



THIRD MEETING OF THE INTERGOVERNMENTAL COMMITTEE FOR THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING: 24-28 FEBRUARY 2014

The Third Meeting of the Open-ended *Ad Hoc* Intergovernmental Committee for the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ICNP 3) to the Convention on Biological Diversity (CBD) begins today in Pyeongchang, Republic of Korea. It was preceded by a capacity-building workshop on the access and benefit-sharing (ABS) Clearing-House, held on 23 February 2014.

ICNP 3 is expected to address outstanding issues in its work plan, in preparation for the first meeting of the Conference of the Parties serving as the Meeting of the Parties to the Protocol (COP/MOP), including: development of a programme budget for the biennium following the entry into force of the Protocol; consideration of rules of procedure for the COP/MOP; elaboration of a draft provisional agenda for COP/MOP 1; the need for and modalities of a global multilateral benefit-sharing mechanism (Article 10); modalities of operation of the ABS Clearing-House; capacity building and development; and procedures and mechanisms on compliance. The eleventh meeting of the Conference of the Parties (COP) to the CBD decided that ICNP 3 should also address monitoring and reporting; and exchange views on the state of implementation of the Nagoya Protocol, and the development, updating and use of sectoral and cross-sectoral model contractual clauses, voluntary codes of conduct, guidelines and best practices and/or standards.

A BRIEF HISTORY OF THE ABS PROTOCOL

The Nagoya Protocol on ABS was adopted at CBD COP 10 on 29 October 2010, in Nagoya, Japan. The objective of the Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biodiversity and the sustainable use of its components. With 29 ratifications to date, the Nagoya Protocol will enter into force 90 days after the deposit of the 50th instrument of ratification.

The Convention's work on ABS was initiated at COP 4 (May 1998, Bratislava, Slovakia) when parties established a regionally-balanced expert panel on ABS. Over two meetings, the expert panel developed recommendations on prior informed

consent (PIC), mutually agreed terms (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.

ABS 1: At its first meeting (October 2001, Bonn, Germany), the Working Group on ABS developed the draft Bonn Guidelines on ABS, identified elements for a capacity-building action plan, and considered the role of intellectual property rights (IPRs) in the implementation of ABS arrangements.

COP 6: At its sixth meeting (April 2002, The Hague, the Netherlands), the COP adopted the Bonn Guidelines on ABS, and considered the role of IPRs in ABS and the relationship with the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization.

WSSD: In the Johannesburg Plan of Implementation, the UN World Summit on Sustainable Development (WSSD) (September 2002, Johannesburg, South Africa) called for negotiating, within the CBD framework, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources.

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 ABS regime, 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 elaborate and negotiate an international ABS regime, and set out the terms of reference for the negotiations.

ABS 3 and 4: At its third and fourth meetings (February 2005, Bangkok, Thailand, and January 2006, Granada, Spain), the ABS Working Group produced draft text compilations to serve as the basis for future negotiations. It also considered additional approaches to complement the Bonn Guidelines on ABS, including an international certificate of origin/source/legal provenance.

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 in 2010. 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 and 6: At its fifth and sixth meetings (October 2007, Montreal, and January 2008, Geneva, Switzerland), the ABS Working Group focused on the main components of the international regime on ABS, including fair and equitable sharing of benefits, access to genetic resources, compliance, traditional knowledge and genetic resources, and capacity building.

COP 9: At its ninth meeting (May 2008, Bonn), the COP adopted a roadmap for the negotiation of the international regime, established three expert groups, and instructed the ABS Working Group to submit an instrument/instruments for consideration and adoption by COP 10. The three expert groups (concepts, terms, working definitions and sectoral approaches; compliance; and traditional knowledge associated with genetic resources) each met once between December 2008 and June 2009.

2009-2010 NEGOTIATIONS: The ABS Working Group met four times between COP 9 and 10 (April 2009, Paris, France; November 2009, Montreal; March 2010, Cali, Colombia; and July 2010, Montreal), assisted by expert, informal and regional consultations. In Cali, the Working Group Co-Chairs Timothy Hodges (Canada) and Fernando Casas (Colombia) circulated a draft protocol text, but due to procedural wrangling the meeting was suspended. The resumed meeting in Montreal, using the interregional negotiating group (ING) format established in Cali, worked on the draft protocol text, reached agreement on non-controversial provisions, and made progress on certain difficult issues, including the relationship with other instruments and compliance with domestic ABS requirements. Delegates also identified key issues that required further negotiations, including scope and pathogens, derivatives and the concept of utilization of genetic resources, and mechanisms to support compliance. An additional meeting of the ING convened in September 2010, in Montreal, but several key issues remained outstanding.

COP 10: Immediately prior and during COP 10 (18-29 October 2010, Nagoya), the ING continued negotiations. Towards the end of the meeting, informal ministerial consultations discussed a compromise proposal put forward by the Japanese COP Presidency, where agreement was reached on a package relating to outstanding issues, including: the concept of utilization and derivatives, and related benefit-sharing; the provision on scope; access procedures; traditional knowledge-related issues, including deleting a provision on publicly available traditional knowledge; special considerations with regard to human, animal or plant health emergencies and food security issues; temporal scope and a related proposal on a multilateral benefit-sharing mechanism to address benefit-sharing for genetic resources and traditional knowledge that occur in transboundary situations or for which it is not possible to grant or obtain PIC; and compliance-related provisions on checkpoints, information requirements and the internationally recognized certificate of compliance. The COP adopted the Protocol as part of a "package" including the new CBD Strategic Plan 2011-2020 and a decision on the implementation of the Strategy for Resource Mobilization. It also established the ICNP to undertake the preparations necessary for COP/MOP 1.

ICNP 1: At its first meeting (5-10 June 2011, Montreal), the Committee adopted four recommendations initiating work on: the modalities of operation of the ABS Clearing-House; capacity building; awareness raising; and compliance.

ICNP 2: At its second meeting (2-6 July 2012, New Delhi, India), the Committee adopted eight recommendations on: the ABS Clearing-House; capacity building; awareness raising; compliance; a global multilateral benefit-sharing mechanism; guidance for the financial mechanism; resource mobilization for the Protocol's implementation; and future work in preparation for COP/MOP 1.

COP 11: COP 11 (8-19 October 2012, Hyderabad, India) decided to reconvene the ICNP for a third meeting and added to its agenda: monitoring and reporting; an exchange of views on sectoral and cross-sectoral model contractual clauses, codes of conduct and guidelines; and an exchange of views on the state of implementation of the Protocol. It also called for intersessional work on a multilateral benefit-sharing mechanism, capacity building and the ABS Clearing-House.

INTERSESSIONAL HIGHLIGHTS

CGRFA 14: Held from 15-19 April 2013, in Rome, Italy, the fourteenth session of the FAO Commission on Genetic Resources for Food and Agriculture (CGRFA 14) adopted two new documents, the Global Plan of Action on forest genetic resources, and the Genebank Standards for Plant Genetic Resources; agreed that it is premature to negotiate an international agreement or agreements on ABS for genetic resources for food and agriculture; and requested the Commission's Intergovernmental Technical Working Groups to explore ABS issues related to their respective sub-sectors, assisted by a team of technical and legal experts on ABS, and aiming at draft elements as a voluntary tool to facilitate domestic implementation of ABS for different sub-sectors.

ITPGR GB 5: At its fifth session (24-28 September 2013, Muscat, Oman), the Governing Body (GB) of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) launched an intersessional Working Group to Enhance the Functioning of the Multilateral System (MLS) of ABS, which is mandated to develop measures to increase user-based payments and contributions to the Treaty's Benefit-sharing Fund as a priority, as well as additional measures to enhance the functioning of the MLS. The GB also decided to reconvene its intersessional committee on the sustainable use of plant genetic resources for food and agriculture, to provide advice on the development of a toolbox on sustainable use, and prepare a set of options for parties' consideration in national implementation of farmers' rights.

WORKING GROUP ON ARTICLE 8(j): At its eighth meeting (7-11 October 2013, Montreal) the CBD Working Group on Article 8(j) (traditional knowledge) and Related Provisions adopted a draft plan of action for customary sustainable use; and recommended developing guidelines on repatriation, and on prior informed approval by indigenous and local communities for access to, benefit-sharing from, and reporting and prevention of unlawful appropriation of, traditional knowledge.

SBSTTA 17: The 17th meeting of the CBD Subsidiary Body on Scientific, Technical and Technological Advice (14-18 October 2013, Montreal) adopted three recommendations on: scientific and technical needs for implementing the Strategic Plan; new and emerging issues; and the Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES).

WIPO IGC 26: Following renewal of its mandate by the 43rd session of the General Assembly of the World Intellectual Property Organization (WIPO) (23 September – 2 October 2013, Geneva), the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore held its 26th session from 3-7 February 2014, in Geneva, where it developed a revised consolidated document on intellectual property and genetic resources. Provisions on including mandatory disclosure of the origin of genetic resources used by patent applicants, as well as a range of post-grant sanctions for non-compliance with the disclosure requirement, remain unresolved.



ICNP 3 HIGHLIGHTS: MONDAY, 24 FEBRUARY 2014

In the morning, ICNP 3 delegates met in plenary to hear opening statements, address organizational matters, and discuss the COP/MOP rules of procedure and capacity building. In the afternoon, they exchanged views on the state of implementation of the Protocol.

OPENING PLENARY

ICNP Co-Chair Janet Lowe (New Zealand) opened the meeting. Jeong Yeon-man, Vice-Minister of the Environment of the Republic of Korea, reported on national efforts towards ratification, and drew attention to agenda items on the COP/MOP rules of procedure and the ABS Clearing-House. Choi Moon-soon, Governor of Gangwon Province, illustrated ongoing biodiversity conservation and restoration efforts, and plans to host the most-ecofriendly Winter Olympics in 2018.

CBD Executive Secretary Braulio Dias reported that ICNP Co-Chair Fernando Casas (Colombia) was unable to participate in this meeting. He reported on progress towards the Protocol's entry into force and achievement of Aichi Target 16 on ABS, pointed to regional balance in ratifications as evidence of the Protocol's global significance, and recalled that UN Secretary-General Ban Ki-moon recently highlighted the Protocol's contribution to sustainable development. Chair Lowe urged countries to ratify the Protocol in time for COP/MOP 1 to be held concurrently with CBD COP 12 in October 2014.

STATEMENTS: Uganda, for the AFRICAN GROUP, affirmed the region's commitment to cooperative discussions on the global multilateral benefit-sharing mechanism, capacity building and compliance. Saint Lucia, for GRULAC, and India, on behalf of ASIA-PACIFIC and the COP Presidency, stressed the importance of ratifying the Nagoya Protocol. Recalling the vital role of indigenous and local communities (ILCs) in the Protocol, an ILC representative urged countries to fully include them in all discussions.

