

ABS 5 HIGHLIGHTS:

WEDNESDAY, 10 OCTOBER 2007

Delegates to the fifth meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met all day in plenary and continued considering elements of an international regime on ABS relating to compliance, traditional knowledge and genetic resources, and capacity building.

INTERNATIONAL REGIME ON ABS

COMPLIANCE: International certificate of origin/source/legal provenance: Many delegates welcomed the report of the expert meeting on an internationally recognized certificate of origin/source/legal provenance (UNEP/CBD/WG-ABS/5/7).

The EU said that a certificate of origin/source/legal provenance would provide proof that genetic resources had been obtained in accordance with national provisions, and called for further consideration of how to integrate traditional knowledge and how a certificate would relate to other elements of an ABS regime.

AUSTRALIA, supported by CANADA and COLOMBIA, proposed developing a certificate of compliance as procedural proof that the access requirements under national legislation have been met. BRAZIL suggested referring to "certificates of compliance with national legislation in compliance with the Convention," identifying certificates by unique numbers, and establishing national authorities in provider and user countries to monitor use of genetic resources and traditional knowledge. Many delegates noted that certificates should complement, not replace underlying contracts between users and providers. AUSTRALIA said the certificate should be issued on a voluntary basis and implemented at the national level to reflect compliance with domestic law.

JAPAN and the INTERNATIONAL CHAMBER OF COMMERCE suggested identifying the objectives of certificates, conducting a cost benefit analysis and, with AUSTRALIA and ARGENTINA, maintained that certificates must be cost effective. The US requested more information regarding the costs associated with the certificate.

The LMMC outlined that a certificate should be internationally recognized, comply with national laws, and include both consequences for infringement and enforcement mechanisms such as checkpoints. The LMMC and Burkina Faso, for the AFRICAN GROUP, stressed that the certificate of origin must be binding. UKRAINE and PERU supported a mandatory certificate for both providers and users, with PERU noting that

national legal systems do not always provide for effective ABS. COSTA RICA stated that a certificate of source should be an instrument to verify compliance with prior informed consent (PIC) and mutually agreed terms (MAT). THAILAND suggested establishing checkpoints for scientific users and developing alternative mechanisms such as internationally recognized serial numbers.

MEXICO said that certificates can facilitate ABS especially when the use of genetic resources occurs outside the provider country. The PHILIPPINES stressed the importance of transparency. ARGENTINA underlined the need for certificates to promote traceability. The LMMC proposed linking monitoring and tracking genetic resources and called for measures that provide for expeditious, effective and low cost access to justice.

The INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY (IIFB) said indigenous peoples' PIC must be obtained, and stressed the need for certainty with respect to indigenous peoples' rights. The NORTH AMERICAN INDIGENOUS CAUCUS said a certificate system must: recognize indigenous customary laws and resource rights; be based on indigenous authorities and institutions; and respect indigenous PIC. The ASIAN, ARCTIC, AFRICAN and PACIFIC INDIGENOUS CAUCUSES and the IIFB requested that a certificate also cover traditional knowledge, with the PACIFIC CAUCUS opposing any certificate that does not do so.

The AMERICAN BIOINDUSTRY ALLIANCE opposed any certificate system involving mandatory disclosure requirements in patent applications. IUCN suggested that the technical expert group's mandate be renewed and that a model certificate be created and tested. The CONSULTATIVE GROUP ON INTERNATIONAL AGRICULTURAL RESEARCH noted that the standard material transfer agreement under the International Treaty on Plant Genetic Resources for Food and Agriculture fulfills the function of a certificate of origin and could serve as a model.

Monitoring, enforcement and dispute settlement: The EU suggested postponing discussion on this item until the main elements of an international regime have been identified. The AFRICAN GROUP and BRAZIL emphasized that measures to support compliance are closely linked to PIC and MAT noting that such measures level the playing field and promote access to justice for developing countries.

ARGENTINA and CUBA, called for an ABS dispute resolution mechanism, and MEXICO proposed a feasibility study of a compliance mechanism similar to that under the Biosafety Protocol. Tuvalu, for the PACIFIC SMALL ISLAND DEVELOPMENT STATES (SIDS), called for an indicative list

of actions constituting misappropriation of genetic resources. THAILAND and PERU proposed that the international regime should require user countries to facilitate access to arbitration and remedial mechanisms for provider countries.

AUSTRALIA challenged delegations to demonstrate why existing enforcement and dispute settlement mechanisms under private international law are insufficient to ensure compliance under any ABS regime. ARGENTINA said litigation is expensive and time consuming. NEW ZEALAND noted the need to consider what can be achieved through contracts and national regimes and consequently what would be required from any international regime to supplement domestic mechanisms. Noting that national laws provide effective remedies, CANADA supported a contractual approach to ensuring compliance.

TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES: PERU said the regime must define links between ABS and traditional knowledge protection, and BRAZIL prioritized the latter as a core element of any ABS regime. The EU, UGANDA and BURKINA FASO suggested considering mechanisms to prevent users circumventing provider countries' national access legislation, with UGANDA adding that any international regime should contain measures to prevent infringements. BURKINA FASO observed that the international regime should stipulate measures for traditional knowledge protection.

The AFRICAN GROUP, with the LMMC, stressed the need to respect knowledge holders' PIC and encouraged parties to adopt national *sui generis* systems for traditional knowledge in accordance with their national laws. He added that delegates must take into account the relevant provisions of UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Supported by the EU, the LMMC and the AFRICAN GROUP also stated that existing systems provide insufficient protection for traditional knowledge.

The EU, JAPAN and CANADA reiterated that WIPO should be the primary forum for discussions on IP aspects of traditional knowledge protection and called for collaboration between the ABS and Article 8(j) Working Groups. While the EU underlined that UNDRIP reinforces the rights of indigenous peoples to participate in decision making in matters that affect them, CANADA objected to citing UNDRIP, pointing out that the declaration is not legally binding.

NEW ZEALAND and AUSTRALIA called on the Article 8(j) Working Group to develop guidelines on the integration of traditional knowledge into national ABS legislation, with AUSTRALIA noting that these should only address non-IPR forms of traditional knowledge protection. COLOMBIA called for the development of national *sui generis* systems for traditional knowledge protection. THAILAND noted that any *sui generis* system for the protection of traditional knowledge could be adopted as either an overall framework or a more detailed system. ECUADOR called for regulation to ensure compliance with PIC and MAT when granting access to traditional knowledge.

MEXICO called for strengthening the Article 8(j) Working Group to which the ABS Working Group should provide input. NORWAY, with UGANDA, said that the ongoing work on *sui generis* systems, an ethical code of conduct and traditional knowledge should be refined, and noted that any new system must address the rights of countries and indigenous peoples.

ETHIOPIA called for measures to prevent biopiracy. The PHILIPPINES, and the THIRD WORLD NETWORK called for a focus on biopiracy, defining it as instances of access to genetic resources and traditional knowledge without knowledge and consent of the holders, and their use, development and commercialization based on IPR applications without benefit-

sharing. He stressed the need for international regulation to protect traditional knowledge and genetic resource holders from biopiracy rather than obliging them to prove misappropriation.

AUSTRALIA raised concerns about defining misappropriation, noting that it should focus on theft and exclude breach of contract and good-faith use of improperly obtained genetic resources. He suggested that misappropriation of genetic resources and traditional knowledge would require different definitions. HAITI observed that indigenous and local communities contribute to research and genetic innovations and should correspondingly benefit from associated IPRs.

The NORTH AMERICAN INDIGENOUS CAUCUS called for full and effective participation of indigenous peoples in monitoring and developing ABS compliance mechanisms. The LATIN AMERICAN INDIGENOUS CAUCUS requested recognition of indigenous peoples as owners of traditional knowledge and genetic resources and that access be subject to free PIC of indigenous peoples. The ARCTIC INDIGENOUS CAUCUS called for the international regime to reflect indigenous customary law. The PACIFIC INDIGENOUS CAUCUS emphasized that it is premature to explore a regime on ABS before issues relating to traditional knowledge have been resolved.

The UN PERMANENT FORUM ON INDIGENOUS ISSUES stated that the development of a strong ethical code of conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities by the Article 8(j) Working Group can assist in the development of an international ABS regime.

CAPACITY BUILDING: The AFRICAN GROUP requested mandatory minimum requirements and multilateral support for capacity building and technology transfer to enable provider countries to engage in value added activities. The LMMC, supported by ARGENTINA and CUBA, pointed out that elements of compliance and benefit-sharing will require capacity building and technology transfer. THAILAND requested capacity building for access to judicial and alternative dispute settlement mechanisms. The EU expressed willingness to continue supporting capacity-building activities for ABS.

SWITZERLAND presented its ABS Management Tool, which provides tools and guidance based on global practical experience to governments, stakeholders and practitioners on the implementation of the Bonn Guidelines. The Solomon Islands, for the PACIFIC SIDS, called for country-driven capacity building. CUBA called for adequate funding in this regard.

IN THE CORRIDORS

The Co-Chairs' announcement that they will prepare a new text for further consideration triggered mixed reactions among delegates. Some were of the opinion that the new text would mark a big step towards substantive negotiations on the international regime. Others woefully acknowledged that the text may reveal less convergence than expected and may even put an end to hopes for building multi-regional coalitions.

A number of delegates pointed to the effectiveness of indigenous participants tabling proposals backed by varying coalitions of regional caucuses, since this approach reflects the diversity of indigenous issues. Another delegate commented however that this approach could only be effective as long as the caucuses do not contradict each other on key demands, as this may weaken their negotiating position. Other delegates noted that the litmus test for meaningful indigenous participation in the ABS process is not plenary session participation, but the accepted level of substantive submissions in contact group negotiations.