



ABS-3 HIGHLIGHTS: THURSDAY, 17 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 and Friends of the Co-Chairs groups throughout the day and into the night. Sub-Working Group I (SWG-I) discussed a conference room paper (CRP) on an international ABS regime. Sub-Working Group II (SWG-II) addressed CRPs on: indicators for ABS; and measures to support compliance with prior informed consent (PIC) and mutually agreed terms (MAT).

SUB-WORKING GROUP I

INTERNATIONAL REGIME: SWG-I Co-Chair Sem Shikongo (Namibia) introduced a CRP containing draft recommendations and an annex including sections on: nature; scope; potential objectives; elements of the regime clustered by subject matter; additional elements identified; and a matrix for analysis of gaps. Many delegates expressed their overall satisfaction with the draft.

Draft recommendation: The Netherlands, on behalf of the EU, proposed preambular language stating that the annex contains a compilation of views and proposals on the international regime.

On the operative part, delegates agreed to transmit the annex to the fourth Working Group meeting for further elaboration and negotiation.

A Friends of the Co-Chairs group was established before adjourning the morning session to discuss outstanding issues. Following consultations in this group, delegates agreed to reaffirm that the ABS Working Group will continue working in accordance with the terms of reference set out in decision VII/19, and to transmit the annex to the next meeting of the Working Group for further elaboration and negotiation and invite Parties and others to submit comments and proposals on the annex.

Delegates agreed to a proposal by SWITZERLAND to request the Executive Secretary to compile and consolidate comments and proposals submitted by Parties and others, and to delete language stating that submissions would facilitate a gap analysis. The INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY requested, and delegates agreed to, language ensuring collaboration between the Working Groups on ABS and Article 8(j) (traditional knowledge).

On exchange of views through meetings and electronic forums, the EU suggested that views include experiences gained in the implementation of the Bonn Guidelines and other

relevant instruments, but delegates did not support the proposal. Delegates decided to add reference, as requested by BURKINA FASO, encouraging countries and donor organizations to provide adequate funding for activities relating to exchange of views.

Annex: Nature of the regime: Delegates agreed on language, noting that the international regime could be composed of one or more instruments within a set of principles, norms, rules and decision-making procedures, legally-binding and/or non-binding, as stated in Decision VII/19. Following extensive discussions, delegates agreed to move references to Parties' views, regarding keeping options open and affirming the need for the core part of the regime to be legally binding, to the report of the meeting.

Scope of the regime: Delegates discussed whether to retain only the text on scope as stated in Decision VII/19 or to also reflect other options as presented by different Parties. The debate focused on references to a legally binding instrument, and to derivatives and products of genetic resources, with developing countries supporting, and developed countries opposing them. MALAYSIA stressed that the reference to the legally binding instrument is a proposal by the Like-Minded Megadiverse Countries (LMMC), and should remain on the negotiating table. Following extensive discussions, a Friends of the Co-Chairs group was established to discuss outstanding issues.

Potential objectives: THAILAND and the EU proposed that the objective of the international regime should be to ensure or guarantee the fair and equitable sharing of benefits arising out of the use of genetic resources in the countries of origin, rather than prevent their misappropriation and misuse. GABON proposed that the regime also ensure transfer of technology. ECUADOR suggested that technology transfer should guarantee that economic, social and environmental benefits flow to the country of origin.

Noting the lack of adequate definitions, JAPAN suggested using the term "unauthorized access and use," rather than "misappropriation and misuse." JAPAN and the EU suggested deleting reference to derivatives of genetic resources.

In the afternoon, the Friends of the Co-Chairs group presented the results of their deliberations on the scope and potential objectives. Delegates agreed to retain the agreed language and Parties' views as options in the text, and to invite submissions by Parties on additional options for the scope and potential objectives, which will be incorporated in the annex for consideration at the next meeting. They decided to amend language in the recommendation accordingly.

Elements: Delegates agreed to keep the elements in Decision VII/19 grouped in clusters and amended the titles of the clusters.



Additional Elements: Delegates agreed that additional elements be considered at the next Working Group meeting. New elements include: measures to promote research and development and joint ventures in the country of origin; measures to ensure non-discriminatory access; and nationally recognized certificates of origin/source/legal provenance of genetic resources and their derivatives and associated traditional knowledge as well as rules of customary law.

Matrix: Delegates debated whether the matrix on gap analysis should be included in the annex or be appended to the draft recommendation. The LMMC and the AFRICAN GROUP, opposed by the EU and CANADA, requested removing the matrix from the annex and appending it as an additional document. The LMMC and the AFRICAN GROUP argued that it is not possible to negotiate gaps in international instruments. The EU and CANADA noted that Decision VII/19 requires an analysis of each element against relevant agreements.

Following informal consultations, delegates agreed that the matrix, retained as the second annex, be recognized as an invaluable tool. They decided that additional elements can be included, but their status will be clearly acknowledged as not negotiated nor agreed to, and recognized the utility of the matrix to identify gaps and determine how to address them.

