



United Nations Environment Programme



Distr.
GENERAL

UNEP/Bio.Div/WG.2/2/5
7 March 1991

ORIGINAL: ENGLISH

AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS ON BIOLOGICAL DIVERSITY

Second session
Nairobi, 25 February - 6 March 1991

REPORT OF THE AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS ON BIOLOGICAL DIVERSITY ON THE WORK OF ITS SECOND SESSION

I. INTRODUCTION

1. The Governing Council of the United Nations Environment Programme by its decisions 14/26 and 15/34 recognized and re-emphasized the need for concerted international action to protect biological diversity on Earth by, inter alia, the implementation of existing legal instruments and agreements in a co-ordinated and effective way and the adoption of a further appropriate international legal instrument, possibly in the form of a framework convention.

2. The first session of the Ad Hoc Working Group of Experts on Biological Diversity, established pursuant to Governing Council decision 14/26, was held in Geneva from 16 to 18 November 1988 (see the report of the first session contained in document UNEP/Bio.Div.1/3) and the Executive Director reported the results to the Governing Council at its fifteenth session held in Nairobi from 15 to 26 May 1989.

3. The second session of the Working Group was convened in Geneva from 19-23 February 1990 to advise further on the contents of a new international legal instrument, with particular emphasis on its socio-economic context (see the report of the second session contained in document UNEP/Bio.Div.2/3). The Group requested the Executive Director to commence a number of studies as a means of responding to specific issues in the process of developing the new legal instrument. These studies, which included biodiversity global conservation needs and costs (UNEP/Bio.Div.3/3); current multilateral, bilateral and national financial support for biological diversity conservation (UNEP/Bio.Div.3/4); an analysis of possible financial mechanisms (UNEP/Bio.Div.3/5); the relationship between intellectual property rights and access to genetic resources and biotechnology (UNEP/Bio.Div.3/6); and biotechnology issues (UNEP/Bio.Div.3/7), were presented and discussed at the third session of the Working Group.

4. The third session of the Ad Hoc Working Group of Experts on Biological Diversity was held in Geneva from 9 to 13 July 1990 to advise further, inter alia, on the contents of elements for a global framework legal instrument on biological diversity in accordance with decision 15/34 of UNEP's Governing Council (see the report of the third session contained in document UNEP/Bio.Div.3/12). The complex issues involved in biotechnology transfer resulted in the Working Group's decision to prepare terms of reference for a Sub-Working Group on Biotechnology to meet before the first session of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity in order to examine detailed draft elements.

5. Taking note of the progress made towards developing an international legal instrument on biological diversity, the Governing Council, at its second special session held in August 1990, adopted decision GCSS II/5, which urged the Executive Director, in conjunction with the members of the Ecosystems Conservation Group, to accord high priority to the work on biological diversity and biotechnology with a view to arriving at an international legal instrument for the conservation and rational use of biological diversity within a broad socio-economic context, taking particular account of the need to share costs and benefits between developed and developing countries and ways and means to support innovation by local people. In the same decision, the Governing Council called upon the Ad Hoc Working Group of Legal and Technical Experts established for this purpose to proceed expeditiously with its task.

6. The Ecosystems Conservation Group was very active in assisting the Working Group. At its special meeting held on 1 October 1990, it considered the substance of the proposed convention, as well as the matter of draft elements for inclusion in the new legal instrument.

7. The first session of the Ad Hoc Working Group of Legal and Technical Experts was preceded by an expert meeting of the open-ended Sub-Working Group on Biotechnology from 14 to 17 November 1990. The Sub-Working Group discussed issues relevant to biotechnology transfer and made recommendations on, inter alia, the scope of biotechnologies to be included in the convention, ways and means of their transfer to and development by developing countries, and how they should be reflected in the planned convention. To assist the Sub-Working Group in its deliberations, the Secretariat had requested the preparation of an in-depth technical report dealing with the role of biotechnology for conservation and sustainable utilization of biological diversity, together with mechanisms for co-operative development (document UNEP/Bio.Div/SWGB.1/3). The full report of the Sub-Working Group is attached as an Appendix to the report of the first session contained in document UNEP/Bio.Div/WG.2/1/4 and Add.1.

8. The first session of the Ad Hoc Working Group of Legal and Technical Experts was held in Nairobi from 19 to 23 November 1990 to consider the reports of the three sessions of the Ad Hoc Working Group of Experts on Biological Diversity (UNEP/Bio.Div.1/3, UNEP/Bio.Div.2/3 and UNEP/Bio.Div.3/12), as well as that of the Sub-Working Group on Biotechnology (UNEP/Bio.Div/WG.2/1/4, Appendix). At the first session, detailed draft elements for the preparation of draft articles for a convention on biological diversity (UNEP/Bio.Div/WG.2/1/3) were discussed. The Working Group requested that the UNEP Secretariat prepare a draft convention for consideration at its second session. The draft convention was to be based upon the list of

elements presented at the first session, the outcome of the previous three sessions of the Ad Hoc Working Group of Experts on Biological Diversity, and the outcome of the first meeting of the Sub-Working Group on Biotechnology.