ORGANIZATIONAL MATTERS: Delegates agreed that ICNP 1 and 2 rapporteur Dubravka Stepic (Croatia) continue in that role. They then adopted the meeting's agenda (UNEP/CBD/ICNP/3/1) and organization of work (UNEP/CBD/ICNP/3/1/Add.1).

Chair Lowe urged delegates to prioritize the items that are necessary for the smooth entry into force of the Protocol by CBD COP 12, including the ABS Clearing-House and the compliance mechanism.

COP/MOP RULES OF PROCEDURE

The Secretariat introduced the document (UNEP/CBD/ICNP/3/3), highlighting the need to address: replacing COP Bureau members from countries that are non-parties to the Protocol; and whether any amendments to the COP rules of procedure will apply automatically to the COP/MOP. He noted that under the Biosafety Protocol such amendments shall not apply unless otherwise decided by the COP/MOP.

INDIA, MEXICO, COLOMBIA, CANADA and the Democratic Republic of the Congo for the AFRICAN GROUP called for following the Biosafety Protocol experience in allowing the COP/MOP to decide on whether to adopt amendments to the rules of procedure made by the COP. The EU stressed the need to keep the Protocol closely linked to the Convention, suggesting that, according to Protocol Article 26.5, amendments to the COP rules of procedure should automatically apply to the COP/MOP, unless otherwise decided by it. CHINA supported decision making by consensus.

CAPACITY BUILDING

The Secretariat introduced a draft strategic framework for capacity building and development under the Protocol (UNEP/CBD/ICNP/3/7), drawing attention to the report of the relevant expert meeting (UNEP/CBD/ICNP/3/INF/6). Many called for awareness raising and expressed support for the draft strategic framework. SWITZERLAND, supported by UGANDA, proposed including national capacity needs and priorities self-assessments, to be compiled by the Secretariat.

Senegal, for the AFRICAN GROUP, suggested establishing an informal advisory committee to assist the Secretariat to include capacity-building best practices from other fora, such as FAO. MALAYSIA proposed that such a committee coordinate initiatives undertaken by various bodies globally, and noted the role of capacity building in promoting better understanding of the Protocol's provisions.

The EU recommended sharing experiences through the ABS Clearing-House. THAILAND emphasized the need to ensure technical accuracy of information shared, including through the ABS Clearing-House, to enhance common understanding of the Protocol.

INDIA, with many, called for adequate financing to ensure action on the elements of the strategic framework. NORWAY, supported by UGANDA, underscored the need for financing for developing countries and ILCs as a common challenge for all parties to the Protocol, and called for guidance to the GEF in this regard. BENIN requested resources to support regional efforts. SAINT LUCIA requested training and financing to reach the commercialization stage.



NIGER proposed considering micro-financing programmes among resources for implementation, and facilitating access to national-level capacity-building activities for the largest possible number of stakeholders. The DEMOCRATIC REPUBLIC OF THE CONGO called attention to capacity for tracking genetic resources and in relation to IPRs. JAPAN recommended prioritizing capacity building for implementing the Protocol provisions on access; and cautioned against proposed capacity-building on monitoring and enforcing compliance with MAT, noting the lack of corresponding obligations under the Protocol.

BRAZIL underscored the need for capacity building for ILCs and checkpoints, and capacity development to negotiate MAT and monitor impacts of benefit-sharing on biodiversity conservation. He supported the development of a global programme to assist developing countries in the implementation of the framework. CANADA questioned the added value of a formal, centralized, CBD-led global programme.

GUATEMALA suggested that toolkits and workshops focused on ILCs, traditional knowledge (TK) and benefit-sharing be made available to government representatives, students and the media. CUBA urged consideration of non-internet-based capacity-building measures.

The ITPGR highlighted the complementary mandates of the Treaty and the Protocol. IUCN suggested including consideration of regional and subregional markets and legislative frameworks. Drawing attention to the role of women, the International Indigenous Forum on Biodiversity (IIFB) prioritized capacity building related to the ABS Clearing-House.

EXCHANGE OF VIEWS ON IMPLEMENTATION

Hem Pande, India, presented on ABS implementation in India, describing the legal nature and activities of the country's National Biodiversity Authority. Giving examples of ABS agreements on the ground, he noted that in determining equitable benefit-sharing, the criteria are considered on a case-by-case basis.

Hugo Schally, EU, presented the proposed EU regulation, currently in the final stages of approval, noting that it focuses on compliance measures, providing for a due diligence requirement for users and establishing two checkpoints, one at the beginning and one at the end of the value chain. He said access requirements and penalties for non-compliance will be regulated at the member state level.

Preston Hardison, Tulalip Tribes, presented on the need to assess culture-related risks in specific ABS transactions. He said the Protocol does not provide for consideration of the risks of sharing TK, noting that such risks can be significant in the context of current survival challenges for many indigenous peoples. He stressed the need to ensure respect for community biocultural protocols in domestic legal systems, and to improve mutual supportiveness between ABS and other TK-related measures.

Sélim Louafi, CIRAD (Agricultural Research for Development), discussed challenges faced by the research sector in complying with ABS rules and procedures. He commented that the ABS narrative is built around access to genetic resources by the private sector, but most transactions occur within the research sector, for example, in the context of conservation, breeding and knowledge generation. He proposed documenting existing exchange and use practices. He highlighted the possibility of long-term partnerships for non-monetary benefit-sharing, which do not preclude the possibility of monetary benefits, for example, through supporting PhD research and hosting visiting scholars.

Maria Julia Oliva, Union for Ethical BioTrade (UEBT), noted that a growing number of companies are reporting on their biodiversity-sourcing practices. She encouraged countries to: focus on providing legal certainty; develop a coherent interpretation of the Protocol; and identify what specific practices are covered under ABS. She highlighted the need to support companies that are pioneering good practices, and proposed a platform for business to discuss on and engage in ABS.

Ensuing discussions focused on: users' due diligence obligations in providing information to checkpoints at different stages of the value chain; the usefulness of voluntary instruments to communicate regulatory requirements effectively to users and identify workable approaches to ensure users' compliance and avoid reputational risk; good practices and challenges within the research community; sanctions for users' non-compliance with their due diligence obligations, and recourse to domestic courts for breaches of MAT; choice and structure of competent national authorities; IPRs and prevention of biopiracy; and predicted timing of the ratification by the EU and its member states.

FRANCE expressed the intention to ratify the Protocol soon after EU legislation is finalized. GERMANY drew attention to a draft legislative package, highlighting challenges regarding setting up a competent national authority in view of the country's federal system, and ongoing discussions on certain access regulations. AUSTRALIA underlined efforts to simplify and streamline the process of requesting access permits for scientific research, including through negotiating institutional-level benefit-sharing agreements and attaching a benefit-sharing agreement to a permit. PERU highlighted ongoing preparations, including at the ILC level, and challenges regarding compliance by the research sector, *ex situ* collections and interlinkages with other treaties, including free trade agreements with provisions on IPRs. The UK noted challenges leading up to ratification, including assent from the foreign office.

MOROCCO noted a domestic study on the most strategic mode of implementing the Protocol. NORWAY drew attention to disclosure requirements in IP legislation and development of legislation on TK. SWITZERLAND described their centralized checkpoint, which he said is user-friendly and simple. BRAZIL noted efforts to improve their 2001 ABS legislation, and announced plans to share their experiences in implementation with India and South Africa.

THAILAND drew attention to four competent national authorities, on plants, traditional medicine, micro-organism collections and protected animals. INDONESIA said a national authority will be established by 2015, noting that more time is needed for stakeholder awareness. COSTA RICA said countries should concentrate not only on access, but also on compiling information about monetary and non-monetary benefits. ETHIOPIA said its first ABS agreement on teff failed due to the user company's "inconsistency."

COLOMBIA underscored the need to factor in the time for consultations with ILCs into national ratification processes. JAPAN reported on a study on benefit-sharing in different sectors as a basis for inter-ministerial and stakeholder consultations. MALAYSIA pointed to the need to persuade ABS stakeholders of the added value of ratifying the Protocol. He suggested provider countries can differentiate between access applications, depending on whether user countries have sufficient domestic measures on users' compliance. SOUTH AFRICA reported on the review of its pre-existing framework on ABS with a view to including measures on checkpoints and on users' compliance, among other provisions.

IN THE CORRIDORS

ICNP 3 delegates gathered by the ski slopes of Pyeongchang, the site of the 2018 Winter Olympics, for what may be the last opportunity to prepare the ground for the entry into force of the Nagoya Protocol. Amidst reports of growing ratification momentum, the first day was characterized by general support for a draft capacity-building framework. Several delegations were keen on joining forces to support parties and ABS stakeholders alike in tackling legal, technical and awareness-raising challenges for the Protocol's successful implementation. Some participants, however, were more cautious, pointing out that the many capacity-building initiatives, which will likely feed into the development of domestic ABS frameworks in developing countries, may themselves lead to a plethora of divergent interpretations of the Protocol. Proposals for a CBD global support programme and an advisory committee to keep tabs on capacity-building efforts are thus likely to capture delegates' attention in the coming days.

ICNP 3 HIGHLIGHTS: TUESDAY, 25 FEBRUARY 2014

In the morning, ICNP 3 delegates met in plenary to continue the exchange of views on the state of implementation, and address the budget, the global multilateral benefit-sharing mechanism (Article 10), and monitoring and reporting. In the afternoon, they considered compliance procedures and mechanisms (Article 30), the ABS Clearing-House, the COP/MOP 1 agenda and the COP/MOP rules of procedure. An evening contact group initiated text-based negotiations on compliance.

EXCHANGE OF VIEWS ON IMPLEMENTATION

Many countries reported on their internal processes for ratification and implementation of the Protocol, including amendment of existing ABS and other frameworks. The PHILIPPINES and ARGENTINA noted that access is ongoing according to pre-existing legislation. NIGER said their draft legislation focuses on deriving benefits from TK. NAMIBIA drew attention to its establishment of supporting measures, including on biotrade. The AFRICAN UNION (AU) said guidelines for harmonized regional standards are being prepared and will be submitted to the African Ministerial Conference on Environment. UNEP noted that, with the support of the Global Environment Facility (GEF), some African countries have already ratified the Protocol and others are preparing to do so.

