



## ABS-3 HIGHLIGHTS: WEDNESDAY, 16 FEBRUARY 2005

Delegates to the third meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met in two sub-working groups throughout the day. Sub-Working Group I (SWG-I) discussed a Co-Chairs' text on an international ABS regime. Sub-Working Group II (SWG-II) addressed conference room papers (CRP) on: other approaches, including an international certificate of origin/source/legal provenance; the use of terms; and measures to support compliance with prior informed consent (PIC) and mutually agreed terms (MAT).

### SUB-WORKING GROUP I

**INTERNATIONAL REGIME:** In the morning, SWG-I Co-Chair Sem Shikongo (Namibia) introduced a Co-Chairs' text, including sections on: scope; potential objectives; elements clustered by subject matter; additional elements; and a matrix on linkages to international instruments.

Ethiopia, on behalf of the AFRICAN GROUP, the Netherlands, on behalf of the EU, India, on behalf of the LIKE-MINDED MEGADIVERSE COUNTRIES (LMMC), THAILAND, CANADA, SWITZERLAND and NEPAL requested that the objectives be narrowed down, with the LMMC suggesting emphasis on: the prevention of misappropriation and misuse of genetic resources and traditional knowledge; ensuring benefit-sharing; and protecting the rights of indigenous and local communities. The EU and AUSTRALIA said the objectives should stay within the framework of the CBD and the mandate of the group. SUDAN cautioned against potential duplications and contradictions. MALAYSIA and PERU said the objectives of the regime should directly relate to those of the CBD.

The EU, CANADA and SWITZERLAND welcomed the clusters of elements and proposed using the matrix as a basis for the gap analysis. On the matrix, the EU and MALAWI suggested adding the study on linkages prepared by the Secretariat, and information on national and regional instruments and other CBD processes. The RUSSIAN FEDERATION and the EU, opposed by COLOMBIA, ECUADOR and the PHILIPPINES, supported establishing an expert group to complete the matrix before the next Working Group meeting.

The AFRICAN GROUP said the regime should be legally binding and cautioned against using the funding mechanism to facilitate access, stressing, with BRAZIL, that the World Intellectual Property Organization (WIPO) and the Agreement on

Trade-Related Aspects of Intellectual Property Rights (TRIPS) do not adequately address benefit-sharing concerns. BRAZIL added that the matrix should differentiate between instruments that ensure and those that promote benefit-sharing. She also noted that neither under TRIPS nor under WIPO have Parties agreed on mandatory disclosure requirements.

THAILAND and TANZANIA requested that measures facilitating access be in accordance with CBD Article 16.2 (access to and transfer of technology to developing countries) and the Bonn Guidelines. UGANDA supported access only for environmentally sound uses, while HAITI suggested that access be controlled and managed rather than facilitated.

The UN FOOD AND AGRICULTURE ORGANIZATION noted that the scope of the International Treaty on Plant Genetic Resources for Food and Agriculture is not limited to the annexed list of crops and that the Treaty addresses benefit-sharing in a variety of cases that the group should consider. The INTERNATIONAL CHAMBER OF COMMERCE stressed that the regime should balance national and international measures.

**Nature:** In the afternoon, SWG-I Co-Chair Shikongo invited views on the nature of the regime.

The LMMC, the AFRICAN GROUP, CUBA, BANGLADESH, HAITI, THAILAND, EL SALVADOR and FIJI supported a legally binding regime, with many noting that such a regime may include non-binding elements, and stressing that the core objective, which is to ensure benefit-sharing, can only be achieved through international legally binding provisions that reinforce national ABS legislation.

The EU, CANADA, JAPAN and AUSTRALIA retained an open position with regard to the legal nature of the regime, while noting that benefit-sharing could be addressed by one or several instruments at the international, regional or other levels. They also called for further gap analysis and sharing of experiences in the implementation of the Bonn Guidelines, stressing that the content and substance of the regime should be defined before deciding upon its nature. Maintaining that the international regime should contain legally binding elements, PALAU and the RUSSIAN FEDERATION supported the requests for gap analysis, sharing of experiences and determination of the content of the regime.

**Process:** The AFRICAN GROUP, supported by the EU, ECUADOR, COLOMBIA, BRAZIL, PERU and MEXICO, suggested inviting Parties to submit views on the regime to be compiled by the Secretariat. The EU and HAITI added that a comprehensive gap analysis should be completed before the next meeting of the Working Group. CUBA and MALAWI, opposed



by CANADA, requested that the Secretariat prepare a draft text on the structure of the regime for the next meeting. BURKINA FASO, opposed by CANADA, ECUADOR, COLOMBIA, BRAZIL, the PHILIPPINES and PERU suggested establishing an expert group to support the Secretariat. UGANDA proposed developing guidelines to keep Parties' submissions focused. HAITI and MALAWI proposed holding regional meetings, and ECUADOR, COLOMBIA and PERU suggested holding electronic consultations as an alternative.

**Additional issues:** SWG-I Co-Chair Shikongo invited suggestions on additional issues that had not been addressed in the Co-Chairs' text or previous discussions. GHANA requested adding an element on communication, education and public awareness. HAITI proposed to more explicitly take into account the relationship with other international legally binding instruments that have linkages to the CBD, such as those under the World Trade Organization. BRAZIL proposed adding measures to ensure the disclosure of origin as a precondition for the registration of new products using genetic resources, their derivatives or associated traditional knowledge.