9. From 7 to 9 January 1991, the Executive Director convened a meeting of senior legal advisers to the Executive Director, representing the different geographical regions. The group reviewed the first draft of the convention prepared by the Secretariat. As directed by the Ad Hoc Working Group at its first session, all the elements discussed at that session were included and reflected in legal language. The experts recommended that cross-references to the material used in drafting should be introduced and that the draft should be limited to provisions based on clear guidance given by delegations at previous meetings on biological diversity.

10. The second session of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity was convened at UNEP headquarters in Nairobi from 25 February to 6 March 1991 to consider the draft convention on biological diversity prepared by the UNEP Secretariat (UNEP/Bio.Div/WG.2/2/2).

II. ORGANIZATIONAL MATTERS

A. Opening of the session

11. The meeting was opened by the Executive Director of UNEP, Dr. Mostafa K. Tolba. He referred the Working Group to the results of the first session of the Ad Hoc Working Group of Legal and Technical Experts as they related to the structure of the negotiations and the composition of the Bureau, and drew attention to the recommendations of the Committee of Permanent Representatives to UNEP.

12. The Executive Director drew the attention of the Working Group to the fact that there was currently a difference of opinion regarding the candidatures for the various offices in the Bureau and he asked the Working Group if it was prepared to agree on its Chairman and the structure of the Bureau.

13. In order to allow work to proceed pending a decision on candidatures for the Bureau, the Working Group invited the Bureau of the first session of the Ad Hoc Working Group of Legal and Technical Experts composed of Denmark, Chairman; Kenya, Union of Soviet Socialist Republics, United States of America and Venezuela, Vice-Chairmen; and Indonesia, Rapporteur, to act as the temporary Bureau. The Working Group having agreed to proceed with the previous Bureau, the Executive Director called upon Mr. Veit Koester (Denmark) to chair the meeting.

14. In his opening statement, the Executive Director emphasized that the meeting was beginning at a time when war was ravaging the Gulf, causing widespread destruction in the area, including environmental destruction. However, over the next 10 days, the Working Group had a great deal to tackle. In the spirit of a new sense of global partnership and respect for the inalienable sovereignty of States over their natural resources, the Working Group was expected to concentrate on pivotal substantive issues of conservation and sustainable use of biological diversity. The convention to be elaborated by the Working Group should not be a "paper tiger", but a strong, clear and concrete agreement. No one was prepared to sacrifice

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content for expediency. Four years had passed since UNEP's Governing Council had called for the elaboration of a legal instrument on biological diversity. During this period, over one million species had been lost.

15. Important preparatory work for the Convention had already been carried out by UNEP in co-operation with the International Union for the Conservation of Nature and Natural Resources (IUCN), the Food and Agriculture Organization of the United Nations (FAO) and the United Nations Educational, Scientific and Cultural Organization (Unesco). Legal expertise had been offered by IUCN. The active participation by all delegations and the wide scope of the draft elements concerning all aspects of conservation of biological diversity underlined the serious determination of Governments to tackle the complex issues of biodiversity.

16. Inputs from previous meetings had been converted into legal language by the Secretariat. The draft convention prepared by the Secretariat and reviewed by a small group of international lawyers from five regions of the world was now before the meeting. Although it was a preliminary draft, it constituted a reasonable legal working document. The Working Group's first task would be to review the draft, narrow the options, clarify the language, and identify the common ground. The Executive Director suggested that the structure of the convention and the reordering of articles should be left to a later stage in the negotiations.

17. The Executive Director drew attention to four of the complex issues covered by the draft convention that were of particular importance: the first concerned the fundamental principle that the conservation of biological diversity was a common concern of all people. This principle required the participation of all countries and all peoples in a global partnership. It implied intergenerational equity and fair burden sharing. The common concern called for a balance between the sovereign rights of nations to exploit their natural resources and the interests of the international community in global environmental protection. The second issue concerned financial mechanisms; the draft convention must contain concrete and binding commitments to funding. It was quite clear that the costs involved were enormous, but it had to be borne in mind that the cost of inaction would be far greater. The third aspect was that of the interlocking issues of availability and access to biological resources and relevant technologies. Access to biodiversity and the availability of biotechnology and other technology relevant to the rational use of biological resources were complementary and inseparable. Sovereign States expected, and should receive, fair compensation for the use of their genetic resources. The private sector, which invested large sums in research and development for new technologies, also expected and should receive fair compensation for participating in technology transfer arrangements, supporting education and training, and developing indigenous technologies. The final issue concerned the need to ensure the continued participation of developing countries in the negotiations at the widest possible level. The additional funding needed to support their participation in appropriate numbers would necessitate approximately \$4 to \$5 million over the next two years. It was necessary to know how the industrialized countries proposed to secure these resources.

18. Formidable tasks lay ahead, therefore, the meeting should rapidly reach agreement on the straightforward organizational questions such as its Chairman and the structure of the Bureau, the procedures for negotiations. The single-minded goal of the negotiations was to build a strong convention. An equitable balance of national positions must be found; that implied a convergence of self-interests, common sense and collective goodwill. In essence, it meant demonstrating to a tragically divided world that moral principles could be translated into binding agreements.

