

**SUMMARY OF THE EIGHTH MEETING OF THE WORKING GROUP ON ACCESS AND BENEFIT-SHARING OF THE CONVENTION ON BIOLOGICAL DIVERSITY: 9-15 NOVEMBER 2009**

The eighth meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) was held from 9-15 November 2009, in Montreal, Canada. Approximately 480 participants attended the meeting, representing governments, UN agencies, intergovernmental and non-governmental organizations, indigenous and local community groups, academia and business.

The Working Group on ABS continued the negotiation of an international regime on ABS, in view of its mandate to finalize the international regime and to submit an instrument/instruments to effectively implement the provisions in Articles 15 and 8(j) of the Convention and its three objectives for consideration and adoption by the tenth meeting of the Conference of the Parties (COP 10) in October 2010. During the course of the meeting, ABS 8 delegates addressed operative text on the components of the regime, including traditional knowledge, capacity building, compliance, benefit-sharing and access. Delegates also discussed the legal nature of the regime. The meeting adopted the Montreal Annex, consisting of a single, consolidated draft on the international regime, and a second annex on proposals for operational texts left in abeyance for consideration at the next meeting of the Working Group. The Working Group also established an intersessional process leading up to ABS 9, including: a Friends of the Co-Chairs group to convene in late January 2010, and a Co-Chairs' inter-regional informal consultation to convene in March 2010. A series of regional and inter-regional consultations will also be held during the intersessional period before ABS 9, scheduled to be held from 22-28 March 2010, in Cartagena, Colombia.

**A BRIEF HISTORY OF THE CBD AND ABS**

The CBD, negotiated under the auspices of the UN Environment Programme (UNEP), was opened for signature on 5 June 1992, and entered into force on 29 December 1993. There are currently 192 parties to the Convention, which aims

to promote the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.

Access to genetic resources, including facilitating access, prior informed consent (PIC), mutually agreed terms (MAT) and benefit-sharing are addressed by CBD Article 15, with related articles referring to access to and transfer of technology (Article 16.3), and handling and distribution of benefits of biotechnology (Article 19).

The Convention's work on ABS was initiated at COP 4 (May 1998, Bratislava, Slovakia) when parties decided to establish a regionally-balanced expert panel on ABS, whose composition and agenda were discussed at an intersessional meeting on the Operations of the Convention (June 1999, Montreal, Canada). The expert panel held two meetings (October 1999, San José, Costa Rica; and March 2001, Montreal, Canada) and developed a set of recommendations, including on PIC, MAT, approaches for stakeholder involvement and options to address ABS within the CBD framework. COP 5 (May 2000, Nairobi, Kenya) established the Working Group on ABS to develop guidelines and other approaches on: PIC and MAT; participation of stakeholders; benefit-sharing mechanisms; and the preservation of traditional knowledge.

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**ABS 1:** At its first meeting (October 2001, Bonn, Germany), the Working Group on ABS developed the draft Bonn Guidelines on ABS and identified elements for a capacity-building action plan.

**COP 6:** At its sixth meeting (April 2002, The Hague, the Netherlands), the COP adopted the Bonn Guidelines on ABS and also considered the role of intellectual property rights (IPRs) in the implementation of ABS arrangements.

**WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT:** In the Johannesburg Plan of Implementation, the UN World Summit on Sustainable Development (September 2002, Johannesburg, South Africa) called for negotiation, within the CBD framework, of an international regime on fair and equitable benefit-sharing.

**ABS 2:** At its second meeting (December 2003, Montreal, Canada), the ABS Working Group debated the process, nature, scope, elements and modalities of an international regime on ABS, and also considered measures to ensure compliance with PIC and MAT, and capacity building.

**COP 7:** At its seventh meeting (February 2004, Kuala Lumpur, Malaysia), the COP adopted the Action Plan on capacity building for ABS, mandated the ABS Working Group to negotiate an international regime on ABS and agreed on the terms of reference for such a negotiation.

**ABS 3:** At its third meeting (February 2005, Bangkok, Thailand), the Working Group initiated negotiations on an international regime on ABS. It also addressed: additional approaches to complement the Bonn Guidelines, such as an international certificate of origin/source/legal provenance; measures to ensure compliance with PIC and MAT; and options for indicators for ABS.

**ABS 4:** At its fourth meeting (February 2006, Granada, Spain), the Working Group compiled a draft text for the negotiation of the international ABS regime, and also considered additional approaches to complement the Bonn Guidelines, including an international certificate of origin/source/legal provenance, and measures to support compliance with PIC and MAT.

**COP 8:** At its eighth meeting (March 2006, Curitiba, Brazil), the COP instructed the ABS Working Group to complete its work with regard to the international ABS regime at the earliest possible time before COP 10, under the co-chairmanship of Fernando Casas (Colombia) and Timothy Hodges (Canada). The COP also established a group of technical experts to explore options of an internationally recognized certificate of origin/source/legal provenance. Following a lengthy controversy over the status of the ABS 4 outcome, the COP decided to transmit it to ABS 5, along with the outcomes of the group of experts on the certificate. The COP also requested the Working Group on Article 8(j) to contribute to the mandate of the ABS Working Group on issues relevant to traditional knowledge.

**ABS 5:** At its fifth meeting (October 2007, Montreal, Canada), the ABS Working Group considered substantive elements of an international regime on ABS, including: access to genetic resources; fair and equitable sharing of benefits; compliance with prior informed consent and mutually agreed terms; an internationally recognized certificate of origin/source/legal provenance; traditional knowledge and genetic resources

in the context of ABS; and capacity building. Delegates also discussed two informal documents tabled by the Co-Chairs, the Co-Chairs' notes on proposals made at the meeting and their reflections on progress made, and agreed they would be circulated to parties as information documents.

**ABS 6:** At its sixth meeting (January 2008, Geneva, Switzerland), the ABS Working Group focused on the main components of the international regime, including fair and equitable sharing of benefits, access to genetic resources, compliance, traditional knowledge and genetic resources, and capacity building. The Working Group made progress in producing a short and concise working document on the international regime, consisting of sections on the main components and lists of items for further elaboration in case of agreement in principle ("bricks"), or for further consideration, in case of disagreement or need for further clarification ("bullets").

**COP 9:** At its ninth meeting (May 2008, Bonn, Germany), the COP adopted a roadmap for the negotiation of the international regime, ensuring that the ABS Working Group will meet three times before the 2010 deadline for completion of negotiations, and establishing three expert groups on: compliance; concepts, terms, working definitions and sectoral approaches; and traditional knowledge associated with genetic resources. It instructed the ABS Working Group to finalize the international regime and to submit an instrument/instruments for consideration and adoption by COP 10, and transmitted to ABS 7 the working document produced at ABS 6 as amended by the COP, as the basis for further negotiation.

**EXPERT GROUP ON CONCEPTS, TERMS, WORKING DEFINITIONS AND SECTORAL APPROACHES:** This group (2-5 December 2008, Windhoek, Namibia) addressed: the different ways of understanding biological resources, genetic resources, derivatives and products and the implications of each understanding; different forms of utilization of genetic resources in relation to sectoral and sub-sectoral activities; sector-specific characteristics of ABS arrangements; and the range of options and approaches for taking these different characteristics into account that may bring coherence to ABS-related practices in different sectors.

**EXPERT GROUP ON COMPLIANCE:** This group (27-30 January 2009, Tokyo, Japan) considered measures to: facilitate access to justice by foreign plaintiffs; support recognition and enforcement of judgments across jurisdictions; and provide remedies and sanctions to ensure compliance with national ABS legislation. The group also addressed: voluntary measures to enhance compliance by users of foreign genetic resources; whether an internationally agreed definition of misappropriation and misuse could support compliance; compliance measures that take account of customary laws; and compliance measures for research with non-commercial intent.

**ABS 7:** At its seventh session (2-8 April 2009, Paris, France), the Working Group focused on operational text on the objective, scope, compliance, fair and equitable benefit-sharing, and access. The meeting encountered several procedural obstacles, most of which related to the structure of the negotiating document and the distinction between "bricks" and "bullets." Two days before the end of the meeting the Working Group agreed to abandon the bricks and bullets concept and work directly on textual proposals

under the existing structure. With regard to substance, the most controversial debate concerned whether to include viruses and pathogens in the scope of the regime.

**EXPERT GROUP ON TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES:** The group (16-19 June 2009, Hyderabad, India) addressed legal and technical issues concerning: the relationship between access to genetic resources and associated traditional knowledge; customary laws of indigenous and local communities regulating access to genetic resources and associated traditional knowledge; and measures to ensure compliance with PIC and MAT.

### ABS 8 REPORT

ABS Working Group Co-Chair Fernando Casas (Colombia) opened ABS 8 on Monday, 9 November 2009, and emphasized that the success of the meeting depended on producing timely, high quality results in the form of a comprehensive text. Working Group Co-Chair Tim Hodges (Canada) underscored that this is the most important meeting in the history of the Working Group, and that results must be sufficient to allow for finalization of the draft international regime at ABS 9.