SUB-WORKING GROUP II

INDICATORS FOR ABS: SWG-II Co-Chair Birthe Ivars (Norway) introduced a CRP containing draft recommendations on indicators for ABS in the framework for evaluation of progress in the implementation of the CBD Strategic Plan. Regarding language recognizing that the development of ABS indicators presupposes targets on benefit-sharing, the EU, opposed by COLOMBIA, suggested including a reference to targets on ensuring access to genetic resources.

COLOMBIA proposed deleting references to sharing of benefits arising from the use of innovations, knowledge and practices of indigenous and local communities, with a view to referring relevant discussions to the Working Group on Article 8(j).

BRAZIL, opposed by the EU and SWITZERLAND, proposed amendments to the preamble highlighting that ensuring benefit-sharing is one of the focal areas of the Strategic Plan. Following informal consultations, delegates agreed on preambular language, including: adding a reference to the first paragraph of Decision VII/30 (focal areas of the Strategic Plan); stressing that benefit-sharing is one of the focal areas of the framework to enhance the evaluation of achievements and progress in the implementation of the Strategic Plan; and highlighting the need for further development of targets and indicators.

SWG-II Co-Chair Ivars said that the draft recommendation, as amended, will be submitted to the Plenary.

MEASURES FOR COMPLIANCE WITH PIC AND MAT: Delegates agreed that discussion on the item is without prejudice to the outcomes of the negotiations on an international regime. The EU, supported by AUSTRALIA, MEXICO and NEW ZEALAND, and opposed by BRAZIL, suggested deleting preambular paragraphs on: the need for further work on administrative and judicial remedies regarding non-compliance with PIC and MAT in user countries; the role of legal certainty and clarity in facilitating access to, and use of, genetic resources; and disclosure of origin/source/legal provenance in IPR applications. Following discussions, outstanding issues were bracketed.

Regarding the operative part, CANADA proposed inviting Parties to start or continue taking appropriate and practical measures to support compliance with PIC and MAT, including measures listed in Decision VII/19. MEXICO suggested that

Parties use the same structure in their submissions on their views on compliance measures.

BRAZIL suggested inviting Parties and governments to consider the introduction of disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in IPR applications as one of the measures to support compliance with PIC and MAT.

On language inviting Parties to identify issues related to disclosure of origin in IPR applications, SWITZERLAND noted that Decision VII/19 mandates the Working Group to transmit the information to the World Intellectual Property Organization (WIPO) and other relevant forums. COLOMBIA said the Working Group should examine the information before transmitting it. Delegates agreed on compromise text proposed by the EU, stating that the Working Group examine a compilation of issues at its fourth meeting, with a view to transmitting the results to WIPO and other relevant forums. BRAZIL, supported by Liberia, on behalf of the AFRICAN GROUP, and opposed by the EU and CANADA, requested a reference to the World Trade Organization, which was bracketed.

The AFRICAN GROUP, supported by CANADA, proposed, and delegates agreed, to invite Parties to provide funding for regional workshops as a means to exchange experiences on the implementation of measures to ensure compliance with PIC and MAT.

Regarding a request to the Executive Secretary to compile pertinent documentation circulated in other relevant forums, SWITZERLAND opposed a reference to the TRIPS Council. BRAZIL, EGYPT, COLOMBIA, MALAYSIA and LIBERIA, opposed by SWITZERLAND, the EU and AUSTRALIA, suggested a reference to submissions made by CBD Parties to the TRIPS Council. References were bracketed.

On the invitation to Parties and others to undertake analytical work on misappropriation of genetic resources, CANADA and the EU, suggested highlighting the occurrence, extent, nature and cost of misappropriation. EGYPT and BRAZIL, opposed by AUSTRALIA and the EU, proposed a reference to misappropriation that may result from IPR grants without compliance with the national legislation of the country of origin. The EU suggested using agreed language as in Decision VII/19. Noting the lack of a clear definition and that legitimate access to genetic resources may result in misappropriation of derivatives, COLOMBIA, supported by BRAZIL and ETHIOPIA, and opposed by the EU, AUSTRALIA, JAPAN and SWITZERLAND, proposed including a reference to derivatives. Options and references were bracketed.

SWG-II Co-Chair Ivars established a Friends of the Co-Chairs group, which met in the evening to discuss the outstanding issues.

IN THE CORRIDORS

After rambling about the process for hours, delegates eventually clashed on the issue of derivatives of genetic resources, a key issue in the ABS debate. As genetic resource use is nowadays mostly based on derivatives, deadlocks in both sub-working groups were derivatives-driven.

Perhaps the reason for the disagreement lies in the very definition of derivatives, something that came up during coffee-break discussions. Some limited the definition to the natural components of species such as essences or molecules, whereas others cautioned that this definition could also include products obtained through biotechnology or plant improvement.

At this stage, delegates agreed to disagree, awaiting the next round of negotiations. But at some point, the issue is bound to resurface, because, as one delegate poetically put it, benefit-sharing without derivatives is akin to a rose without its fragrance.