**Procedural issues:** SWG-I Co-Chair Shikongo requested Parties' suggestions for preparing a revised Co-Chairs' text. The AFRICAN GROUP and SWITZERLAND said the revised text should serve as a basis for country submissions before the next meeting of the Working Group.

Delegates then discussed how to group elements into clusters. BRAZIL, opposed by CANADA, suggested grouping elements according to their operative clauses rather than subject matter. The BAHAMAS proposed clusters on: providers; users; international arena; and elements addressed by CBD provisions. SINGAPORE proposed moving the objectives not directly related to benefit-sharing into a new preamble.

SWG-I Co-Chair Shikongo said a revised Co-Chairs' text will be prepared.

### **SUB-WORKING GROUP II**

**OTHER APPROACHES:** SWG-II Co-Chair Birthe Ivars (Norway) introduced a CRP on other approaches, including an international certificate of origin/source/legal provenance, calling for views on technical options for the design of a certificate, including their implications for the practicality, feasibility and cost, to be compiled and considered at the next Working Group meeting.

MEXICO, supported by NEW ZEALAND and COLOMBIA, suggested including a reference to the participation of industry in compiling information on the design of a certificate. He also proposed that submissions focus on: the rationale and objectives of the certificate; desirable characteristics or features; and practicality, feasibility and cost. The EU, opposed by COLOMBIA, requested that submissions include further studies and pilot projects. SWG-II Co-Chair Ivars said the CRP will be revised and a draft recommendation will be submitted to the Plenary.

**USE OF TERMS:** SWG-II Co-Chair Ivars introduced a CRP on the use of terms, definitions and/or glossary. BRAZIL, supported by Liberia, on behalf of the AFRICAN GROUP, INDIA, ETHIOPIA, COLOMBIA, and the GAMBIA, proposed adding preambular language, highlighting that the definitions on ABS will not substitute those in national legislation, which would prevail. The EU, supported by SWITZERLAND, CANADA, JAPAN, NEW ZEALAND and EGYPT, opposed the proposal, considering the early stage of negotiations and the supremacy of international instruments over national legislation. Following informal consultations, delegates agreed to include a reference

to the CBD Articles 2 (Use of Terms) and 15 (Access to Genetic Resources).

Delegates agreed to a proposal by BRAZIL not to specify additional terms that need to be considered, and to a suggestion by the AFRICAN GROUP to request that the Executive Secretary prepare a consolidated glossary of existing and additional definitions for consideration at the next Working Group meeting.

**MEASURES FOR COMPLIANCE WITH PIC AND MAT:** SWG-II Co-Chair Ivars introduced a CRP on measures to support compliance with PIC of the Party providing genetic resources and MAT on which access was granted.

The EU stressed that the development of measures to support compliance with PIC and MAT is at different stages in different countries, and requested that this be recognized in the document. She also stressed that Parties need to continue implementation of the Bonn Guidelines. CANADA proposed that work be undertaken on the occurrence, extent and cost of misappropriation of genetic resources and associated traditional knowledge, including, in countries with relevant national legislation, on the extent of non-compliance. The INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY called for measures to ensure PIC of indigenous and local communities over the use of their genetic resources and traditional knowledge. COLOMBIA stressed the need to focus deliberations on international exchanges of genetic resources and their derivatives, and urged international measures to address illegal access.

LIBERIA, INDIA and ETHIOPIA opposed language stating that legal certainty and clarity facilitate access. Following discussions, the text was bracketed.

LIBERIA, supported by the EU, opposed a specific reference to the TRIPS Council as a source of pertinent documentation. BRAZIL and EGYPT requested that the Executive Secretary compile pertinent documentation circulated in relevant forums, particularly recent proposals presented by CBD Parties at the TRIPS Council.

Delegates debated language inviting Parties to ensure that appropriate remedies are available to address non-compliance with ABS arrangements in their national jurisdiction. BRAZIL called for including penalties and compensation according to national law. The EU suggested using language regarding legislative, administrative and policy measures, contained in Decision VII/19 on ABS. The reference was bracketed. Delegates also bracketed language stating that disclosure of origin in IPR applications is a measure to ensure compliance with PIC and MAT.

Discussions on the CRP will continue on Thursday.

### **IN THE CORRIDORS**

On the day of entry into force of the Kyoto Protocol, delegates reconvened in high spirits, commending SWG-I Co-Chairs for the text prepared on the ABS regime. Their enthusiasm soon started to fade away when they realized that this document, albeit a starting point for discussions, may well be their main takeaway from the meeting. However, one delegate noted that the scope of disagreement has successfully been identified, and this, after all, is the purpose of this "test round" in ABS negotiations. Optimists stated that defining the objectives and clustering the elements in the Co-Chairs' text has the potential to lay the procedural groundwork for a successful outcome, expecting negotiations on substance to take place at the next Working Group meeting. Several delegates felt that, by that time, regional positions may be mature enough to pave the way for a productive negotiation process, hoping that the road ahead will not be as rocky as the one that led to the Kyoto Protocol.