Jochen Flasbarth, on behalf of the German Presidency of the Conference of the Parties (COP), urged parties not to fail in their mandate to finalize a regime by 2010. CBD Executive Secretary Ahmed Djoghlaif reminded delegates that progress is essential given the few negotiating days remaining before COP 10.

Bakary Kante, on behalf of UNEP Executive Director Achim Steiner, emphasized UNEP's commitment to ABS and the CBD, stating that UNEP will invest US\$5 million in biodiversity activities over the next biennium. Co-Chair Hodges expressed appreciation to UNEP for supporting a series of regional consultations to follow ABS 8.

**ORGANIZATIONAL MATTERS:** Working Group Co-Chair Hodges reminded delegates that the COP 9 Bureau serves as the meeting Bureau and nominated Somaly Chan (Cambodia) as rapporteur. Delegates then adopted the meeting's agenda and organization of work (UNEP/CBD/WG-ABS/8/1 and Add.1).

Working Group Co-Chair Casas drew attention to the meeting's mandate, as outlined in COP Decision IX/12, and workflow, in accordance with the three-step approach agreed upon at ABS 7: compilation of proposed operational text; review of the compilation for accuracy; and negotiation in order to reach agreement. He stressed that all new proposals need to be presented in plenary, and no new proposals will be accepted during the negotiation stage, except compromise text. Several parties and regional groups expressed their commitment to the process and their support for the proposed workflow.

This report outlines discussions and summarizes the outcome of negotiations on nature, traditional knowledge, capacity building, compliance, benefit-sharing and access.

### INTERNATIONAL ABS REGIME: NEGOTIATION OF OPERATIONAL TEXT

**NATURE:** In Monday's plenary, Working Group Co-Chair Hodges called for short statements on the legal nature of the regime, noting that all interventions will be included in the

meeting report, along with wording drafted by the Co-Chairs on the basis of informal consultations, to reflect common understanding.

The African Group, Latin America and the Caribbean Group, and the Like-Minded Megadiverse Countries (LMMC) supported a single legally-binding instrument, containing, *inter alia*, a set of principles, norms, rules, and compliance and enforcement measures. Norway said the regime should be composed of, but not limited to, a single legally-binding agreement, namely a protocol, which should build upon and further develop the Bonn Guidelines. Thailand said the regime should be composed of one or more legally-binding and/or non-binding instruments within a set of principles, norms, rules and procedures.

Japan stated they do not rule out specific legally-binding provisions, but cannot unconditionally accept a legally-binding regime. New Zealand welcomed discussions on which parts of the regime should be binding or not and on how any legally-binding elements could be implemented internationally and domestically. Switzerland called for focus on a legally-binding instrument, containing a set of principles, norms, rules and procedures, legally-binding and/or non-binding, implemented in harmony with other agreements and flexible to allow for adoption of more specialized agreements in harmony with the CBD. Central and Eastern Europe (CEE) preferred one legally-binding instrument or a combination of binding and non-binding instruments.

Sweden, for the European Union (EU), stated that a regime that includes international access standards linked to compliance support measures could be constituted of a mix of legally-binding and non-binding measures, and that discussion should proceed on which components should be binding, non-binding, or a mix of the two. Canada noted the need to reach a decision on the content of, and on how to implement, each component before deciding on nature, adding that the regime should include existing voluntary instruments and provide flexibility for implementing its components, legally-binding or not.

The International Indigenous Forum on Biodiversity (IIFB) called for legally-binding provisions to protect traditional knowledge and genetic resources of indigenous peoples in accordance with international agreements affirming indigenous peoples' rights. Stressing that voluntary agreements have failed to protect and enforce the rights of provider countries and to establish compliance mechanisms in user countries, a civil society representative stressed the need for a single legally-binding instrument as a protocol to the CBD, and urged parties that do not envisage ratifying such a protocol not to block progress.

During the closing plenary, Working Group Co-Chair Hodges drew parties' attention to the section of the meeting report reflecting parties' interventions on nature. A number of delegates, including New Zealand, Japan, Jordan, Mexico and the Like-Minded Asia-Pacific Countries, requested accurate reflection of their positions.

Co-Chair Hodges said the Co-Chairs took careful note of parties' interventions and, following discussions with all regions and stakeholders, are of the view that the Working Group shares the preponderant understanding that the international regime will contain at least one or more legally-binding provisions and

will therefore aim to finalize a draft protocol under the CBD. He noted that this position by the Co-Chairs, to be included in the meeting's report, in no way alters COP Decision IX/12 and positions expressed by parties, and is without prejudice to the final decision to be taken by COP 10.

**Final Outcome:** The report of the meeting (UNEP/CBD/WG-ABS/8/L.1, Section 3.1) contains a record of all country and regional group interventions on nature.

**TRADITIONAL KNOWLEDGE:** The component on traditional knowledge was considered in plenary on Monday and in a contact group from Tuesday to Thursday, and again on Saturday. Deliberations focused on proposals submitted intersessionally (UNEP/CBD/WG-ABS/8/3 and Add.1-2) and the views submitted by the Article 8(j) Working Group (UNEP/CBD/WG-ABS/8/7). During the closing plenary, the component was approved as part of the Montreal Annex, with minor amendments.

In plenary, the African Group and the LMMC pointed to the importance of the views provided by the sixth meeting of the Article 8(j) Working Group (UNEP/CBD/WG-ABS/8/7). The Philippines and Thailand stressed the inseparability of traditional knowledge and genetic resources. Norway and the LMMC stressed that provisions related to traditional knowledge should be integrated into the regime as a cross-cutting issue, including in the components on access and on benefit-sharing, with the IIFB adding that traditional knowledge should be included in any definition of misappropriation. The LMMC proposed that parties ensure that respect for the rights of indigenous and local communities form the basis for PIC; the internationally recognized certificate of compliance requires evidence that PIC and MAT are fulfilled when traditional knowledge is accessed; and that the regime cover traditional knowledge associated with genetic resources accessed *ex situ*.

Canada said the international regime should be limited to traditional knowledge associated with genetic resources and not in the public domain. The EU stressed that those seeking access to traditional knowledge would benefit from a system where indigenous and local communities identify the authority to decide the terms for ABS. The African Group stressed that World Intellectual Property Organization (WIPO) negotiations on international instrument(s) to ensure the effective protection of genetic resources, traditional knowledge and traditional cultural expressions are without prejudice to the work pursued in other fora, especially the work of the ABS Working Group. The EU and Norway welcomed the WIPO decision to undertake such negotiations. The CEE stated that national legislation should incorporate customary laws, and the international regime should protect indigenous and local community rights. A civil society representative supported inclusion of traditional knowledge in all relevant provisions of the regime, and the establishment of a legal support body, such as an ombudsperson, to address knowledge asymmetries. The IIFB said traditional knowledge should be treated as a cross-cutting issue, noting however that an additional section on indigenous and local communities could resolve duplication and simplify negotiations.

The contact group, co-chaired by Tone Solhaug (Norway) and Damaso Luna (Mexico) considered a non-paper collating submitted text, and a number of revisions of that paper. First,

country submissions were consolidated and attributions removed, then attempts were made to integrate the submissions and reduce text, and this text was bracketed and distinctions between preambular and operative text introduced. The contact group then produced document UNEP/CBD/WG-ABS/8/CRP.2, which was checked for accuracy and further bracketed, and finally included as a main component in the Montreal Annex. Discussions in the contact group focused on the following issues.

Regarding benefit-sharing with traditional knowledge holders, delegates built on a comprehensive African proposal and integrated: a Mexican proposal on stipulating terms for benefit-sharing in national legislation and in MAT; and an IIFB proposal that the international regime shall uphold the rights of indigenous peoples and local communities to benefit-sharing when their genetic resources and/or associated traditional knowledge are accessed. The latter proposal was made into a preambular paragraph and bracketed by Canada. Delegates worked on an operative paragraph that parties take legislative, administrative or policy measures to ensure sharing with indigenous and local communities of benefits arising from commercial utilization. They further added references that: these measures include PIC and MAT; and that the development or use of genetic resources is integrally linked to the traditional knowledge of specific indigenous and local communities. Delegates included a clarification stating that indigenous peoples and local communities also have the right to benefit-sharing in cases where states are the owners of genetic resources, under national and international law. Canada requested retaining an alternative EU proposal, which the African Group wanted to delete, on parties taking measures to encourage holders of traditional knowledge associated with genetic resources to provide in their MAT for fair and equitable sharing of benefits.

The Philippines requested to ensure respect for the rights of indigenous and local communities to their resources and the duty of states under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) to protect communities' exercise of those rights. It was retained as preambular language. Delegates discussed identification of the individual or authority to grant access in accordance with community-level procedures, noting that when indigenous and local communities have well-defined structures and established indigenous authorities, national regulations can directly rely on these. Malaysia said communities shall determine appropriate authorities to serve as interlocutors and the LMMC requested adequate information about the rights of indigenous and local communities be provided. Delegates retained provisions on measures to ensure that access to traditional knowledge takes place in accordance with community-level procedures, and merged text on parties taking necessary measures to recognize traditional forms of organization, and to respect indigenous peoples' and local communities' customary laws, norms and protocols.