BUDGET

CBD Executive Secretary Braulio Dias introduced a draft programme budget for the biennium following the entry into force of the Protocol (UNEP/CBD/ICNP/3/2), noting that an information session is scheduled for Wednesday, while the budget will be discussed and agreed by COP/MOP 1. JAPAN reiterated the need for a budget that will avoid additional financial burdens to parties. South Africa, for the AFRICAN GROUP, called for holding COP/MOP and CBD COP Bureau meetings in conjunction, and the addition of a budget line for capacity building and, with PERU, stressed the need to fund participation of an additional delegate to the COP/MOP. Peru, for GRULAC, expressed concern that the document may set a precedent for non-parties to be obligated to finance the Protocol.

GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM

Expert Group Co-Chair Won Seog Park (Republic of Korea) presented the report of the expert meeting on Article 10 (UNEP/CBD/ICNP/3/5) and the synthesis of the online discussions (UNEP/CBD/ICNP/3/INF/4). Many delegates said the mechanism should not compromise national sovereignty over

genetic resources and the Protocol's bilateral approach to ABS. INDIA called for ensuring the mechanism is used only as a last resort. MALAYSIA recalled that the provision was intended to avoid letting users escape benefit-sharing obligations when the origin cannot be identified, noting, with SAINT LUCIA, that it is supplementary to the Protocol's bilateral approach.

Namibia for the AFRICAN GROUP stated that: it is impossible to effectively implement the Protocol without the global mechanism; its key principles must not compromise national sovereignty and ILCs' rights over TK; the mechanism must complement bilateral and regional approaches to ABS; and all utilization of genetic resources and TK should always trigger the benefit-sharing obligation. She suggested that: the mechanism be compulsory in situations to be identified by the COP/MOP; parties identify other situations for mandatory recourse to the mechanism in their national laws; and the mechanism be also used on a voluntary basis. She urged adoption of the mechanism at COP/MOP 1.

Many delegates, including South Africa for the LIKE-MINDED MEGADIVERSE COUNTRIES (LMMC), the EU and SWITZERLAND, proposed postponing discussion to COP/MOP 2, noting that discussions will benefit from experience in implementing the Protocol. The EU proposed a roadmap of activities to support discussion at COP/MOP 2. MEXICO, with others, recommended to continue online discussions. BRAZIL proposed recommending that COP/MOP 1 request an additional study, to be prepared by a regionally-balanced expert group, for consideration by COP/MOP 2.

NEW ZEALAND favored an identification of gaps feeding into further discussion of the need for the mechanism. JAPAN added that the mechanism should be in line with the CBD and Protocol, cost-effective and directly benefit conservation and sustainable use, while being acceptable to users. SWITZERLAND drew attention to the possibility of establishing regional multilateral mechanisms first.

Cautioning against reopening discussion on the temporal and spatial scope of the Protocol, the EU, with CANADA, argued that the Protocol only applies to genetic resources under Parties' sovereignty and that marine genetic resources in areas beyond national jurisdiction (ABNJ) must be considered under the process agreed by the UN General Assembly. ARGENTINA considered discussion on the mechanism premature, and, with NORWAY, pointed to the applicability of the UN Convention on the Law of the Sea and the Antarctic Treaty System to genetic resources in ABNJ. NORWAY stated that Article 11 (transboundary cooperation) does not provide a solution to situations in which genetic resources are shared, which "is the norm rather than the exception," calling for the identification of possible scenarios for using the mechanism. CANADA



highlighted that Article 10 is not intended to cover failure to implement other Protocol provisions. THAILAND supported enabling the mechanism to supplement bilateral cooperation under Article 11 by providing guidance on minimum benefit-sharing requirements under the Protocol.

The IIFB called for indigenous peoples, including women, to be active participants in all stages of the discussion of the mechanism; and requested additional studies on Article 11 (transboundary cooperation), based on a non-market approach that is fair and transparent. A BUSINESS representative prioritized focusing on national implementation, to ensure the resulting national regimes are workable for both users and providers.

MONITORING AND REPORTING

The Secretariat introduced the document (UNEP/CBD/ICNP/3/9) and Chair Lowe invited comments on the proposed reporting intervals and development of a reporting format, for approval at COP/MOP 1. Delegates agreed that the Secretariat prepare a reporting format for consideration at COP/MOP 1.

JAPAN and CANADA supported submission of an interim report on national implementation at the end of 2015. The EU preferred that parties submit their first national report in 2017. CANADA questioned including indicators in the interim report, saying this may slow down preparation. SWITZERLAND and the EU stressed the need for efficiency and reducing administrative burdens.

COMPLIANCE

Chair Lowe introduced the document, including annexed draft procedures and mechanisms to promote compliance and address non-compliance (UNEP/CBD/ICNP/3/8). South Africa, for the LMMC, stressed the mechanism should: be cooperative and facilitative in promoting compliance, while being strong and effective in addressing non-compliance; and differentiate between non-compliance due to lack of capacity and lack of political will. The EU noted it should be simple, facilitative, non-judicial, non-adversarial, and linked to relevant processes under the Protocol including on capacity building and the ABS Clearing-House. JAPAN said the procedures should not be legally binding, favoring cooperative measures including advice and assistance in cases of non-compliance, and opposing any sanctions. ARGENTINA cautioned against imposing punitive measures such as trade sanctions. Uganda, for the AFRICAN GROUP, expressed concern about limiting the powers of a compliance committee, in instances of repetitive or deliberate non-compliance.

The LMMC, the EU and JAPAN said the mechanism should address obligations of parties, not private users. MEXICO said that Articles 15 (compliance with domestic ABS requirements) and 18 (compliance with MAT) come into play when establishing a comprehensive compliance mechanism. PERU proposed establishing a reconciliation mechanism in cases of non-compliance with benefit-sharing requirements.

The EU expressed openness to explore ways for ILCs' participation, as well as innovative types of cooperative procedures. Highlighting that TK-related articles carry the same weight as the articles on genetic resources in terms of parties' obligations, NORWAY stressed the mechanism should benefit from, and safeguard the interests of, indigenous peoples and local communities through "some sort of representation." The IIFB recommended: including in the compliance committee ILC representatives from each UN region; establishing regional ILC committees to advise and support ILC submissions to the compliance committee; and enable ILCs to make submissions to the compliance committee independently from national authorities.

ABS CLEARING-HOUSE

The Secretariat introduced the report on progress in implementation of the pilot phase of the ABS Clearing-House, including draft modalities of operation (UNEP/CBD/ICNP/3/6, and INF/5). Chair Lowe, with many, called upon delegates to participate in the testing of the ABS Clearing-House so that it can work more effectively during implementation. South Africa, for the LMMC, stressed the importance of an effective and user-friendly ABS Clearing-House, and supported the proposed draft recommendations. The EU highlighted that the ABS Clearing-House is essential for monitoring and reporting. Madagascar, for the AFRICAN GROUP, noted the need for criteria to streamline the kind of information to be fed into the ABS Clearing-House. The REPUBLIC OF KOREA said that information in the ABS Clearing-House should be accessible, non-confidential and general in manner. SWITZERLAND requested clarification on the implications of updating the internationally recognized certificate of compliance, and also suggested that the informal advisory committee continue to provide advice to the Secretariat. CANADA stressed that posting permits or their equivalents, and information on third party transfers is not mandatory. The IIFB suggested that parties appoint a national focal point on CBD Article 8(j) to help address the communication gap with ILCs. A BUSINESS representative stressed the ABS Clearing-House should include reliable and complete information, and raised concerns regarding confidentiality of commercially sensitive information.

COP/MOP 1 AGENDA

Chair Lowe introduced the agenda item (UNEP/CBD/ICNP/3/4). The EU suggested linking the discussions on monitoring and reporting to the ABS Clearing-House. He proposed adding agenda items on: review of implementation (Article 26.4); model clauses, guidelines, standards and best practices; and a report from the ICNP.

COP/MOP RULES OF PROCEDURES

Chair Lowe introduced a CRP. ARGENTINA suggested bracketing text on the COM/MOP Bureau, pending a decision on the budget for the first biennium, arguing that the CBD COP Bureau should serve on an interim basis as the COP/MOP Bureau, while CBD parties, rather than Protocol parties, contribute to the Protocol budget. The Secretariat recalled that the composition of the COP/MOP Bureau is determined by the Protocol. MALAYSIA suggested adding reference to the relevant Protocol provision. Delegates adopted the recommendation with this amendment, with Chair Lowe suggesting to reflect Argentina's concerns in the draft recommendation on the budget.

IN THE CORRIDORS

On Tuesday, the question of how indigenous and local communities (ILCs) can fully participate in the governance of the international ABS framework came up repeatedly, in relation to the Protocol provisions on traditional knowledge (TK) and genetic resources held by ILCs. Indigenous representatives called for systematic opportunities to contribute to the discussion on a global multilateral benefit-sharing mechanism, which now appears likely to continue until COP/MOP 2. In addition, they queried how their views may be appropriately incorporated in monitoring and reporting processes under the Protocol. As for the ABS Clearing-House, a participant noted that "Many indigenous peoples and local communities face a digital gap, so non-electronic means of submitting information should also be considered." Finally, questions on ILC participation in a future compliance committee are on the table of the contact group on compliance, which is likely to take centre-stage at ICNP 3.



ICNP 3 HIGHLIGHTS: WEDNESDAY, 26 FEBRUARY 2014

Plenary addressed model contractual clauses, codes of conduct, guidelines and standards; and discussed CRPs on monitoring and reporting, and capacity building. The contact group on compliance met throughout the day and in the evening. An informal information session on the budget took place during lunchtime.

MODEL CONTRACTUAL CLAUSES, CODES OF CONDUCT, GUIDELINES AND STANDARDS

Delegates heard presentations from panelists, followed by a question and answer session. Rodrigo Gonzales Videla, Argentina, described Argentina's efforts in regulating ABS, including the 2010 guidelines for import, export and registration of activities relating to genetic resources and benefit-sharing. China Williams, Royal Botanic Gardens, Kew, UK, said using model agreements and clauses introduces some predictability; however, monitoring compliance is also needed. She highlighted the challenge of remaining flexible based on experience with use, and the changing legal framework.

Geoff Burton, United Nations University Institute of Advanced Studies (UNU-IAS), referred delegates to the UNU-IAS survey of model clauses (UNEP/CBD/ICNP/3/INF/2) and outcomes of an informal meeting for the implementation of Articles 19 and 20, organized by Japan, the CBD Secretariat, and UNU-IAS (UNEP/CBD/ICNP/3/INF/3). He said the survey found that most permits involve non-commercial use, and that more clarity is needed about "change of intent" and "change of use." He noted the ABS Clearing-House and the WIPO databases should be mutually supportive.

