

ABS-4 HIGHLIGHTS: TUESDAY, 31 JANUARY 2006

Delegates to the fourth meeting of the *Ad Hoc* Open-ended Working Group (WG) on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met in a Committee of the Whole, and addressed the elements and objectives of an international regime on ABS, a certificate of origin/source/legal provenance, and measures to ensure compliance with prior informed consent (PIC) and mutually agreed terms (MAT). A Friends of the Chair group met in the afternoon to discuss participation of indigenous and local communities in the ABS negotiations.

COMMITTEE OF THE WHOLE

INTERNATIONAL REGIME ON ABS: Elements:

Discussions continued on the elements of the regime, with Venezuela, on behalf of GRULAC, prioritizing: capacity building; traditional knowledge protection; financial mechanisms to guarantee the regime's implementation; and a certificate of legal provenance generated by countries of origin. India, on behalf of the LIKE-MINDED MEGADIVERSE COUNTRIES (LMMC), said the regime should implement the CBD objectives and include benefit-sharing, compliance measures, a certificate of legal provenance, traditional knowledge protection, effective implementation and financial mechanisms. The EU stressed: human rights, and the work of the World Intellectual Property Organization (WIPO) on prior art, in elements on traditional knowledge; and awareness raising and disclosure requirements, in elements on compliance. She also proposed a transparent and workable certificate of origin, and suggested using the gap analysis to check whether elements identified in the discussion are covered by existing agreements. SWITZERLAND proposed regrouping the list of elements into clusters on: access; benefit-sharing; traditional knowledge; compliance; and capacity building.

UGANDA said the regime should take into account the transboundary nature of genetic resources, and highlighted: benefit-sharing; collaborative research and technology transfer; traditional knowledge protection; compliance, enforcement, and arbitration mechanisms; and an international certificate of origin/source/legal provenance. COTE D'IVOIRE and KIRIBATI supported ensuring benefit-sharing, including through, *inter alia*, monetary and non-monetary benefits and effective technology transfer and cooperation. COLOMBIA said that PIC should be unilateral, while benefit-sharing should not be voluntary but directly related to the conditions of access.

Noting their commitment to facilitating access to genetic resources, MEXICO and COSTA RICA said access falls under national sovereignty and does not require an international instrument other than for providing legal certainty. AUSTRALIA

said access is a fundamental building block of the regime. EGYPT said facilitating access must be linked to benefit-sharing on the basis of PIC and MAT. BURKINA FASO cautioned against references to facilitated access, and suggested instead using the CBD language relating to creating conditions to facilitate access to genetic resources.

GRULAC, UGANDA and EGYPT said the regime should address genetic resource derivatives and related traditional knowledge, with EGYPT noting that derivatives are the main object of biopiracy. AUSTRALIA opposed reference to derivatives. The EU suggested considering concerns related to derivatives prior to their inclusion in the international regime, while NEW ZEALAND requested clarification on the need to address them in the regime.

The UN PERMANENT FORUM ON INDIGENOUS ISSUES (UNPFII) stressed that any instrument must conform to existing and emerging international law relating to indigenous rights. The UN CONFERENCE ON TRADE AND DEVELOPMENT drew attention to its study of options for implementing disclosure of origin requirements in intellectual property rights (IPRs) applications (UNEP/CBD/WG-ABS/4/INF/2). The INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (UPOV) said the principles of plant variety protection and breeders' rights should be recognized in the regime. WIPO reported on the preparation of a technical paper contributing to international discussions on ABS and IPRs and clarifying legal questions, for submission to COP-8. The WORLD TRADE ORGANIZATION (WTO) reported on the activities of the Council on Trade-related Aspects of Intellectual Property Rights (TRIPS) and the consultative process on the TRIPS-CBD relationship. She identified four divergent positions among WTO members on disclosure of origin/source in patent applications and noted that the Hong Kong Ministerial Declaration calls for an intensification of the consultative process.

The IIFB noted that the recognition and protection of indigenous rights should not be a separate element but a cross-cutting issue. She also said the regime should address conflict resolution for PIC cases and conflict of laws to decide on cases of transboundary or shared traditional knowledge.

The US called for developing a clear understanding of technical terms and definitions. Stressing that an international regime cannot replace national frameworks, the INTERNATIONAL CHAMBER OF COMMERCE noted that a regime should be composed of different national and international instruments, including guidelines developed by stakeholders. The BIOTECHNOLOGY INDUSTRY ORGANIZATION drew attention to its guidelines on bioprospecting. The AUSTRALIAN APEC STUDY CENTER called for a practical approach with market-based instruments.

Objectives: Discussions were held on the basis of the options contained in Annex I of Recommendation 3/1 of the WG on ABS (UNEP/CBD/WG-ABS/4/2). MEXICO, COLOMBIA, PERU, VENEZUELA, ECUADOR, YEMEN, MALI, ANTIGUA AND BARBUDA, GRENADA, SAINT VINCENT AND THE GRENADINES, SAINT KITTS AND NEVIS, BAHAMAS and EGYPT proposed preventing the misappropriation of genetic resources and their derivatives, facilitating access for environmentally sound uses, supporting compliance with PIC, MAT and, with GUINEA and GABON, protecting traditional knowledge and supporting compliance with national legislation. CUBA, VENEZUELA, EGYPT, KENYA and INDONESIA supported widening the capacity to use genetic resources through technology transfer, especially for developing countries. Many highlighted collaborative research and capacity building.