B. Attendance

19. The meeting was attended by delegations from the following countries: Argentina, Australia, Austria, Bahamas, Bangladesh, Belgium, Brazil, Burundi, Canada, Central African Republic, Chad, Chile, China, Colombia, Costa Rica, Cyprus, Czechoslovakia, Denmark, Djibouti, Egypt, Ethiopia, Finland, France, Gambia, Germany, Ghana, Greece, Guinea, Guyana, India, Indonesia, Iran, Iraq, Israel, Japan, Kenya, Kuwait, Lesotho, Malawi, Malaysia, Mexico, Morocco, Myanmar, Netherlands, Nigeria, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Rwanda, Sao Tome and Principe, Senegal, Somalia, Spain, Sudan, Swaziland, Sweden, Switzerland, Turkey, Uganda, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Zaire, Zambia and Zimbabwe.

20. Observers from Palestine attended the meeting.

21. The following United Nations bodies, specialized agencies and international organizations were present: FAO, United Nations Conference on Environment and Development (UNCED), Unesco, United Nations Population Fund (UNFPA) and the Commission of the European Communities (CEC).

22. The following non-governmental organizations were also present: African Centre for Technology Studies (ACTS), Genetic Resources Action International (GRAIN), IUCN, International Board for Plant Genetic Resources (IBPGR), International Council of Environmental Law, Pro-Scientia - Colombia, World Wide-Fund for Nature (WWF).

C. Documentation

23. The following documents were made available to the meeting:

- (a) Provisional agenda (UNEP/Bio.Div/WG.2/2/1);
- (b) Draft Convention on Biological Diversity (UNEP/Bio.Div/WG.2/2/2);
- (c) Draft Rules of Procedure (UNEP/Bio.Div/WG.2/2/3);
- (d) Note by the Executive Director (UNEP/Bio.Div/WG.2/2/4).

24. The following documents were also at the disposal of delegates:

- (a) Recommendations on the structure of the Bureau and the organization of work of the Negotiating Group on a Convention on Biological Diversity, submitted by the Committee of Permanent Representatives to UNEP (UNEP/Bio.Div/WG.2/2/L.3);

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(b) Rules of procedure of the Governing Council;

(c) Rules of Procedure for the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change.

25. The following documents were available:

(a) Report of the Ad Hoc Working Group of Legal and Technical Experts Biological Diversity on the work of its first session (UNEP/Bio.Div/WG.2/1/4

(b) Points identified by the Secretariat as Repetitions and Inconsistencies in the Draft Convention (UNEP/Bio.Div/WG.2/2/L.4 and Corr.1)

(c) Excerpt from the 1991 State-of-the-Environment Report: Chapter II Biological Diversity, Report of the Executive Director (UNEP/Bio.Div/WG.2/2/Inf.1);

(d) Excerpt from the Note by the Executive Director to the Third Session of the Ad Hoc Working Group of Experts on Biological Diversity, Geneva, 9-13 July 1990 (UNEP/Bio.Div.3/2/Annex) and from the report of the Ad Hoc Working Group of Experts on Biological Diversity, third session, Geneva, 9-13 July 1990 (UNEP/Bio.Div.3/12/Annex I) on elements, amendments and comments concerning a framework legal instrument on biological diversity (UNEP/Bio.Div/WG.2/2/Inf.2).

D. Adoption of the agenda

26. The following agenda, contained in document UNEP/Bio.Div/WG.2/2/1, was adopted by the Ad Hoc Working Group:

1. Opening of the session.
2. Organizational matters:
 - (a) Adoption of rules of procedure;
 - (b) Election of the Bureau;
 - (c) Adoption of the agenda;
 - (d) Organization of work.
3. Consideration of the draft convention on biological diversity prepared by the Secretariat as recommended by the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity at its first session.
4. Other matters.
5. Adoption of the report.
6. Closure of the session.

E. Adoption of the rules of procedure

27. Draft rules of procedure were prepared by the Secretariat at the request of the Ad Hoc Working Group at its first session and submitted to the meeting as document UNEP/Bio.Div/WG.2/2/3. After discussion of the draft in plenary, the meeting agreed to establish an open-ended sub-working group, chaired by H.E. Mr. J. Barboza (Argentina) to review the draft rules of procedure. The sub-working group held three meetings. Draft rules of procedure as revised by the sub-working group were presented to the plenary by Mr. Barboza, who explained the reasons why some parts of the draft contained bracketed portions for decision by the plenary. After discussing the revised text, the meeting adopted its rules of procedure which are annexed to this report.

28. The following statements were made concerning the rules of procedure as adopted:

(a) The representative of the Netherlands, speaking on behalf of the European Community and its member States, stated that he had listened carefully to the discussion regarding his proposal to include "regional economic integration organizations" in the definition of "Parties". It had become clear to him that some misunderstanding existed with regard to the position of the European Community as such an organization. As proof of his readiness for compromise and co-operation, he said he would withdraw the proposed amendment and he confirmed the intention of the European Community as a whole to participate fully in the negotiating process of the Ad Hoc Working Group under its rules of procedure. He expressed the expectation that this participation would take place in constructive co-operation with other delegations. He reserved the right to reopen the debate on the substance of the amendment withdrawn, on the basis of rule 53 of the rules of procedure, in case the European Community and its member States would consider it necessary to do so.

