

ABS 7 HIGHLIGHTS: MONDAY, 6 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 brief morning and afternoon plenary sessions to hear reports from the contact groups. Contact groups on the objective and scope of the regime, and on compliance met throughout the day and late into the evening.

PLENARY

In the morning, René Lefeber (the Netherlands), Co-Chair of the contact group on benefit-sharing and access, reported on progress achieved on Sunday. Working Group Co-Chair Fernando Casas (Colombia) outlined the schedule for contact group meetings on the objective and scope, compliance, benefit-sharing, and access. He also stated that the meeting's outcome would be annexed to the report, which was accepted.

In the afternoon, Birthe Ivars (Norway), Co-Chair of the contact group on the objective and scope, reported on deliberations on the objective. Reporting on deliberations on compliance, contact group Co-Chair Lefeber said that delegates had agreed on the ground rules for the process, and recommended to continue revising the non-paper to produce a conference room paper (CRP).

CONTACT GROUP ON THE OBJECTIVE AND SCOPE

OBJECTIVE: Co-Chair Ivars asked delegates whether there was agreement with developing a short and precise objective. The EU, JAPAN, the REPUBLIC OF KOREA, NEW ZEALAND and SWITZERLAND supported this, while ARGENTINA, EGYPT and the LMMC preferred a version setting out more details.

Regarding the chapeau, which references the CBD objectives and a number of CBD provisions, delegates debated whether to state that the international regime should pursue all three CBD objectives, or just its third (benefit-sharing), with the LMMC and the AFRICAN GROUP preferring the former and CANADA preferring the latter. CANADA made a proposal to integrate the chapeau and more detailed points listed in the CRP into one more concise paragraph. This proposal was opposed by the LMMC and others, who preferred to keep a more detailed text. The LMMC, supported by many, presented a shorter chapeau referencing the three CBD objectives and Articles 8(j) (traditional knowledge) and 15 (Access to Genetic Resources), with Articles 1 (Objectives), 16 (Access to and Transfer of Technology) and 19 (Handling of Biotechnology

and Distribution of its Benefits) remaining bracketed. NEW ZEALAND, supported by NORWAY, proposed a text for the chapeau not referring to CBD Articles but rather naming the concepts enshrined in them, which was opposed by the LMMC. ARGENTINA suggested, and delegates agreed to, retain the LMMC proposal in brackets as the chapeau text.

On a sub-paragraph dealing with access to genetic resources, delegates agreed to merge two options to include a reference to the sovereign rights of states to their genetic resources. They debated whether to reference associated traditional knowledge, with CANADA, the EU, and GRULAC arguing that Article 8(j) does not refer to facilitated access to traditional knowledge. Following a suggestion by ARGENTINA, the reference was moved to another sub-paragraph dealing with traditional knowledge, and the issue remains to be addressed. The AFRICAN GROUP reserved its right to address the issue in a separate sub-paragraph.

Delegates were divided over whether to state that access to genetic resources should be facilitated or regulated, with ARGENTINA, CANADA, the EU, JAPAN, KOREA and SWITZERLAND favoring the former, and the AFRICAN GROUP preferring the latter formulation. NEW ZEALAND, supported by the AFRICAN GROUP, the LMMC and NORWAY, suggested replacing both references with a reference to "appropriate access," but the issue remains unresolved.

Regarding a sub-paragraph on benefit-sharing, delegates agreed to delete the reference to misappropriation and address it in a separate sub-paragraph. Following lengthy discussions, delegates kept additional wording on "the establishment of enabling conditions for benefit-sharing" in brackets, but agreed to include associated traditional knowledge under "effective" benefit-sharing.

On a sub-paragraph on preventing the misappropriation and misuse of genetic resources, their derivatives and associated traditional knowledge, CANADA and JAPAN, opposed by the AFRICAN GROUP and the LMMC, argued that the text as formulated is an outcome and not an objective. NEW ZEALAND, supported by the AFRICAN GROUP, AUSTRALIA and CANADA, but opposed by the LMMC, suggested that misuse and misappropriation be defined. On the suggestion by the African Group, a footnote was inserted to say that the terms "may need to be articulated."

Regarding four possible options for a sub-paragraph on compliance, delegates agreed to work on the basis of the most comprehensive text. The EU, supported by SWITZERLAND and AUSTRALIA, but opposed by the AFRICAN GROUP and the LMMC, proposed to replace "securing" compliance

with “supporting” it, and called for reference to national laws and requirements rather than to domestic regulatory ABS frameworks. They also called for referring to both user and provider countries or for deleting both references, and for deleting a further specification regarding the country of origin. CANADA suggested limiting PIC by specifying “unless otherwise determined by that party.” Discussions continued into the night.

CONTACT GROUP ON COMPLIANCE

Contact group Co-Chair Lefeber explained the revised non-paper constituting the working document, noting: mention of both genetic and biological resources in brackets; neutral formulations with regard to the choice of instrument; and a footnote that the placement of paragraphs must be further considered. Delegates discussed the latter issue, and clarified that elements identified as components to be further elaborated (bricks) and components for further consideration (bullets) remain as such, but agreement is needed on the proper placement of different paragraphs.

