Earth Negotiations Bulletin
ABS 9 #3
A Reporting Service for Environment and Development Negotiations
Online at http://www.iisd.ca/biodiv/abs9/
Vol. 9 No. 498 Published by the International Institute for Sustainable Development (IISD) Wednesday, 24 March 2010

ABS 9 HIGHLIGHTS: TUESDAY, 23 MARCH 2010

Delegates met in a morning plenary and established contact groups on specific issues. Contact group 3 on derivatives, benefit-sharing and access, and contact group 4 on traditional knowledge (TK) met in the morning and afternoon. Contact group 1 on scope and finance, and contact group 2 on compliance-related issues met in the evening.

PLENARY

Upon Working Group Co-Chair Hodges' proposal, delegates established four contact groups mandated to provide solutions for specific issues, by either: keeping original draft protocol text; amending existing text; or suggesting additional text. Group 1 was mandated to discuss: relationship with other instruments and processes; temporal and geographical application; flexibility for sectoral approaches; non-parties; and financial mechanism/ financial resources. Group 2 will consider: monitoring, reporting and tracking, including disclosure requirements and checkpoints; dispute settlement and access to justice; country of origin; and instances of no PIC or MAT. Group 3 will address: utilization of genetic resources/derivatives/benefit-sharing; benefit-sharing obligation including access to and transfer of technology; as well as biodiversity-related research, access requirements, and parties who determine that access is not subject to PIC. Group 4 was mandated to address TK-related issues, including: the relationship between ABS activities and TK; diversity of national circumstances; and recognition of customary law. The Working Group agreed that: solutions will be reported back to plenary and circulated in isolation, before they are inserted into the draft protocol; and bracketing is not allowed until a later stage.

The Working Group then elected the following contact group Co-Chairs: Johan Bodegård (Sweden) and José Luis Sutera (Argentina) for group 1; René Lefeber (the Netherlands) and Ricardo Torres (Colombia) for group 2; Cosima Hufler (Austria) and Pierre du Plessis (Namibia) for group 3; and Tone Solhaug (Norway) and Damaso Luna (Mexico) for group 4.

CONTACT GROUP 3

Utilization of genetic resources/derivatives/benefit-sharing: Delegates discussed whether derivatives should be included under the regime's scope or addressed in other ways. ASIA-PACIFIC suggested that benefits from derivatives be addressed under genetic resource utilization. CANADA suggested further clarifying the concept of utilization rather than amending the scope. AFRICA stressed that including derivatives is a prerequisite to legal certainty. SWITZERLAND said reference to derivatives does not increase legal certainty if understandings differ.

The EU recalled that the Friends of the Co-Chairs meeting had agreed not to define derivatives to avoid excluding future scientific developments and, with CANADA, supported addressing benefit-sharing from derivatives in MAT. GRULAC said obligations should not be left to bilateral negotiations, suggesting including the concept of utilization in the regime's scope to ensure compliance with national obligations. ASIA-PACIFIC stated that MAT only refer to benefit-sharing modalities, and international guidance is needed on what can legitimately be subject to MAT.

To clarify that utilization of genetic resources also covers benefits from derivatives, ASIA-PACIFIC suggested that derivatives should include substances derived from the metabolism of a genetic resource; synthetic molecules; and molecules expressing the same function as genetic resources. AUSTRALIA suggested referring to expression, replication and characterization of genetic resources instead, noting that these terms cover all potential uses of genetic resources without excluding future technological developments. CANADA suggested reference to benefits from utilization, including benefits from derivatives "produced through" expression, replication or characterization of genetic resources. GRULAC agreed in principle, but suggested retaining the term derivatives. SWITZERLAND suggested reference to benefits from "technological applications," to achieve clarity without restricting the range of benefits covered.

Benefit-sharing and technology transfer: ASIA-PACIFIC underscored that technology transfer is essential for benefit-sharing and needs to be addressed in a stand-alone article, adding that the protocol's language is weaker than the Convention text. GRULAC said that benefit-sharing should be made mandatory for all types of uses, independent of MAT. The PHILIPPINES said the benefit-sharing obligation should be made explicit in the protocol and linked to all genetic resource utilizations, pointing to countries with no ABS legislation or to those not using contracts. IRAN emphasized multilateral or regional arrangements in addition to MAT. AFRICA said that accessed material should be developed jointly by providers and users, in order to bridge the technology gap. The REPUBLIC OF KOREA noted that most technology is owned by the private sector, and that government's role is to encourage and facilitate technology transfer to the provider. The PHILIPPINES called for a requirement for contracts to provide for technology transfer. AUSTRALIA preferred retaining flexibility to negotiate benefits through MAT.

