

ABS 7 HIGHLIGHTS: TUESDAY, 7 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 hear reports from the contact groups and informal consultations, resolve procedural issues and determine the way forward. Contact groups on compliance, benefit-sharing and access, and scope met in the afternoon and evening.

PLENARY

Working Group Co-Chair Fernando Casas (Colombia) reminded delegates that this was the last day to make substantial progress. David Hafashimana (Uganda), Co-Chair of the contact group on the objective and scope, reported on progress made in reducing options and operational texts on objective, and recommended the group move on to scope.

René Lefeber (the Netherlands), Co-Chair of the contact group on compliance, reported that the group had arrived at a deadlock over a brick on measures to ensure compliance, making it impossible to continue working on the basis of its current rules of engagement. He said the group suspended work to convene a closed-door meeting with the main spokespersons of the negotiating groups to discuss the way forward. They considered a “minimalist approach” demoting the brick to a bullet, and a “maximalist approach” of removing the distinction between bricks and bullets throughout the documents on compliance, benefit-sharing and access. He reported that the majority of participants preferred the maximalist approach while some had to seek instructions from capitals.

CANADA, the EU, the LMMC, the AFRICAN GROUP, NEW ZEALAND, NORWAY and JAPAN, among others, supported the maximalist approach. CANADA requested clarification that the three-step approach to negotiations – submitting and consolidating proposals, bracketing and amending text to ensure adequate reflection of positions, and negotiating text – would be maintained and consistently applied across all contact groups. The EU emphasized the merit of removing duplicate proposals under different headings. NEW ZEALAND sought clarification whether the removal of the distinction between bricks and bullets implied that all text would be on the same footing. The LMMC emphasised the importance of keeping proceeding on the basis of the existing structure, notwithstanding the removal of bricks and bullets.

Pierre du Plessis (Namibia), Co-Chair of the contact group on compliance, underscored that the bricks and bullets illustrated the state of play at ABS 6, but that a new approach is needed to forge consensus by COP 10.

Co-Chair Timothy Hodges (Canada) and contact group Co-Chair Lefeber confirmed that the removal of the bricks and bullets results in all elements in the text having the same status. Lefeber explained parties could bracket text, but the structure as set out in the headings would be maintained. CHINA urged delegates to focus remaining discussions on substance rather than process.

CONTACT GROUP ON THE OBJECTIVE AND SCOPE

SCOPE: On a paragraph on exclusions from scope, the EU, supported by AUSTRALIA and CANADA, proposed a footnote stating that it reserves its position because of ongoing internal discussions on pathogens. A lengthy discussion on process ensued. The AFRICAN GROUP, the LMMC and GRULAC rejected the footnote, noting that the purpose of this stage of negotiation is to work on the text, and that the definition of “pathogen” is not well understood. Co-Chair Hafashimana proposed the EU bracket the reference in the text and make a statement during the closing plenary, but this was rejected by the EU who suggested the footnote be bracketed instead. Following consultation with the Working Group Co-Chairs, Co-Chair Ivars noted that at this stage parties could make submissions on text only. The EU insisted on a footnote and the issue was set aside.

In a paragraph on the overall scope of the international regime, the AFRICAN GROUP agreed to delete a reference to environmentally sound uses, but insisted on retaining “biological resources” that BRAZIL and CHILE sought to delete. SWITZERLAND supported a reference to “all” genetic resources. JAPAN, opposed by the PHILIPPINES, proposed stating that the regime applies to genetic resources, and deleting any specifications. PERU and ARGENTINA proposed deleting reference to “transboundary nature” and, with the EU and the AFRICAN GROUP, but opposed by JAPAN, to “other international obligations,” noting that these issues are covered in subsequent paragraphs.

PERU introduced a paragraph that the international regime will also apply to genetic resources of migratory species that for natural reasons are found in the territories of parties. Delegates agreed that this should be merged with the paragraph on overall scope.

CANADA, supported by many and opposed by the AFRICAN GROUP, suggested deleting three sub-paragraphs addressing: benefits arising from utilization of genetic resources

acquired after the CBD's entry into force; continuing benefits from utilization of resources taken prior to the CBD's coming into force; and intellectual property rights (IPR) associated with research and technology arising from the use of genetic resources. The sub-paragraphs were retained in brackets.

Delegates then debated a paragraph listing exemptions to scope, focusing on plant genetic resources for food and agriculture covered under the International Treaty on Plant Genetic Resources for Food and Agriculture, and on genetic resources acquired before the CBD's entry into force. Different options were retained. Discussions continued into the night.

CONTACT GROUP ON COMPLIANCE

Delegates addressed development of tools to enforce compliance. The contact group upheld a suggestion by NORWAY to move its proposal on development of tools to monitor compliance to this section. The EU proposed to entirely bracket provisions on: ensuring compliance with the national legislation of the country of origin; remedies and sanctions, which should be discussed together with their triggers; and cooperation in the investigation of alleged violations of national ABS legislation. SIDS suggested adding a new paragraph providing that user parties shall provide financial assistance for the settlement of legal disputes.

