

ABS 9 HIGHLIGHTS: FRIDAY, 26 MARCH 2010

The inter-regional group met throughout the day and evening to address a revised draft protocol (UNEP/CBD/WG-ABS/9/CRP.1 and Corr.1), including provisions on fair and equitable benefit-sharing (article 4), access to genetic resources (article 5) and compliance (articles 12-14). Late in the evening, negotiations broke down over compliance mechanisms and the meeting was adjourned to seek direction from the Working Group Co-Chairs.

INTER-REGIONAL GROUP

RULES OF ENGAGEMENT: In the morning, inter-regional group Co-Chair Johan Bodegård (Sweden) set out the working method to negotiate the revised draft protocol by: addressing first the revised, highlighted text and then the remaining text; and finally identifying outstanding issues. Delegates then held a lengthy procedural discussion to clarify the process forward. Co-Chair Bodegård said the group will consider the text article by article, calling for all views to be put on the table, including changes to existing text and additional text.

In the afternoon, Co-Chair José Luis Sutera (Argentina) requested delegates to propose amendments to the revised draft protocol, discuss self-standing and new articles in the evening, and leave text-based negotiations for Saturday. A number of delegates expressed frustration at the rules of engagement, noting the impossibility to express disagreement and expressing concern that a “new Montreal Annex” was emerging. Following protracted procedural debates, delegates established new rules of engagement to: identify concerns on each article; discuss key areas of divergence and convergence; and submit proposed language in writing.

Late in the evening, following the break down of the negotiations, AFRICA proposed and delegates agreed to seek direction from the Working Group Co-Chairs and to request they provide a revised draft protocol, for parties to start negotiations immediately.

BENEFIT-SHARING (ARTICLE 4): Temporal Scope: LIKE-MINDED ASIA-PACIFIC, GRULAC and AFRICA suggested that benefit-sharing cover every utilization of genetic resources or associated traditional knowledge (TK). The EU, AUSTRALIA and NEW ZEALAND said benefit-sharing should apply to genetic resources acquired after the entry into force of the protocol for each party. NORWAY suggested compliance measures can apply, and benefit-sharing be encouraged, for material acquired before the protocol’s entry into force.

GRULAC distinguished between entry into force of the protocol and date on which obligations become binding, calling for respect of pre-existing rights and obligations and national legislation consistent with the CBD. AFRICA and LIKE-MINDED ASIA-PACIFIC added that CBD obligations are valid notwithstanding the protocol’s entry into force. CIVIL SOCIETY stressed the issue of temporal scope with regard to *ex situ* collections should be addressed at the political level. Highlighting such accessions date back to colonial times and noting existing voluntary initiatives, she said this is an issue of “historic debt” similar to discussions in the climate change process.

Country of origin: LIKE-MINDED ASIA-PACIFIC, GRULAC and AFRICA proposed that benefit-sharing be with the “party providing resources that is the country of origin.” AUSTRALIA and NEW ZEALAND raised concerns on the basis of Convention language and technical limitations. LIKE-MINDED ASIA-PACIFIC drew attention to references and definition of the country of origin in the Convention text.

Derivatives: On benefit-sharing from derivatives produced through expression, replication and characterization, LIKE-MINDED ASIA-PACIFIC, GRULAC and CENTRAL AND EASTERN EUROPE (CEE) supported general reference to derivatives, with AFRICA calling for reference to derivatives in all their current and future forms. JAPAN and the REPUBLIC OF KOREA pointed to common understanding reached in the contact group and argued against expanding the reference.

The EU, AUSTRALIA and NEW ZEALAND expressed concerns regarding reference to an annex listing typical genetic resource uses and its regular review by the meeting of the parties to the protocol. LIKE-MINDED ASIA-PACIFIC and CEE supported its inclusion, and AFRICA added it should be regularly adapted to advances of science and technology. Many said the list should be made indicative. GRULAC expressed concerns regarding reference to breeding and selection, propagation and cultivation, due to potential food security implications.

Associated TK: LIKE-MINDED ASIA-PACIFIC and GRULAC supported references to benefit-sharing from TK utilization throughout the draft article. AFRICA said that benefits should be shared directly with the community providing the knowledge through processes overseen by national governments. IIFB suggested that benefit-sharing from genetic resources be also with ILCs where ILCs hold rights to genetic resources under national or international law, and further proposed language on respecting ILCs’ existing rights on genetic resources. Pointing to instances where TK is held by the state, ASIA-PACIFIC noted that TK is not necessarily held by ILCs. AFRICA recalled

agreement in the contact group on reference to the rightful holders of TK and IIFB expressed frustration at reopening agreed text.

ACCESS TO GENETIC RESOURCES (ARTICLE 5): AFRICA requested that references to access to genetic resources also refer to access to associated TK. LIKE-MINDED ASIA-PACIFIC, supported by GRULAC, proposed adding a principle that every access be accompanied with PIC of the party providing genetic resources and associated TK that is the country of origin or the party that has acquired genetic resources or associated TK, unless a party otherwise determines, in accordance with the CBD. Stressing national sovereignty, GRULAC opposed: references to the possible evaluation of the national application of PIC; and, with LIKE-MINDED ASIA-PACIFIC, mandatory language related to a list of measures on access. IIFB requested insertion of text providing for recognition of ILCs' rights to genetic resources and calling for ILCs' PIC. CANADA proposed that access measures and their application do not discriminate between foreign users, or between foreign and domestic users. LIKE-MINDED ASIA-PACIFIC proposed allowing developing and least developed countries to take into account the special needs of their nationals as users vis-à-vis foreign users.

