

ABS 7 HIGHLIGHTS: FRIDAY, 3 APRIL 2009

Delegates to the seventh meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met in a morning plenary to address compliance, benefit-sharing, and access. A contact group met in the afternoon and evening to negotiate operational text on the objective of the international regime.

PLENARY

COP 9 President Jochen Flasbarth (Germany) informed delegates that their colleague Ben Donnie (Liberia) had suddenly passed away. Delegates observed one minute of silence.

Working Group Co-Chair Timothy Hodges (Canada) announced deadlines for the submission of operational text on compliance, benefit-sharing and access, following the conclusion of the initial discussion on each item. He also announced that two non-papers on objective and scope compiling all submissions of operational text had been tabled to facilitate discussions in a contact group. Plenary elected Birthe Ivars (Norway) and David Hafashimana (Uganda) as Co-Chairs of the contact group on the objective and scope.

At the end of the morning plenary, NORWAY presented on its proposed national law on ABS.

COMPLIANCE: Brazil, for the LIKE-MINDED MEGADIVERSE COUNTRIES (LMMC), proposed an additional provision, that the governing body of the future protocol shall consider, at its first meeting at the latest, measures to support effective implementation, including by providing assistance to parties upon request in litigation of cases of non-compliance. NEW ZEALAND explained its proposal on measures to ensure compliance with customary law, noting that it is based on local belief systems and does not derive its legitimacy from other legal systems. The EU stressed the linkage between compliance measures for benefit-sharing and access, and the need to ensure fairness, equality and transparency by facilitating compliance measures across jurisdictions, such as internationally recognized certificates of compliance, especially to verify the prior informed consent (PIC) of the competent national authority. He also pointed to model national legislation; best practice guidelines; and awareness-raising.

The INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY congratulated the government of Australia for endorsing the UN Declaration on the Rights of Indigenous Peoples. He highlighted the need for parties to take measures to recognize the rights of indigenous peoples and local communities to genetic resources and associated traditional knowledge, and stated that certificates should reference community protocols and customary laws.

BENEFIT-SHARING: The LMMC proposed additional text linking access to benefit-sharing, stating that: PIC for access to genetic resources, their derivatives and associated traditional knowledge shall be obtained from the party of origin, in accordance with the CBD, through its competent authorities; and subject to national legislation, where access is sought to traditional knowledge, users shall obtain PIC from the indigenous and local communities in accordance with Article 8(j) (traditional knowledge).

The EU and JAPAN underscored that benefit-sharing should be subject to mutually agreed terms (MAT). The EU suggested that model clauses and inventories could contribute to a level-playing field between providers and users. SWITZERLAND further suggested identifying three specific categories of activity: research not aiming at commercialization; research and development; and commercialization. THAILAND stated that benefits should be determined according to MAT, and include monetary and non-monetary benefits, while encouraging transfer of technology and research in the non-commercial sector. The AFRICAN GROUP noted that benefits should include those derived from genetic resources accessed before the CBD's entry into force. Haiti, for SMALL ISLAND DEVELOPING STATES, said that benefits should be social and monetary.

ACCESS: The LMMC presented additional text, stating that parties shall take the necessary measures to establish an appropriate national regulatory framework to protect their sovereignty over genetic resources, their derivatives and associated traditional knowledge, and to ensure benefit-sharing.

The EU explained that its submitted proposals build mainly on the Convention's text, including Article 15.2 (facilitating access for environmentally sound uses), calling for specific measures to ensure legal certainty, clarity and transparency of national access frameworks. He stressed the link between access and compliance across jurisdictions, as well as the need for:

simplified access rules for non-commercial biodiversity research; non-discrimination of access rules; and strengthening capacity for development of national ABS frameworks.

THAILAND proposed that parties take national measures to promote awareness and access to information on ABS.

CONTACT GROUP

OBJECTIVE: Contact group Co-Chairs Ivars and Hafashimana asked delegates to make proposals on the basis of the text on the objective contained in the annex of COP Decision IX/12.