On measures to address transboundary traditional knowledge, delegates retained a reference to address benefit-sharing through bilateral or multilateral agreements, and an operative paragraph on development of minimum standards for MAT. Delegates added an operative paragraph on the need to address traditional knowledge accessed *ex situ*.

The EU considered that text referring to traditional knowledge accessed prior to entry into force of the CBD related to discussions on the scope of the regime, but agreed to retain it as an operative paragraph under the traditional knowledge component.

Delegates deleted the headings within the text. Canada requested bracketing all references to PIC and to “genetic resources and/or” associated traditional knowledge throughout the text. Brazil added mention of derivatives alongside mention of genetic resources, and of a protocol alongside references to the international regime throughout the text. All references remained bracketed awaiting agreement on scope and nature. Brazil further asked to include reference to the country of origin as an alternative to “provider country,” which Canada requested retaining. Australia bracketed all references to licenses.

New Zealand raised the broader question of whether traditional knowledge would be a separate element in the regime or addressed under other elements. Brazil noted that the two approaches are not mutually exclusive.

The LMMC asked to replace any reference to knowledge holders with reference to indigenous and local communities, and agreed with New Zealand to include the compromise language from the Article 8(j) Working Group that where consent or authority of indigenous and local communities is required with respect to traditional knowledge, it is the right of indigenous and local communities, according to their customary laws, to identify relevant knowledge holders. As a result, a footnote was inserted at every mention of traditional knowledge holders in the text, which states that the language will be reviewed in light of agreement reached during the sixth meeting of the Working Group on Article 8(j).

In the closing plenary, New Zealand announced that in order to reduce duplication and not repeat the footnote at every mention of traditional knowledge holders, the clarification should be included in the report of the meeting. Delegates adopted the traditional knowledge component within the Montreal Annex with this amendment.

**Final Outcome:** The traditional knowledge component of the Montreal Annex (UNEP/CBD/WG-ABS/8/L.2) is heavily bracketed, including brackets around entire paragraphs and items within each paragraph. The traditional knowledge component contains eight preambular paragraphs, including on: the international regime upholding the rights of indigenous peoples and local communities to benefit-sharing; the inseparability of traditional knowledge and genetic resources; respect for indigenous and local community rights, taking into account the duties of states under UNDRIP; and recognition of traditional forms of organization of indigenous and local communities.

In relation to benefit-sharing, two options remain for an operative paragraph that parties take measure to ensure benefit-sharing with traditional knowledge holders: a shorter one to encourage traditional knowledge holders and those seeking access to provide in their MAT for benefit-sharing; and a more detailed one suggesting legislative, administrative or policy measures to ensure benefit-sharing for utilization of genetic resources is integrally linked to traditional knowledge, and of traditional knowledge associated with genetic resources. Additional paragraphs address: stipulating conditions for benefit-

sharing in MAT; traditional knowledge accessed prior to entry into force of the CBD; measures to address transboundary knowledge and minimum standards for MAT; traditional knowledge that is accessed *ex situ*; and benefit-sharing arrangements based on recognition of the rights of indigenous and local communities to PIC/approval and involvement.

The component on traditional knowledge further contains operative provisions relating to: measures to ensure that access to traditional knowledge takes place in accordance with community-level procedures; identification of best practices; incorporation of traditional knowledge in model clauses for material transfer agreements; recognition and protection of collective rights of indigenous and local communities to their traditional knowledge; a requirement for PIC/approval and involvement of indigenous and local communities before access is granted to their genetic resources and traditional knowledge; no restriction of exchange between indigenous and local communities; mechanisms to ensure that users meet their obligations regarding ABS; a requirement that access be based on MAT and developed at the community level; and an internationally recognized certificate of compliance to establish that traditional knowledge has been duly acquired.

**CAPACITY BUILDING:** Capacity building was first considered in plenary on Monday followed by contact group discussions from Tuesday to Friday. Deliberations focused on proposals submitted intersessionally (UNEP/CBD/WG-ABS/8/5 and Add.1). The closing plenary adopted the component on capacity building, as contained in the Montreal Annex.

In plenary, the African Group explained that its submission provided for capacity-building requirements for governments, indigenous and local communities, academia and research institutions, and the private sector. The EU called on parties, international organizations, the private sector and NGOs to engage in capacity-building measures responding to needs, including of indigenous and local communities. The LMMC underscored that capacity building cannot replace compliance.

Thailand stated that the CBD Action Plan on Capacity Building for ABS should be the basis for capacity building under the international regime. Costa Rica stressed, *inter alia*: development of institutional capacity, and of information and communication technologies; indicators for evaluating parties' capacity; funding mechanisms; and South-South cooperation. The Philippines drew attention to recommendations of the Association of Southeast Asian Nations (ASEAN) Conference on Biodiversity, on: improving digitalization and tracking to combat biopiracy; capacity building to understand the economics of ecosystem services; and financing the operation of the international regime.

The UN Food and Agriculture Organization (FAO) noted that its Commission on Genetic Resources for Food and Agriculture, at its twelfth session, agreed on a resolution on ABS for genetic resources for food and agriculture, which stresses: willingness to cooperate with the CBD and its ABS Working Group; sectoral approaches; and options to accommodate existing and forthcoming ABS arrangements for genetic resources for food and agriculture. The International Treaty on Plant Genetic Resources for Food and Agriculture described progress

under its Multilateral System of ABS. Civil society called for participatory capacity building that empowers indigenous and local communities to determine their own priorities.

On Tuesday, the contact group, co-chaired by José Luis Sutera (Argentina) and Andreas Drews (Germany), discussed a non-paper compiling submissions and agreed to work on the basis of the LMMC proposal. On text regarding cooperation among parties, the EU proposed adding references to facilitating private sector involvement. The Cook Islands, Canada and Mexico added references to small island developing states, countries with economies in transition and centers of origin, respectively. On a paragraph stressing financial needs and access to and transfer of technology, the African Group stressed that capacity building should be in accordance with nationally identified needs.

Following a proposal by the EU, delegates decided to restructure and consolidate the text, to provide for chapeau language and a list of specific areas for capacity building. Brazil highlighted differing proposals for the chapeau and delegates agreed to retain alternative language that parties shall cooperate through capacity-building programmes for, or that measures may focus on, a list of issue areas. With regard to such a list, delegates worked on the basis of the EU submission. Mexico inserted an element on capacity building for monitoring and enforcing compliance. Colombia requested retaining language on: training for national competent authorities and patent examiners; and support for the required institutional developments in each country. The EU bracketed elements on training patent examiners and supporting institutional developments.

On funding for capacity-building programmes, the IIFB, supported by Norway, proposed inviting governments and the Global Environment Facility to provide financial resources to indigenous peoples and local communities to implement their own capacity-building strategies and mechanisms. Canada proposed that parties identify national needs and priorities, including those of indigenous and local communities, for ABS capacity building. The IIFB, supported by Haiti, proposed utilization of methodologies for valuation, developing human and institutional resources of indigenous peoples and local communities to undertake research, and supporting capacity to undertake monitoring and compliance measures.

Delegates discussed whether to refer to a protocol, an international regime or both, eventually retaining both references in brackets. The EU and Japan proposed deleting reference to new and additional funding for capacity building. On technology transfer and cooperation, Brazil preferred deleting a specific reference to CBD Article 16 (Technology Transfer). Canada proposed stating “in accordance with the relevant provisions of the Convention,” with the African Group opposing and adding specific references to several other CBD provisions.

On Wednesday, the contact group discussed a conference room paper (UNEP/CBD/WG-ABS/CRP.1) compiled following Tuesday’s discussions, and agreed that a revised CRP would be prepared to include the headings of the annex to Decision IX/12 and reworded African text on lists of capacity-building measures for governments, academia and the private sector.

The contact group discussed the revised CRP (UNEP/CBD/WG-ABS/CRP.1/Rev.1) on Thursday. The EU requested bracketing the entire provision on capacity-building measures for governments, academia and the private sector. On measures for governments, the EU requested bracketing a clause on conserving and sustainably using genetic resources and associated traditional knowledge. Norway and Japan requested bracketing a clause referring to the capacity to protect different forms of intellectual property rights (IPRs) relating to genetic resources. On a clause on promoting the sustainable use of genetic resources and traditional knowledge for socioeconomic development, the Philippines proposed adding that this should be carried out with the participation and involvement of indigenous and local communities. Delegates agreed to a provision on capacity to ensure communication, education and public awareness regarding ABS.

Regarding academia, delegates discussed a clause on capacity to use intellectual property systems and community-public-private partnerships in the commercialization of research results. The Philippines inserted text on alternatives to intellectual property, including open source licensing. The IIFB added a reference to customary law and practices to a provision on capacity to increase collaboration and understanding between researchers and communities.

