

## RESUMED ABS 9 HIGHLIGHTS: MONDAY, 12 JULY 2010

Delegates met in the inter-regional negotiating group throughout the day and into the night to address provisions of the draft protocol contained in the Cali Annex (UNEP/CBD/WG-ABS/9/3, Annex I). Informal groups met on the relationship with other instruments, and derivatives.

### INTER-REGIONAL NEGOTIATING GROUP

**OUTSTANDING ISSUES:** MALAYSIA reported on informals on the relationship with other instruments, noting the need for further consultations. CANADA reported on informals on derivatives, noting emerging consensus on focusing on benefit-sharing and what constitutes utilization of genetic resources, rather than defining derivatives.

The LIKE-MINDED ASIA PACIFIC suggested a new article on benefit-sharing in the absence of mutually agreed terms (MAT). The REPUBLIC OF KOREA proposed adding a provision making CBD Article 27 (Settlement of Disputes) applicable to the protocol *mutatis mutandis*.

### ACCESS TO GENETIC RESOURCES (ARTICLE 5):

**Paragraph 1:** The EU clarified that prior informed consent (PIC) needs to be articulated in national legislation, proposing that in the exercise of sovereign rights over natural resources and subject to national legislation, access shall be subject to PIC of the party providing resources unless otherwise determined by that party in accordance with CBD Article 15 (Access to Genetic Resources). The AFRICAN GROUP proposed adding reference also to CBD Article 9(d) (regulation of collection of biological resources for *ex situ* conservation purposes).

GRULAC, supported by the AFRICAN GROUP and the LMMC, requested insertion of “derivatives” and reference to the country of origin rather than the provider country. The AFRICAN GROUP requested reference to associated TK in the heading of the article, as well as in the text. CANADA preferred keeping all references to TK in a separate provision. The IIFB underscored that draft articles 5 and 5 bis address separate issues, as well as the difference between “genetic resources and associated TK” and “TK associated with genetic resources.”

**Paragraph 2:** The REPUBLIC OF KOREA suggested parties’ necessary measures should be communicated through the ABS clearing house. CANADA proposed that the requirement apply only for parties requiring PIC. The AFRICAN GROUP proposed that a party’s decision to waive its sovereign right to require PIC be posted on the ABS clearing house, to highlight this as an exception.

CANADA, opposed by the LMMC, the AFRICAN GROUP, the LIKE-MINDED ASIA PACIFIC and NORWAY, proposed a new paragraph stating that parties’ measures provide for equal treatment between similar domestic and foreign applicants and between foreign applicants from different parties. NORWAY and INDIA stressed non-discrimination is a trade-related matter. The AFRICAN GROUP suggested instead that parties should avoid application of discriminatory rules in processing access applications, except where such rules aim at advancing local non-commercial biodiversity and ecosystem research and education.

CANADA, opposed by the AFRICAN GROUP, suggested that parties require the establishment of MAT at the time of access. JAPAN proposed that parties establish clear criteria to assess applications for PIC and notify the decision to the applicant in a reasonable time period. SWITZERLAND recommended that parties provide for appropriate administrative or judicial appeals procedures; and ensure that the costs for obtaining decisions on PIC do not exceed the actual costs of processing them.

GRULAC opposed reference to the approval and involvement of indigenous and local communities (ILCs) as an alternative to their PIC. NEW ZEALAND presented text developed jointly with Australia and Canada, stating that, where applicable national law recognizes that ILCs have the right to provide access to genetic resources, parties should set out processes for obtaining their PIC or for approval and involvement, and/or for negotiating MAT.

**Paragraph 3:** Following a request by the EU, the paragraph on making decisions to grant PIC available to the ABS clearing house was retained pending negotiations on the ABS clearing house and information-sharing (article 11).

**Paragraph 4:** On informing the ABS clearing house about which genetic resources will or will not be subject to PIC, the EU proposed that a party determines which of its genetic resources will be subject to PIC. The AFRICAN GROUP proposed to revert to the original wording, or to restate that, unless a party waives its sovereign right to require PIC, such requirement is imposed.

Following discussion, delegates agreed to ask the Secretariat to produce a new version of the article displaying options for further negotiation.

### ACCESS TO ASSOCIATED TK (ARTICLE 5 BIS):

The REPUBLIC OF KOREA requested reference to PIC “in accordance with parties’ national legislation.” NORWAY proposed references to ensuring compliance, addressing non-compliance, and cooperation in cases of violation. Recalling difficult discussions in Cali, delegates agreed to revisit Norway’s proposal after discussing compliance.

**CONSIDERATIONS RELEVANT TO RESEARCH AND EMERGENCY SITUATIONS (ARTICLE 6):** A PUBLIC RESEARCH representative called for simplified access procedures, while fully respecting ABS and national sovereignty. The CEE requested reference to CBD Article 12 (Research and Training). JAPAN requested reference to simplified access measures. GRULAC opposed reference to “facilitating” non-commercial research. SWITZERLAND suggested a separate article on non-commercial research, and stating that ABS should not affect biological resources that are trade commodities.

The EU suggested additional text on: access to pathogens under the scope of other organizations or conventions; the importance of genetic resources for food and agriculture, food security and climate change adaptation; and sectoral approaches. In response, the AFRICAN GROUP requested stating that there shall be no special considerations without fair and equitable benefit-sharing and compliance and, with the LMMC and the LIKE-MINDED ASIA PACIFIC, cautioned against bringing back issues that have been previously rejected and introducing issues linked to the relationship with other instruments.