The EU, COSTA RICA, THAILAND, CUBA and ZAMBIA supported contributing to the effective implementation of CBD Articles 15 (Access to Genetic Resources) and 8(j) (traditional knowledge) and the three objectives of the Convention. The EU, COSTA RICA and THAILAND also supported promoting implementation and compliance, benefit-sharing, user rights and obligations, and rights of indigenous and local communities; and with AUSTRALIA, CANADA and NEW ZEALAND, facilitating access to genetic resources.

SWITZERLAND said the objectives should be drafted in a positive way with no reference to misappropriation. JAPAN supported creating conditions to facilitate access to genetic resources for environmentally sound uses and, with CUBA, to provide effective protection of traditional knowledge subject to national legislation. The IIFB highlighted consistency with international human rights obligations.

CERTIFICATE OF ORIGIN/SOURCE/LEGAL PROVENANCE: Chair Margarita Clemente (Spain) opened the discussion on other approaches, including the design of an international certificate of origin/source/legal provenance (UNEP/CBD/WG-ABS/4/4). Many said a certificate should be issued by national authorities in the country of origin, be homogeneous in format, simple, easily recognizable, practical and cost-effective.

The EU said an international certificate could be a key component of an international ABS regime, cautioning against a "one-size-fits-all" certificate and high transaction costs. With NORWAY, NEW ZEALAND, JAPAN and AUSTRALIA, she also called for further studies on potential benefits, practical aspects and costs of an international certificate.

BRAZIL supported a certificate of legal provenance of genetic resources, derivatives and traditional knowledge as one of the central elements of an international benefit-sharing regime. Noting that the certificate's purpose is to provide a mechanism for disclosure of origin, INDONESIA proposed establishment of web-based databases for tracing ownership. MEXICO, supported by many, said a certificate should provide an international instrument to trace genetic resources across the entire reach of CBD obligations, and have clear triggers to activate disclosure requirements. NORWAY said a certificate should verify compliance with the CBD and national access legislation. NEW ZEALAND emphasized that a certificate does not substitute national ABS legislation. EL SALVADOR said that certification of legal provenance is a prerequisite to certifying legality of access, and it should be complemented by a national regime, with HAITI highlighting the need for functioning national ABS procedures. UGANDA and VENEZUELA highlighted successful application of certificates within the Convention on International Trade in Endangered Species.

AUSTRALIA suggested that a certificate of source, covering transboundary genetic resources, coupled with a certificate of legal provenance through the use of a contractual device, would provide legal certainty to both users and providers in a multilateral system. NAMIBIA supported the establishment of additional conditions through material transfer agreements.

COLOMBIA questioned if these certificates will provide guarantees for benefit-sharing and protection of traditional knowledge, and said information should be transmitted electronically to ensure traceability. SINGAPORE said certificates would be useful as long as they do not bar IPR requests. The US highlighted existing certification processes, and said the certificate should build trust and not replace agreed contractual terms.

The IIFB commented on the complexities of developing such certificates in cases where the genetic resources are transboundary or traditional knowledge relates to genetic resources held *ex situ*. CHINA proposed using certificates of origin and, in the case of plant varieties improved *ex situ*, certificates of source. The REPUBLIC OF KOREA called for further studies on the center of origin of crops. The CONSULTATIVE GROUP ON INTERNATIONAL AGRICULTURAL RESEARCH questioned the likelihood of determining the origin of many plant genetic resources for food and agriculture.

COMPLIANCE WITH PIC AND MAT: Chair Clemente invited comments on measures to ensure compliance with PIC and MAT (UNEP/CBD/WG-ABS/4/5 and INF/1, 2, 5 and 6). AUSTRALIA called for simplified arrangements and underscored the role of existing systems and codes of ethical conduct. CANADA highlighted the need for respect for decision-making processes of indigenous communities, and common understanding on the implications of PIC of providers and users of traditional knowledge. NEW ZEALAND requested further study on the feasibility, cost and practicality of international measures to ensure compliance with PIC and MAT. The PHILIPPINES requested considering the special situation of shared resources in ensuring compliance with PIC. The IIFB proposed using the UNPFII definition of PIC for indigenous and local communities.

UGANDA called for transparency in patent applications and disclosure of origin. The EU recalled its proposal to WIPO on disclosure of origin or source in patent applications, and INDIA highlighted its proposal to the TRIPS Council. NORWAY highlighted disclosure of origin and of PIC under the International Treaty on Plant Genetic Resources for Food and Agriculture. UPOV said disclosure of origin should not be an additional condition for the protection of plant varieties. SOUTH AFRICA noted the role of national measures to ensure disclosure of origin and benefit-sharing. JAPAN, SWITZERLAND and THAILAND, opposed by COLOMBIA and BRAZIL, preferred discussing disclosure of origin in other forums.

Chair Clemente then created a contact group on the certificate of origin/source/legal provenance and on PIC and MAT, which will meet on Wednesday.

IN THE CORRIDORS

The second day of the ABS WG-4 was marked by convergence, commotion and collaboration. As delegates were shaping the elements and objectives of an ABS regime, many expressed surprise at the good pace of negotiations, noting that GRULAC and the LMMC's positions appeared increasingly convergent, while divergences with other groups were mostly evident on the issues of facilitated access and derivatives. A source of noticeable commotion throughout the day was the anticipated Chair's text on the elements and objectives of the regime, with some delegates trying to influence the document by approaching suspected, but as yet incognito, drafters. Finally, the question of collaboration was on the minds of participants in the Friends of the Chair group as they discussed mechanisms for participation of indigenous and local communities, with many optimistic that all major players would be eventually involved in the design of the international ABS regime.