AUSTRALIA asked about challenges for smaller institutions. Williams noted constraints on staff time and capacity for dealing with agreements. Executive Secretary Dias suggested networks can be helpful. CANADA asked if the models contained an "if/then" clause covering change of intent. Burton said many models stipulate that material is provided for non-commercial purposes and will require PIC and MAT, if commercialized. He noted inconsistency occurs in identifying the trigger point of commercialization, which may be a change of intent, change of action, or security of IPR, saying more work is needed on such transitions.

The BAHAMAS asked what constitutes commercial versus non-commercial use, and how TK is dealt with. Williams replied that "change of use" sometimes occurs when material is transferred, but intent also matters. Videla highlighted Argentina's efforts to consult with indigenous peoples, noting the challenge of building trust. Burton added that "commercialization" can mean producing a profit, or producing

an economic return (such as in the case of vaccines sold for non-profit purposes), arguing that providers of genetic material should still benefit in the latter case.

Responding to a question by the EU, Burton said that most codes and guidelines surveyed were developed by users. He noted an emerging gray area where guidelines are becoming *de facto* regulations. Dias encouraged considering existing models and relevant initiatives from ILCs.

TIMOR-LESTE asked about monitoring of MAT, and Burton advised that a feedback mechanism between the provider and user is needed, such as a statement of provenance together with materials.

CHINA asked how Kew Gardens are sharing benefits with local communities. Williams replied that they work through counterpart institutions, and that most benefits they share are non-monetary, including information sharing, technology transfer, training and capacity building. The THIRD WORLD NETWORK stressed that the work of researchers in most developed countries is subject to IPRs that apply when their outputs are commercialized, even many years later. Burton referred to Article 8(a) on taking into account change of intent and use.

The Secretariat then introduced the relevant document (UNEP/CBD/ICNP/3/10). CANADA supported the proposed recommendations, including that the COP/MOP take stock of the use of model contractual clauses and other voluntary instruments four years following entry into force. The EU, ARGENTINA and BRAZIL called for considering them at later COP/MOPs, noting that more practical experience is needed.

The EU highlighted the importance of such instruments for ensuring compliance of the non-commercial research sector, and said they should be developed by users themselves and stakeholders implementing them. SWITZERLAND said that such tools may add value if they are consistent with the Protocol, relevant instruments and national regulations, but could lead to cases of non-compliance if they are not up to date, consistent and flexible; and, with the AFRICAN UNION, noted they should be developed in close collaboration between users and providers.

The FAO reported on the process agreed upon by the CGRFA for the development of voluntary draft elements to facilitate domestic implementation of ABS for different sub-sectors of genetic resources for food and agriculture, taking into account relevant international ABS instruments; and the EU requested inserting reference to this process in the recommendations. The IIFB requested reference to the ongoing work of the Working Group on Article 8(j) on guidelines for tasks 7, 10 and 12 of the work programme on Article 8(j) (prior informed approval by ILCs for access to, benefit-sharing from, and reporting and prevention of unlawful appropriation of, TK). WIPO drew



attention to its development of relevant tools, particularly regarding IPR considerations, and provided an update on the IGC negotiations on intellectual property and genetic resources.

MONITORING AND REPORTING

Delegates adopted a CRP, amending it to, *inter alia*, request the Secretariat to consolidate information contained in the interim national reports and published in the ABS Clearing-House for COP/MOP 3 consideration, as a contribution to the review of the effectiveness of the Protocol (Article 31).

CAPACITY BUILDING

Delegates considered a CRP, including draft recommendations, a strategic framework on capacity building, and terms of reference for an informal advisory committee.

CANADA, opposed by the LMMC and the AFRICAN GROUP, proposed deleting a reference to the development of a global programme to assist in the implementation of the strategic framework and contribute to the implementation of the Strategic Plan. The text was bracketed pending informal consultations.

On establishing an informal advisory committee, SWITZERLAND, supported by CANADA, proposed that the committee be *ad hoc*, and provide advice to COP/MOP 2. The LMMC, the AFRICAN GROUP and ARGENTINA preferred to extend its mandate beyond COP/MOP 2, calling for retaining text on the committee providing advice on matters related to the implementation of the strategic framework. The EU disagreed, saying this could be read as establishing a subsidiary body, and the text was bracketed pending informal consultations.

COLOMBIA suggested replacing mention of the ABS Capacity Development Initiative in the preamble with a general mention of ABS activities “such as those led by the CBD Secretariat.” After discussion, Namibia for the AFRICAN GROUP asked to refer to the ABS Capacity Development Initiative “*inter alia*,” noting that the African Group has received substantial support from that initiative.

The EU requested: reference to the private sector among those providing resources for, and information on, capacity-building initiatives; and encouraging developing country parties to incorporate capacity-building needs and priorities into their national biodiversity strategies and action plans. Delegates agreed to text on ensuring that information on capacity-building needs can be accessed from all platforms under the Convention.

On the development of tools to assist parties and ILCs assess their capacity-building needs, ARGENTINA, MALAYSIA and SOUTH AFRICA preferred requesting the Secretariat to undertake this role, while the EU preferred text on ‘encouraging the development of tools,’ expressing concern about staff capacity and funding needs. ANTIGUA AND BARBUDA proposed, and delegates agreed, to ask the Secretariat to compile information on existing tools and report to COP/MOP 2 on the need for new tools.

Delegates also considered the draft strategic framework, including appendices on measures requiring capacity building to implement the Protocol and practical capacity-building activities. In a key area on capacity for development and implementation of domestic ABS measures, the AFRICAN GROUP proposed including an item on developing procedures for granting or refusing PIC. CANADA suggested that developing minimum requirements for MAT to secure fair and equitable benefit-sharing from TK utilization should be “as appropriate.”

The AFRICAN GROUP proposed that capacity regarding developing mechanisms to monitor the utilization of genetic resources, should extend to tracking them, including though the designation of checkpoints after they have left the jurisdiction of the provider country. The issue remained outstanding, pending consultations.

COMPLIANCE

The compliance contact group was co-chaired by Jimena Nieto (Colombia) and Kaspar Sollberger (Switzerland). Participants discussed including ILC representatives in a

proposed 15-member compliance committee, with many agreeing that each region may nominate an ILC representative as one of three members. Others expressed concern about limiting the number of ILC representatives as committee members, or about the proposal to limit them to observers. The text remained bracketed.

Participants then debated at length whether committee members should serve “in their personal capacity”, “as representatives of parties” or “in the best interest of the Protocol.” One participant suggested, and many supported, the use of the formulation under the Biosafety Protocol whereby members work “objectively and in a personal capacity.” Delegates eventually agreed that committee members serve “in the best interest of the Protocol and in their individual expert capacity.”

Participants agreed that committee members would serve four-year terms, and not more than two consecutive terms. They also agreed on holding meetings, subject to the availability of funding.

Delegates then discussed the term of the rotating Chair of the committee, eventually deciding that it will be agreed in the committee’s rules of procedure. On the committee’s decision-making, participants discussed whether two-thirds of members should constitute a quorum, and whether the committee, having exhausted efforts to reach consensus, should decide by two-thirds or three-quarters majority of members present and voting, leaving options in brackets.

In the afternoon, participants discussed and eventually agreed that the compliance committee meetings be open, but when the committee is dealing with individual cases of parties whose compliance is under consideration, the meetings be closed to the public, unless the concerned party agrees otherwise. Delegates also debated whether only committee members would be allowed to participate in the deliberations of the committee, eventually deciding to leave the question to future deliberations on the committee’s rules of procedure.

Delegates then considered the functions of the committee. On the type of information that the committee should consider, some participants pointed to the need to specify that the committee will consider information submitted to it, and others preferred a broader formulation to allow it to consider information from the Clearing-House and other sources, particularly when national reports have not been submitted. One participant proposed not to pre-empt discussion of triggers, addressed in a later section of the draft. Discussions continued in the evening.

IN THE CORRIDORS

The view of skiers executing expert telemark turns, visible through the tall glass windows of the Alpensia Convention Centre, provided a welcome relief to delegates engaged in a balancing act of their own in the compliance contact group on Wednesday. Working through heavily bracketed text, delegates proceeded at snail pace on key aspects, including the make-up of a future compliance committee. Those hoping for innovative procedures also to accommodate the needs of ILCs were somewhat disappointed to witness participants generally choosing well-trodden options to preserve parties’ comfort zone.

Meanwhile, in plenary, delegates completed a first reading of draft recommendations on monitoring and reporting, and capacity building. Many expressed satisfaction at the pace of proceedings and commended the panel presentations on model clauses and other voluntary instruments. However, difficulty over establishment of a global programme and an advisory committee to assist in implementation of the strategic framework on capacity building served as a reminder that many bridges still need to be built through challenging sections, jokes about “slippery slopes” notwithstanding.



ICNP 3 HIGHLIGHTS: THURSDAY, 27 FEBRUARY 2014

In the morning, plenary heard a brief presentation on a UN Development Programme-India initiative, the “Global e-Network,” which facilitates scientific and technical knowledge-sharing between countries to assist in building the capacity necessary to ratify and implement the Nagoya Protocol. Plenary then addressed CRPs on: the draft agenda of COP/MOP 1; the ABS Clearing-House; model contractual clauses, codes of conduct, guidelines, best practices and standards (Articles 19-20); capacity building; and the global multilateral benefit-sharing mechanism. The contact group on compliance met in the morning, and continued its deliberations in the evening.

COP/MOP 1 AGENDA

Delegates addressed a CRP. The EU proposed, and delegates agreed, to make a request to the Secretariat to develop a proposal for the organization of a concurrent meeting of the CBD COP and COP/MOP 1 for consideration by the fifth meeting of the CBD Working Group on the Review of Implementation. Delegates approved the draft recommendation, with this amendment.

ABS CLEARING-HOUSE

Delegates addressed a CRP. Following a proposal by the EU, delegates agreed to specify that the advisory committee, and the Secretariat when it refines the modalities of the ABS Clearing-House, will also take into account the feedback received from parties and stakeholders during the pilot phase. CANADA called for advice by the committee on what information is mandatory or voluntary according to the Protocol provisions. Following a brief discussion on whether this is a technical issue falling within the committee’s mandate, delegates agreed to request the Secretariat to further refine the modalities of operation of the ABS Clearing-House, “especially with regard to the identification of mandatory and non-mandatory information according to the provisions of the Protocol,” as well as its functionality and user-friendliness. The CRP was approved with these and other minor amendments.

MODEL CONTRACTUAL CLAUSES, CODES OF CONDUCT AND GUIDELINES

Delegates addressed a CRP. Adding to an existing preambular paragraph on the work of the Working Group on CBD Article 8(j) concerning standards and guidelines, ARGENTINA proposed another paragraph to also take into account the work of parties, international organizations and ILCs in this area.

Delegates agreed to the proposal.