**CONTRIBUTION TO CONSERVATION AND SUSTAINABLE USE (ARTICLE 7):** Delegates accepted the formulation as in the Cali Annex.

**TRANSBOUNDARY COOPERATION (ARTICLE 8):** On two options in the Cali Annex, SWITZERLAND and CANADA expressed preference for option 1, including separate paragraphs on transboundary cooperation on genetic resources and on TK respectively; while INDIA, the PHILIPPINES and the AFRICAN GROUP preferred option 2, addressing both issues in the same paragraph. Eventually, the AFRICAN GROUP proposed, and delegates agreed on, accepting option 1, adding reference to the involvement of ILCs in the paragraph on transboundary cooperation on genetic resources.

AUSTRALIA, supported by the EU and SWITZERLAND, proposed that parties “endeavor to cooperate,” rather than “cooperate.” INDIA recommended reference to “more than one party” rather than “neighboring parties.”

CANADA proposed new text on cooperation through competent international organizations or regional organizations, in particular Small Island Developing States (SIDS). The PHILIPPINES, on behalf of SIDS, warned that SIDS issues should not be used to delay substantive discussions. CANADA withdrew the proposal.

**ARTICLE 9 (TK): Paragraph 1:** CANADA suggested limiting to implementation of article 9, rather than of the entire protocol, the provision on giving due consideration to customary laws. The LIKE-MINDED ASIA PACIFIC opposed, noting that the provision is cross-cutting. The IIFB, endorsed by MALAYSIA, requested to specify that “meaningful” consideration should be given “in good faith.”

**Paragraph 2:** CANADA requested that parties shall establish mechanisms to inform TK users about their ABS obligations “as appropriate.” The REPUBLIC OF KOREA proposed reference to the procedures for access, in addition to obligations and, following a proposal by GRULAC, agreed to additional reference to measures as made available through the ABS clearing house. The LIKE-MINDED IN SPIRIT GROUP OF WOMEN, endorsed by NEW ZEALAND, suggested explicit mention of women with regard to the effective participation of ILCs.

**Paragraph 3:** Delegates discussed whether parties shall “support” “endeavor to support” or “encourage,” as appropriate, the development of ABS-related instruments by ILCs.

**Paragraph 4:** CANADA, opposed by the AFRICAN GROUP and GRULAC, proposed to delete reference to the exchange of genetic resources and TK among ILCs. NORWAY suggested specifying that customary use and exchange are compatible with conservation and sustainable use requirements.

**Paragraph 5:** On encouraging users of publicly available TK to enter into benefit-sharing arrangements with knowledge holders, GRULAC, supported by CANADA, but opposed by NORWAY, suggested deleting the provision due to its weak wording. INDIA proposed to use “require” rather than “encourage.” NEW ZEALAND suggested specifying the rightful holders of TK within ILCs. CANADA proposed that parties, where appropriate, encourage the users of publicly available TK to take reasonable measures to enter into benefit-sharing arrangements with TK holders.

**NATIONAL FOCAL POINTS AND COMPETENT NATIONAL AUTHORITIES (ARTICLE 10): Paragraph 1:** CANADA proposed that national focal points inform applicants wishing to access TK on procedures for obtaining PIC or approval and involvement of ILCs and establishing MAT including benefit-sharing. GRULAC opposed reference to “approval and involvement” of ILCs. The LIKE-MINDED ASIA PACIFIC suggested requiring national focal points to make available information through the ABS clearing house, rather than inform applicants. An INDUSTRY representative stressed the need for an obligation for national focal points to inform users. In the evening, CANADA proposed, and delegates agreed on, requiring national focal points to “make information available” to applicants.

**Paragraph 2:** Following a proposal by New Zealand, delegates agreed to make competent national authorities responsible for granting access or, as appropriate, issuing written evidence that access requirements have been met.

**OTHER ARTICLES:** Late into the evening, delegates heard reports from the informal groups and addressed the ABS clearing house (article 11). They then initiated negotiations on compliance (article 12) and monitoring, tracking and reporting (article 13). On compliance, many proposed new and alternative text, with a number of delegates expressing concern about repeating previous exercises rather than working on compromise text. Negotiations continued late into the night.

### INFORMAL GROUP ON DERIVATIVES

Delegates considered draft text describing utilization of genetic resources as including research and development, subsequent applications and commercialization on the biological makeup of genetic material or biological resources, including through biotechnology. Discussion focused on the difference between genetic material and biological resources, the meaning of subsequent applications and commercialization, and how the description would affect provisions on ABS. The group decided to seek feedback from regional groups first and to then decide what further definitions or descriptions of terms are needed.

### IN THE CORRIDORS

On Monday, the near clash over non-commercial research and emergency situations evoked memories of earlier crises caused by inflexible positions between regional groups. Some hoped that the tension was due to confusion, while others explained it as fear that linkages with discussions on the relationship with other instruments could unravel the precious progress achieved on that issue. Yet another delegate opined that some regions still see a red flag when terms such as sectoral approaches are mentioned. Overall, though, steady – albeit not fast – progress within small groups was interpreted as a sign that all sides are still ready to tackle the difficult issues constructively.

A bumpy late night start on compliance resulting in a free-for-all tabling and bracketing of text showed that positions on this core issue of the protocol are still far apart. As one delegate said, “a small group will not be enough to bridge this divide; it will take a monumental effort.”