

ABS-4 HIGHLIGHTS: WEDNESDAY, 1 FEBRUARY 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 a Chair's text on an international regime on ABS. An informal 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: Chair Margarita Clemente (Spain) invited comments on a Chair's text on an international ABS regime containing sections on: objectives; scope; ownership; accessing genetic resources; accessing traditional knowledge; benefit-sharing; certificate of origin; and other measures. Ethiopia, speaking for AFRICA, Venezuela for GRULAC, and India for the LIKE-MINDED MEGADIVERSE COUNTRIES (LMMC) welcomed the document as a starting point for negotiations, with GRULAC stressing: international measures that complement national legislation; and identification of the country of origin in intellectual property rights (IPR) applications. The LMMC added compliance with national legislation and mandatory user measures. GRULAC, MONGOLIA, CHINA, NORWAY and others stressed balance between user and provider measures. MEXICO emphasized legal certainty for users and providers of biodiversity.

Many highlighted the importance of capacity building and compliance, with SOUTH AFRICA also emphasizing technology transfer, KENYA access to justice, PERU and ECUADOR monitoring, COSTA RICA, NIGER and ANTIGUA AND BARBUDA a financial mechanism, and VENEZUELA training of indigenous and local communities to ensure their effective participation. PERU prioritized: compliance with prior informed consent (PIC) and mutually agreed terms (MAT); and with MALAWI, a certificate of source/origin/legal provenance.

ARGENTINA and COLOMBIA called for strengthening the benefit-sharing components in the draft. LIBERIA and UGANDA requested more clarity in the administrative structure and role of national authorities.

Noting that the draft text moves too quickly towards a legally binding regime, AUSTRALIA, NEW ZEALAND and the REPUBLIC OF KOREA expressed concern and proposed discussing the scope and nature of the regime, and the gap analysis. NEW ZEALAND stressed that the regime must be consistent with national ABS regimes and existing international

obligations. MONGOLIA and the EU said the Chair's text does not capture the results of the gap analysis, with the EU noting that it can be a basis for discussion but not for negotiations in accordance with the COP mandate. SWITZERLAND, opposed by COLOMBIA, said the gap analysis needs to be concluded to identify the elements of a regime. NORWAY emphasized the need to link the regime to the CBD objectives of conservation and sustainable use and, with SWITZERLAND, recalled that the regime may consist of several instruments.

The INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY (IIFB) said the document fails to recognize the rights of indigenous and local communities on lands, territories and resources. The INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE called for formal mechanisms for cooperation between relevant institutions on the ABS regime.

In the afternoon, Chair Clemente encouraged delegates to improve the text, without engaging in formal negotiations. Delegates debated whether to use the Chair's text or merge it with the options forwarded by ABS-3, and finally proceeded with considering the proposed elements in the Chair's text.

CHINA, AUSTRALIA and CANADA proposed adding a section on "potential elements" and deleting the bracketed reference to a "legally binding" regime in the document's title. The EU stressed that the title must not prejudge the outcomes of negotiations.

Ownership: COSTA RICA, CANADA, MEXICO, MONGOLIA and the EU supported SWITZERLAND's proposal to delete the section on ownership, while UGANDA, MALAWI, SAINT LUCIA and LIBERIA called for retaining it. EL SALVADOR suggested refining the language drawing upon the Bonn Guidelines.

Accessing genetic resources: MEXICO, UGANDA, ECUADOR, COSTA RICA and COLOMBIA proposed deleting the entire section on access. CANADA stressed that without text on access there will be no agreement on benefit-sharing. BURKINA FASO proposed ensuring access without imposing restrictions that run counter to the CBD objectives. NEW ZEALAND opposed a reference to non-discriminatory access.

UGANDA emphasized that access should be subject to PIC of the country of origin, in accordance with MAT and, with KENYA, that conditions for the transfer to successive users be determined by the country of origin. KENYA and MONGOLIA also proposed that countries of origin should require MAT as a condition for granting PIC, rather than using their discretion in this regard.

SWITZERLAND and AUSTRALIA proposed focusing international measures on access to genetic resources, while EL SALVADOR and MEXICO called for international measures to prevent illegal access. MALAYSIA proposed reference to “regulation” rather than “facilitation” of access. INDONESIA suggested that national legislation “require,” and not “request,” PIC. WIPO drew attention to its work on traditional knowledge. AFRICA noted that work on the international regime should have primacy over the work done by other forums.

Accessing traditional knowledge: CUBA, BRAZIL, SWITZERLAND, ECUADOR, VENEZUELA and AFRICA requested that the title of the section be “Recognition and protection of traditional knowledge.” AUSTRALIA opposed reference to the protection of traditional knowledge, noting that this is beyond the mandate of the WG, while AFRICA said the regime needs to reflect the provisions of Article 8(j). CANADA, COLOMBIA and INDIA proposed to change the title of the section to “Traditional knowledge associated with genetic resources.”