The EU, supported by CANADA, proposed a new paragraph encouraging the Executive Secretary to engage with the ABS process launched at CGRFA 14. NAMIBIA said that: the CGRFA process should not be singled out, as other international processes are also relevant; CGRFA’s guidance to governments does not relate to model contractual clauses; and it is not yet known whether the CGRFA’s work will be relevant to Articles 19 and 20. Responding to queries, FAO suggested referring to the specific process of the CGRFA, namely the development of “draft elements to facilitate domestic implementation of ABS for different sub-sectors of genetic resources for food and agriculture.” Delegates agreed to include an additional preambular paragraph, “recognizing the need for the Executive Secretary to engage with relevant international processes, as appropriate, relevant to Articles 19 and 20.”

CAPACITY BUILDING

Plenary addressed compromise proposals on outstanding issues in the CRP, resulting from informal consultations regarding the establishment of an informal advisory committee to provide advice to the Secretariat until COP/MOP 3 on matters related to the assessment of the effectiveness of the strategic framework; and deletion of the reference to the development of a global programme to assist developing countries achieve Aichi Target 16. Proposed amendments to the terms of reference of the informal advisory committee included that the committee provide: advice on the need for developing new tools, guidelines and training materials, including e-learning modules; and facilitation for matching needs in capacity building expressed by countries with potential opportunities and resources to support the implementation of the strategic framework. Under the key area on capacity to negotiate MAT, Namibia for the AFRICAN GROUP presented text resulting from informal consultations, on “developing capacity to enhance transparency about the utilization of genetic resources and TK associated with genetic resources, in accordance with the Protocol, to share information, including on MAT, and including after they have left the provider country, as appropriate.” Delegates approved the draft recommendation with these, and other minor amendments.

GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM

SWITZERLAND, supported by the EU, CANADA and AUSTRALIA, proposed that parties and stakeholders submit to the Secretariat not only views, but also experiences gained



in the implementation of the Nagoya Protocol. SAINT LUCIA, BRAZIL, EGYPT, UGANDA, INDIA and MALAYSIA expressed concern that this may limit the opportunity only to parties who have gained experience in implementation, with the PHILIPPINES noting that most countries have not yet reached that stage. Delegates eventually agreed that the views collected by the Secretariat “may, where available, also include, reflections on experiences gained” towards the achievement of the Protocol.

On commissioning a study to support further discussion on Article 10, the EU proposed the study focus on any experience with the implementation of the Protocol, relevant for determining the need for, and the modalities of, a potential multilateral benefit-sharing mechanism. The PHILIPPINES proposed that the study also focus on the Pandemic Influenza Preparedness Framework of the World Health Organization, as an example of experiences gained in the development and implementation of other multilateral mechanisms; and, opposed by the EU, that it contain information on applications and commercialization of genetic resources accessed from *ex situ* collections relevant to Article 10. ARGENTINA suggested simplifying the proposal by eliminating reference to specific examples of relevant multilateral mechanisms or processes. NORWAY proposed that the study broadly include information on other processes that can enlighten further deliberations on Article 10. ARGENTINA, supported by BRAZIL, MEXICO, MALAYSIA and PERU, stressed inclusion of TK in the study through models, simulations and/or examples on a mechanism relating to *ex situ* collections and TK. The EU recommended focusing the study on already existing experiences at the international level and on the “potential relevance of ongoing work in other processes.”

The AFRICAN GROUP, supported by MEXICO, CHINA and the LMMC but opposed by CANADA and JAPAN, requested not to subject the conduct of the study to availability of funds, with UGANDA urging against making availability of funds “another hurdle” in the urgently needed discussion on Article 10. CANADA cautioned against expanding beyond the scope of an information-gathering exercise. JAPAN recommended keeping the scope of the study in line with the CBD and the Nagoya Protocol. The LMMC emphasized the importance of implementing the recommendations of the expert meeting concerning areas of further examination, stating that the study is “of utmost importance.”

In the evening, ARGENTINA presented the outcome of informal consultations on the study, noting agreement that the study focus on the “experiences gained in the development and implementation of the Nagoya Protocol and other multilateral mechanisms” and on the “potential relevance of ongoing work undertaken by other processes, including case studies in relation to *ex situ* and *in situ* genetic resources as defined by CBD Article 2, traditional knowledge associated with genetic resources and transboundary situations.” She said informal consultations did not reach agreement on whether the study will be subject to the availability of funding or not. NAMIBIA requested time to consult within the African Group, and the paragraph remained bracketed for consideration on Friday morning.

COMPLIANCE

In the morning, the contact group debated at length whether the compliance committee may decide not to consider a submission if it “is *de minimis*,” “is manifestly ill-founded,”

“does not meet requirements” or “is anonymous.” One participant queried whether the burden of proof would be placed on those making a submission, and another whether the Secretariat would exercise some judgment before transmitting submissions to the committee.

Participants then discussed whether, in the context of a party-to-party trigger, the party that made the submission may be able to participate in the consideration of the submission and present responses or comments to the committee. Some participants opposed, noting the non-adversarial nature of the procedure. Other participants argued that due process necessitates participation by the party making the submission. A civil society representative invited delegates to consider a scenario where genetic resources are owned by, and traditional knowledge is located in, several countries. Delegates then debated whether “the concerned party” or all parties involved in the submission could be given the opportunity to comment on the committee’s recommendations; and whether any such comments are to be reflected in the committee’s report. Discussions continued in the evening.

IN THE CORRIDORS

On Thursday, delegates labored over draft recommendations in a final push to get all papers ready for overnight translation. Despite the steady pace of negotiations through the week, discussions on this second-last day were protracted.

“There are many open questions about the scope of the Nagoya Protocol and its relation to other regimes,” said a CBD veteran. This created some stumbling blocks when it came to nailing down text even on relatively uncontroversial topics, such as the scope of a study to continue discussions on a global multilateral benefit-sharing mechanism (Article 10) and specifically which international processes and mechanisms should be looked at for inspiration in that context. The Protocol’s relationship with other bodies also came up during discussions on model contractual clauses, guidelines and other voluntary instruments for the Protocol’s implementation: a reference to engaging with the CGRFA, particularly its process of developing draft ABS elements for different agricultural sub-sectors, was expunged after a long and animated discussion, as delegates at the end considered it just one of many relevant processes, and not “the most relevant,” as one frustrated delegate was heard exclaiming.

Others highlighted that countries’ lack of experience in implementing the specific provisions of the Protocol may be a hindrance to holding more concrete deliberations. “We should discuss based on experiences, and not only opinions,” said one delegate. Another participant, expressed the conundrum: “Since we still need to find common understanding about the functioning of the Protocol on so many important areas, how can we start implementation on the ground?” As delegates hunkered down to try and get through the text on compliance in an evening session of the contact group, a new type of incentive was put before them: “There will be food in the room, but only for the ‘workers.’”

ENB SUMMARY AND ANALYSIS: The *Earth Negotiations Bulletin* summary and analysis of ICNP 3 will be available on Monday, 3 March 2014 online at: <http://www.iisd.ca/biodiv/icnp3/>



SUMMARY OF THE THIRD MEETING OF THE INTERGOVERNMENTAL COMMITTEE FOR THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING TO THE CONVENTION ON BIOLOGICAL DIVERSITY: 24-28 FEBRUARY 2014

The Third Meeting of the Open-ended *Ad Hoc* Intergovernmental Committee for the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ICNP 3) to the Convention on Biological Diversity (CBD) was held from 24-28 February 2014, in Pyeongchang, Republic of Korea. It was preceded by a capacity-building workshop on the Access and Benefit-Sharing (ABS) Clearing-House on 23 February 2014.

ICNP 3 adopted recommendations on: the rules of procedure for the Conference of the Parties serving as the Meeting of the Parties (COP/MOP); monitoring and reporting; capacity building; the draft agenda for COP/MOP 1; the ABS Clearing-House; sectoral and cross-sectoral model contractual clauses, voluntary codes of conduct, guidelines, best practices and standards; a global multilateral benefit-sharing mechanism; and procedures and mechanisms on compliance. The meeting also exchanged views on the state of implementation of the Protocol, hearing from countries, regions and stakeholders on efforts to operationalize the Protocol.

Gathering in snow-covered Pyeongchang, delegates worked steadily and cooperatively on outstanding items in the ICNP agenda, in order to give the Protocol a good head-start. They succeeded in forwarding a manageable workload to the future COP/MOP, while the informal advisory committee to the ABS Clearing-House was mandated to continue providing technical guidance to the Secretariat with respect to practical preparations for entry into force. At the same time, the committee left several key questions related to the compliance procedures, particularly regarding participation or input by indigenous and local communities (ILCs), to be resolved by the future parties to the Protocol.

A BRIEF HISTORY OF THE ABS PROTOCOL

The Nagoya Protocol on ABS was adopted at CBD COP 10 on 29 October 2010, in Nagoya, Japan. The objective of

the Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biodiversity and the sustainable use of its components. With 29 ratifications to date, the Nagoya Protocol will enter into force 90 days after the deposit of the 50th instrument of ratification.

The Convention's work on ABS was initiated at COP 4 (May 1998, Bratislava, Slovakia) when parties established a regionally-balanced expert panel on ABS. Over two meetings, the expert panel developed recommendations on prior informed consent (PIC), mutually agreed terms (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

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stakeholders; benefit-sharing mechanisms; and the preservation of traditional knowledge.

ABS 1: At its first meeting (October 2001, Bonn, Germany), the Working Group on ABS developed the draft Bonn Guidelines on ABS, identified elements for a capacity-building action plan, and considered the role of intellectual property rights (IPRs) in the implementation of ABS arrangements.

COP 6: At its sixth meeting (April 2002, The Hague, the Netherlands), the COP adopted the Bonn Guidelines on ABS, and considered the role of IPRs in ABS and the relationship with the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization.

WSSD: In the Johannesburg Plan of Implementation, the UN World Summit on Sustainable Development (WSSD) (September 2002, Johannesburg, South Africa) called for negotiating, within the CBD framework, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources.

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 ABS regime, 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 elaborate and negotiate an international ABS regime, and set out the terms of reference for the negotiations.

ABS 3 and 4: At its third and fourth meetings (February 2005, Bangkok, Thailand, and January 2006, Granada, Spain), the ABS Working Group produced draft text compilations to serve as the basis for future negotiations. It also considered additional approaches to complement the Bonn Guidelines on ABS, including an international certificate of origin/source/legal provenance.

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 in 2010. 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 and 6: At its fifth and sixth meetings (October 2007, Montreal, and January 2008, Geneva, Switzerland), the ABS Working Group focused on the main components of the international regime on ABS, including fair and equitable sharing of benefits, access to genetic resources, compliance, traditional knowledge and genetic resources, and capacity building.

