

## RESUMED ABS 9 HIGHLIGHTS: TUESDAY, 13 JULY 2010

In the morning, delegates met in the inter-regional negotiating group to continue work on the draft protocol contained in the Cali Annex (UNEP/CBD/WG-ABS/9/3, Annex I), and in three informal groups to discuss compliance, derivatives and the relationship with other instruments. An afternoon plenary reviewed progress. In the evening, the inter-regional group worked on the basis of the revised text tabled in plenary, and addressed the relationship with other instruments, scope and final clauses.

### INTER-REGIONAL NEGOTIATING GROUP

#### MODEL CONTRACTUAL CLAUSES AND CODES OF CONDUCT AND BEST PRACTICE STANDARDS (ARTICLES 15 AND 16):

Delegates discussed two articles from the Cali Annex with similar structure. On both articles, CANADA requested reference to development “in collaboration with regional and international organizations.” The EU requested to “consider” the use of voluntary sectoral model clauses, codes of conduct and best practice standards, rather than “take stock” of them. The PHILIPPINES asked to suspend discussion on the articles pending negotiations on compliance, or address their subject matter under the article on capacity building.

**AWARENESS RAISING (ARTICLE 17):** CANADA suggested adding indigenous and local communities’ (ILCs) protocols and guidelines as items for awareness raising; and SWITZERLAND education and training of users and providers of genetic resources, and involvement of stakeholders in the further elaboration and implementation of the protocol. GRULAC and the AFRICAN GROUP considered reference to “elaboration” inappropriate after the protocol’s adoption. The IIFB, supported by several parties, requested specific reference to ILCs, along with stakeholders.

**CAPACITY (ARTICLE 18):** The EU supported using the term “capacity development,” while GRULAC and the AFRICAN GROUP preferred “capacity building” but agreed to use the two terms in conjunction. SWITZERLAND asked to add other relevant stakeholders, including the private sector. CANADA proposed to amend the paragraph on capacity building for ILCs to extend it to stakeholders. GRULAC requested specifying that the priorities should be identified by ILCs, with the IIFB, supported by AUSTRALIA, asking to specifically reference women.

CANADA proposed that capacity “may, *inter alia*,” rather than “shall” cover a list of key areas. The IIFB, endorsed by the AFRICAN GROUP, asked to extend the special measures for ILCs to relate to access to genetic resources and associated traditional knowledge (TK). The PHILIPPINES proposed to

revise the paragraph on information on capacity building to include information on model contractual clauses which should be provided to the ABS clearing house.

### TECHNOLOGY TRANSFER AND COOPERATION

**(ARTICLE 18 BIS):** The AFRICAN GROUP requested inserting “*inter alia*” to broaden the reference to developed country measures. The CEE called for specific reference to SIDS and parties with economies in transition, in addition to developing and the least developed countries. SWITZERLAND recommended that parties’ cooperation be subject to mutual agreement and specifying that creating a sound technological base is to ensure biodiversity conservation and sustainable use. The LIKE-MINDED ASIA PACIFIC added that the technological base should also ensure the development of technologies utilizing genetic resources and their derivatives and associated TK. The EU suggested cross-references to the CBD and protocol objectives. CANADA requested that parties “should” rather than “shall” collaborate in research.

**NON-PARTIES (ARTICLE 18 TER):** CANADA requested bracketing reference to a specific ABS clearing house. GRULAC proposed that non-parties submit information on activities and transactions regarding ABS relating to genetic resources and associated TK; and that ABS-related activities and transactions be consistent with the protocol and the Convention.

### FINANCIAL MECHANISM AND RESOURCES

**(ARTICLE 19):** GRULAC and the AFRICAN GROUP requested referring to “adequate, predictable and timely flow of new and additional financial resources.” The CEE requested reference to parties with economies in transition. The IIFB, supported by the PHILIPPINES, proposed reference to the specific needs of ILCs, including women. The EU suggested referencing CBD Article 21 (Financial Mechanism).

**REPORTS ON INFORMALS:** CANADA reported on informal discussions on compliance, noting cooperative spirit, increased mutual understanding and readiness to start textual negotiations. MALAYSIA reported on discussions on the relationship with other international instruments, noting the group worked on five paragraphs and reached agreement on two of them. CANADA reported on discussions on derivatives, noting that the group’s proposed description of “utilization of genetic resources” is not negotiated text, and should be presented to delegates for their consideration in conjunction with references throughout the draft protocol.

### PLENARY

Co-Chairs Hodges and Casas introduced the revised draft protocol, prepared following the first reading of the substantive articles in the Cali Annex. Regional group representatives welcomed progress to date and recommended returning to the inter-regional group as quickly as possible.

GRULAC called on delegates to work on compromise proposals so that by COP 10 few issues are left outstanding. Lamenting that similar progress had not been made during the first part of ABS 9, the LMMC asked delegates to keep working towards a good outcome for adoption in Nagoya. The CEE called for effective work, noting the need to also develop a draft COP decision. The REPUBLIC OF KOREA requested an opportunity to consider key issues, such as access, benefit-sharing and compliance, in conjunction rather than in isolation. Pointing to the many concessions it had made in the negotiations, the AFRICAN GROUP expressed concern about lack of compromise on the part of other regions and warned that the protocol's integrity had to be maintained. JAPAN commended the constructive attitude, and called on delegates to explain their concerns with regard to difficult issues. CBD Executive Secretary Ahmed Djoghlaif congratulated delegates on progress made and thanked the Co-Chairs for their commitment to the process.

