

RESUMED ABS 9 HIGHLIGHTS: WEDNESDAY, 14 JULY 2010

Delegates met in the inter-regional negotiating group throughout the day and into the evening, to address compliance-related issues on the basis of the revised draft tabled on Tuesday. An informal group on institutional and final clauses met in the evening.

INTER-REGIONAL NEGOTIATING GROUP

COMPLIANCE WITH ABS LEGISLATION (ARTICLE 12): Paragraph 1: Delegates focused on text concerning parties' measures to ensure that utilization of genetic resources within their jurisdiction is in compliance with the legislation of the provider country or the country of origin. Stressing linkages with article 5 (access), the EU proposed new text requesting parties to apply appropriate, effective and proportionate measures to natural or legal persons who misappropriate a genetic resource in the jurisdiction of another party, as well as to persons who, on its territory, intentionally or negligently acquire or use a genetic resource that has been misappropriated. GRULAC preferred requiring parties to apply measures to permit effective action against any infringement of the protocol and the CBD, arguing that reference to misappropriation limits measures to criminal sanctions.

The LMMC and LIKE-MINDED ASIA PACIFIC proposed deciding first whether to work on the original text in the revised draft or the EU proposal. GRULAC and the AFRICAN GROUP preferred the original text, with the AFRICAN GROUP recalling their requested reference to traditional knowledge (TK) along with genetic resources and compliance with international legislation on ABS to address the case of countries with no national ABS legislation. The EU eventually agreed to work on that basis, noting that their proposal on misappropriation gives clarity on user country measures and needs to be reflected in the text. CANADA also noted that text on misappropriation would provide clarity for domestic implementation. Urging delegates not to lose sight of the benefit-sharing obligation, NORWAY drew attention to the role of the state in enforcing mutually agreed terms (MAT). The AFRICAN GROUP clarified that the provision deals with genetic resource utilization, rather than simply possession, without prior informed consent (PIC) and MAT, and called on delegates to avoid a debate on the definition of misappropriation.

The LIKE-MINDED ASIA PACIFIC proposed, and delegates agreed, to state that parties "provide for," rather than "aim to ensure" or "ensure," use in accordance with PIC and MAT.

The REPUBLIC OF KOREA suggested compromise language stating that: genetic resources should be utilized in accordance with PIC and MAT; and parties shall take appropriate measures to ensure that PIC has been obtained and that MAT have been established in accordance with national legislation. He noted that this would separate the concept of utilization from compliance with PIC and MAT. JAPAN added that compliance with MAT is addressed in article 14 and need not be addressed here. The AFRICAN GROUP suggested compromise text requiring parties to "provide that natural and legal persons who utilize genetic resources or associated TK within their jurisdiction have obtained the PIC of the country of origin and/or the ILCs involved, in accordance with the CBD, the protocol and national legislation, policies, measures or requirements." Recalling that they withdrew their proposal on misappropriation in good faith, the EU objected to the introduction of new proposals. After discussion, the AFRICAN GROUP and the REPUBLIC OF KOREA agreed to withdraw their proposals.

Regarding the requirement for genetic resources to be "accessed" with PIC, JAPAN, the EU and CANADA preferred the term "obtained." GRULAC explained that genetic resources are accessed; whereas PIC is obtained. The PHILIPPINES commented that the paragraph's focus is on compliance with PIC and MAT according to national legislation. The AFRICAN GROUP proposed that parties provide for measures to ensure that PIC has been obtained and MAT have been established when genetic resources are utilized within their jurisdiction. Noting that compliance with the protocol requires only that MAT have been established, JAPAN suggested, and delegates agreed, to delete reference to compliance with MAT. The EU proposed rewording the sentence to note that parties shall take measures to provide that when genetic resources are utilized in their jurisdiction, PIC has been obtained and MAT established.

GRULAC recommended requiring that genetic resources be accessed according to PIC as required by the country of origin. Instead, the EU proposed to refer to the domestic legislation of the party providing the genetic resource, and CANADA to the country in which the resources have been accessed. GRULAC and the CEE insisted on using reference to the country of origin, in order to ensure compliance with CBD Article 15 (Access to

Genetic Resources). CANADA raised concerns that compliance with policies and measures of all countries of origin would be impractical. Delegates agreed in principle to include reference to the country of origin, noting that the language remains to be elaborated.

Delegates then discussed whether to refer to PIC and MAT as required by the country of origin only, or to also state “in accordance with the Convention and the protocol.” The LIKE-MINDED ASIA PACIFIC and the AFRICAN GROUP argued that this would ensure respect of parties’ sovereign rights in cases where there is no domestic legislation. The EU said that absence of national legislation indicates that a party has not decided how to exercise its sovereign right in accordance with the Convention, noting that provisions of the Convention or the protocol do not apply directly to individuals. The LIKE-MINDED ASIA PACIFIC replied that absence of national ABS legislation does not imply free access. NORWAY supported keeping the reference and, supported by the AFRICAN GROUP and GRULAC, suggested referring to domestic ABS frameworks, to make the provision more inclusive. The EU suggested establishing an international procedure for countries that have not been able to regulate access domestically.