During a further reading of the CRP, Brazil proposed language that parties undertake special capacity-building measures for technology transfer and cooperation. Delegates left in brackets paragraphs on training of patent examiners, programmes to support institutional developments for implementation, and monitoring and enforcing compliance.

Regarding a list of capacity-building measures for indigenous and local communities, the EU noted that monitoring and enforcing compliance with the international regime rests with governments, and, with Japan, requested bracketing the entire paragraph. Delegates agreed with an EU proposal to have a stand-alone paragraph on national capacity self-assessments. Canada proposed to add elements from a paragraph on developing countries identifying national needs as the basis for capacity-building measures. The EU, opposed by Brazil and Switzerland, proposed that capacity self-assessments be conducted through established mechanisms. The EU suggested a stand-alone paragraph stating that “parties should take measures to strengthen, where necessary, the capacity of ABS stakeholders” and, with Japan, opposed establishment of a fund/financial mechanism to support capacity-building programmes.

In the closing plenary, contact group Co-Chair Sutera noted that the contact group had decided to delete the headings. The text on capacity was adopted as part of the Montreal Annex with minor editorial amendments.

**Final Outcome:** The section on capacity in the Montreal Annex (UNEP/CBD/WG-ABS/8/L.2) is heavily bracketed, including brackets around entire paragraphs and items within each paragraph. The document addresses the following issues:

- Cooperation in the development and/or strengthening of human resources and institutional capacities in ABS taking into account the needs identified at the national level by developing countries for financial resources and access to and transfer of technology and know-how;

- National capacity-building self assessments as the basis for capacity development/capacity-building measures;
- Capacity-building programmes for, *inter alia*: development and implementation of ABS laws and other relevant legislation; development and training of national competent authorities; training of patent examiners; supporting institutional developments in each county; training in negotiations including contractual arrangements; ABS compliance management; and monitoring and enforcing compliance;
- Capacity-building measures for governments, include: conserving and sustainably using genetic resources and associated traditional knowledge; identifying, asserting and protecting IPRs relating to genetic resources; and ensuring communication, education and public awareness regarding ABS;
- Capacity requirements of academia and research institutions, including: capacity for curriculum development and institutional capacity; capacity to use intellectual property systems; and increased collaboration and understanding between researchers and indigenous and local communities;
- Capacity-building requirements of the private sector including: capacity for bioprospecting and to ensure best practice ABS processes and agreements; capacity to identify and utilize business opportunities; and differentiated capacity development for different kinds of business relating to ABS;
- Measures to be taken by parties to strengthen capacity of ABS stakeholders, including to participate in the development and to make use of model clauses and inventories/catalogues of typical utilization of genetic resources;
- Special capacity-building measures for indigenous and local communities to be undertaken on the basis of the needs identified with their full and effective participation, particularly of indigenous women, including capacity to: conserve, sustainably use and promote their traditional knowledge associated with genetic resources; identify and assert their rights over such knowledge; develop, implement and/or enforce community protocols; document traditional knowledge; ensure protection of databases of traditional knowledge; increase understanding of the economics of biodiversity and ecosystem services; develop human resources and institutional capacity to undertake biodiversity-related research and technology transfer; and monitor and enforce compliance with the protocol/international regime, community procedures, customary laws, and community protocols;
- Establishing a fund/financial mechanism to support capacity-building programmes; and
- Undertaking appropriate measures with regard to donors and international funding mechanisms to ensure the provision of financial resources for capacity-building programmes, including resources to indigenous and local communities to implement their own capacity-building strategies and mechanisms.

**COMPLIANCE:** Deliberations on compliance were held in plenary and in a contact group, and focused on the examination of additional text proposals submitted since ABS 7 (UNEP/CBD/WG-ABS/7/6 and Add.1-4) in order to decide whether they add value to the text of the Paris Annex (UNEP/CBD/WG-ABS/7/8)

and should be retained. The contact group met from Wednesday to Saturday, co-chaired by René Lefeber (the Netherlands) and Ricardo Torres (Colombia).

In plenary, the EU explained its proposal containing provisions on: an international understanding of misappropriation; obligations on parties to take action in case of misappropriation; and effective sanctions. Switzerland said that a definition of misappropriation, international access standards, disclosure requirements and exchange of information should be core elements of the compliance component of the international regime. The IIFB stressed that states should respect customary laws, norms and protocols on traditional knowledge and associated genetic resources, and proposed a broad definition of misappropriation. The LMMC introduced a number of new proposals, including on: PIC and MAT; providing legal assistance to parties for enforcement; and establishing regulatory frameworks to protect rights over genetic resources, their derivatives and associated traditional knowledge. Malaysia, for the Like-Minded Asia-Pacific Countries, aligned with the LMMC, the African Group and the Group of Latin American and Caribbean Countries (GRULAC) on compliance issues. A civil society representative stressed that a compliance mechanism should cover both misuse and misappropriation, deal with non-parties, and include a certificate and checkpoints as part of a monitoring system.

On Wednesday, plenary established a contact group with the task of integrating the intersessional submissions on compliance into the Paris Annex. The EU suggested that the party who had submitted the text indicate where it should be placed. Recalling the three-stage approach agreed to in Paris, Brazil reiterated that the Paris Annex had benefited from two stages of negotiation already and, at this final stage, the group was to decide whether and where new operational text should be included. He requested a ruling that text that did not fit in the framework of the Paris Annex not be included. Following informal consultations, Working Group Co-Chair Hodges stated that the Paris Annex provides the structure, its integrity must be maintained and any new proposals should build upon it. As for procedure, he suggested that parties: identify which submissions serve as the basis for further work, including bracketing text or introducing new elements into it; streamline text and remove overlap with existing text in the Paris Annex; and finally, build an updated version of the Paris Annex to form the basis of further negotiations.

The contact group conducted a first reading of additional proposals on compliance included in a non-paper, to decide which additional proposals should be retained as the basis for further work. Colombia withdrew its submissions in favor of the LMMC proposals. A submission by the Economic and Social Research Council Centre for Economic and Social Aspects of Genomics (CESAGEN) with regard to awareness-raising activities was sponsored by the African Group and retained.

On sectoral menus of model clauses for material transfer agreements, delegates retained a CESAGEN proposal sponsored by the African Group. On an element requiring research funding agencies to oblige users receiving research funds to comply with specific ABS requirements, delegates debated at length whether an additional proposal submitted by the EU should be retained.

Delegates eventually agreed to take note of the elements of the EU proposal that should later be added to the text in the Paris Annex.

The group retained a CESAGEN proposal on a unilateral declaration by users, sponsored by the African Group. With regard to mechanisms for information exchange, delegates discussed, and eventually retained, an LMMC proposal regarding additional items on the minimum information to be contained in a certificate of compliance, including: a unique identifier assigned by the competent national authorities; confirmation of compliance with domestic access requirements, including PIC and MAT; evidence that PIC and MAT have been fulfilled when traditional knowledge associated with genetic resources has been accessed; and excluding confidential information. Canada requested retaining a proposal by the Biotechnology Industry Organization (BIO) and the Pharmaceutical Research and Manufacturers of America (PhRMA) stating that parties shall ensure that confidential information is fully protected according to national laws consistent with international agreements. The African Group supported a CESAGEN proposal on facilitating exchange of experiences in the use of ABS licenses, and making available through the Clearing-House Mechanism customary laws, community protocols and ABS licenses.

The EU requested retaining its proposal on an international understanding of misappropriation/misuse as the basis for negotiations. Recalling a ruling not to address definitions at this stage, the LMMC proposed “parking” submitted proposals for consideration in plenary, including an IIFB proposal sponsored by the African Group. A lengthy debate ensued, with the EU, Japan, Australia, Canada, and Norway noting that the Paris Annex includes a heading on “international understanding of misappropriation/misuse” so the contact group had the mandate to address the element. The contact group eventually decided to request guidance from plenary on how to proceed on controversial issues, including: definitions, in particular text on the international understanding of misappropriation/misuse; identical text submitted under different components, and in some cases already rephrased by another contact group; and a Mexican proposal to establish a compliance committee, considered to be an institutional provision of relevance to the international regime as a whole.

In Thursday’s plenary, Working Group Co-Chair Hodges noted the Working Group Co-Chairs would engage in informal consultations on how to deal with definitions. Following such consultations, he proposed appending a footnote to the element on an international understanding of misappropriation/misuse to allow for further submissions to be made on the definition of misappropriation, including on the need for such a definition. Two options were retained in the text with regard to an international understanding of misappropriation: the EU proposal, and the Swiss and IIFB proposals, with the agreed footnotes. Hodges also suggested that wherever delegates encounter definition-related operative text under other components, they append a footnote stating that: “the discussion on this paragraph was left in abeyance both as regards content and placement and will occur at the next meeting of the Working Group.” Plenary accepted the proposals.

