

RESUMED ABS 9 HIGHLIGHTS: SUNDAY, 11 JULY 2010

Delegates met in the inter-regional negotiating group throughout the day and into the evening. They addressed provisions of the draft protocol contained in the Cali Annex (UNEP/CBD/WG-ABS/9/3, Annex I) on the protocol's relationship with other instruments, and fair and equitable benefit-sharing. Small groups met on the relationship with other instruments, and derivatives.

INTER-REGIONAL NEGOTIATING GROUP RELATIONSHIP WITH OTHER INSTRUMENTS

(NEW ARTICLE): Co-Chair Casas offered new text, based on CBD Article 22.1 (Relationship with other International Conventions), as well as requiring that the protocol and other relevant international instruments are implemented in a mutually supportive manner. The CEE supported the Co-Chairs' proposal.

NEW ZEALAND noted that lack of reference to Article 22.2 (implementation consistent with the law of the sea) could raise questions with regard to areas beyond national jurisdiction. GRULAC and the PHILIPPINES opposed insertion of such a reference, noting that it would create problems for countries that are not parties to the UN Convention on the Law of the Sea.

JAPAN, supported by the EU and CANADA, underlined the lack of clarity of the expression "in a mutually supportive manner" and proposed that the protocol does not apply whenever the provisions of a specialized international ABS regime apply, provided that the other regime is in force among the parties concerned and does not run counter to the CBD objectives.

The LIKE-MINDED ASIA PACIFIC stressed the need to preserve the protocol's integrity. In line with this, the LMMC suggested stating that nothing in this protocol will prevent the development of other international agreements, provided that they are supportive of, and do not run counter to, the objectives of the Convention and the protocol. Supporting the LMMC, CANADA suggested referring to international agreements "relating to ABS." The LIKE-MINDED ASIA PACIFIC noted that agreements not related to ABS could also have an impact on the protocol, citing Article 16.5 (intellectual property rights' influence on CBD implementation). SWITZERLAND proposed that the provisions of the protocol shall not prejudice the development of other more specialized ABS instruments.

The AFRICAN GROUP suggested that the protocol is the comprehensive international ABS instrument, noting the need to ensure that parties act in good faith to ensure mutual supportiveness, without subordinating the protocol to other

international instruments. The EU agreed that the protocol should be the default instrument on ABS, and suggested amending the Japanese proposal to that effect. NORWAY suggested clarifying that the article does not subordinate the protocol to other instruments. INDIA said the provision should cover: rights and obligations under existing treaties; implementation of the protocol; and development of other agreements without reference to any specific agreement.

AUSTRALIA suggested retaining and streamlining proposals made. An informal group was then established to draft compromise language. In the evening, MALAYSIA reported that the informal group had reached agreement on most of the text and was working on a remaining paragraph.

BENEFIT-SHARING (ARTICLE 4): Paragraph 1: The PHILIPPINES proposed that benefits arise from "every" utilization of genetic resources and associated traditional knowledge (TK). CANADA, opposed by the AFRICAN GROUP and the LIKE-MINDED ASIA-PACIFIC, proposed removing reference to TK, in order to address sharing of benefits from TK utilization in a separate provision.

GRULAC requested reference to derivatives along with genetic resources, and to the country of origin rather than the provider country. JAPAN expressed concern that the term "country of origin" does not cover all situations where benefit-sharing would have to occur. GRULAC recognized the need to address intermediaries, but requested explicit reference to the country of origin. CANADA expressed preference for reference to the "country providing" genetic resources, while the EU requested a focused discussion on the country of origin as a cross-cutting issue. The LIKE-MINDED ASIA-PACIFIC suggested drawing from CBD Article 15.3 (specification of provider countries). INDIA proposed adding elsewhere in the protocol a definition of provider country based on CBD Article 15.3.

JAPAN and CANADA requested adding reference to mutually agreed terms (MAT). The EU proposed reference to benefit-sharing "in accordance with the protocol," while CANADA noted that this should be kept separate from reference to MAT. The AFRICAN GROUP opposed reference to MAT, pointing to cases of resources acquired without prior informed consent and MAT, and from *ex situ* collections. Noting the need for balance in the text, he proposed that when a genetic resource or associated TK is utilized without MAT, the country of origin or the indigenous and local communities (ILCs) involved shall be entitled to 100% of the benefits generated, including any intellectual property, plus punitive damages.

The AFRICAN GROUP, supported by the INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY (IIFB), expressed preference for ILCs “providing,” rather than “holding,” genetic resources and associated TK. NEW ZEALAND preferred deleting reference to ILCs, to avoid singling out one type of non-party beneficiaries, and suggested addressing the issue in a related paragraph addressing sharing of benefits with ILCs. The IIFB requested retaining the reference in this paragraph.

Paragraph 2: Negotiations on the second paragraph as in the Cali Annex focused on sharing benefits from utilization of derivatives. GRULAC, with the LIKE-MINDED ASIA PACIFIC and the LMMC, suggested deleting specifications of derivatives in the text, referring instead to “any” utilization of genetic resources including derivatives. GRULAC, the LIKE-MINDED ASIA PACIFIC, the LMMC and NORWAY also suggested deleting the proposed list of typical uses of genetic resources. CANADA and JAPAN supported efforts to shorten the paragraph, but highlighted outstanding concerns on derivatives. JAPAN requested to qualify derivatives “in accordance with MAT.” The AFRICAN GROUP opposed leaving the term unspecified, for reasons of legal certainty and flexibility to cover advances in technology. The EU agreed, noting they cannot accept the term unless specified. While agreeing that it was important to reach a common understanding of derivatives, GRULAC said it is impossible to develop an exhaustive list and proposed to instead stipulate general criteria. He reminded delegates that countries can decide what to cover under the monitoring system, and that derivatives are already referred to in the CBD.