This issue of the *Earth Negotiations Bulletin* © <enb@iisd.org> is written and edited by Johannes Gnann, Stefan Jungcurt, Ph.D., Elisa Morgera, Ph.D., Nicole Schabus, and Elsa Tsioumani. The Digital Editors are Diego Noguera and Holly Shrumm. The Editor is Pamela S. Chasek, Ph.D. <pam@iisd.org>. The Director of IISD Reporting Services is Langston James "Kimo" Goree VI <kimo@iisd.org>. The Sustaining Donors of the *Bulletin* are the United Kingdom (through the Department for International Development – DFID), the Government of the United States of America (through the Department of State Bureau of Oceans and International Environmental and Scientific Affairs), the Government of Canada (through CIDA), the Danish Ministry of Foreign Affairs, the German Federal Ministry for Economic Cooperation and Development (BMZ), the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), the Netherlands Ministry of Foreign Affairs, the European Commission (DG-ENV), and the Italian Ministry for the Environment, Land and Sea. General Support for the *Bulletin* during 2010 is provided by the Government of Australia, the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management, the Ministry of Environment of Sweden, the New Zealand Ministry of Foreign Affairs and Trade, SWAN International, Swiss Federal Office for the Environment (FOEN), the Finnish Ministry for Foreign Affairs, the Japanese Ministry of Environment (through the Institute for Global Environmental Strategies - IGES), the Japanese Ministry of Economy, Trade and Industry (through the Global Industrial and Social Progress Research Institute - GISPRI), the Government of Iceland, the United Nations Environment Programme (UNEP), and the World Bank. Funding for translation of the *Bulletin* into French has been provided by the Government of France, the Belgium Walloon Region, the Province of Québec, and the International Organization of the Francophone (OIF and IEPF). Funding for translation of the *Bulletin* into Spanish at this meeting has been provided by the Spanish Ministry of the Environment and Rural and Marine Affairs. The opinions expressed in the *Bulletin* are those of the authors and do not necessarily reflect the views of IISD or other donors. Excerpts from the *Bulletin* may be used in non-commercial publications with appropriate academic citation. For information on the *Bulletin*, including requests to provide reporting services, contact the Director of IISD Reporting Services at <kimo@iisd.org>, +1-646-536-7556 or 300 East 56th St., 11A, New York, New York 10022, USA. The ENB team at CBD ABS 9 can be contacted at the Expositors Room and by e-mail at <elsa@iisd.org>.

CONTACT GROUP 4

Relationship between ABS activities and TK associated with genetic resources: AFRICA stressed that communities should be involved in granting PIC and negotiating MAT under national competent authorities' overall guidance. He also expressed willingness to find alternative language to community PIC, as long as communities' participation in PIC and MAT is ensured. The IIFB recommended reflecting the intrinsic link between TK and genetic resources in the sections on access, PIC, benefit-sharing and compliance; and favored using the broad term "genetic resources and/or associated TK." AUSTRALIA proposed defining "associated TK" as knowledge used in connection with a genetic resource.

NEW ZEALAND proposed that the international regime provide principles for benefit-sharing from TK use, including: approval and involvement of TK holders; and benefit-sharing with these holders. The EU suggested treating genetic resources separately from associated TK, with the right of communities to refuse access to it.

INDIA called for benefit-sharing with, and obtaining the approval of, communities through national processes. NORWAY noted that genetic resources are a common resource managed by the state, not subject to exclusive rights of indigenous peoples. CANADA stated that it is unclear who provides PIC at the local level, and proposed to address this through MAT and community protocols.

GRULAC, AFRICA and NORWAY proposed including language in the articles on benefit-sharing and access stating that use of TK associated with genetic resources requires PIC of the communities that own the TK, according to national legislation. AFRICA requested that community PIC and involvement in negotiations of MAT be included in provisions on access, benefit-sharing and compliance.