Delegates then addressed tools to encourage compliance. CANADA bracketed a paragraph on international understanding of misappropriation and misuse. Others indicated their intention to submit new text during the third reading of the document. On sectoral menus of model clauses for material transfer agreements, the AFRICAN GROUP proposed that parties should also ensure binding compliance measures. JAPAN requested bracketing reference to sectoral menus and suggested that users and providers take into account the common elements of various sectors and the particularity of each sector. The LMMC bracketed the entire element and added language to ensure that access is addressed at the national level. CANADA supported that parties submit a compilation of model clauses to the clearing-house mechanism. On codes of conduct for important groups of users, the AFRICAN GROUP called for ensuring the communication of codes of conduct and best-practice standards to the relevant user groups.

On international access standards (that do not require harmonization of domestic access legislation) to support compliance across jurisdictions, the LMMC proposed moving all the text into the CRP on access. The EU stressed the need for a linking clause on access-related tools to enforce compliance, either as a self-standing provision or within key compliance-related provisions. Upon the suggestion by the LMMC to provide for the link, but to avoid duplication of text, the EU agreed to include only an "open" cross-reference, which was subsequently bracketed by the LMMC.

Delegates discussed tools to monitor compliance. On tracking and reporting systems, AUSTRALIA suggested language on information exchange, and including monitoring and tracking in ABS contracts. NEW ZEALAND and JAPAN bracketed paragraphs on disclosure requirements, while the EU bracketed references to disclosure in product approval applications. On identification of checkpoints, the AFRICAN GROUP introduced language requesting parties to establish checkpoints at IPR offices, market approval authorities and entities funding research, which should cover all uses.

Delegates then addressed tools to enforce compliance. On measures to ensure access to justice, SIDS proposed stating that such measures should be in accordance with Principle 10 of the Rio Declaration (participation and access to justice). CANADA and the LMMC requested bracketing a paragraph on

an international ombudsman. CANADA also bracketed a section on alternative dispute resolution, suggesting that parties should encourage users and providers to use existing mechanisms.

On enforcement of judgments, the EU and CANADA requested bracketing language on enforcing decisions of the courts of provider countries. CANADA added reference to a provision on the applicable law in ABS contracts. On information exchange procedures between national focal points, the AFRICAN GROUP provided text on the international ombudsman facilitating information exchange on infringement of PIC requirements. On remedies and sanctions, JAPAN requested bracketing a paragraph addressing IPR, while CANADA and AUSTRALIA bracketed paragraphs on systems to seek redress in cases of breach of contractual obligations or misappropriation, and on cooperation between parties on addressing infringements of ABS agreements.

CONTACT GROUP ON BENEFIT-SHARING AND ACCESS

In the evening, delegates addressed a CRP on benefit-sharing. On the linkage of access to the fair and equitable sharing of benefits, CANADA bracketed provisions referring to: PIC, including for use changes and unforeseen uses; indigenous and local communities; and measures requiring users to comply with ABS legislation of provider countries.

On benefits to be shared under mutually agreed terms (MAT), PERU proposed language stating that the absence of MAT must not constitute grounds for the denial of benefit-sharing. AUSTRALIA preferred reference to the party providing the resources, rather than the country of origin, while the LMMC favoured the opposite. An indigenous representative called for reference to community protocols and customary laws along with national legislation.

On monetary and non-monetary benefits, CANADA bracketed language on ensuring that benefit-sharing includes all forms of resource utilization. The AFRICAN GROUP proposed that parties take measures to share the benefits of research and technology linked to conservation and sustainable use irrespective of access. Discussions continued into the night.

IN THE CORRIDORS

Delegates arrived red-eyed on Tuesday morning as many had worked late into the night to clean up the debris of Monday's crash. They were reassured in the morning plenary that the process was still on the tracks, but as one delegate stated: "the goodwill has been damaged." The main effect of the ceasefire on procedure was that delegates were now free to add text and brackets reflecting their positions, which substantially accelerated deliberations on compliance and benefit-sharing. Even so, skirmishes moved from fighting over "bricks and bullets" to "brackets and footnotes" evidenced on seemingly minor issues such as whether contact group procedures allowed for the introduction and bracketing of footnotes, leading one delegate to joke that "the devil is not in the detail, but in the footnotes."

Despite applause at the completion of the document on compliance, delegates were reluctant to speak of progress. While one participant suggested that "we are now working towards consensus by exhaustion" another attempted a more serious assessment noting, "in past meetings, it was unclear how much convergence there was between parties, after ABS 7 we are at least finally clear about the depth of the divergence that remains."

ENB SUMMARY AND ANALYSIS: The *Earth Negotiations Bulletin* summary and analysis of ABS 7 will be available on Saturday, 11 April 2009 online at: <http://www.iisd.ca/biodiv/abs7/>