The contact group then held another reading of retained additional proposals on compliance, to confirm their correct placement within the Paris Annex. On internationally recognized certificates issued by a domestic competent authority, Brazil proposed introducing preambular text from their submission on recognizing the importance of legal certainty. On disclosure requirements, Brazil introduced preambular text recognizing that intellectual property rights play an important role in benefit-sharing and should not run counter to the CBD objectives. On development of tools to enforce compliance, Brazil introduced preambular paragraphs on ensuring compliance with ABS national legislation, regulations and requirements.

On Saturday, the contact group held a third reading of new text integrated in the Paris Annex, and delegates proceeded with bracketing language and attempting to streamline the text. Delegates discussed a list of awareness-raising activities under a section on tools to encourage compliance. Canada requested qualifying references to traditional knowledge as traditional knowledge “associated with genetic resources.” The EU requested bracketing a clause on an online system of ABS licenses, and Australia bracketed references to ABS licenses throughout the text. The African Group proposed language to merge and streamline text on awareness-raising on using ABS licenses among indigenous and local communities, the non-commercial research sector, research groups aiming at commercialization, and research and development funding agencies. He further proposed streamlining text to provide for: awareness-raising on the possibility of product labeling for certifying ABS compliance; and establishment of an online register of collaborative research networks and scientific publications using ABS licenses.

On an international understanding of misappropriation/misuse, parties discussed paragraphs not related to definitions, which Canada requested bracketing. Regarding a provision that each party take measures to prevent misappropriation on its territory, Norway, opposed by the EU, requested reference to associated traditional knowledge alongside genetic resources. The African Group specified that misappropriation should refer to violation of the international regime and/or laws and regulations of the country of origin. Brazil, opposed by Australia, proposed that each party shall apply “legal, administrative and policy measures, including disclosure requirements,” to prevent misappropriation. The IIFB, sponsored by the African Group and Malaysia, requested further reference to customary laws, community level procedures and community protocols.

Regarding a provision specifying in which cases and to whom measures regarding misappropriation shall apply, Switzerland added reference to natural or legal persons with a permanent place of business within a party’s jurisdiction. Norway asked to specify that misappropriation apply to instances occurring in the provider country, and Brazil requested inclusion of alternative wording throughout the text referring to the country of origin or country that has acquired genetic resources in accordance with the Convention. Norway proposed to delete a sub-paragraph on persons who should have known that the genetic resources had been misappropriated, but the EU asked to retain it.

Regarding information to be included in a compliance certificate, New Zealand bracketed reference to whether there is associated traditional knowledge and it has been accessed with the free PIC of indigenous and local communities. Canada added reference to “approval and involvement” of indigenous and local communities as an alternative to PIC. Brazil proposed bracketing a clause on minimum information to be included in the certificate for tracking access to traditional knowledge.

On measures to ensure access to justice with the aim of enforcing ABS arrangements, the EU bracketed a paragraph on establishing appropriate national regulatory frameworks. The EU further bracketed two paragraphs on access to justice in the jurisdiction of the users who allegedly breached ABS legislation. New Zealand bracketed text on parties’ measures to facilitate recognition and enforcement of judgments. With regard to measures to ensure compliance with customary law and local systems of protection, Australia bracketed language on: disclosure of evidence of PIC in applications for intellectual property rights; and invalidation of IPRs in case of lack of PIC.

The closing plenary adopted the section on compliance of the Montreal Annex with one correction suggested by the African Group, that activities on the establishment of an online system of display of ABS licenses and development of publicly visible symbols for resources and traditional knowledge covered under such licenses be listed in a sub-section on tracking and reporting systems.

**Final Outcome:** The compliance component of the Montreal Annex (UNEP/CBD/WG-ABS/8/L.2) includes sections on development of tools to encourage, monitor, and enforce compliance, and measures to ensure compliance with customary law and local systems of protection. The text remains heavily bracketed, including brackets around entire paragraphs and items within each paragraph.

In the section on development of tools to encourage compliance, sub-sections include:

- Awareness-raising activities, with new text on: awareness-raising on the development and use of ABS licenses among indigenous and local communities, the non-commercial sector, research groups aiming at commercialization and research and development funding agencies; awareness-raising about the possibility of product labeling for certifying ABS compliance; and establishment of an online register of collaborative research networks and scientific publications using ABS licenses;
- An international understanding of misappropriation/misuse, with two new options footnoted to state that further submissions may be made relating to a definition of misappropriation, including on the need for such a definition. The first option includes: general text on the meaning of misappropriation, that misappropriating genetic resources means to acquire either intentionally or negligently, genetic resources in violation of applicable domestic legislation of a party that requires PIC and MAT for access to its genetic resources; and provisions on parties’ actions and measures to prevent and address misappropriation. A second option, with two alternatives, addresses the meaning of misappropriation.
- Sectoral menus of model clauses of material transfer agreements, with new mentions of licensing terms and

development of indicators using standardized classification schemes;

- Codes of conduct for important groups of users;
- Identification of best-practice codes of conduct;
- Research funding agencies to oblige users receiving research funds to comply with specific ABS requirements, with new text referring to acting in accordance with the domestic ABS legislation of parties providing access, the international ABS regime, laws and/or administrative measures, and customary laws, community-level procedures and/or community protocols of indigenous and local communities;
- Unilateral declaration by users, with new text stating that parties may provide users seeking access to resources and traditional knowledge with the opportunity to signal advanced acceptance of the terms of a non-exclusive non-commercial ABS license; and
- International access standards to support compliance across jurisdictions.

In the section on development of tools to monitor compliance, sub-sections include:

- Mechanisms for information exchange, including on experience in the use of ABS licenses. Other new text includes: making available to the Clearing-House Mechanism (CHM) customary laws, community protocols and ABS licenses; and ensuring that confidential information is fully protected;
- Three options for an internationally recognized certificate issued by a domestic competent authority, including: additional information to be included in the certificate of compliance, such as reference to whether associated traditional knowledge has been accessed in accordance with the free PIC of relevant indigenous and local communities, and the name and location of such communities, evidence that PIC and MAT have been fulfilled, and permitted uses, restrictions of use and licensing terms for research not aiming at commercialization, research and development aiming at commercialization, and commercialization; a provision that the certificate shall not include confidential information related to PIC and MAT; and a certification process through the use of standardized classification schemes. A new option contains two paragraphs that PIC should be evidenced through a certificate of compliance, obtained in compliance with the domestic ABS framework and customary laws;
- Tracking and reporting systems, including new operative language on use of communication tools and internet-based systems for tracking and reporting, establishment of an information exchange framework and use of established international classification schemes;
- Information technology for tracking;
- Disclosure requirements, including new operative text stating that the declaration of source of the certificate of compliance be notified to the CHM; and
- Identification of check points.

In the section on development of tools to enforce compliance, new operative language states that parties may encourage providers and users in their jurisdiction to include provisions relating to dispute resolution and other enforcement matters in MAT. Sub-sections include:

- Measures to ensure access to justice with the aim of enforcing ABS arrangements, including new text on: establishing an appropriate national regulatory framework; establishment of a legal aid body; and legal action in the user's jurisdiction in case of any alleged breach of ABS legislation;
- Dispute-settlement mechanisms;
- Enforcement of judgments and arbitral awards across jurisdictions, including new text on parties' measures with regard to the interpretation of infringement of ABS contracts and violation of national ABS legislation;
- Information exchange procedures between national ABS focal points to help providers obtain information in specific cases of alleged infringements of PIC requirements;
- Remedies and sanctions; and
- Measures to ensure compliance with customary law and local systems of protection, including new references to: compliance with ABS licenses; disclosure of the identity and PIC of the relevant indigenous and local communities in IPR applications; directing any benefits arising out of misappropriation to the relevant indigenous and local communities as compensation; respect for customary laws, norms and protocols; and lack of PIC resulting in invalidation in product registration or grant of IPRs.

**FAIR AND EQUITABLE BENEFIT-SHARING:** Delegates considered benefit-sharing in plenary on Tuesday. Deliberations focused on the examination of additional text proposals submitted since ABS 7 (UNEP/CBD/WG-ABS/7/6 and Add.1-4) in order to decide whether they add value to the text of the Paris Annex (UNEP/CBD/WG-ABS/7/8) and should be retained. A contact group on benefit-sharing and access addressed the matter of benefit-sharing from Thursday to Saturday, co-chaired by Pierre du Plessis (Namibia) and Cosima Hufler (Austria).

In plenary, Switzerland proposed that MAT be established by the time of access to genetic resources, to create legal certainty and promote compliance. The African Group drew attention to their definition of fair and equitable benefit-sharing.

The contact group began by identifying which intersessional submissions compiled in a non-paper should be retained as a basis for further work. The LMMC explained that their submission provided additional detail on a financial mechanism for the international regime. The EU, opposed by the LMMC, proposed moving the submission to the component on capacity building. Canada and the African Group noted that this is a cross-cutting issue and, with the EU and Norway, suggested "parking" the text for consideration under a section on institutional arrangements. The LMMC, supported by the African Group, added text to the section on effective participation in research activities, stating that foreign researchers and institutions undertake research in collaboration with approved national institutions in the country of origin. Mexico withdrew its submissions, but requested specifying that only traditional knowledge associated with genetic resources is covered under provisions on establishment of trust funds to address transboundary situations, and measures to ensure community involvement in MAT.

