

ABS 9 HIGHLIGHTS: THURSDAY, 25 MARCH 2010

Contact group 3 on benefit-sharing and access, and contact group 4 on traditional knowledge (TK) met in the morning. Contact group 1 on scope and finance and contact group 2 on compliance met in the afternoon. An afternoon plenary reviewed progress and established an inter-regional group to negotiate a revised draft protocol. Contact group 5 on the draft COP decision met in the evening.

PLENARY

Working Group Co-Chair Hodges presented the process forward as discussed in the Bureau, including circulation of a revised draft protocol and establishment of an inter-regional group mandated to negotiate it. He said the group will work in a roundtable format, inspired by the Vienna setting used during the biosafety negotiations, and comprise five representatives for each UN region, and two representatives for indigenous and local communities (ILCs), civil society, industry and public research, respectively. He explained spokespersons and representatives can change freely, and discussions will be open to the attendance of all Working Group participants. The Working Group approved the process and the nomination of José Luis Sutera (Argentina) and Johan Bodegård (Sweden) as Co-Chairs of the inter-regional group.

CONTACT GROUP 3

Access for biodiversity-related research: GRULAC, supported by AFRICA, suggested text along the lines of CBD Article 12(b) (promoting and encouraging research contributing to biodiversity conservation and sustainable use). The EU proposed language on parties creating conditions that facilitate biodiversity research. GRULAC, ASIA-PACIFIC and LMMC requested links to tracking and monitoring any change of intent or subsequent uses.

Parties who determine that access is not subject to PIC: Discussion focused on clarifying that parties can decide not to require PIC in the exercise of their sovereign rights in accordance with CBD Article 15.5, while safeguarding the protocol's objectives. The EU cautioned against placing requirements on the right to opt out of the obligation to require PIC and, supported by CANADA and NEW ZEALAND, noted that sovereign rights include the authority to determine for which resources and which situations PIC is required. The PHILIPPINES cautioned that not requiring PIC does not imply that PIC is voluntary, and that parties must recognize other parties' decisions to require PIC.

AFRICA proposed that national decisions that PIC is not required be posted on the CHM and specify conditions such as geographic and time limitations; and requirements for non-discrimination apply to commercial utilization only. The EU noted that PIC requirements, rather than the decision not to require PIC, should be notified. AFRICA stressed that decisions not to require PIC should be reflected in certificates of compliance, with GRULAC adding that the certificate for TK use should be issued by the national competent authority and refer to the legality of community PIC. ASIA-PACIFIC and LMMC cautioned that not requiring PIC could undermine the protocol's objectives in the case of transboundary genetic resources.

Access requirements: ASIA-PACIFIC, GRULAC and LMMC suggested clearly reflecting national sovereignty and stating that a list of party measures is not prescriptive. The EU and JAPAN requested references to appeals of decisions by the competent authority. IIFB proposed that parties set criteria for indigenous PIC where the applicable law recognizes indigenous rights to genetic resources. CANADA, supported by NEW ZEALAND, objected to prescribing the content of MAT.

AFRICA requested stating that intellectual property rights should not violate the protocol and deleting reference to non-discrimination. The EU asked to consider emergency situations, with SWITZERLAND suggesting reference to CBD Articles 15.2 (access for environmentally sound uses). NORWAY requested specifying the timing for negotiating MAT and flexibility for different contractual approaches.

Derivatives: Delegates considered a proposal to refer to "utilization of genetic resources, including derivatives resulting from characterization, replication and expression." GRULAC and AFRICA requested further elaborating these concepts, with GRULAC otherwise preferring reference to "derivatives" only. LMMC suggested referring to "use of a compound" or "information relating to the compound."

Technology transfer: Delegates examined a new provision on technology transfer and cooperation submitted by the contact group Co-Chairs, referring to collaboration in scientific research and development programmes as a means to generate benefits, and encouraging private sector cooperation. ASIA-PACIFIC and LMMC suggested developed countries should provide incentives to enterprises for technology transfer purposes. The EU observed lack of a specific link to ABS activities.

CONTACT GROUP 4

BRAZIL, AFRICA and IIFB insisted on TK being cross-cutting throughout the protocol, whereas NEW ZEALAND and CANADA argued that benefit-sharing and access regarding associated TK should be covered solely under the article on TK.

Preamble: Delegates agreed with Australia's proposal recognizing diverse circumstances in which TK associated with genetic resources is held and developed by ILCs, and with AFRICA adding that ILCs also "own" genetic resources.

BRAZIL proposed an additional paragraph on the distinction between ILCs controlling TK and knowledge holders, and delegates eventually agreed to refer to ILCs' right to identify the rightful holders of the knowledge, consistent with their laws, customary laws, community protocols and procedures. IIFB proposed preambular language on the inseparable nature of genetic resources and TK, and possible reference to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which no party supported.

IIFB further proposed a paragraph on "taking into account the rights of indigenous peoples and local communities to genetic resources and associated TK." Expressing support, AFRICA requested reference to "indigenous and local communities"; and NEW ZEALAND to ILCs' "existing" rights. COLOMBIA, opposed by AUSTRALIA, proposed referring to rights over "TK and associated genetic resources." Co-Chair Luna suggested informal consultations on this point.