SWITZERLAND pointed to two main options: to name different derivatives, including biochemical compounds; or to instead clarify what is meant by utilization of genetic resources. AUSTRALIA suggested specifying utilization of genetic resources, by inserting “for purposes of research and development on their biochemical make-up.” GRULAC proposed to refer to naturally occurring biochemical compounds instead of derivatives. The AFRICAN GROUP prioritized clarifying utilization of genetic resources. INDIA stressed that derivatives are at the heart of the protocol, and that even if it is difficult to define or describe them, a solution has to be found to address them. Co-Chair Casas proposed to set up an informal group to discuss how to best address derivatives.

Co-Chair Casas then invited delegates to comment on an EU proposal to refer to parties’ “appropriate measures in accordance with the protocol,” rather than “legislative, administrative or policy measures.” PERU stressed the need for measures with legal effects. CANADA opposed reference to “in accordance with the protocol,” stressing that the protocol does not instruct as to which measures should be taken by parties. Co-Chair Casas proposed to leave the issue for later discussion.

Delegates then discussed whether the paragraph should require parties to take measures “with the aim of ensuring,” or “to ensure” benefit-sharing. The EU and CANADA supported the first option for consistency with CBD language, whereas the LIKE-MINDED ASIA PACIFIC preferred the second, arguing that stronger language is necessary, in accordance with COP decisions. The AFRICAN GROUP and GRULAC preferred a third option, requiring parties to take measures “with the aim of sharing benefits.”

Paragraph 3: JAPAN and the EU suggested negotiating the paragraph addressing sharing of benefits from genetic resources and associated TK on MAT, in conjunction with the first paragraph. CANADA raised concerns about references to CBD Articles 16 (Access to and Transfer of Technology) and 19 (Handling of Biotechnology and Distribution of Benefits), noting that these refer to benefit-sharing among states, not with

communities, and suggesting a separate paragraph on sharing benefits from the utilization of TK with ILCs. The AFRICAN GROUP suggested addressing Canada’s concern by inserting “as appropriate” in the original paragraph.

Paragraph 4: Delegates addressed an EU proposal that parties’ measures on sharing benefits from TK utilization with ILCs be “in accordance with the protocol.” The AFRICAN GROUP questioned the usefulness of the reference and the EU noted the need to clarify CBD Article 15.7 (benefit-sharing). NEW ZEALAND stressed that, while the provision should not create additional obligations for parties, it should provide for legal certainty and clarify Article 15.7.

RULES OF ENGAGEMENT: Following a lengthy absence from the negotiating table, the IIFB expressed its deep concern about the lack of their full and effective participation and requested opening the negotiation to ILC representatives. The AFRICAN GROUP stressed the need for indigenous participation, noting that ABS concerns them directly, and expressed concern about pursuing discussions without their voice. A CIVIL SOCIETY representative highlighted misunderstanding about the rules of engagement and requested that the ILCs and stakeholders meet with the Co-Chairs.

GRULAC, NEW ZEALAND and the EU said the process would benefit from ILCs’ ideas, and expressed hope that the Co-Chairs’ consultation would provide a solution. NORWAY highlighted the valuable input received from the Article 8(j) Working Group. Co-Chair Hodges noted that the ILCs and other stakeholders were expected to provide guidance, but only parties could propose and accept text. The AFRICAN GROUP drew attention to past practice allowing ILCs to propose text if supported by a party. The meeting was then suspended to allow for the Co-Chairs’ informal consultation with the IIFB and stakeholders.

Following the consultations, Co-Chair Hodges stressed the important role of ILCs in the process and proposed to revert to the previous practice of allowing them to table text as long as it is endorsed by at least one party. The meeting was suspended to allow the informal group on derivatives to meet.

IN THE CORRIDORS

Sunday saw the invention of a new negotiating tool – imaginary brackets – the use of which was allowed to identify parts of the text that require further work, with the hope that “they disappear as fast as they appear.” While constructive morning discussions on the relationship with other instruments led participants to speculate that consensus on this key issue was within reach, the impasse on references to mutually agreed terms with regard to benefit-sharing led others to worry: “I hope we are not only making imaginary progress.”

As expected, football analogies abounded in the late afternoon, when delegates refocused on negotiations after having watched the World Cup final. A celebrating Spanish delegate appealed to the Working Group to take a team approach towards winning the negotiations. As discussions on derivatives went into overtime however, others drew a less optimistic parallel, noting that, like the Spanish team, negotiators play a great defense and have excellent attack strategies, but don’t score that often.

Concerns relating to their lack of participation had indigenous representatives leaving their seats at the negotiating table for most of the afternoon and evening. Although a brief evening meeting with the Co-Chairs remedied the situation, some indigenous participants stressed their deeper concern about the lack of a rights-based approach in the text, while many wondered when negotiators would tackle the recommendations by the UN Permanent Forum on Indigenous Issues, which could provide guidance in that regard.