Delegates retained CESAGEN proposals on: effective participation in research activities; development of international minimum conditions and standards; providing capacity building

in the use of tools for tracking and monitoring compliance; measures to ensure community involvement in MAT; and mechanisms to encourage benefits to be directed towards conservation.

On Friday, delegates considered a conference room paper (UNEP/CBD/WG-ABS/8/CRP.3), confirming the correct placement of proposed operative text within the Paris Annex and indicating where brackets were required. Brazil reintroduced preambular text from the LMMC submission under the heading on benefits to be shared on MAT, recognizing that benefit-sharing measures are tools for the eradication of poverty and emphasizing the strategic, economic and social value of biodiversity resources. Canada asked to specify that references to traditional knowledge be limited to traditional knowledge "associated with genetic resources" or otherwise bracket any reference to it. Australia bracketed all references to licenses and customary laws. The African Group preferred the CBD formulation "indigenous and local communities," bracketing references to indigenous peoples, and asked to include reference to biological resources where genetic resources are mentioned throughout the text.

Under the heading on effective participation in research activities, Canada bracketed reference to collaboration with the "country of origin" and added a new bracketed reference to provider countries. He also bracketed a reference to research capability strengthening for "identified research needs of developing countries," while Brazil requested bracketing reference to promotion of research networks for "the generation of mutually agreed public goods." Brazil also bracketed a reference to parties elaborating ABS commons licenses to support participation in research, with Canada bracketing reference to "commons."

On Saturday, delegates considered a revised CRP and attempted to lift brackets from the insertions. Pointing to general support for a special provision for research activities, Brazil proposed removing the brackets around the initial part of the paragraph referring to access for purposes of scientific and technological research, and keep the specifics in brackets. Norway opposed, noting that they were still considering whether there should be a special approach.

During the closing plenary, delegates approved the outcome document without amendment.

**Final Outcome:** The component on benefit-sharing in the Montreal Annex (UNEP/CBD/WG-ABS/8/L.2) consists of the existing text of the Paris Annex and the agreed insertions from this meeting. Many insertions contain brackets, and each insertion is also bracketed in full.

Under the section on linkage of access to the fair and equitable sharing of benefits, the insertion of operative text states that MAT be established by the time of access to the genetic resources.

Under the section on effective participation in research activities, and/or joint development in research activities, insertions of operative text address:

- Parties agreeing to strengthen research capability and promote the establishment of collaborative research networks between countries, institutions and indigenous and local communities, directed towards the research needs of developing countries

and indigenous and local communities participating in the international regime;

- Parties elaborating ABS commons licenses to support effective participation in research activities, joint research and development and establishment of collaborative research networks between providers and users;
- Parties' measures to ensure that the private sector facilitates joint development of technologies or makes use of genetic resources in accordance with Article 16 of the Convention (Access to and transfer of technology) including the promotion of the use of non-exclusive commercial ABS licenses;
- Parties, in accordance with Article 18 of the Convention (Technical and Scientific Cooperation), promoting the establishment of joint research programmes, joint ventures and collaborative research networks; and
- Foreign researchers and institutions or legal entities, when accessing genetic resources or associated traditional knowledge, undertaking research in collaboration with a nationally approved research institution in the country of origin of such resources, in accordance with that country's national legislation.

Under the section on mechanisms to promote equality in negotiations, the insertion states that the effective involvement of indigenous and local communities should be promoted by providing capacity building in tracking and monitoring compliance with the terms of ABS agreements, including compliance with licensing terms.

Under the section on measures to ensure participation and involvement of indigenous and local communities in MAT and sharing of benefits with traditional knowledge holders, a number of insertions relate to recognition and respect for customary laws, community protocols, and the terms of ABS licenses, including, *inter alia*, on issues of protecting traditional knowledge associated with genetic resources, ensuring benefit-sharing, obtaining PIC, and documenting traditional knowledge.

Under the section on mechanisms to encourage benefits to be directed towards conservation and sustainable use of biodiversity and socioeconomic development, insertions relate to parties elaborating the use of ABS licenses directed towards realization of the Millennium Development Goals.

Under the section on development of international minimum conditions and standards, on a paragraph addressing parties' contributions to strengthening the situation of less powerful parties in the benefit-sharing relation, there are insertions related to enabling participation in international collaborative research networks; and respect for customary laws, community protocols, and ABS licenses of indigenous and local communities.

Under the section on establishment of trust funds to address transboundary situations, there is an insertion aiming to provide consistency with language in the rest of the document, referring to knowledge associated with genetic resources/biological resources/their derivatives/and products.

The remaining sections retained in the component on benefit-sharing, where no new operative text was inserted, are: benefits to be shared on MAT; monetary and/or non-monetary benefits; access to and transfer of technology; sharing of results of research and development on MAT; awareness-raising; benefit-

sharing for every use; multilateral benefit-sharing options when origin is not clear or in transboundary situations; development of menus of model clauses for potential inclusion in material transfer agreements; and enhanced utilization of the Bonn Guidelines.

**ACCESS:** The Working Group considered access in plenary on Tuesday. Deliberations focused on the examination of additional text proposals submitted since ABS 7 (UNEP/CBD/WG-ABS/7/6 and Add.1-4) in order to decide whether they add value to the text of the Paris Annex (UNEP/CBD/WG-ABS/7/8) and should be retained. A contact group on benefit-sharing and access, co-chaired by Pierre du Plessis (Namibia) and Cosima Hufner (Austria), conducted a first reading of a non-paper on access on Thursday, a second reading on the basis of a revised non-paper on Friday, and considered a CRP on Saturday.

In plenary, the EU drew attention to their submission regarding conformity of domestic access frameworks with the international regime. Recognizing the sovereign rights and authority of parties to determine access, the IIFB called for provisions on transboundary genetic resources, and on *ex situ* genetic resources and associated traditional knowledge. A civil society representative stressed that genetic resources and traditional knowledge are inseparable and that traditional knowledge has to be addressed under access.

In the contact group, under a section on recognition of the sovereign rights of parties to determine access, delegates discussed an LMMC submission and agreed to add to existing text the concept of "associated traditional knowledge." Delegates agreed that the authority to determine access is subject to national legislation. They also agreed to retain, as alternative text, language relating to access to traditional knowledge being subject to PIC of indigenous and local communities "through their representatives, where applicable." Delegates also decided to retain the LMMC proposals on access being undertaken only when PIC has been granted, and on a list of the minimum information needed for obtaining PIC. Delegates also retained: a proposal by the EU that parties requiring PIC confirm national arrangements in writing with the CBD Secretariat; and a proposal by Switzerland on accelerated access procedures in emergency situations.

The closing plenary approved the outcome document without amendments.

**Final Outcome:** The section on access contained in the outcome document (UNEP/CBD/WG-ABS/8/L.2) consists of the existing text of the Paris Annex and the agreed insertions from this meeting. Many insertions contain brackets, and each insertion is also bracketed in full.

The insertions of operative text under the section on recognition of sovereign rights and the authority of parties to determine access address the following issues:

- Parties having sovereign rights over their natural resources and the authority to determine access to genetic resources and associated traditional knowledge resting with national governments and being subject to national legislation.
- Access to traditional knowledge associated with genetic resources and access to genetic resources owned by indigenous and local communities being subject to the PIC/ approval and involvement of these communities, subject to

national legislation and, in the case of traditional knowledge, through their representatives;

- Access to genetic resources being undertaken only when PIC, as determined by national legislation, has been granted;
- The minimum information on any application for obtaining PIC, including, *inter alia*, legal entity and affiliation of the applicant, type and quantity of genetic resources sought, types of benefits that could arise from utilization, and identification of benefit-sharing arrangements.
- Parties requiring PIC for access to genetic resources confirming details of their domestic access and benefit-sharing framework for registration by the Secretariat in the CBD CHM; and
- Parties requiring PIC for access to their genetic resources to provide for accelerated access procedures in emergency situations when public health, food security or biological diversity is seriously threatened.

The insertion under the section on internationally developed model domestic legislation states that a provider country/country of origin may decide to make the subsidiary access procedures set out in the outcome document on proposals for operative text left in abeyance (UNEP/CBD/WG-ABS/8/L.3) available to applicants if the applicants' party has implemented in its national framework the user measures to monitor compliance referred to in the international regime.

The remaining sections retained in the component on access, under which there were no new insertions of operative text, are: linkage of access to fair and equitable sharing of benefits; legal certainty, clarity and transparency of access rules; non-discrimination of access rules; international access standards (that do not require harmonization of domestic legislation) to support compliance across jurisdictions; minimization of administration and transaction costs; and simplified access rules for non-commercial research.

### PROPOSALS LEFT IN ABEYANCE

In Thursday's plenary, Working Group Co-Chair Hodges proposed to have a section on institutional arrangements, implementation and other operative text, to serve as a holding area for operative text that does not fit under existing elements. The EU noted that proposals in this section should not have the same status as existing components in the Montreal Annex.