On awareness-raising activities to encourage compliance, parties proposed additional tools, including: an ABS clearing-house mechanism (CHM); best-practice tools; measures to promote a wider understanding of the concept of misappropriation, misuse and biopiracy; and the recognition of the contribution made by indigenous and local communities to biodiversity. The AFRICAN GROUP suggested that parties raise awareness to promote application of traditional knowledge by involving indigenous and local communities in various research and education activities.

On development of tools to monitor compliance, delegates discussed whether the chapeau should refer to “measures,” “appropriate legal, administrative or policy measures,” or “measures to support” tools to monitor compliance, and whether the sub-paragraphs should reference the introduction of rules and requirements or to refer to tools only. They decided to bracket all sub-paragraphs. Parties made additional proposals on capacity-building measures to develop tools to monitor compliance, and on requiring compliance with national legislation in the country of origin and the mutually agreed terms (MAT) on which access was granted, including requirements for benefit-sharing. Delegates also inserted a footnote reflecting the African Group’s position that reference to genetic resources is without prejudice to the scope of the regime, in particular the potential inclusion of biological resources, derivatives and products, with the EU observing that this issue is not related to compliance. When the contact group reconvened, following the evening plenary and an hour of regional consultations, delegates decided to delete the footnote, noting that text would need to be introduced on a case by case basis.

On mechanisms for information exchange, parties proposed adding references to: non-internet means; and facilitating funding, capacity building and participation in the ABS CHM. Regarding the types of information to be made available by parties, new paragraphs were added on: information about model ABS legislation and menus of model clauses; experiences in the development of electronic tools for the tracking of genetic resources; community protocols; and codes of conduct and best practices. The EU said that monitoring compliance should not be a CHM function, and proposed that the CHM support users of genetic resources in accessing information, and the exchange of information for non-commercial research.

On the domestic competent authority, the EU and NEW ZEALAND, supported by CANADA and AUSTRALIA, reiterated that the text should be placed in the CRP on access. The EU, JAPAN and CANADA requested bracketing a reference to emission of certificates of compliance as part of the authority’s functions. The EU proposed a new function on helping providers

of genetic resources to obtain relevant information, including in cases of alleged infringements of provider country requirements in relation to PIC and MAT.

On an internationally recognized certificate of compliance, delegates discussed: first an elaborate option including minimum information requirements, checkpoints, technologies to facilitate certification, and disclosure requirements in intellectual property right (IPR) applications; and second a short option requiring provider parties to issue a certificate on the country of origin and compliance with national ABS legislation.

The AFRICAN GROUP, the LMMC, SIDS, the EU, SWITZERLAND, CANADA and NEW ZEALAND made amendments on the first option, including on: geographic location of access activities or source; tracking procedures; checkpoints; and disclosure requirements. AUSTRALIA, NORWAY and COLOMBIA commented on the second option including amendments to the effect that certificates would be a voluntary measure, and be issued by a national competent authority. Delegates debated at length whether to refer to “provider countries,” or to quote CBD Article 15.3 stipulating that genetic resources are resources provided by parties that are countries of origin of such resources or that have acquired the resources in accordance with the Convention, as the definition of provider countries.

Regarding enforcement of national ABS legislation under a brick on tools for compliance, NORWAY suggested additional tools, including compliance with PIC for imports of genetic resources and documentation accompanying genetic resources for research and commercialization. PERU suggested reference to safeguarding and respecting the genetic and traditional knowledge heritage of countries of origin in the granting of any right, in particular in relation to IPR and product approvals. CANADA and the EU raised concerns that text introduced contained elements that had been agreed to be bullets. The EU subsequently introduced language on compliance with international access standards as a precondition for compliance with national ABS legislation; and CANADA on facilitated access to genetic resources and ensuring non-discrimination among users accessing these resources. PERU, the LMMC and the AFRICAN GROUP opposed the introduction of reference to international access standards, arguing this upgrades bullets into bricks. Following a lengthy discussion, parties supported a proposal by Co-Chair Lefeber, to resolve the issue in a closed-doors meeting with the spokespersons of negotiating groups, which was held late into the night.

IN THE CORRIDORS

Day 5 started with reminders that delegates were running out of time to reach a substantive outcome at this meeting - and it ended with a bang! In the morning, many commented that negotiating groups were not yet ready to give up anything yet, but were still engaged in the process of staking out positions for negotiating package deals at a later stage. Still, with the biggest challenges awaiting the Working Group at ABS 8, one delegate noted that “once we get to the real tough nuts to crack, harvesting the low-hanging fruits of objective and scope will be a breeze.”

Tempers rose in the evening contact group on compliance with groups accusing each other of sabotaging the process by trying to promote bullets to bricks “by stealth,” and quickly reached the melting point, after which the group had to be adjourned to allow for closed-door discussions among the major negotiating groups. As the smoke cleared in the conference room, some said they had seen the “iceberg” coming, but knew it was too late, while one whispered “I think this clash was needed.” Another added “maybe this way we can get rid of the bricks and bullets,” noting that the stroke of genius that had brought the breakthrough at ABS 6 was now increasingly seen as “an invitation to cheat.”