(b) The representative of the Executive Director of UNEP drew the meeting's attention to rule 2, pointing out that practical difficulties might arise over its implementation, particularly when the time interval between meetings grew shorter. Arrangements for meetings could also be time consuming when a host country was involved.

F. Election of the Bureau

29. In accordance with rule 41 of the rules of procedure, the meeting held a secret ballot to elect its Chairman. H.E. Mr. Frantisek Penazka (Czechoslovakia) served as election officer. The results of the vote were as follows:

Number of representatives present and voting:	67
Number of votes cast:	61
Abstentions:	6
H.E. Dr. V. Sanchez (Chile):	32
H.E. Dr. N. Mungai (Kenya):	29

30. After the Chairman had announced the election results, Dr. Mungai congratulated Dr. Sanchez on his election and pledged his own, as well as Kenya's and the African Group's full support for the negotiating process under

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the chairmanship of Dr. Sanchez. The meeting also expressed its gratitude to the previous Bureau and particularly to its Chairman, Mr. Veit Koester (Denmark), for its work and achievements.

31. After receiving congratulations from numerous regional groups and delegations, the Chairman thanked the meeting for having elected him. He assured participants that he would make every effort to guide the meeting in the development of a convention on biological diversity. He expressed his confidence that the joint capacities of the delegations participating in the negotiating process and the concerted efforts of the UNEP Secretariat and other international organizations concerned with biological diversity would lead to a successful conclusion.

32. The meeting elected the following Bureau:

<u>Vice-Chairmen:</u>	-	Mr. V. Koester (Denmark)
	-	Mr. J. Muliro (Kenya)
	-	Mr. G. Zavarzin (USSR)
<u>Rapporteur:</u>	-	Mr. J. Husain (Pakistan)

G. Organization of Work

33. The Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity decided to establish two sub-working groups to deal with specific aspects and commitments under the Convention as follows:

(a) Sub-Working Group I to deal with general issues, such as the fundamental principles, general obligations, measures for in situ and ex situ conservation, and relationship with other legal instruments, as well as the financial aspects of such measures, and in particular, Chapters I, Objectives; III, Fundamental principles; IV, General obligations; V, Measures; and XI, Institutional measures at the national level.

(b) Sub-Working Group II to deal with the issues of access to biodiversity and related technologies, including biotechnology, technology transfer, technical assistance, financial mechanisms and international co-operation, and, in particular, Chapters VI, Availability and access; VII, Transfer of technology; VIII, Technical assistance and IX, Financial mechanisms.

34. The discussion on the organization of work took place on the basis of the recommendations by the Committee of Permanent Representatives (UNEP/Bio.Div/WG.2/2/L.3), the proposal by the Western European and Others Group (UNEP/Bio.Div/WG.2/2/L.6), and informal proposals by India and Malaysia in the negotiating group headed by the Chairman and composed of Brazil, Canada, Egypt, Finland, Gambia, Guyana, India, Kenya, Malaysia, Mexico, Netherlands, Switzerland, Uganda, Union of Soviet Socialist Republics and the United Kingdom.

35. Agreement was reached on the distribution of subjects between Sub-Working Groups I and II and on the provisions contained in sub-paragraphs (a), (b) and (c) of paragraph 37 below. Discussion continued in plenary on the proposal contained in sub-paragraph (d), which was approved following amendments by some delegations.

36. Some delegations supported the informal proposal by two delegations concerning the guidelines for work, while other delegations opposed it. A consensus was reached by adopting paragraph 3 of the proposal concerning subsidiary organs submitted by the Vice-Chairman to the first session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (A/AC.237/L.3) as sub-paragraph (e) of paragraph 37.

37. The Ad Hoc Working Group agreed the following:

(a) Each Sub-Working Group would elect a Vice-Chairman and a Rapporteur, to assist its Chairman;

(b) Specific aspects of the negotiations would be dealt with in the sub-groups for presentation to the plenary, which would have the power of decision. Co-ordination and integration would be the responsibility of plenary meetings and frequent Bureau meetings, under the Chairman;

(c) Only two parallel meetings would be held at any one time (plenary and one Sub-Working Group, or two Sub-Working Groups);

(d) Each Sub-Working Group would ensure that the conclusions of its work corresponded fully to the obligations and commitments identified by the other Sub-Working Groups;

(e) Funding commitments, mechanisms and means for transfer of technology to developing countries, as well as matters concerning international scientific and technological co-operation, should be an integral element in the negotiations.

38. It should be noted that the division of work could be amended by the Ad Hoc Working Group at any time, including through the establishment of further sub-groups or working groups. In particular, it would be necessary for the Ad Hoc Working Group, at an appropriate time, to assign responsibility for the preparation of the formal articles and measures for the implementation of the convention. It should also be noted that at some stage the Ad Hoc Working Group would have to take a decision with regard to the chapters and articles to be included in the draft convention.

