

ABS 9 HIGHLIGHTS:
WEDNESDAY, 24 MARCH 2010

Contact group 1 on scope and finance, and contact group 2 on compliance met throughout the day and in the evening. A brief mid-day plenary reviewed progress and established a fifth contact group on the draft COP decision, which met at lunchtime.

CONTACT GROUP 1

Temporal and geographical application: Delegates agreed to work on the basis of CBD Article 4 (Jurisdictional Scope) and 22 (Relationship with Other International Conventions). The EU, AUSTRALIA, NEW ZEALAND and the REPUBLIC OF KOREA called for excluding areas beyond national jurisdiction and under the Antarctic Treaty system. AFRICA opposed, cautioning against creating loopholes in the protocol.

Regarding materials accessed before the coming into force of the CBD, AFRICA proposed benefit-sharing obligations for continuing uses, and benefit-sharing and PIC for new uses. The EU suggested adding language to the provision on benefit-sharing, stating that it applies to accessions after the protocol's entry into force.

Sectoral approaches: The EU suggested provisions on research, food security and agriculture, and pathogens in emergency situations.

Non-parties: GRULAC called for specific reference to non-party obligations, possibly along the lines of Biosafety Protocol Article 24 (Non-Parties), broad enough to accommodate third parties involved in ABS arrangements. AFRICA explained that parties to the protocol will have to enforce protocol obligations in their transactions with non-parties or private entities.

Financial mechanism/financial resources: AUSTRALIA, SWITZERLAND, NEW ZEALAND, the EU and NORWAY suggested that the Global Environment Facility should be the financial mechanism, since it is cost-effective and already provides ABS funding. ASIA-PACIFIC and LMMC preferred a separate mechanism, with LMMC suggesting using language from the ITPGR, including on the development of a funding strategy. GRULAC prioritized clarifying the source of financial means over elaborating the mechanism.

Relationship with other instruments and processes: AUSTRALIA proposed taking note of obligations under the ITPGR and the Antarctic Treaty, whereas GRULAC preferred not to reference specific instruments. NORWAY requested recognizing that ABS under the ITPGR fulfills ABS obligations

under the protocol. The EU proposed inserting language on existing instruments, specialized instruments and instruments developed in parallel to the protocol. JAPAN suggested using preambular language from the Biosafety Protocol. AFRICA objected to a stand-alone provision on relationship with other processes, noting the Antarctic Treaty does not cover commercial benefits from bioprospecting activities.

In the afternoon, delegates discussed draft text tabled by the contact group Co-Chairs. Many welcomed a non-derogation clause based on text contained in the Biosafety Protocol. GRULAC cautioned that language on an exception for cases of "serious threat or damage to biodiversity" could lead to conflicting interpretations. AUSTRALIA questioned the need for a paragraph noting that the non-derogation clause is not intended to subordinate the protocol to other international agreements.

Controversy focused on language giving precedence to specialized international ABS regimes over the protocol. IRAN and the EU stressed the need for flexibility to allow for development and application of more specialized regimes. AFRICA agreed, but cautioned that such a blanket subordination would erode CBD norms on national sovereignty, PIC and benefit-sharing.

All regions then supported drafting a simple and concise provision. ASIA-PACIFIC suggested: recognizing rights and obligations under other agreements, rather than listing existing agreements on ABS; and stating that future agreements should not run counter to protocol or Convention objectives. The EU agreed, but requested specifying that both future developments under the protocol and developments of specialized ABS regimes be safeguarded. AFRICA suggested adding that the protocol is a comprehensive international instrument on ABS and that future developments should be in conformity with the protocol and make specific reference to PIC and MAT.

In the evening, following informal consultations with AFRICA, the EU reported on a common understanding to: recognize the comprehensive nature of the protocol; not affect existing obligations of parties; and preserve flexibility to develop more specialized arrangements which do not run counter to the protocol. AFRICA underscored that the specialized agreements should be in conformity with the protocol's basic elements, including general compliance obligations. The Co-Chairs then proposed new text replacing their previously circulated draft, stating that: CBD Article 22 shall apply to the protocol; the protocol is the comprehensive international instrument for implementing the ABS provisions of the CBD; and the protocol does not prejudice development and implementation of

specialized instruments that are in harmony with it. Noting the need for further consideration, the EU, CHINA and GRULAC expressed concern with reference to “harmony,” which SWITZERLAND said should relate to the Convention rather than the protocol. Contact group discussions continued into the evening.

CONTACT GROUP 2

Compliance with national ABS legislation: The REPUBLIC OF KOREA, opposed by AFRICA, requested avoiding prescriptive language on compliance with national ABS legislation. CANADA and AUSTRALIA preferred an internationally agreed understanding of “misappropriation” leaving flexibility for parties to adopt measures to address it. NEW ZEALAND preferred references to “international cooperation” rather than onerous and unworkable obligations, whereas GRULAC stated the protocol should provide for implementation of national ABS legislation in other jurisdictions. ASIA-PACIFIC, supported by NORWAY, stressed the need for a clear obligation for countries to enforce providers’ ABS laws, accepting flexibility in its implementation.