COP 9: At its ninth meeting (May 2008, Bonn), the COP adopted a roadmap for the negotiation of the international regime, established three expert groups, and instructed the ABS Working Group to submit an instrument/instruments for consideration and adoption by COP 10. The three expert groups (concepts, terms, working definitions and sectoral approaches; compliance; and traditional knowledge associated with genetic resources) each met once between December 2008 and June 2009.

2009-2010 NEGOTIATIONS: The ABS Working Group met four times between COP 9 and 10 (April 2009, Paris, France; November 2009, Montreal; March 2010, Cali, Colombia; and July 2010, Montreal), assisted by expert, informal and regional consultations. In Cali, the Working Group Co-Chairs Timothy Hodges (Canada) and Fernando Casas (Colombia) circulated a draft protocol text, but due to procedural wrangling the meeting was suspended. The resumed meeting in Montreal, using the interregional negotiating group (ING) format established in Cali, worked on the draft protocol text, reached agreement on non-controversial provisions, and made progress on certain difficult issues, including the relationship with other instruments and compliance with domestic ABS requirements. Delegates also identified key issues that required further negotiations, including scope and pathogens, derivatives and the concept of utilization of genetic resources, and mechanisms to support compliance. An additional meeting of the ING convened in September 2010, in Montreal, but several key issues remained outstanding.

COP 10: Immediately prior to and during COP 10 (18-29 October 2010, Nagoya, Japan), the ING continued negotiations. Towards the end of the meeting, informal ministerial consultations discussed a compromise proposal put forward by the Japanese COP Presidency, where agreement was reached on a package relating to outstanding issues, including: the concept of utilization and derivatives, and related benefit-sharing; the provision on scope; access procedures; traditional knowledge-related issues, including deleting a provision on publicly available traditional knowledge; special considerations with regard to human, animal or plant health emergencies and food security issues; temporal scope and a related proposal on a multilateral benefit-sharing mechanism to address benefit-sharing for genetic resources and traditional knowledge that occur in transboundary situations or for which it is not possible to grant or obtain PIC; and compliance-related provisions on checkpoints, information requirements and the internationally recognized certificate of compliance. The COP adopted the Protocol as part of a “package” including the CBD Strategic Plan 2011-2020 and a decision on the implementation of the Strategy for Resource Mobilization. It also established the ICNP to undertake the preparations necessary for COP/MOP 1.

ICNP 1: At its first meeting (5-10 June 2011, Montreal), the Committee adopted four recommendations initiating work on: the modalities of operation of the ABS Clearing-House; capacity building; awareness raising; and compliance.

ICNP 2: At its second meeting (2-6 July 2012, New Delhi, India), the Committee adopted eight recommendations on: the ABS Clearing-House; capacity building; awareness raising; compliance; a global multilateral benefit-sharing mechanism; guidance for the financial mechanism; resource mobilization for the Protocol’s implementation; and future work in preparation for COP/MOP 1.

COP 11: COP 11 (8-19 October 2012, Hyderabad, India) decided to reconvene the ICNP for a third meeting and added to its agenda: monitoring and reporting; an exchange of views on sectoral and cross-sectoral model contractual clauses, codes of conduct and guidelines; and an exchange of views on the state of

implementation of the Protocol. It also called for intersessional work on a multilateral benefit-sharing mechanism, capacity building, and the ABS Clearing-House.

ICNP 3 REPORT

On Monday, ICNP Co-Chair Janet Lowe (New Zealand) opened the meeting. Jeong Yeon-man, Vice-Minister of the Environment of the Republic of Korea, reported on national efforts towards ratification, and drew attention to agenda items on the COP/MOP rules of procedure and the ABS Clearing-House. Choi Moon-soon, Governor of Gangwon Province, illustrated ongoing biodiversity conservation and restoration efforts, and plans to host the most eco-friendly Winter Olympics in 2018.

CBD Executive Secretary Braulio Ferreira de Souza Dias reported that ICNP Co-Chair Fernando Casas (Colombia) was unable to participate in this meeting. He reported on progress towards the Protocol's entry into force and achievement of Aichi Target 16 on ABS, pointed to regional balance in ratifications as evidence of the Protocol's global significance, and recalled that UN Secretary-General Ban Ki-moon recently highlighted the Protocol's contribution to sustainable development. Chair Lowe urged countries to ratify the Protocol in time for COP/MOP 1 to be held concurrently with CBD COP 12 in October 2014.

Uganda, for the African Group, affirmed the region's commitment to cooperative discussions on the global multilateral benefit-sharing mechanism, capacity building and compliance. Saint Lucia, for the Latin American and Caribbean Group (GRULAC), and India, on behalf of Asia-Pacific and the COP Presidency, stressed the importance of ratifying the Nagoya Protocol. Recalling the vital role of ILCs in the Protocol, an ILC representative urged countries to fully include them in all discussions.

ORGANIZATIONAL MATTERS: Delegates agreed that ICNP 1 and 2 Rapporteur Dubravka Stepic (Croatia) will continue in that role. They adopted the meeting's agenda (UNEP/CBD/ICNP/3/1) and organization of work (UNEP/CBD/ICNP/3/1/Add.1). Chair Lowe urged delegates to prioritize items that are necessary for the smooth entry into force of the Protocol by CBD COP 12, including the ABS Clearing-House and the compliance mechanism.

This report summarizes discussions and outcomes on each of the items on the agenda of the meeting. All recommendations were adopted on Friday without substantive discussion.

DEVELOPMENT OF A BUDGET

Delegates addressed the draft programme budget for the biennium following the entry into force of the Protocol (UNEP/CBD/ICNP/3/2) on Tuesday. CBD Executive Secretary Dias noted that an information session was scheduled for Wednesday, while the budget itself will be discussed and agreed by COP/MOP 1. In the brief ensuing discussion, Japan reiterated the need for a budget that will avoid additional financial burdens to parties. South Africa, for the African Group, called for holding COP/MOP and CBD COP Bureau meetings in tandem, and for adding a budget line for capacity building. With Peru, he stressed the need to fund participation of an additional delegate to the

COP/MOP. Peru, for GRULAC, expressed concern that the document may set a precedent for non-parties to be obligated to finance the Protocol.

In the informal information meeting on Wednesday, it was agreed that, if necessary, the Secretariat will seek additional input on the budget requirements through the COP Bureau.

COP/MOP RULES OF PROCEDURE

Delegates first discussed this issue on Monday and considered a draft recommendation on Wednesday. Introducing the item (UNEP/CBD/ICNP/3/3), the Secretariat highlighted the need to address: replacing COP Bureau members from countries that are non-parties to the Protocol; and whether any amendments to the COP rules of procedure will apply automatically to the COP/MOP. He noted that under the Biosafety Protocol such amendments shall not apply unless otherwise decided by the COP/MOP.

India, Mexico, Colombia, Canada and the Democratic Republic of the Congo, for the African Group, stressed the need to follow the Biosafety Protocol experience in allowing the COP/MOP to decide on whether to adopt amendments to the rules of procedure made by the COP. The European Union (EU) stressed the need to keep the Protocol closely linked to the Convention, suggesting that, according to Protocol Article 26.5, amendments to the COP rules of procedure should automatically apply to the COP/MOP, unless otherwise decided. China supported decision making by consensus.

Discussing the draft recommendation, Argentina suggested bracketing text on the COP/MOP Bureau, pending a decision on the budget for the first biennium, arguing that the CBD COP Bureau should serve on an interim basis as the COP/MOP Bureau, while CBD parties, rather than Protocol parties, contribute to the Protocol's budget. The Secretariat recalled that the composition of the COP/MOP Bureau is determined by the Protocol. Malaysia suggested adding reference to the relevant Protocol provision, and delegates approved the recommendation with this amendment. Argentina's concerns were recorded in the meeting report.

Final Outcome: In the recommendation (UNEP/CBD/ICNP/3/L.2), the ICNP notes Protocol Article 26.5 on the application, *mutatis mutandis*, of the COP rules of procedure, except as may be otherwise decided by consensus by the COP/MOP, and decides by consensus that:

- where a member of the COP Bureau representing a party to the Convention but, at that time, not a party to the Protocol, is replaced by a member elected by, and from among, the parties to the Protocol, the term of office of the substitute member shall expire at the same time as the term of office of the member of the Bureau he or she replaces; and
- when the COP rules of procedure are amended by the COP, the amendments shall apply *mutatis mutandis* to meetings of the COP/MOP, unless the COP/MOP decides otherwise.

COP/MOP 1 DRAFT AGENDA

Delegates first discussed this item (UNEP/CBD/ICNP/3/4) on Tuesday and considered a draft recommendation on Thursday.

The EU suggested linking the discussions on monitoring and reporting to the ABS Clearing-House. He proposed adding

agenda items on: review of implementation (Article 26.4); model clauses, guidelines, standards and best practices; and a report from the ICNP.

Addressing the draft recommendation, the EU proposed, and delegates agreed, to make a request to the Secretariat to develop a proposal for the organization of a concurrent meeting of the CBD COP and COP/MOP 1 for consideration by the fifth meeting of the CBD Working Group on the Review of Implementation (WGRI 5). Delegates approved the draft recommendation, with this amendment.

Final Outcome: In the recommendation (UNEP/CBD/ICNP/3/L.5), the ICNP, noting the ongoing process of improving the efficiency of the structures and processes under the Convention and its Protocols, and stressing the importance for the concurrent meetings of the COP and the COP/MOP to allow for the full participation of all parties:

- requests the Secretariat to develop a proposal for the organization of the concurrent meetings of the COP and COP/MOP for consideration by WGRI 5; and
- recommends that COP/MOP 1 adopt the draft provisional agenda annexed to the recommendation.

The annexed proposed agenda for COP/MOP 1 includes all ICNP 3 agenda items, as well as items on awareness raising, resource mobilization, guidance to the financial mechanism and the budget.

GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM

ICNP 3 addressed the item on Tuesday and Thursday. On Tuesday, Expert Group Co-Chair Won Seog Park (Republic of Korea) presented the report of the expert meeting on Article 10 (UNEP/CBD/ICNP/3/5) and the synthesis of the online discussions (UNEP/CBD/ICNP/3/INF/4). Many delegates said the mechanism should not compromise national sovereignty over genetic resources and the Protocol's bilateral approach to ABS. Malaysia recalled that the provision was intended to avoid letting users escape benefit-sharing obligations when the origin cannot be identified, noting, with Saint Lucia, that it is supplementary to the Protocol's bilateral approach. India said it should only be used as "a last resort."