### **INTER-REGIONAL NEGOTIATING GROUP**

**RELATIONSHIP WITH OTHER INSTRUMENTS (NEW ARTICLE 3 BIS):** MALAYSIA presented the new text arising from informal consultations as a package, noting acceptance of paragraphs 3 and 5 stating that the protocol does not: prevent parties from developing and implementing other specialized ABS agreements, provided they are supportive of the objectives of the protocol and the CBD; and apply for parties to a specialized ABS instrument in respect of specific genetic resources covered by, and for the purpose of, the specialized instrument.

**Paragraphs 1-2:** MALAYSIA reported on: new text stating that the protocol is not intended to be subordinated to other international instruments, which some delegates wished placed in the preamble; and disagreement over reflecting the text of CBD Article 22.2 (rights and obligations under the law of the sea). AUSTRALIA argued that lack of language reflecting CBD Article 22.2 may create the impression that Article 22 does not apply in its entirety to the protocol. The EU noted the possibility to resolve this issue in the protocol's final clauses, with GRULAC specifically pointing to article 23 on the relationship with the CBD. NORWAY stressed the importance of new text on the protocol not being subordinated to other international instruments, and proposed moving the text to the preamble to overcome differences.

**Paragraph 4:** Delegates discussed an EU proposal stating that mutually supportive implementation is without prejudice to ongoing work or practices under relevant international organizations and conventions. The EU explained the reference would ensure that the protocol does not hinder existing practices, such as agreements among botanical gardens. The AFRICAN GROUP said the reference would create exceptions and proposed stating instead that parties act in good faith to ensure mutual supportiveness. GRULAC suggested that the protocol be implemented "bearing in mind," rather than "without prejudice to" other processes, which the EU agreed to consider as an alternative.

**SCOPE (NEW ARTICLE 3):** Co-Chair Casas proposed to delete the paragraph containing exemptions, but AUSTRALIA opposed. Casas then proposed to work on the basis of compromise text on temporal scope proposed by Norway, which encourages benefit-sharing arrangements for new and continuous utilization of genetic resources acquired before the entry into force of the Protocol. The AFRICAN GROUP and GRULAC preferred to distinguish continuous from new uses. Regarding situations where the owner providing access is not clear, the AFRICAN GROUP proposed establishment of an international trust fund to be used for conservation and sustainable use purposes.

Pointing out that some of these issues require political direction and could be addressed at COP 10, JAPAN said some exclusions might not be required once compromise is reached on other issues, such as the relationship with other instruments.

Insisting on a broad scope, the AFRICAN GROUP indicated they could agree to exemptions for commodities as long as they are not put to other uses and for genetic resources contained in Annex I of the ITPGR as long as they are used in accordance with that Treaty. GRULAC proposed referring to "commodities in trade used solely for final consumption." The EU requested retaining a self-standing paragraph exempting areas beyond national jurisdiction and the Antarctic Treaty Area.

The AFRICAN GROUP recommended that the protocol apply to: benefits arising from continuing uses; benefits arising from new uses; genetic resources from the Antarctic Treaty Area; and marine genetic resources from areas beyond national jurisdiction. The AFRICAN GROUP stressed that the discussion on scope is of political nature, and proposed focusing on compliance instead.

**FINAL CLAUSES:** Delegates continued discussions on institutional arrangements and final clauses (articles 20-31 of the Cali Annex) late into the evening.

### **INFORMAL GROUP ON COMPLIANCE**

Delegates discussed the rationale behind the textual proposals made on compliance (article 12) on Monday evening, debating whether to: focus on "utilization" of genetic resources or "misappropriation"; establish a clear obligation for governments to assist provider countries in ensuring compliance with national ABS laws and/or with MAT; address misappropriation of TK in contravention of national legislation and community procedures; use criminal law to determine the consequences of violations; cover only the most serious violations or all types; address compliance with PIC in article 12 or elsewhere in the protocol; clarify that benefit-sharing applies even in cases of infringement or lack of MAT; and include measures to prevent misappropriation. Some delegations requested to deal with all compliance-related articles of the protocol as a package and to work on the basis of the text in the Cali Annex.

### **INFORMAL GROUP ON DERIVATIVES**

Delegates discussed a definition of "utilization of genetic resources," as the conduct of research and development on the genetic and biochemical makeup or composition of genetic material or biological resources, including through the application of biotechnology as defined in CBD Article 2 (Use of Terms), as well as subsequent application and commercialization. Discussion focused on ensuring flexibility to accommodate future scientific developments while being legally precise.

### **IN THE CORRIDORS**

Midway through this final round of negotiations before COP 10 and with a revised draft protocol in their hands, delegates expressed mixed sentiments in assessing progress achieved so far. Some congratulated the "magnificent" progress achieved in relatively short time. Others opined that the negotiating text has turned into a "Monstreal Annex," pointing to over-bracketing and similarities with the unworkable outcome of ABS 8. As the group returned into negotiating mode in the inter-regional group, the pessimists were heard noting that "to adopt the protocol in October, we should have been at this point a year ago." Those standing in the middle, however, experienced "Montreal Annex déjà-vu" only with respect to the article on scope. The optimists noted that there is still time to find creative solutions, pointing to the fact that brackets and alternative options in other controversial provisions seem to constructively focus attention on specific areas of disagreement.