39. The composition of the Bureaus of the Sub-Working Groups was agreed as follows:

Sub-Working Group I:

Chairman:

Mr. Joseph Muliuro (Kenya)

Vice-Chairman:

A representative of the Eastern European Group

Rapporteur:

A representative of the Western Europeans and Others Group

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Sub-Working Group II:

Chairman: Mr. Veit Koester (Denmark)
Vice-Chairman: A representative of the Asian Group
Rapporteur: A representative of the African Group

III. PROCEEDINGS OF THE SUB-WORKING GROUPS

40. At the request of the meeting, the reports of the meetings of Sub-Working Group I (SWG I) and Sub-Working Group II (SWG II) are incorporated in the main body of this report.

A. Report of Sub-Working Group I

41. Sub-Working Group I (SWG I), established by decision of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity, met on 5 and 6 March 1991.

42. The Sub-Working Group elected Ms. Joanna Gliwicz (Poland) as Vice-Chairman.

43. Mr. Craig Ferguson (Canada) was elected as Rapporteur.

44. The sessions of the Sub-Working Group were attended by representatives of Argentina, Australia, Bahamas, Bangladesh, Brazil, Burundi, Canada, Central African Republic, Chad, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Ethiopia, Finland, France, Germany, Guinea, India, Indonesia, Japan, Kenya, Lesotho, Malawi, Malaysia, Mexico, Morocco, Myanmar, Netherlands, Norway, Philippines, Poland, Romania, Rwanda, Sao Tome and Principe, Senegal, Spain, Sweden, Switzerland, Uganda, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Zaire, Zambia, Zimbabwe.

45. In addition, observers from the FAO, Unesco, UNCED, CEC, GRAIN, IUCN, Pro-Scientia and WWF attended the sessions.

46. After considering how the Sub-Working Group should organize its work, it was decided that the discussion should begin with the draft articles of Chapter I, Objectives, of the draft convention (UNEP/Bio.Div/WG.2/2/2), the Nordic proposal presented by Denmark, Finland, Norway and Sweden (UNEP/Bio.Div/WG.2/2/CRP.2), the technical position of the delegation of Costa Rica (UNEP/Bio.Div/WG.2/2/CRP.1) and the proposal by the USSR (UNEP/Bio.Div/WG.2/2/L.1), with a view to providing guidelines for the documents that the Secretariat would submit to the Ad Hoc Working Group at its third session.

47. The representatives of Sweden, on behalf of the Nordic countries, and Costa Rica introduced their respective proposals. Several speakers recognized equal importance for national action plans and international commitments while others wished to give priority to international commitments. A few speakers said that the USSR proposal was clear and helpful.

48. The Secretariat was asked to take note of terms identified by the Sub-Working Group as requiring definition in the future.

49. Several representatives expressed the view that the statement of objectives in Chapter I should be short and to-the-point.

50. An alternative view was expressed by several delegations that the objectives should be more detailed and include specific references to the various interests of different groups.

51. With respect to the four alternative formulations in the draft convention, support was expressed by several delegations for each of the alternatives, together with some specific amendments.

52. Delegations referred to several themes or concepts that could be reflected in a more detailed formulation. In particular, paragraph 6 of UNEP/Bio.Div/WG.2/2/L.4 was thought to provide a useful basis for drafting. These themes or concepts included, inter alia, conservation of biological diversity for the benefit of present and future generations and for its intrinsic value; the connection between development, conservation and sustainable use; the special situation of developing countries, financial implications; and technology transfer.

53. The Sub-Working Group decided to ask the Secretariat to prepare further alternative formulations, based on the two approaches put forward in the discussions, i.e. a brief, concise formulation and a more detailed formulation including references to themes and concepts.

54. The Sub-Working Group agreed that all the alternatives in the draft convention, the additional alternatives prepared by the Secretariat and other alternatives that might be proposed by delegations at a later date would provide the basis for further discussion. Several delegations expressed their desire to reduce the number of alternatives prior to the start of the third session.

55. SWG I considered the alternatives prepared by the Secretariat (UNEP/Bio.Div/WG.2/2/L.8) and decided that they should be forwarded to the Ad Hoc Working Group at its next meeting as additional to the alternatives contained in Chapter I, Objectives of the draft convention.

56. SWG I considered the draft report (UNEP/Bio.Div/WG.2/2/L.7), paragraph by paragraph, and proposed amendments thereto. The draft report, as amended, was adopted.

B. Report of Sub-Working Group II

57. The Sub-Working Group (SWG II) established by decision of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity met on 5 and 6 March 1991.

I. ORGANIZATIONAL MATTERS

A. Election of the Bureau

58. The Chairman, Mr. Viet Koester (Denmark) opened the meeting of the Sub-Working Group and called for the election of the remainder of the Bureau.

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59. Malaysia, on behalf of the Asian group, proposed India as Vice-Chairman. The United Republic of Tanzania, on behalf of the African group, proposed Gambia as Rapporteur. The Group elected the following Bureau:

Vice-Chairman: Mr. A. Vaish (India)

Rapporteur: Mr. S. Samba (Gambia).