Benefit-sharing: JAPAN, opposed by GRULAC, AFRICA, NORWAY and IIFB, suggested "encouraging" rather than "ensuring" benefit-sharing from TK utilization. AUSTRALIA, NEW ZEALAND and JAPAN preferred reference to TK "holders," while the IIFB suggested "custodians." CANADA proposed, and delegates agreed, that parties take measures "with the aim of ensuring" benefit-sharing from utilization of TK associated with genetic resources with "ILCs holding such knowledge."

Access: IIFB opposed subjecting ILCs' PIC to national legislation, requesting that the protocol confirm their right to PIC as collective TK owners, with states empowering ILCs to secure PIC and assisting them in implementing it. AFRICA, INDIA and NORWAY, opposed by CANADA, proposed referring to PIC "in accordance with" rather than "subject to" national law. IIFB called for accordance with "national and international law" or "national law in accordance with UNDRIP." NEW ZEALAND requested reference to "PIC/approval." CANADA proposed that parties take measures "with the aim of ensuring" that TK associated with genetic resources held by ILCs is accessed with the "PIC or approval and involvement of ILCs," and that "if mandated by ILCs, national or local authorities may represent ILCs' interests." Co-Chair Luna called for informal consultations.

Traditional knowledge: AFRICA, supported by INDIA, preferred for parties to "ensure" rather than "encourage" benefit-sharing for access to publicly available TK. LMMC proposed to ensure benefit-sharing by users of TK whether or not TK is publicly available. NEW ZEALAND suggested that parties take measures as appropriate "with the aim of ensuring" such benefit-sharing. The EU, opposed by AFRICA, recommended addressing this issue under WIPO IGC.

Transboundary issues: AFRICA requested a reference to transboundary TK in the article on transboundary cooperation, with SWITZERLAND, the EU and IIFB requesting cooperation of affected ILCs. Co-Chair Solhaug requested text to be drafted informally.

Capacity building for ILCs: IIFB proposed a separate provision on capacity building to allow ILCs to determine their own needs and priorities. Delegates agreed that parties "shall support" capacity building for ILCs.

CONTACT GROUP 1

Temporal scope: The EU, supported by AUSTRALIA and CANADA, proposed that parties ensure benefit-sharing arising from the utilization of genetic resources acquired after the protocol's entry into force for the concerned party. AFRICA, supported by ASIA-PACIFIC, suggested that benefit-sharing cover continued and new uses of genetic resources acquired before the protocol's entry into force.

Delegates raised implementation-related concerns regarding determining, tracking and monitoring the new use. The EU and GRULAC noted the rule that legal obligations arise after ratification and entry into force. Underscoring their mandate provided by the African Ministerial meeting (4-6 March 2010, Windhoek, Namibia) to address pre-protocol accessions, AFRICA argued that use not intended at the time of accession is a new use. NORWAY suggested the African concerns could be addressed through a provision encouraging voluntary benefit-sharing arrangements regarding pre-protocol accessions.

Relationship with other agreements: All regions agreed to reference CBD Article 22 (Relationship with Other International Conventions) as one element of the provision. Many expressed reservations on reference to the protocol: being "the comprehensive" international ABS instrument and related language requiring parties to duly consider this when implementing or developing other international ABS instruments; and not prejudicing the implementation or development of other instruments that are "in harmony" with the protocol.

CONTACT GROUP 2

Compliance with MAT: NEW ZEALAND reiterated that MAT should be the primary compliance mechanism under the protocol. GRULAC stressed that general rules are insufficient to deal with the asymmetry among countries and litigation costs in foreign jurisdictions related to genetic resources and TK.

GRULAC, LMMC and AFRICA called for including an international ombudsman and provision of legal aid. AFRICA and GRULAC also requested compliance mechanisms in the absence of MAT; and sanctions to be applied to persons in foreign jurisdictions. GRULAC, opposed by the EU, called for compliance with national legislation related to contracts.

Measures on non-compliance with MAT: The REPUBLIC of KOREA and CANADA argued that parties should "provide" legal avenues to users and providers, rather than "facilitate" access to them. MALAYSIA, supported by BRAZIL, suggested that parties should instead create "convenient" and "meaningful" opportunities to seek recourse under user parties' jurisdictions.

Review of effectiveness of measures on non-compliance with MAT: GRULAC supported text on the meeting of the parties to the protocol reviewing these measures and considering further action. The EU opposed, expressing concern that this implies subjecting domestic legal systems to broad review. MALAYSIA proposed clarifying that this will not result in a review of national judicial systems, or to state that the COP "may" engage in such a review, or include this in the clause on the review of the protocol.

Informal discussions on compliance continued into the evening.

IN THE BREEZEWAYS

The news that an inter-regional group would convene in the "Vienna-plus setting" on Friday morning spurred a wave of speculations in the breezeways. Many saw a clear signal that the period for consultations and building technical understanding was over and the time for tough political negotiations had come. Not everybody agreed, though, that the timing was right. Some raised concerns that the setting would be unsuitable to reflect the diverse views of large regional groups. Others felt that forcing delegates into negotiation mode was risky, since a number of them might not have instructions to engage in striking deals. Looking at the deadline for finalizing the draft protocol, most delegates thought that there was no other option. As one seasoned negotiator noted, "at the very least we will know this week where agreement is possible and where not. We will have to delete some of the most tricky issues, but that won't happen until the last night in Nagoya." Regardless of their expectations on the outcome, delegates braced for what will certainly be two long nights in hot Cali.