AFRICA, NEW ZEALAND and others agreed to further discuss misappropriation. ASIA-PACIFIC stressed the need to set out criteria for the enforcement of national ABS laws of other countries. Instead, CANADA proposed to define misappropriation as acquiring genetic resources by failing to obtain PIC and MAT. AFRICA and the PHILIPPINES asked to also refer to community PIC. AFRICA further noted the need to take into account the situation of states without national ABS legislation.

Certificate: AFRICA, supported by GRULAC and the EU, reiterated the need for the protocol to establish an internationally recognized certificate of compliance, rather than postpone it after the protocol’s entry into force. ASIA-PACIFIC and GRULAC clarified that the certificate will be issued by national authorities; called attention to the criteria identified by the expert group on the certificate (January 2007, Lima, Peru); and noted the need for a transitional clause until the international recognition system is established.

The REPUBLIC OF KOREA, supported by many, proposed using the CHM for the international recognition of the certificate. AFRICA said that a PIC certificate should be granted within the provider country before negotiating MAT and seeking international recognition. NORWAY suggested the certificate should reflect the situation at the time of access, while subsequent uses should be dealt with under compliance with MAT.

AFRICA proposed clarifying the elements of the internationally recognized certificate in the protocol. The EU noted practical and legal difficulties in detailing the minimum content in the protocol. GRULAC explained that the certificate should be a short document, while confidential information remains in the contract. BRAZIL proposed including: contact details of the provider, user and competent national authority; description of the subject matter and unique identifier; location of access; conditions of transfers to third parties; and date of issue. CANADA and AUSTRALIA stressed the need to allow for discretion as to whether to issue a certificate.

Co-Chair Torres summarized agreement on the need for the protocol to establish an international certificate: issued by the national competent authority; internationally recognized through the CHM; voluntary and allowing for flexibility; and providing evidence of compliance with PIC in line with national legislation. He also noted agreement to explore the certificate’s minimum requirements.

Opposing a voluntary certificate, GRULAC and the PHILIPPINES stressed that provider countries may choose not to issue a certificate if they decide not to require PIC, but would need to recognize a certificate issued by another country. AFRICA added that an internationally recognized certificate of compliance with PIC and MAT should be the norm, unless provider countries decide not to require PIC. CUBA recommended that the certificate confirm compliance with legislation on genetic resources or on TK. The IIFB called for provision to verify compliance with indigenous PIC, stressing that certificates of compliance related to TK should cover compliance with community PIC, going beyond national law.

Disclosure requirements and checkpoints: NEW ZEALAND recommended that a list of measures to monitor genetic resource utilization should not be prescriptive, and suggested language to allow for flexibility. CANADA expressed concern over references to patent offices and product approval authorities. MALAYSIA noted that establishment of effective checkpoints should be mandatory but their choice can be left flexible. GRULAC said checkpoints are necessary to monitor genetic resource utilization and verify compliance, and suggested discussion on the specific examples included in the list. AFRICA stressed the need for checkpoints and mandatory disclosure requirements, with INDIA noting that the current protocol provision fails to stipulate consequences of non-disclosure.

In the evening, delegates discussed: the need for, and mandatory character of, checkpoints and disclosure requirements; different degrees of flexibility in monitoring; sanctions and incentives related to disclosure; a list of possible checkpoints; and additional monitoring measures. Delegates further debated whether issues related to intellectual property rights (IPRs) should be addressed under this process, with some developed countries saying that WIPO IGC is the appropriate body to deal with those issues. While many developing countries pointed to frustrations with the WIPO IGC process, noting that issues related to genetic resources, traditional knowledge, disclosure and IPRs should be dealt with under the protocol because it is in the final stages of negotiation. Delegates mandated the contact group Co-Chairs to prepare amended draft articles reflecting the discussions and to seek direction from plenary on how to proceed.

IN THE BREEZEWAYS

While delegates seemed to make progress on key issues throughout the day, particularly regarding compliance with national ABS legislation and certificates, divergences on other areas persisted and “common understanding” seemed to be still developing on a series of items. A humorous example was the intervention on “a common misunderstanding on misappropriation,” which some feared was “a true Freudian slip.” Others felt that work towards a concept of misappropriation linked to failure to obtain PIC and MAT might hold the key to coming to terms with compliance as a whole.

Refreshed by the evening breeze, delegates also started making headway on the future protocol’s relationship with other international agreements – a long-standing stumbling block particularly because of the relationship with the ITPGR. The secret to success in this case might be a broad reference to recognizing specialized agreements as long as they do not run counter to the protocol’s objectives. While some feared that this would allow other processes to “bite off” pieces of the ABS regime until nothing is left, others appreciated the flexibility to include future developments and thus ensure that the protocol is “future-proof.”