IIFB reiterated that TK is a cross-cutting issue, and AFRICA said it should be reflected in the article's title. AFRICA, GRULAC, CEE and the LIKE-MINDED ASIA-PACIFIC cautioned that the list of access measures is too prescriptive and raised their concerns with individual measures in the list. Stressing the need for flexibility to allow for different national circumstances, NEW ZEALAND suggested that access measures "may" rather than "shall" include the measures listed. AFRICA replied this would affect the balance with compliance provisions. AFRICA also argued for clearly setting out national and international measures; and LIKE-MINDED ASIA-PACIFIC cautioned against prescribing details for national processes and decision-making. The EU and SWITZERLAND called for including reference to appeal procedures for those seeking access.

With regard to individual measures, GRULAC called for clear reference to an internationally recognized certificate of compliance rather than "certificate" only. CANADA noted that use of a certificate seemed conceptually acceptable to all.

On parties not requiring PIC, AFRICA restated its proposal that such decisions should be registered with the CHM, including any applicable conditions. LIKE-MINDED ASIA-PACIFIC said all decisions regarding PIC should be notified to the CHM.

Co-Chair Bodegård said that references to associated TK could be integrated in the article on access, and the additional article on access to TK associated with genetic resources could be merged with it. The EU and LIKE-MINDED ASIA-PACIFIC urged the Co-Chairs to draft new text on the basis of discussions.

PREAMBLE: IIFB requested noting the significance of the UN Declaration on the Rights of Indigenous Peoples. CANADA proposed inserting reference to the World Health Organization (WHO) International Health Regulations (2005) and the importance to ensure access to human pathogens.

SELF-STANDING ARTICLES: Delegates addressed protocol articles not addressed in the contact groups and suggested additional articles. AUSTRALIA and NEW ZEALAND stressed the need for acknowledging WHO work of relevance to ABS. AFRICA proposed clarifying that pre-CBD *ex situ* collections are included in the protocol scope, excluding resources covered by the ITPGR if used for the purposes of that treaty. CANADA recalled the need to include an international understanding on misappropriation.

NEW ZEALAND restated its position that Antarctic genetic resources are sufficiently covered by the Antarctic Treaty system. LIKE-MINDED ASIA-PACIFIC proposed

text addressing no-PIC and no-MAT situations; and IRAN language recognizing the contribution of farmers and ILCs in the creation and maintenance of genetic resources. AUSTRALIA proposed defining utilization of genetic resources as "access and use of genetic resources for purposes of research and development on their genetic and biochemical makeup." CIVIL SOCIETY suggested reference to "peaceful use" in the context of sustainable use of genetic resources. GRULAC called for language stating that future instruments should adhere to the fundamental and basic ABS principles, even if they are more specific.

COMPLIANCE WITH NATIONAL ABS LEGISLATION (ARTICLE 12): GRULAC called for parties to: take measures to ensure that genetic resources, derivatives and associated TK are obtained, accessed and used in accordance with PIC and MAT as specified in the legislation of the country of origin; and, supported by AFRICA, to require natural and legal persons using genetic resources, derivatives and/or associated TK to prevent their acquisition or utilization not in compliance with the protocol. The EU and SWITZERLAND preferred to only refer to "access" and not "use" of genetic resources, opposed by LIKE-MINDED ASIA-PACIFIC and AFRICA who noted that subsequent uses have to be covered. CANADA preferred to refer to "measures aimed at preventing the use of genetic resources that have been acquired without PIC and MAT in violation of national legislation" and, opposed by GRULAC and AFRICA, asked not to include a reference to TK in the provision. IIFB called for ILCs' rights and interests to be covered by compliance, with AFRICA adding "in accordance with national legislation." AFRICA also called for cooperation among parties in case of alleged and actual violations of national ABS legislation.

AUSTRALIA suggested limiting an international understanding of misappropriation to "accessed genetic resources," objecting to including TK and derivatives in the article on compliance. The REPUBLIC OF KOREA stressed that non-compliance occurs at the contractual level and that governments' role should be limited to providing solid legal systems. CANADA, AFRICA and GRULAC asked to refer to the country of origin using Convention language. Discussions continued until negotiations broke down over compliance mechanisms.

IN THE BREEZEWAYS

*To negotiate or not to negotiate – that is the question
 Whether 'tis nobler for the delegates to agree to disagree
 The slings and arrows of conciliation,
 Or to take arms against a sea of brackets
 And, by confronting, end them. To die, to sleep ...*

Today the skies over Cali were gray as if preparing for a storm both inside and outside the conference center. In the morning, many participants awaited the revised draft protocol and the unprecedented "Vienna-plus" setting with anticipation, hoping to move negotiations forward. Instead, they found themselves in the middle of the gathering storm: first negotiating without text, and later disagreeing on how to amend text without using brackets.

Seasoned negotiators around the table were confused by the rules of engagement, openly complaining about the lack of clear direction from the inter-regional group Co-Chairs on how to build consensus. Many therefore called for "ending the ban on brackets" imposed by the "big" Co-Chairs, to allow negotiators to set out clear alternatives and contribute to a text that all can feel ownership over and that can be presented to capitals for final consideration. Preparing the ground for such consideration at capitals was thought to be crucial by several players, as political controversy continues to underlie many issues, such as the "historic debt" related to lack of benefit-sharing for pre- and post-CBD accessions. Later in the evening the storm broke and discussions collapsed over accusations of bad faith, leaving many wondering whether this protocol will ever see the light of day.