B. Attendance

60. The sessions of the Sub-Working Group were attended by representatives of Argentina, Australia, Austria, Bahamas, Bangladesh, Brazil, Burundi, Canada, China, Colombia, Denmark, Egypt, Ethiopia, Finland, France, Gambia, Germany, Ghana, Greece, India, Indonesia, Iraq, Japan, Kenya, Malaysia, Maldives, Mexico, Morocco, Myanmar, Netherlands, Norway, Pakistan, Philippines, Poland, Sao Tome and Principe, Senegal, Spain, Sudan, Sweden, Switzerland, Uganda, United Kingdom, United Republic of Tanzania, United States of America, Union of Soviet Socialist Republics, Venezuela, Zaire, Zambia and Zimbabwe.

61. In addition, observers from UNCED and CEC attended the sessions.

C. Organization of work

62. As decided by the plenary meeting, SWG II's task was to consider Chapters VI, Availability and access; VII, Transfer of technology; VIII, Technical assistance; and IX, Financial mechanisms of the draft convention (UNEP/Bio.Div/WG.2/2/2). SWG II was also to consider Chapter XII, International co-operation, for which there were only draft elements prepared for the first session of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity (UNEP/Bio.Div/WG.2/1/3). There were, therefore, no draft articles for this Chapter. Because SWG II could not deal with this amount of material in two sessions, the Chairman suggested a possible approach as a basis for the Group's work. He noted that the goal should be to try to provide as much input as possible so that the next meeting had a clear basis for future discussions. He suggested that the Group should not go into any kind of drafting procedure and that it avoid very general political statements. He appealed to the delegations for brevity.

II. SUBSTANTIVE MATTERS

63. The Chairman identified five main issues common to all the articles assigned to SWG II. These included: (a) scope (e.g. the scope of biological diversity to be covered by the articles); (b) purpose (e.g. the purpose of access to technology or biological resources); (c) principles (e.g. what were the principles behind these articles); (d) conditions (e.g. what are the conditions for access to biological diversity or technology); and (e) measures (e.g. how should access to biological diversity or technology be regulated). The Chairman suggested that each article be examined according to these divisions. The SWG accepted this proposal, but noted that the discussion would not reflect commitments nor be conclusive, but only serve as a guide for future consideration. In considering Chapter VI, Article 13, SWG II addressed the following issues:

(a) Scope of access to biological diversity

64. SWG II first considered the scope of access to biological diversity. Its general conclusion was that the scope of access to biological diversity should include genetic material, both in situ and ex situ, from both wild and domestic species, from both terrestrial and non-terrestrial species, and from both within and beyond national jurisdiction, including international areas. It also included direct physical access to biological diversity as well as indirect access, e.g. access to information. It was also noted that access must address issues related to migratory species.

(b) Purpose of access to biological diversity

65. SWG II summarized the general purpose of access to biological diversity as including enhancing conservation, promoting the rational use of biological diversity, promoting sustainable development, promoting the continued functioning of the biosphere, promoting other environmentally sound uses and uses for the collective benefit of humankind, including economic development. An additional purpose was the promotion of scientific research.

(c) Principles supporting and conditions for access to biological diversity

66. SWG II decided that one condition for access to biological diversity was that it should not endanger viable populations. SWG II stressed that the principle of sovereignty over biological diversity should be reflected in this Chapter. There was considerable support for a principle of prior informed consent, although there was some concern that such a principle might create an illusion. There was general consensus that all access should be based upon mutual agreement, though there was some feeling that this should be dealt with under the heading of measures and not principles. Many delegations felt that there was a linkage between access to genetic material and access to related technologies, the results of research and products developed and sharing of commercial profits. SWG II requested that the words in brackets such as free, fair and equitable remain in brackets for consideration at the next meeting. There was common feeling that access to biological diversity should be regulated but not to such an extent that access was prevented. It had to be kept in mind that access should not endanger viable populations and that any regulatory system should promote and not prevent access. One delegation pointed out that research and studies related to biogenetic diversity should be carried out preferentially in situ. This principle should lead to the establishment of mechanisms for co-operation for the in situ conservation of biodiversity.

(d) Measures and access to biological diversity

67. The general recommendations of SWG II regarding measures and access to biological diversity include:

- (i) The establishment of a clearing-house for information and research results;
- (ii) The creation of a data base of information relevant to the conservation and rational use of biological diversity;

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- (iii) The inclusion of general measures for joint research and joint development of technologies and the sharing of benefits from these joint efforts;
- (iv) The inclusion of a measure to facilitate co-operation with States to see that undue restrictions were not placed on access to biological diversity;
- (v) The inclusion of a measure to promote training in developing countries as it related to access to biological diversity.

68. On the basis of the Chairman's introductory statement and the comprehensive discussion on Article 13 of Chapter VI, and due to time constraints, the Sub-Group decided to consider together Article 14 of Chapter VI (Availability and access to technology and information), Chapter VII (Transfer of technology), and Chapter VIII (Technical assistance).