Discussions regarding such proposals had already occurred in the contact group on benefit-sharing and access. On Tuesday, under benefit-sharing, delegates debated an LMMC submission providing detail on a financial mechanism for the international regime. The EU, opposed by the LMMC, proposed moving the submission to the component on capacity building. Canada and the African Group noted that this is a cross-cutting issue and, with the EU and Norway, suggested "parking" the text for later consideration.

A procedural debate ensued during discussions on access, about the placement of a proposed Mexican annex on subsidiary access procedures. Mexico explained the annex was related to its proposal on compliance and, supported by Brazil, requested that it be "parked" for consideration under the section on institutional arrangements. The EU asked that the text be retained under the access element. Mexico said they would withdraw their text under these circumstances, but other delegates supported

retention, and the annex was "parked" for later consideration. Both the LMMC and the Mexican proposals were moved to the section on institutional arrangements established during Thursday's plenary.

On Saturday, Working Group Co-Chair Hodges explained that the section should become a second annex to the meeting's report, containing "operative text on institutional, implementing provisions, final clauses and other text relevant for the consolidation of the international regime," which was not discussed in detail at ABS 8. He stressed that no further submissions of operative text for the main components, as contained in the Montreal Annex, are requested, although further submissions may be made with respect to preambular paragraphs and definitions, as well as operative text contained in the second annex.

**Final Outcome:** The second annex to the meeting report on "Proposals for operational texts left in abeyance for consideration at the next meeting of the Working Group" (UNEP/CBD/WG-ABS/8/L.3) contains a proposal on a financial mechanism and a proposal on subsidiary access procedures.

### INTERSESSIONAL WORK

On Saturday, Working Group Co-Chair Casas presented the plenary with the result of informal consultations with regard to the intersessional process leading up to ABS 9, consisting of two distinct meetings. The first is a group of the Friends of the Co-Chairs to convene in late January 2010, bringing together 26 key negotiators and representatives selected by the Co-Chairs, including: 18 members of delegations; two representatives of the COP 9 and COP 10 Presidencies; and two representatives each from indigenous and local communities, civil society organizations, and industry. He said the first meeting will produce a Co-Chairs' report reflecting possible solutions on key issues in the negotiations.

The second meeting is a Co-Chairs' inter-regional informal consultation to be held prior to ABS 9, bringing together: five key representatives from each of the five UN regional groups and selected by the regions; two representatives each from indigenous and local communities, civil society, industry, and the COP 9 and 10 Presidencies; and no more than two advisors per region to be allowed in the room. He said the meeting will consult on preambular text, definitions, and provisions relevant to the consolidation of all operative text, including the structure of the regime.

Several parties requested clarifications. Canada offered to host the first intersessional meeting. New Zealand, Switzerland, Norway and Australia underscored the need to ensure representation of the diversity of views within a region. The African Group said the second meeting should go beyond consultations and, with Haiti, stressed that the meeting must help advance negotiations at ABS 9. Underscoring the need for transparency, Brazil and the EU requested flexibility with regard to advisors. Jordan and the African Group expressed concerns regarding regional imbalance.

During the closing plenary, the African Group, supported by Switzerland and the EU, proposed that the number of participants and observers to the Friends of the Co-Chairs' meeting and

to the inter-regional informal consultation be increased. Final composition and schedule of the intersessional meetings will be confirmed by the Co-Chairs.

### CLOSING PLENARY

The closing plenary convened at 11:00 am on Sunday, 15 November, to adopt the report of the meeting, the Montreal Annex and a second annex on proposals for operational texts left in abeyance. Working Group Co-Chair Hodges thanked delegates and especially the contact group co-chairs for their hard work during the week.

Delegates then considered the Montreal Annex containing the draft international regime on ABS (UNEP/CBD/WG-ABS/8/L.2). He explained that sections on objective and scope that had not been debated at this meeting were included along with all the main components of the regime, and noted that this is the first time the Working Group has a consolidated draft of the international regime in a single document. The Montreal Annex was adopted with minor amendments and corrections. The second annex on proposals for operational texts left in abeyance for consideration at the next meeting of the Working Group (UNEP/CBD/WG-ABS/8/L.3) was adopted without amendments. Egypt reiterated, and delegates agreed with, its proposal to request the Executive Secretary to prepare a short review paper on the concept of genetic resources, building on the report of the *ad hoc* technical expert group on concepts, terms, working definitions and sectoral approaches, and adding elements related to traditional knowledge.

Co-Chair Hodges announced that ABS 9 would be held from 22-28 March 2010, in Cartagena, Colombia. New Zealand announced the creation of a new group, the "Like-Minded in Spirit Group of Women," and stressed the importance of taking into account the principle of gender balance in the selection of participants to the intersessional meetings leading up to ABS 9. The Working Group applauded creation of the group. Norway pledged US\$75,000 to support participation of developing country delegates in ABS 9 and the intersessional meetings, as an addition to Norway's annual contribution to the CBD.

The Working Group then considered the report of the meeting (UNEP/CBD/WG-ABS/8/L.1). Regarding wording on the Working Group Co-Chairs' ruling that new submissions for the Montreal Annex would not be "allowed," Canada recalled that the Co-Chairs had said submissions would not be "invited"; whereas Brazil noted that the ruling was that they would not be "allowed." Co-Chair Hodges indicated that the wording would be amended to state that such submissions would not be "requested," so that it was clear that they were no longer looking for submissions on the Montreal Annex. The report was then adopted with minor corrections and amendments.

**CLOSING STATEMENTS:** Haiti, on behalf of GRULAC, commended the atmosphere at the meeting and the increasing dynamism of the negotiations signaling commitment to complete a legally-binding protocol by ABS 9. Brazil, for the LMMC, welcomed the Montreal Annex as a step towards the Nagoya Protocol. Reminding delegates of the Japanese proverb that "when you have completed 95% of the journey you are only half way there," he said the Working Group had a long way to go in a short period of time. Ukraine, for the CEE, expressed satisfaction with the outcome of the meeting as it forms the basis for future

work to prepare, hopefully, a legally-binding instrument by COP 10. Welcoming the positive spirit, the African Group said adaptability and innovation will be required to advance the work intersessionally, and suggested to "start and complete" negotiations at ABS 9. She said the time for give and take has come and invited delegates to make the international regime a reality.

The EU looked forward to the intersessional consultations and ABS 9 with a view to finalizing the international regime. Japan, as the incoming presidency of COP 10, welcomed the intersessional consultations, supported the understanding on the nature of the regime as expressed by the Working Group Co-Chairs, and highlighted that Japan will work towards finalizing negotiations by COP 10 in Nagoya. Malaysia, for the Like Minded Asia-Pacific Countries, noted the diversity of views in the group and the importance of developing a commonality of interests within such diversity. Welcoming the roadmap for intersessional negotiations, he highlighted that Asia will hold the first regional consultation for ABS in December 2009, in Cambodia. China stressed its commitment to biodiversity preservation and the importance of the international regime. Syria noted that great efforts have been made to promote the third CBD objective and to start negotiations on an ABS protocol.

IIFB and the Indigenous Women Biodiversity Network noted efforts to recognize the rights of indigenous peoples and local communities to biodiversity, and stressed the need to respect their rights and regulate the use of traditional knowledge in accordance with customary laws, community protocols and free PIC. Civil society expressed full support for a single, legally-binding instrument, noting that compliance is at the heart of an effective protocol to stop misappropriation and misuse, and expressing concern on the shortcomings of any contract-based system.

Jochen Flasbarth, on behalf of the German COP Presidency, highlighted success in producing a comprehensive negotiating text and a roadmap with a well-designed sequence of consultations, noting that everything is in place to consolidate the text of a protocol for adoption at COP 10.

CBD Executive Secretary Ahmed Djoghlafl highlighted that the establishment of an intersessional process, along with the development of the Montreal Annex, has elevated the Working Group to an "Intergovernmental Negotiating Committee" for negotiations of the Nagoya international regime.

Working Group Co-Chair Hodges thanked the Governments of Canada and Colombia for allowing them to serve as Working Group Co-Chairs, and recognized the donors who made broad participation at ABS 8 possible. Recognizing the *Earth Negotiations Bulletin* (ENB) team as the "eyes and ears of the negotiations," he noted that ENB coverage of future CBD meetings was at risk due to the increasing demands of the climate change process, and advised ENB donors that additional funding is required, including for a full ENB team at ABS 9. Working Group Co-Chair Casas said the good spirit of the meeting inspired hope that the Working Group will carry out its mandate and achieve a proud outcome at COP 10. The Co-Chairs gavelled the meeting to a close at 1:34 pm.