CUBA, PERU and BRAZIL requested additional measures addressing traditional knowledge protection at the international level. BRAZIL, opposed by CANADA, suggested references to compliance with PIC of indigenous and local communities in accordance with Article 8(j) and subject to national legislation, and to their rights to benefit-sharing.

PERU and MALAYSIA, opposed by CANADA and AUSTRALIA, requested reference to the establishment of *sui generis* systems, with COLOMBIA and IIFB noting that these *sui generis* systems should be addressed by the Article 8(j) WG.

BURKINA FASO, supported by INDIA, requested that all paragraphs in the section refer to elements of the international regime, rather than national legislation. NEW ZEALAND and CANADA requested time for further consideration.

Benefit-sharing: MEXICO proposed that conditions for benefit-sharing be stipulated in national legislation or be subject to alternative benefit-sharing provisions established under the international regime. BURKINA FASO preferred that the international regime establish the conditions for benefit-sharing. NEW ZEALAND suggested that conditions for benefit-sharing including MAT be determined in the context of national ABS regimes.

MEXICO proposed using the certificate of legal origin as a means to ensure compliance with PIC and MAT and, supported by COSTA RICA and UGANDA, highlighted the need to explore alternative benefit-sharing obligations in the absence of specific access arrangements.

COLOMBIA and KENYA said that MAT should always be based on PIC, and proposed that the international regime should facilitate access to research and development based on genetic resources and derivatives arising out of commercial and other uses, while BRAZIL called for measures to ensure benefit-sharing from results of research and development.

UGANDA, COTE D’IVOIRE, KENYA and ZAMBIA requested prescriptive language on MAT. Expressing concern about indigenous and local communities stipulating MAT with users, COTE D’IVOIRE and VENEZUELA, opposed by CANADA and SAINT LUCIA, underscored the importance of the oversight role of the State. The IIFB expressed concern about State approval, noting that indigenous and local communities have the right to refuse access. NEW ZEALAND proposed that indigenous and local communities stipulate MAT subject to national legislation. INDONESIA proposed that MAT should ensure benefit-sharing between users and providers. EL SALVADOR and the THIRD WORLD NETWORK supported,

while AUSTRALIA, CANADA and NEW ZEALAND opposed referring to derivatives and to IPRs in the international regime. NAMIBIA requested stating that the recipient of genetic material shall not apply for IPR protection without the PIC of the provider country.

Certificate of origin: BRAZIL, MALAYSIA, COLOMBIA, INDIA, EGYPT and MEXICO proposed adding references to: mandatory disclosure of the country of origin of genetic resources and associated traditional knowledge, and proof of compliance with national PIC and benefit-sharing provisions in IPR applications; and national legislation providing for the revocation of the IPR if disclosure is insufficient. JAPAN, AUSTRALIA, the EU, NEW ZEALAND and SWITZERLAND opposed, stating that a mandatory disclosure requirement conflicts with international IPR law. AUSTRALIA stressed the need to analyze the functions and roles of different types of certificates and with the EU, SWITZERLAND, NORWAY and CANADA, stressed that disclosure requirements should be addressed by WIPO.

The EU and CANADA reiterated the need for further research on the cost and feasibility of certification, with NEW ZEALAND and CANADA opposing references to certificates. MEXICO urged clarifying the types of certificates of source/origin/legal provenance, noting that disclosure of traditional knowledge should not be a prerequisite for its protection. Chair Clemente said a contact group will meet on Thursday to discuss the technical aspects of this issue.

Other measures: MEXICO proposed mechanisms to facilitate collaboration among implementation agencies; and with UGANDA, measures to ensure that the use of genetic resources under parties’ jurisdiction is performed in compliance with the Convention and MAT. COLOMBIA supported user measures to prevent misappropriation and ensure compliance with PIC of: indigenous and local communities, when dealing with traditional knowledge; and of countries of origin, when dealing with genetic resources. CUBA highlighted periodic monitoring as users’ responsibility, easy verification of the certificate of legal provenance, information exchange mechanisms, and binding compliance measures; and PERU proposed evaluation systems and auditing. NEW ZEALAND proposed including alternative options for compliance with national ABS regimes, and AUSTRALIA proposed an additional element on institutional support.

Scope: CANADA opposed including equitable sharing of benefits and transfer of derivatives and products in the scope, while AUSTRALIA proposed limiting the scope to the mandate of the CBD and this WG.

IN THE CORRIDORS

Midway through ABS-4, delegates were shaken up by a concerted effort of the LMMC to introduce references to mandatory disclosure requirements in IPR applications. Nevertheless, as one delegate reckoned, the maneuver may prove to be a turning point in the dynamics of the meeting and herald more surprises, as some negotiating groups may see themselves under pressure to counter-attack. A hasty move may, however, lead to reinserting countless options into the Chair’s text – an outcome dreaded by most but seemingly preferred by a few.

Following the re-christening of the Friends of the Chair group as “informal group” on indigenous participation and the time running out in the Committee to allow for comments by observers in the evening, some indigenous representatives felt they were “sent to the kitchen,” while parties in the “dining-room” were discussing their future.