORWAY proposed using wording from the Bonn Guidelines. JAPAN suggested that facilitation of research should be non-discriminatory. The EC, supported by EL SALVADOR, proposed clarifying that the regime should



cover both access and benefit-sharing, and requested adding reference to the conservation and sustainable use of biodiversity in text on promoting and safeguarding fair and equitable benefit-sharing.

Elements: LIBERIA and JAPAN called for both provider and user measures. UGANDA sought clarification on language on promotion of user measures. The LMMC opposed references to: existing instruments; countries of origin, provider countries and indigenous and local communities, in text on provisions to ensure compliance; and, with ALGERIA, a code of ethics. The LMMC also supported referring to an international certificate of legal provenance of genetic resources, derivatives and associated traditional knowledge, for bioprospecting in a country of origin. JAMAICA favored an international certificate of country of origin or country providing genetic resources. BRAZIL and COLOMBIA stressed the need for cooperation with the Working Group on Article 8(j). The EC asked that any inclusion of elements be made on the basis of a gap-analysis. CUBA proposed addressing genetic resources not subject to national sovereignty. TANZANIA and NAMIBIA proposed noting the transboundary distribution of some genetic resources. The REPUBLIC OF KOREA suggested reference to arbitration mechanisms rather than dispute settlement. ARGENTINA requested specific reference to relevant agreements of the World Trade Organization.

Modalities: ARGENTINA proposed that the COP review the regime's implementation and legal status five years after its entry into force.

Chair Verleye said she would prepare a revised text.

SUB-WORKING GROUP II

COMPLIANCE MEASURES WITH PIC AND MAT:

SWG-II Chair Desh Deepak Verma (India) presented a Chair's text on measures to ensure compliance with PIC and MAT.

BURKINA FASO and BRAZIL stressed that language referring to the international ABS regime should be coherent with language agreed upon in SWG-I.

COLOMBIA, supported by BRAZIL, said compliance measures should address not only PIC and MAT, but also national legislation. COLOMBIA proposed referring to monitoring activities and access to justice in case of breach of legislation in user countries. The EU stressed ensuring consistency with CBD language, proposed recognizing written or oral traditional knowledge as prior art in patent law, and recommended requesting the Executive Secretary to undertake further analysis of existing practices and trends regarding commercial and other utilization of genetic resources and the benefit generation.

On a certificate of legal origin, MEXICO and BRAZIL supported an international certificate of legal provenance, noting that it differs from a certificate of legal origin. The EU proposed to retain the terms "disclosure of origin/source/legal provenance," to allow for consistency with language to be agreed upon in SWG-I.

While COLOMBIA and BRAZIL stressed the need to refer to the PIC of the country of origin, rather than of the provider Party, the EU drew attention to CBD Article 2 (Use of Terms) referring to Parties providing genetic resources. Chair Verma said the CBD definition covers countries of origin. References remain bracketed.

Regarding incentive measures to encourage users to comply with PIC and MAT, BRAZIL suggested referring to certification schemes, and the EU insisted that certification schemes be voluntary. On other compliance measures, BRAZIL and CANADA opposed language on the development of contractual agreements.

The EU, opposed by JORDAN, suggested that contractual agreements apply to different user groups and different genetic resources.

Delegates debated language on recognizing written or oral traditional knowledge as prior art, without reaching agreement. BRAZIL supported the reference, while AUSTRALIA, CANADA, SWITZERLAND and JAPAN opposed it, noting that the issue does not relate to compliance with PIC. WIPO suggested that disclosed traditional knowledge be recognized as prior art, while COLOMBIA stressed the role of secret traditional knowledge.

Delegates debated language inviting Parties to facilitate PIC of indigenous and local communities, with CANADA supporting PIC required by national legislation. The IIFB recalled that COP decision V/16 requires Parties to guarantee local and indigenous communities' rights over their traditional knowledge and establish national mechanisms in accordance with customary law.

SWITZERLAND suggested that the ABS Working Group take into account discussions in relevant fora when considering issues relating to disclosure of country of origin. Language requesting the ABS Working Group to consider issues relating to disclosure of origin in IPR applications remains bracketed.

AUSTRALIA proposed, and delegates agreed, to include language on measures which preserve and promote legal certainty for users regarding access conditions.

IN THE CORRIDORS

While consideration of the Chair's text on an international regime got off to a promising start, debate stalled over procedural issues. A developing country delegate remarked that delaying negotiations to COP-7 regarding the terms of reference for the regime would be detrimental to small delegations in Kuala Lumpur, considering the number of crucial items on the COP's agenda. This also prompted one delegate to question Parties' willingness to make progress on the issue. Many participants expect heavy sailing prior to reaching agreement on even bracketed recommendations, pointing at such thorny issues as the modalities to develop the regime, and balance between access and benefit-sharing.

The debate on the international ABS regime clearly overshadowed SWG-II's laborious discussions on compliance measures for PIC and MAT. Despite isolated efforts to convince delegates that progress on these issues would assist in resolving urgent problems related to implementation of ABS arrangements, discussions on the Chair's text dragged into the night, with some grumbling that progress was being hindered by endless seesawing over minor modifications.

THINGS TO LOOK FOR TODAY

SUB-WORKING GROUP I: SWG-I will convene at 10:00 am in Room I to consider a revised Chair's text on the international ABS regime, and Chair's texts on reports, use of terms, and other approaches for implementing ABS arrangements.

SUB-WORKING GROUP II: SWG-II will meet at 10:00 am in Room II to consider a Chair's text on capacity building for ABS and a revised text on compliance measures for PIC and MAT.

PLENARY: Plenary will convene at 5:30 pm in Room I to review progress.