A small group was formed to discuss the issue. Following brief discussions, SOUTH AFRICA reported on limited progress in informal consultations. Later on however, the group presented language stating that each party shall take appropriate, effective and proportionate measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with PIC, and MAT have been established, as required by the domestic ABS regulatory requirements of the other party or, alternatively, the country of origin. References to derivatives and associated TK along with genetic resources remain bracketed.

Paragraph 2: Delegates accepted language on parties’ appropriate, effective and proportionate measures to address situations of non-compliance, as amended by New Zealand to specify that there can be legislative, administrative or policy measures. Discussion then focused on an EU proposal, that parties may refrain from taking such measures if the domestic ABS framework of the party providing the misappropriated genetic resources at the time of misappropriation was not in conformity with a list of criteria for parties’ measures on access set out in article 5.2 of the protocol. Upon delegates’ request for clarification, the EU explained that the proposal aims at ensuring a minimum of legal certainty. Requesting withdrawal of the EU proposal, GRULAC, the LMMC and the AFRICAN GROUP noted that in cases of misappropriation, a court or administrative authority would only need to check whether PIC and MAT have been obtained. The AFRICAN GROUP further highlighted that agreement on article 5.2 is still pending and INDIA noted that such language would bring great uncertainty to the whole process of compliance. NEW ZEALAND added that such language gives the wrong impression, since a fundamental objective of the protocol is to address misappropriation.

The EU highlighted the relationship between user country measures and corresponding decision making in provider countries, and the need to make provider countries’ obligations on users enforceable in user countries.

Paragraph 3: Delegates discussed whether to remove “as appropriate” from the text requiring parties to cooperate in cases of alleged violations of ABS law. The REPUBLIC OF KOREA preferred retention, while AUSTRALIA required time to consult.

The EU stressed the need for a clear obligation with regard to cases of alleged violation of national ABS law. The AFRICAN GROUP, supported by GRULAC, requested adding reference also to alleged violation of the CBD and the protocol.

SWITZERLAND proposed generally requiring parties to cooperate in cases of alleged violation of national ABS legislation, without reference to provider country or country of origin. JAPAN expressed willingness to accept reference to the country of origin in this specific context.

MONITORING (ARTICLE 13): Paragraph 1: The AFRICAN GROUP expressed preference for a requirement for parties’ measures on monitoring, tracking and reporting the utilization of genetic resources, accepting to add “in order to create transparency.” CANADA opposed reference to tracking and, with the EU, noted lack of clarity regarding reporting. The EU proposed requiring parties to “take measures, as appropriate, to monitor the utilization of genetic resources in order to create transparency.” GRULAC stressed that monitoring is not primarily related to transparency, thus suggesting adding “to support compliance measures under the protocol.” CANADA proposed, and delegates agreed, to delete the above references to purposes. JAPAN, supported by the LIKE-MINDED ASIA PACIFIC and CANADA, proposed instead adding “to support compliance measures under article 12.1,” and the AFRICAN GROUP “compliance with PIC and MAT.” GRULAC reserved the right to include reference to other articles related to compliance. The AFRICAN GROUP requested reference to derivatives and associated TK along with genetic resources. JAPAN proposed, and delegates agreed, to delete reference to the international certificate of compliance in this paragraph, since it constitutes evidence of compliance and is dealt with elsewhere. Delegates agreed to revisit the chapeau after addressing the following sub-paragraphs listing possible parties’ measures. Discussions continued into the night.

IN THE CORRIDORS

Tuesday’s late night discussions on institutional provisions triggered talks about the logistics of holding COP/MOP meetings in parallel or back-to-back with the CBD COP once the protocol is adopted, with some reckoning that future COPs could resemble climate change meetings. As most of Wednesday was spent on negotiations on a single article, even the most optimistic realized they might have got ahead of themselves talking about institutional arrangements before resolving a series of compliance-related issues. Still, while during the day many complained that negotiations seemed to circle around at a snail’s pace, late in the evening most celebrated a breakthrough on a requirement for user country measures to ensure that access is in accordance with domestic regulations on PIC and MAT.

With a lengthy list of politically controversial and legally challenging issues still pending, delegates were understandably reluctant to comment on the prospect of concluding negotiations this week, although most agreed that the ongoing serious negotiations on compliance prove that there is will and commitment to get as close as possible to meeting the 2010 deadline. Some even felt that once compliance is resolved, everything else would quickly fall into place, although others joked that it would take some serious magic to complete the protocol in the remaining forty-eight hours in Montreal.