Delegates first discussed which CBD articles to refer to in the chapeau of the provision stating the regime's objective. Most developed countries favored referencing only Articles 15 (Access to Genetic Resources) and 8(j), along with the three objectives of the Convention. Several developing country regional groups proposed also referencing Articles 16 (Access to and Transfer of Technology) and 19.2 (access to results and benefits from biotechnologies). One developing country regional group suggested adding reference to Articles 3 (Principle), 4 (Jurisdictional Scope), 8 (*In-situ* conservation), 17 (Exchange of Information), 18 (Technical and Scientific Cooperation), 20 (Financial Resources), and 22 (Relationship with Other International Conventions), arguing that these articles contain important guidance for the elaboration of the regime.

Parties agreed on referencing Articles 1 (Objectives) and 15, but agreement on references to other CBD provisions remained outstanding. With regard to the CBD objectives, parties disagreed as to whether the regime should "effectively implement" or "pursue" them. On reference to Article 8(j), one delegate noted that the scope of the provision expands beyond genetic resources, and asked to limit the reference by adding "as it relates to genetic resources." An indigenous representative, supported by several delegates, proposed also referencing associated traditional knowledge. Other delegates then called for referencing biological resources, and derivatives, while others argued against the need to narrow the reference to Article 8(j). The issue remained pending.

Delegates then addressed a paragraph on facilitating access to genetic resources, their derivatives and associated traditional knowledge. Several developing countries called for its deletion, noting that it goes against the intent of Article 15. Others argued that such language clarifies that the regime should specifically implement Articles 15.1 (sovereign rights of States over natural resources) and 15.2 so as to facilitate access. Many developing countries stressed the regime should implement benefit-sharing, rather than facilitate access. Some parties supported that access should be regulated and transparent, but others opposed such a reference.

Delegates also debated reference to traditional knowledge. Some argued that their national legislation did not provide for facilitating access to traditional knowledge as it is the prerogative of indigenous and local communities. On the request of one party, the reference was retained. Others preferred specifying that access to traditional knowledge should be facilitated "where appropriate."

Delegates then addressed a paragraph on ensuring fair and equitable sharing of benefits and agreed to remove the brackets around associated traditional knowledge in the paragraph.

A group of developed countries proposed to refer to the establishment of conditions for benefit-sharing, noting that these conditions will be set out mainly in contracts and MAT.

A group of developing countries suggested having a separate paragraph on misappropriation and misuse. A number of developed countries, while acknowledging the importance of the issue, felt this should be addressed in the components of the regime, rather than its objective. Many developing countries recited cases of misuse and misappropriation, and considered their prevention a key objective of the international regime. Others referred to the effectiveness of contracts and said that misappropriation had occurred in the absence of any contracts, whereas developing countries pointed to cases where contracts had not been honored. They also stressed that the international regime was to establish international rules and procedures that ensure fair and equitable benefit-sharing, rather than rely on contracts. Others proposed to have a minimalist objective, and said it was difficult to set out the objective in the absence of definitions.

Regarding a paragraph on securing compliance in user countries with national laws and requirements in provider countries, delegates discussed a proposal by a group of developed countries to refer to "compliance with domestic regulatory ABS frameworks," so as to also address non-legal compliance measures such as awareness raising or voluntary codes of conduct. While many developed countries supported the proposal, developing countries generally opposed it, with many arguing that the proposal was too vague and that language on compliance should focus on compliance with the international regime and enforcement of national ABS laws in provider countries. Several developed countries raised concerns about making reference to compliance under the regime's objective, whereas developing countries explained that addressing compliance across jurisdictions is at the heart of the international regime and should therefore be part of its objective.

Delegates then discussed a paragraph addressing rights over genetic resources, including the rights of indigenous and local communities, and ensuring compliance with PIC. Discussions continued into the night.

IN THE CORRIDORS

With 20 days left for the Working Group to fulfil its mandate and finalize a regime before COP 10, most delegates were enthusiastic to start negotiating operational text or, as a seasoned participant put it "drop the politeness and get straight to the tug war on substance, because we have to go through this, one way or the other."

Just prior to the start of the contact group on objective and scope, delegates were split on how it would go. "Revisiting the submissions was good for transparency," said one delegate, "but it revealed that huge differences still exist." Others reckoned that "the warm-up is over, the marathon is about to begin." As deliberations on the objective revived a long-standing clash over whether the regime should facilitate or regulate access, or even address access at all, some expressed concerns on whether there is room for compromise. Another pointed to the upside, noting that "the main thing is that we are discussing substance and parties are engaging."