Namibia, for the African Group, stated that: it is impossible to effectively implement the Protocol without the global mechanism; its key principles must not compromise national sovereignty and ILCs' rights over traditional knowledge (TK); the mechanism must complement bilateral and regional approaches to ABS; and all utilization of genetic resources and TK should always trigger the benefit-sharing obligation. She suggested that: the mechanism should be compulsory in situations to be identified by the COP/MOP; parties identify other situations for mandatory recourse to the mechanism in their national laws; and the mechanism should also be used on a voluntary basis. She urged adoption of the mechanism at COP/MOP 1.

Many delegates, including South Africa, for the Like-Minded Megadiverse Countries (LMMC), the EU and Switzerland, proposed postponing discussion to COP/MOP 2, noting that discussions will benefit from experience in implementing the Protocol. The EU proposed a roadmap of activities to support discussion at COP/MOP 2. Mexico, with others, recommended

continuing online discussions. Brazil proposed recommending that COP/MOP 1 request an additional study, to be prepared by a regionally-balanced expert group, for consideration by COP/MOP 2. New Zealand favored an identification of gaps feeding into further discussion of the need for the mechanism.

Cautioning against reopening discussion on the temporal and spatial scope of the Protocol, the EU, with Canada, argued that the Protocol only applies to genetic resources under parties' sovereignty and that marine genetic resources in areas beyond national jurisdiction (ABNJ) must be considered under the process agreed by the UN General Assembly. Argentina considered discussion on the mechanism premature and, with Norway, pointed to the applicability of the UN Convention on the Law of the Sea and the Antarctic Treaty System to genetic resources in ABNJ. Norway stated that Article 11 (transboundary cooperation) does not provide a solution to situations in which genetic resources are shared, which "is the norm rather than the exception," and called for the identification of possible scenarios for using the mechanism. Canada highlighted that Article 10 is not intended to cover failure to implement other Protocol provisions. Thailand supported enabling the mechanism to supplement bilateral cooperation under Article 11 by providing guidance on minimum benefit-sharing requirements under the Protocol.

The International Indigenous Forum on Biodiversity (IIFB) called for indigenous peoples, including women, to be active participants in all stages of the discussion of the mechanism; and requested additional studies on Article 11 (transboundary cooperation), based on a non-market approach that is fair and transparent. A business representative prioritized focusing on national implementation, to ensure the resulting national regimes are workable for both users and providers.

On Thursday, delegates discussed a draft recommendation, focusing on the scope of the proposed study. The EU proposed the study should focus on experience relevant to determining the need for, and the modalities of, a potential multilateral benefit-sharing mechanism. The Philippines proposed that: the study also focus on the Pandemic Influenza Preparedness Framework of the World Health Organization, as an example of experiences gained in the development and implementation of other multilateral mechanisms; and, opposed by the EU, that it contain information on applications and commercialization of genetic resources accessed from *ex situ* collections relevant to Article 10. Norway proposed that the study broadly include information on other processes that can enlighten further deliberations on Article 10. Argentina, supported by Brazil, Mexico, Malaysia and Peru, stressed inclusion of TK in the study through models, simulations and/or examples on a mechanism relating to *ex situ* collections and TK.

The African Group, the LMMC, Mexico and China stressed the importance of conducting the study. Canada and Japan said the study should be "subject to the availability of funds."

After informal consultations on the focus and funding of the study, delegates agreed it should focus on the "experiences gained in the development and implementation of the Nagoya Protocol and other multilateral mechanisms" and on the "potential relevance of ongoing work undertaken by other processes, including case studies in relation to *ex situ* and *in*

situ genetic resources as defined by CBD Article 2, traditional knowledge associated with genetic resources and transboundary situations.” As agreement was not reached on whether the study will be subject to availability of funds or not, the references remained in brackets. Namibia expressed concerns regarding reference to the definitions of *ex situ* and *in situ* genetic resources in CBD Article 2.

On Friday, plenary adopted the recommendation.

Final Outcome: In the recommendation (UNEP/CBD/ICNP/3/L.8), the ICNP recommends that COP/MOP 1 invite parties and others to submit their views on:

- situations that may support the need for a global multilateral benefit-sharing mechanism, which are not covered under the bilateral approach;
- possible modalities for such a mechanism; and
- areas requiring further consideration, noting that such views may include, where available, reflections on any experiences gained in working towards the Protocol’s implementation.

The recommendation also calls on COP/MOP 1 to request the Secretariat to:

- prepare a synthesis of these views;
- commission a study on experiences gained in the development and implementation of the Protocol and other multilateral mechanisms, including case studies in relation to *ex situ* and *in situ* genetic resources as defined in CBD Article 2, TK associated with genetic resources, and transboundary situations; and
- convene an expert group meeting to review the synthesis of views and study, for submission to COP/MOP 2.

The recommendation retains bracketed text on whether the study and the expert group meeting will be subject to the availability of funds, and on the reference to the definitions of *in situ* and *ex situ* genetic resources contained in CBD Article 2.

ABS CLEARING-HOUSE

On Tuesday, the Secretariat introduced the report on progress in implementation of the pilot phase of the ABS Clearing-House, including an annex on draft modalities of operation (UNEP/CBD/ICNP/3/6) and a summary of outcomes of the meeting of the informal advisory committee (UNEP/CBD/ICNP/3/INF/5). Chair Lowe, with many, called on delegates to participate in the testing of the ABS Clearing-House. South Africa, for the LMCC, stressed the importance of an effective and user-friendly ABS Clearing-House. The EU highlighted that the ABS Clearing-House is essential for monitoring and reporting. Madagascar, for the African Group, noted the need for criteria to streamline the kind of information to be fed into the ABS Clearing-House. The Republic of Korea said that information in the ABS Clearing-House should be accessible, non-confidential and general in nature. Switzerland requested clarification on the implications of updating the internationally recognized certificate of compliance, and also suggested that the informal advisory committee continue to provide advice to the Secretariat. Canada stressed that posting permits or their equivalents and information on third party transfers to the ABS Clearing-House is not mandatory.

The IIFB suggested that parties appoint a national focal point on CBD Article 8(j) to help address the communication gap with ILCs. A business representative stressed the ABS Clearing-House

should include reliable and complete information, and raised concerns regarding confidentiality of commercially sensitive information.

On Thursday, delegates addressed a draft recommendation. The EU proposed, and delegates agreed, that the advisory committee and Secretariat take into account feedback from parties and other stakeholders, when refining the modalities of the ABS Clearing-House. Canada proposed asking the committee to advise on what information is mandatory or voluntary according to the Protocol’s provisions. Following a discussion on whether this is a technical issue falling within the committee’s mandate, delegates agreed to request the Secretariat to further refine the modalities of operation of the ABS Clearing-House, “especially with regard to the identification of mandatory and non-mandatory information according to the provisions of the Protocol,” as well as its functionality and user-friendliness.

On Friday, during adoption of the final recommendation, the Philippines asked about the status of the draft annex to the progress report, which outlines modalities of operation. The Secretariat clarified that input from parties at ICNP 3 will be reflected in a revised version, to be presented as a basis for negotiation at COP/MOP 1.

Final Outcome: In the recommendation (UNEP/CBD/ICNP/3/L.6), the ICNP notes the progress made in implementing the pilot phase, and requests further measures be undertaken to ensure the Clearing-House is fully functional by the time the Protocol enters into force, including, *inter alia*, to:

- invite parties to designate a publishing authority and/or one or more national authorized users;
- encourage all parties, in particular those that have ratified the Protocol, to publish national records, including permits or equivalents constituting an internationally recognized certificate of compliance, and provide feedback to the Secretariat;
- request the Secretariat to make information on ABS measures, competent national authorities, and national focal points currently hosted on the CBD website available in the ABS Clearing-House for parties to validate;
- invite international organizations, ILCs and relevant stakeholders to register reference records, and provide feedback to the Secretariat;
- invite the informal advisory committee to continue providing technical guidance to the Secretariat;
- request the Secretariat to further refine the modalities of operation, especially with regard to the identification of mandatory and non-mandatory information according to the Protocol’s provisions; and
- invite parties and others to submit their views to the Secretariat on possible functions and responsibilities of a competent authority of ILCs, and its contact point for the Clearing-House, and on who should be responsible for submitting information on these authorities to the Clearing-House, for the Secretariat to prepare a synthesis of these views for consideration at COP/MOP 1.

CAPACITY BUILDING

Delegates first discussed the draft strategic framework for capacity building and development under the Protocol (UNEP/CBD/ICNP/3/7 and INF/6) on Monday and considered a draft

recommendation on Wednesday and Thursday. The main issues addressed included the establishment of an informal advisory committee to assist the Secretariat on considering capacity-building best practices outside the CBD, the terms of reference for this committee, the development of a global programme to assist developing countries in the implementation of the strategic framework, and the need for financial resources.

Many called for awareness raising and expressed support for the draft strategic framework. Switzerland, supported by Uganda, proposed including national capacity needs and priorities self-assessments, to be compiled by the Secretariat.

Senegal, for the African Group, suggested establishing an informal advisory committee to assist the Secretariat to include capacity-building best practices from other fora, such as the Food and Agriculture Organization (FAO). Malaysia proposed that such a committee coordinate initiatives undertaken by various bodies globally, and noted the role of capacity building in promoting better understanding of the Protocol's provisions.

The EU recommended sharing experiences through the ABS Clearing-House. Thailand emphasized the need to ensure technical accuracy of information shared, including through the ABS Clearing-House, to enhance common understanding of the Protocol.

India, with many, called for adequate financing to ensure action on the elements of the strategic framework. Norway, supported by Uganda, underscored the need for financing for developing countries and ILCs as a common challenge for all parties to the Protocol, and called for guidance to the Global Environment Facility (GEF) in this regard. Niger proposed considering micro-financing programmes among resources for implementation, and facilitating access to national-level capacity-building activities for the largest possible number of stakeholders. The Democratic Republic of the Congo called attention to capacity for tracking genetic resources in relation to IPRs. Japan recommended prioritizing capacity building for implementing the Protocol's provisions on access; and cautioned against proposed capacity-building on monitoring and enforcing compliance with mutually agreed terms (MAT), noting the lack of corresponding obligations under the Protocol.

Brazil underscored the need for capacity building for ILCs and checkpoints, and capacity development to negotiate MAT and monitor impacts of benefit-sharing on biodiversity conservation. He supported the development of a global programme to assist developing countries in the implementation of the framework. Canada questioned the added value of a formal, centralized, CBD-led global programme.

Guatemala suggested that toolkits and workshops focused on ILCs, TK and benefit-sharing be made available to government representatives, students and the media. Cuba urged consideration of non-internet-based capacity-building measures.