69. In considering access to as well as the transfer of technology and technical assistance to developing countries, there was a consensus that technology transfer and technical assistance were important elements of the planned convention, as they had the potential to contribute to improved conservation and sustainable utilization of genetic diversity. Several representatives emphasized that not only technologies for conservation and sustainable utilization of biological diversity, but also those that made use of genetic resources for other purposes, such as the production of pharmaceuticals, should be transferred under the convention. They expressed concern about the need for a more concrete commitment to adequate and satisfactory transfer of the required technologies to developing countries on a concessional basis and to training personnel to manage the transferred technologies. Many delegations stressed the need for the establishment of a clearing-house mechanism within the framework of the convention to facilitate access to and transfer of the required technologies. Some delegations expressed concern about the appropriateness of covering the full range of technologies in the planned Convention and proposed to limit obligations for the transfer of biotechnology and other technologies to those areas where there was direct application to the conservation of biological diversity and the sustainable use of biological resources.

70. Some delegations pointed out that obligations with regard to technology transfer under the Convention should take into consideration issues relevant to patents and intellectual property rights, as well as the fact that biotechnology was largely a product of the private sector. Some delegations were of the opinion that it was necessary to take into account the work undertaken on the relevant issues in other forums such as FAO, the World Intellectual Property Organization (WIPO), the General Agreement on Trade and Tariffs (GATT) and International Union for Protection of New Varieties of Plants (UPOV). Other delegations pointed out that GATT and WIPO should take the negotiation on biological diversity into consideration in their ongoing negotiations. Several delegations requested that sovereign rights and property of genetic materials and biodiversity should be considered when dealing with access and technology transfer under the convention.

71. Some delegations would like the Secretariat to prepare a short descriptive paper listing the technologies the transfer of which is relevant to the conservation of biodiversity and its sustainable use. It should

address both "hard" (e.g. computers) and "soft" (e.g. training) technologies and should not be confined to biotechnology. Other delegations felt that they needed more time to consider the proposal. The Deputy Assistant Executive Director requested delegations to consult the in-depth technical report entitled "Biotechnology and Biodiversity" (document UNEP/Bio.Div/SWGB.1/3), which might be sufficient for the purpose. In order to pursue this proposal the representative who had made it consulted the document and subsequently reiterated her belief in the necessity for this work.

72. The Sub-Working Group then turned to consideration of Chapter IX on Financial mechanisms. There was general agreement that a convention without firm commitments to funding to meet incremental costs likely to arise from conservation of biodiversity by developing countries would be meaningless. It should be noted that such funding should realistically provide for the transfer of resources and allow for the implementation of the convention by developing countries. Many delegations stressed the need for sufficient new and additional funds to achieve the conservation and sustainable utilization of biological diversity and emphasized that the funds should come from a multiplicity of sources. One delegation, however, felt that a multiplicity of sources should be avoided. The following text agreed during the negotiations on a framework convention on climate change in Washington was noteworthy and should guide the present negotiation: appropriate commitments on adequate and additional financial resources to enable developing countries to meet incremental costs required to fulfil the commitments under the convention (document A/AC.237/L.5). Some delegations emphasized that a detailed and concrete funding commitment should be included in the convention and not left to a future protocol, otherwise the protocol would have to be concluded and signed concurrently with the convention. Several delegations pointed out that the financial mechanism should take into account bilateral and multilateral funding mechanism initiatives currently under consideration in the field of biological diversity such as the Global Environment Facility. A number of delegations were of the opinion that to facilitate the work of the Sub-Working Group, the Secretariat should prepare a model for a financial mechanism based on the experience gained in negotiating a fund under the Montreal Protocol. A few delegations felt, however, that it was rather early to specify the institutional framework of a financial mechanism and noted that there was a need to assess the available resources and the financial needs of developing countries through the undertaking of country studies on benefits and costs of biodiversity conservation as recommended by the Working Group.

73. SWG II agreed that the notion of technical assistance should be replaced by technical co-operation.

III. RECOMMENDATIONS

74. A number of issues were discussed in order to present substantive recommendations to the plenary. SWG II agreed to recommend to the Plenary that it should request the Secretariat to prepare the following for the next meeting:

1. A redrafted version of Chapters VI, VII and VIII based upon the working method used by SWG II as outlined in paragraph 63 above, avoiding repetitions and overlaps. The Secretariat should include the elements identified during the discussions, but should not leave out any of the present options.

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2. Draft articles on international co-operation based on the elements identified by the Secretariat and the discussions on Chapter XII that took place during the first session of the Working Group as contained in document UNEP/Bio.Div/WG.2/2/Inf.2.

3. A Note in treaty language containing the different options for a financial mechanism based on solutions adopted in other conventions and other multilateral financial mechanisms.

4. A preliminary Note on the concepts contained in some of the key terms and phrases used in the draft Chapters assigned to SWG II, inter alia:

- (a) genetic material;
- (b) in situ and ex situ conservation;
- (c) environmentally sound uses/utilization;
- (d) wild species/wild relatives of crop plant species;
- (e) environmentally sound technology;
- (f) access.

5. A Note clarifying a clearing-house mechanism on transfer of technology and technical co-operation taking into account existing mechanisms both within and outside the United Nations system.