Diversity of national circumstances: NORWAY suggested reflecting the facilitative role of consultations to ensure communities' participation with the aim of obtaining consent. CANADA called for flexibility to allow for different national circumstances. CHINA noted that consideration of diverse national circumstances should not be an obstacle to reaching agreement at the international level. AFRICA stressed that the draft protocol should provide a common starting point for all CBD parties on ownership of genetic resources and granting of PIC. The COOK ISLANDS, supported by the PHILIPPINES, stressed that that the international regime should secure communities' rights in the decision-making process related to access to genetic resources and TK.

The IIFB recommended that the protocol spell out public international law obligations confirming that TK holders have the right to grant access to TK, and states have the flexibility to ensure that this is realized under specific national circumstances. AUSTRALIA proposed to have a preambular paragraph on diverse national circumstances relating to ABS activities and TK.

Customary law: AUSTRALIA remarked that the protocol should recognize, but not require, customary law or community protocols, leaving flexibility to communities. NEW ZEALAND said that the protocol should recognize communities' rights according to their customary laws and establish procedures to identify relevant knowledge holders. The EU stressed that the protocol should recognize the importance of customary law, while procedures for the recognition of customary law should be defined by national legislation.

AFRICA noted that respect for customary law is a cross-cutting issue that should be reflected in the preamble and be applied to the whole regime. The IIFB called for recognition of customary laws and traditional forms of organization, noting links with dispute resolution and access authorization.

An informal group, coordinated by Australia, met to develop elements for a common understanding on TK.

CONTACT GROUP 1

Relationship with other instruments and processes: GRULAC, LMMC, NORWAY, the EU and others stressed ensuring mutual supportiveness through a separate article. IRAN, the EU, NORWAY, AUSTRALIA, CANADA and the REPUBLIC OF KOREA stressed the need to respect existing instruments and processes and provide flexibility for future development of specialized ABS systems. AFRICA expressed concern about "sectoralization" of the ABS regime and subjecting parts of it to other processes. On the relationship with the ITPGR, delegates agreed to base discussions on CBD Articles 4 (Jurisdictional Scope) and 22 (Relationship with other International Conventions).

Temporal/geographical application: Delegates discussed the issue of temporal application without reaching a common understanding. AFRICA suggested informal consultations.

CONTACT GROUP 2

Monitoring, reporting and tracking: LMMC proposed that use of genetic resources, derivatives and TK comply with the legislation of countries of origin, whereas CANADA preferred linking compliance to a definition of misappropriation in the protocol. AFRICA called for compliance not only with national legislation, but also with the international regime, and for compliance with TK-related provisions, whereas the EU stressed that compliance obligations should focus exclusively on genetic resources. The IIFB stressed that the provisions on compliance must include reference to TK and the rights of indigenous peoples.

LMMC and AFRICA requested the establishment of an internationally recognized certificate as part of the protocol, with GRULAC recommending that the protocol provide a list of minimum criteria for such a certificate. The REPUBLIC OF KOREA suggested that compliance have PIC and MAT as its basis. PERU called for the establishment of an international ombudsman.

AUSTRALIA and NEW ZEALAND stressed that the WIPO IGC was the appropriate body to deal with the connection between genetic resources and TK. AFRICA noted that WIPO IGC has not entered into text-based negotiations and requested that the international regime include a disclosure requirement going beyond the intellectual property rights system.

NEW ZEALAND said that contractual agreements based on MAT should be the primary compliance measure. SWITZERLAND expressed concern with broad wording on compliance, opposed checkpoints and supported an internationally recognized compliance certificate. MALAYSIA called for measures to combat misappropriation, including checkpoints and an international certificate with agreed-upon criteria.

IN THE BREEZEWAYS

Tuesday's contact group negotiations turned out to be unexpectedly structured and constructive: some were positively surprised by the swift progress on the list of key concerns. The frank intention to compromise by several regional groups had some delegates note that, for the first time in the negotiations' history, the solution of controversial matters, such as derivatives, does not seem quite as distant an outlook. The crucial stage of striking deals lies yet ahead, of course, and several expressed concern about the fragility of the current momentum. Their fears seemed justified as confusions over "temporal application" revealed that fundamental differences in views remain in areas where some might not have expected it. The approaching deadline for concluding negotiations will increase the pressure to collaborate but, as some noted, also raises the stakes to be gained through strategic bargaining. Even if the atmosphere of trust can be maintained, many wondered whether time will be sufficient to draft an international regime that will be both legally sound and technically effective.