## A BRIEF ANALYSIS OF ABS 8

### PREAMBLE

With less than a year to go before COP 10 in Nagoya, Japan, delegates gathered in Montreal knowing that time was running out. Many had hoped that real negotiations on the international ABS regime, also known as “stage three” in the approach agreed last April in Paris, would begin in Montreal. But the real negotiations never happened. Instead, delegates engaged in multiple readings of intersessional submissions, although the components of the regime on compliance, benefit-sharing and access were already in an advanced stage of consolidation, following deliberations in Paris. Delegates focused on compiling the “new” components on traditional knowledge and capacity building, and, as a result, a single, comprehensive document, the “Montreal Annex,” was adopted. Although heavily bracketed and unwieldy, this Annex does contain most of the elements needed to shape the international ABS regime. Struck in the final days of the meeting by the urgent need to fast-track negotiations, however, delegates set up an intersessional process to give negotiators a fighting chance to meet the Nagoya deadline.

This brief analysis will consider progress made on traditional knowledge and compliance, two issues that have emerged as key elements of the international regime, and review how procedural issues affected the negotiations.

### OPERATIVE PROVISIONS

Traditional knowledge, once considered a side-issue in the ABS negotiations, is increasingly recognized as a central pillar of the regime. This was made clear during the constructive debates in the Article 8(j) Working Group meeting preceding the ABS negotiations. One message emerging from these discussions is that traditional knowledge and genetic resources are inseparable concepts. In the context of the ABS process, this resulted in discussions about whether there should be references to traditional knowledge in general or whether such references should be limited to “traditional knowledge associated with genetic resources.” Delegates also debated whether traditional knowledge should be treated as a cross-cutting issue throughout the document or whether it should be contained in a separate chapter. On the one hand, indigenous representatives want the access provisions in particular to include a focus on traditional knowledge, including a requirement for indigenous prior informed consent (PIC). On the other hand, a few countries want to address traditional knowledge separately, and keep it entirely absent from the components on benefit-sharing and access. The vast majority of delegates, however, see traditional knowledge as a cross-cutting issue, stressing that only its explicit incorporation into components on benefit-sharing and access can ensure that it is taken into account at every stage of the ABS process.

While discussions on traditional knowledge are related to the scope of the regime, compliance issues speak directly to the regime’s legal nature, and therefore go to the very heart of the ABS negotiations. Although a final decision on the legal nature of the regime is still pending, the fact that delegates in Montreal discussed mechanisms to monitor and enforce compliance implies that the international regime will be legally binding, in whole or in part. Given its central importance, negotiating positions quickly crystallized around the compliance issue, with

key players maintaining the same positions as when the matter was last discussed in Paris. The Like-Minded Megadiverse Countries (LMMC) have long maintained that compliance links to benefit-sharing, whereas the EU places emphasis on access, linking international access standards to compliance support measures. However, the EU proposal on misappropriation – the subject of intense debates at this meeting – signals a readiness to meet the LMMC and the African Group half-way on one of their key demands, namely to address biopiracy through measures to avoid, and sanctions for, appropriation of genetic resources and traditional knowledge in violation of applicable international or domestic ABS legislation.

Further compromise proposals will be needed for the negotiations to move forward. Certain delegations are strategically positioned to develop such proposals, as in the case of Mexico, a country that is not only a member of the LMMC and GRULAC, but also an observer in JUSCANZ. Mexico was among the delegations that used the intersessional period to work on provisions that either seemed to be missing from the regime or that could serve as “bridging elements” between entrenched positions, guiding the way to future compromise.

### DECISION-MAKING PROCEDURES

The good will generated in Montreal over the first two days of the meeting as delegates moved ahead with consolidation of operational text was soon affected by lengthy procedural debates. The most controversial issue was how to handle operative text that did not fit squarely under the main components of the regime, as set out in COP Decision IX/12. The reaction to the seemingly innocuous decision early in the week to “park” such proposals for later consideration was indicative of the lingering lack of trust between parties, built up over years of sometimes acrimonious debates in the ABS process. It did not take long for some delegates to note that the “parking lot” could be used as a means to hide text and keep it from being considered in detail, while others implied that it could threaten the integrity of the Paris Annex.

In an effort to head off further procedural wrangling, the Co-Chairs legitimized the “parking lot” by creating a second annex for operative text left in abeyance, for consideration at the next meeting of the Working Group. This new approach required repeated clarification to reassure delegates as to its correct application. At the same time, the required multiple readings of submissions further restricted the time available for substantive discussion. In the end, delegates in contact groups could do little more than identify submissions for retention, point out text for bracketing, and forward text to the second annex, arguably simply reconfirming well-known positions.

At the same time, discussions on text that did not fit squarely under the main components of the regime made delegates realize the need for additional provisions in the international regime – text on definitions, institutional arrangements, and implementation that will cement the main components together into a coherent structure. Proposals for such elements, as well as solutions for key issues still outstanding in the negotiations, to be identified by the Co-Chairs, will be the focus of the intersessional process before ABS 9.

## FINAL CLAUSES

In a demonstration of mind over matter, delegates managed to maintain their optimism and were hopeful that the intersessional process will inject new dynamism into the negotiations. Nevertheless, the same questions were on everyone's mind: is there enough time left before Nagoya to build an international regime? Will it be a protocol? If not, what form could it take? Would it be better to miss the Nagoya deadline but use the extra time to build a strong regime? Would a weak regime be better than no regime at all?

Everybody seemed to agree that the intersessional process, which will bring a limited number of key players together in a smaller room, will be instrumental in hammering out positions and finding some solutions that may be acceptable to the larger working group. After all, this type of intersessional strategy led to the adoption of the Cartagena Protocol on Biosafety. In the meantime, as delegates refresh their positions looking for compromises, the quest for momentum and inspiration in these negotiations continues.

## UPCOMING MEETINGS

**THIRD BUSINESS AND THE 2010 BIODIVERSITY CHALLENGE CONFERENCE:** This conference will be held from 30 November - 2 December 2009, in Jakarta, Indonesia. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/business3/>

**ABS REGIONAL CONSULTATIONS FOR ASIA:** The access and benefit-sharing regional consultations for Asia are tentatively scheduled to be held from 7-8 December 2009, in Siem Reap, Cambodia. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/meetings/>

**WIPO IGC 15:** The fifteenth session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization (WIPO) will be held from 7-11 December 2009, in Geneva, Switzerland. For more information, contact: WIPO Secretariat; tel: +41-22-338-9111; fax: +41-22-733-5428; internet: [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=17585](http://www.wipo.int/meetings/en/details.jsp?meeting_id=17585)

**INTERSESSIONAL FRIENDS OF THE CO-CHAIRS GROUP:** The intersessional Friends of the Co-Chairs Group meeting on the international regime on ABS will attempt to identify possible solutions on key issues in the negotiation of the international regime. The meeting is scheduled to be held in January 2010, in Canada. The exact date and venue are yet to be determined. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/meetings/>

**ABS REGIONAL CONSULTATIONS FOR GRULAC:** The access and benefit-sharing regional consultations for Latin America and Caribbean countries are tentatively scheduled to be held from 18-19 January 2010, in Panama City, Panama. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/meetings/>

**ABS REGIONAL CONSULTATIONS FOR CEE:** The access and benefit-sharing regional consultations for Central and Eastern European countries are tentatively scheduled to be held from 9-10 February 2010, in the Isle of Vilm, Germany. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/meetings/>

**ABS REGIONAL CONSULTATIONS FOR THE PACIFIC:** The access and benefit-sharing regional consultations for the Pacific are tentatively scheduled to be held from 15-16 February 2010, in Auckland, New Zealand. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/meetings/>

**ABS REGIONAL CONSULTATIONS FOR AFRICA:** The access and benefit-sharing regional consultations for Africa are tentatively scheduled to be held in March 2010 in Windhoek, Namibia. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/meetings/>

**CO-CHAIRS' INTER-REGIONAL INFORMAL CONSULTATION ON ABS:** The Co-Chairs' inter-regional informal consultations on the international regime on ABS are tentatively scheduled to be held in March 2009, in Cartagena, Colombia, prior to ABS 9. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/meetings/>

**ABS 9:** The ninth meeting of the CBD *Ad Hoc* Open Ended Working Group on Access and Benefit-sharing is scheduled to be held from 22-28 March 2010, in Cartagena, Colombia. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/meetings/>

**CBD SBSTTA 14:** The 14th meeting of the CBD Subsidiary Body on Scientific, Technical and Technological Advice will be held from 10-21 May 2010, in Nairobi, Kenya. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/doc/?meeting=SBSTTA-14>

**WGRI 3:** The third meeting of the CBD *Ad Hoc* Open-ended Working Group on Review of Implementation of the Convention will be held from 24-28 May 2010, in Nairobi, Kenya. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/doc/?meeting=WGRI-03>

**CBD COP 10:** The tenth Conference of the Parties to the CBD will be held from 18-29 October 2010, in Nagoya, Japan. COP 10 is expected to: assess achievement of the 2010 target to reduce significantly the rate of biodiversity loss; adopt an international ABS regime; and celebrate the International Year of Biodiversity 2010. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@cbd.int](mailto:secretariat@cbd.int); internet: <http://www.cbd.int/doc/?meeting=COP-10>