6. A Note on the legal instruments in existence relevant to access to biological diversity outside areas of national jurisdiction.

7. Furthermore, the Secretariat was requested to provide delegations the third session with documents of the UNCED Preparatory Committee relevant to biological diversity, including documents on biological diversity and biotechnology.

75. In connection with recommendation 4 above, some delegations felt that concept of genuine additional resources should be included among the concepts in the preliminary Note to be prepared by the Secretariat. They also considered that a Note explaining the concepts contained in paragraphs 2 and 3 of draft article 17 should be prepared. Other delegations felt that these issues need not be addressed at the present stage.

76. SWG II considered its draft report (UNEP/Bio.Div/WG.2/2/L.9) paragraph by paragraph and proposed amendments thereto. The draft report, as amended, was adopted.

C. Adoption of reports of Sub-Working Groups

77. The plenary considered the reports of SWG I and SWG II and adopted them as its own.

IV. OTHER MATTERS

A. Contributions

78. Several delegations announced pledges made by their Governments to support participation by developing countries in the negotiations on the convention on biological diversity and to undertake relevant country studies. The pledges made were the following:

Australia - has put aside funds for participation of Pacific Islands and a country study;

Denmark - \$100,000 for participation of developing countries and plans to fund a country study;

Finland - \$100,000 for participation of developing countries and is currently considering a country study.

Netherlands - will continue to contribute towards participation of developing countries;

Norway - general commitment to fund participation of developing countries;

Sweden - will provide \$200,000 for participation of developing countries;

Switzerland - general commitment to fund participation of developing countries;

United Kingdom - will make further contributions towards participation of developing countries;

United States of America - will defray the administrative costs of meeting at the discretion of Secretariat (will match or improve current level of contribution).

79. The Chairman, together with a number of delegations, expressed gratitude for the pledges made.

B. Title of the Ad Hoc Working Group

80. Several delegations pointed out that during informal consultations and the sessions of the Sub-Working Groups the matter of renaming the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity had been raised. It was decided to submit this issue to the UNEP Governing Council at its sixteenth session, was the body empowered to make such a decision. Several proposals were made regarding a new title for the Ad Hoc Working Group. The proposal to use the title "Intergovernmental Negotiating Committee" met with the general support of delegations. It was stressed by several delegations that renaming the Ad Hoc Working Group should not prejudice the understanding that elaboration of a convention on biological diversity was a continuous process.

C. Date and venue of the next session

81. Following clarification by the Secretariat, it was agreed that the third session of the Ad Hoc Working Group would be held in Madrid (Spain) from 24 June - 3 July 1991. The tentative dates announced for the subsequent session were the end of September - beginning of October 1991.

D. Proposal by the Bureau

82. The plenary discussed the proposals submitted by the Bureau for action between the current and the next sessions of the Ad Hoc Working Group and agreement was reached on the following action:

(a) The Secretariat of UNEP (including the staff seconded by Unesco, FAO and IUCN to assist UNEP in the work on the convention on biological diversity) would carry out the following functions between now and the first week of April 1991:

(i) Complete the draft convention by including the chapters which were not included in the current draft;

(ii) Any other recommendations by the Sub-Working Groups that were agreed-by the Ad Hoc Group.

(b) The Secretariat would invite a regionally balanced group of lawyers from among those who participated in the Nairobi meeting to review the revised draft convention. This meeting would take place for three days during April 1991. The UNEP Secretariat would then finalize the revised draft Convention

(c) The Bureau of the Ad Hoc Working Group would meet once or twice between now and the third session.

(d) The Secretariat would prepare a draft letter to be sent by the Executive Director to all Governments indicating the process followed in the revision of the convention. The revised draft convention would be circulated by 10 May 1991 to all Governments with a letter of invitation to the next meeting as drafted by the Secretariat and agreed upon by the Bureau.

E. 1992 United Nations: Conference on Environment and Development

83. The meeting requested the Chairman to attend meetings of the Preparatory Committee for UNCED in order to keep the meeting informed of UNCED's work on biological diversity and to inform UNCED of the progress of the meeting's negotiations on the convention on biological diversity.

84. The Chairman invited the representative from UNCED to make a short statement about its activities related to biological diversity. The UNCED representative indicated that he would gladly inform the Secretary-General of UNCED of the meeting's desire that its Chairman should attend meetings of the Preparatory Committee and thanked the Secretariat for the excellent documents provided for the meeting. He informed the meeting that the documents for the second meeting of the Preparatory Committee included a report on biological diversity and biotechnology. Furthermore, the convention on biological

diversity had been identified as a possible output from the 1992 Conference, therefore, the Secretary-General was keenly interested in the progress of negotiations. He concluded by thanking the Secretariat for inviting UNCED to the meeting.

V. ADOPTION OF THE REPORT AND CLOSURE OF THE MEETING

A. Adoption of Report

85. The meeting adopted its report at its last meeting held on 6 March 1991.

B. Closure of Meeting

86. The Chairman thanked participants for their hard work and for the many pledges of support he had received. After having expressed gratitude to the interpreters and the Secretariat for their tireless work and co-operation, he declared the meeting closed.

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