The International Treaty on Plant Genetic Resources for Food and Agriculture highlighted the complementary mandates of the Treaty and the Protocol. IUCN suggested including consideration of regional and subregional markets and legislative frameworks. Drawing attention to the role of women, the IIFB prioritized capacity building related to the ABS Clearing-House.

On Wednesday, delegates considered a draft recommendation, including a strategic framework on capacity building, and

terms of reference for an informal advisory committee. Canada, opposed by the LMMC and the African Group, proposed deleting a reference to the development of a global programme to assist in the implementation of the strategic framework and contribute to the implementation of the Strategic Plan. The text was bracketed pending informal consultations.

On establishing an informal advisory committee, Switzerland, supported by Canada, proposed that the committee be *ad hoc*, and provide advice to COP/MOP 2. The LMMC, the African Group and Argentina preferred to extend its mandate beyond COP/MOP 2, calling for the retention of text on the committee providing advice on matters related to the implementation of the strategic framework. The EU disagreed, saying this could be read as establishing a subsidiary body, and the text was bracketed pending informal consultations.

The EU requested: reference to the private sector among those providing resources for, and information on, capacity-building initiatives; and encouraging developing country parties to incorporate capacity-building needs and priorities into their national biodiversity strategies and action plans. Delegates agreed to text on ensuring that information on capacity-building needs can be accessed from all platforms under the Convention. Antigua and Barbuda proposed, and delegates agreed, to ask the Secretariat to compile information on existing tools and report to COP/MOP 2 on the need for new tools.

Delegates also considered the draft strategic framework, including appendices on measures requiring capacity building to implement the Protocol and practical capacity-building activities. In a key area on capacity for development and implementation of domestic ABS measures, the African Group proposed including an item on developing procedures for granting or refusing prior informed consent. Canada suggested that developing minimum requirements for MAT to secure fair and equitable benefit-sharing from TK utilization should be "as appropriate."

The African Group proposed that capacity regarding developing mechanisms to monitor the utilization of genetic resources should extend to tracking them, including though the designation of checkpoints after they have left the jurisdiction of the provider country. The issue remained outstanding, pending consultations.

On Thursday, ICNP 3 agreed to compromise proposals on outstanding issues in the draft recommendation, resulting from informal consultations regarding the establishment of an informal advisory committee to provide advice to the Secretariat until COP/MOP 3 on matters related to the assessment of the effectiveness of the strategic framework; and deletion of the reference to the development of a global programme to assist developing countries to achieve Aichi Target 16. Proposed amendments to the terms of reference of the informal advisory committee included that the committee provide: advice on the need for developing new tools, guidelines and training materials, including e-learning modules; and facilitation for matching needs in capacity building expressed by countries with potential opportunities and resources to support the implementation of the strategic framework. Under the key area on capacity to negotiate MAT, Namibia, for the African Group, presented text resulting from informal consultations, on "developing capacity to enhance transparency about the utilization of genetic resources

and TK associated with genetic resources, in accordance with the Protocol, after they have left the provider country, as appropriate.” Delegates approved the draft recommendation with these, and other minor amendments.

Final Outcome: In the recommendation (UNEP/CBD/ICNP/3/L.4), the ICNP takes note of the views and domestic needs and priorities of parties and ILCs, notes the need for sufficient financial resources for capacity-building and development activities to support Protocol implementation, and recalls Protocol Article 14.1 that states the ABS Clearing-House is part of the CBD Clearing-House Mechanism. It recommends that COP/MOP 1, *inter alia*:

- adopt the strategic framework for capacity building and development, contained in the annex;
- decide to establish an informal advisory committee to provide advice to the Secretariat until COP/MOP 3 on matters related to the implementation of the strategic framework;
- invite governments, ILCs and others to develop and implement capacity-building and development activities consistent with the strategic framework;
- invite governments, the GEF, international organizations, regional development banks, other financial institutions and the private sector to provide financial resources to support the implementation of the strategic framework; and
- encourage developing country parties and ILCs to make information available through the ABS Clearing-House regarding their capacity-building and development needs and priorities identified through national capacity self-assessments, and to incorporate them in their national strategies and action plans.

The recommendation also requests the Secretariat to, *inter alia*:

- ensure that information on capacity-building and development needs, opportunities and activities can be submitted to and accessed from all platforms under the Convention;
- compile information on existing tools that assist parties and ILCs to assess their capacity-building and development needs and priorities and to make the resulting information available through the ABS Clearing-House, and report to COP/MOP 2 on the need for the development of new tools;
- prepare updates on the status of implementation of the strategic framework and its contribution to the Strategic Plan for consideration by the COP/MOP, beginning at COP/MOP 2; and
- prepare an evaluation of the strategic framework in 2019 and submit the evaluation report for consideration by the MOP in 2020 for possible revision of the strategic framework in conjunction with the review of the Strategic Plan.

The annexes to the recommendation contain: the draft strategic framework for capacity building and development to support effective implementation of the Protocol; and the amended terms of reference of the informal advisory committee on capacity building. The draft strategic framework contains two appendices on an overview of measures requiring capacity building and development in order to effectively implement the Protocol based on the needs and priorities expressed by countries and ILCs; and practical capacity-building and development activities to support the effective implementation of the Protocol.

Both appendices outline measures and activities under five key areas:

- capacity to implement and comply with the obligations of the Protocol;
- capacity to develop, implement and enforce domestic legislative, administrative or policy measures on ABS;
- capacity to negotiate MAT;
- needs and priorities of ILCs and relevant stakeholders, including the business sector and the research community, in relation to the implementation of the Protocol; and
- capacity of countries to develop their endogenous research capabilities to add value to their genetic resources.

COMPLIANCE

Delegates addressed the issue in plenary on Tuesday. A contact group, co-chaired by Jimena Nieto (Colombia) and Kaspar Sollberger (Switzerland), met on Wednesday and Thursday.

On Tuesday, Chair Lowe introduced the document, including annexed draft procedures and mechanisms to promote compliance and address non-compliance (UNEP/CBD/ICNP/3/8). South Africa, for the LMMC, stressed the mechanism should: be cooperative and facilitative in promoting compliance, while being strong and effective in addressing non-compliance; and differentiate between non-compliance due to lack of capacity or lack of political will. The EU noted it should be simple, facilitative, non-judicial, non-adversarial, and linked to relevant processes under the Protocol, including on capacity building and the ABS Clearing-House. Japan said the procedures should not be legally binding, favoring cooperative measures including advice and assistance in cases of non-compliance, and opposing any sanctions. Argentina cautioned against imposing punitive measures such as trade sanctions. Uganda, for the African Group, expressed concern about limiting the powers of a compliance committee, in instances of repetitive or deliberate non-compliance.

The LMMC, the EU and Japan said the mechanism should address obligations of parties, not private users. Mexico said that Articles 15 (compliance with domestic ABS requirements) and 18 (compliance with MAT) come into play when establishing a comprehensive compliance mechanism.

The EU expressed openness to explore ways for ILCs’ participation, as well as innovative types of cooperative procedures. Highlighting that TK-related articles carry the same weight as the articles on genetic resources in terms of parties’ obligations, Norway stressed the mechanism should benefit from, and safeguard the interests of, indigenous peoples and local communities through “some sort of representation.” The IIFB recommended: including in the compliance committee ILC representatives from each UN region; establishing regional ILC committees to advise and support ILC submissions to the compliance committee; and enable ILCs to make submissions to the compliance committee independently from national authorities.

The contact group was mandated to revise and refine the draft text on compliance procedures and mechanisms that had been forwarded by ICNP 2 and CBD COP 11. Among other issues, participants discussed participation of ILC representatives in a proposed 15-member compliance committee. Many agreed

that each region may nominate an ILC representative as one of three members. Others expressed concern about limiting the number of ILC representatives as committee members, or about the proposal to limit their status to observers. Participants then debated at length whether committee members should serve “in their personal capacity,” “as representatives of parties,” or “in the best interest of the Protocol.” One participant suggested, and many supported, the use of the formulation under the Biosafety Protocol whereby members work “objectively and in a personal capacity.” Delegates eventually agreed that committee members serve “in the best interest of the Protocol and in their individual expert capacity.”

Participants agreed that committee members would serve four-year terms, and not more than two consecutive terms. On the term of the rotating Chair of the committee, delegates decided that this will be agreed in the committee’s rules of procedure. On the committee’s decision-making, participants discussed whether two-thirds of members should constitute a quorum, and whether the committee, having exhausted efforts to reach consensus, should decide by two-thirds or three-quarters majority of members present and voting, leaving options in brackets.

Participants discussed and eventually agreed that the compliance committee meetings be open, but when the committee is dealing with individual cases of parties whose compliance is under consideration, the meetings be closed to the public, unless the concerned party agrees otherwise. Delegates also debated whether only committee members would be allowed to participate in the deliberations of the committee, eventually deciding to leave the question to future deliberations on the committee’s rules of procedure.

On the type of information that the committee should consider, some participants pointed to the need to specify that the committee will consider information submitted to it, and others preferred a broader formulation to allow it to consider information from the Clearing-House and other sources, particularly when national reports have not been submitted.

The contact group debated at length, without reaching agreement, whether the compliance committee may decide not to consider a submission if it “is *de minimis*,” “is manifestly ill-founded,” “does not meet requirements,” or “is anonymous.” In the context of a party-to-party trigger, the group discussed whether the party that made the submission may be able to participate in the consideration of the submission and present responses or comments to the committee. Some participants opposed, noting the non-adversarial nature of the procedure. Other participants argued that due process necessitates participation by the party making the submission. Delegates then debated whether “the concerned party” or all parties involved in the submission could be given the opportunity to comment on the committee’s recommendations; and whether any such comments are to be reflected in the committee’s report.

On Friday morning, contact group Co-Chair Sollberger reported to the plenary that there had been constructive discussions and the successful elimination of a large number of brackets. Chair Lowe introduced a draft recommendation, noting that COP/MOP 1 will resolve outstanding issues in the annexed procedures and mechanisms. Plenary approved the draft recommendation without discussion.

Final Outcome: In the recommendation (UNEP/CBD/ICNP/3/L.9), the ICNP agrees to forward the text of the draft cooperative procedures and institutional mechanisms to promote compliance and to address cases of non-compliance to COP/MOP 1 for its consideration and approval.

The annexed procedures and mechanisms include sections on: objectives, nature and underlying principles; institutional mechanisms; functions of the committee; procedures; information for and consultation by the committee after the triggering of the procedures; measures to promote compliance and address cases of non-compliance; an ombudsman; and review of procedures and mechanisms.

The agreed objective is to promote compliance and address cases of non-compliance. The procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate; and shall be separate from, and without prejudice to, the dispute settlement procedures and mechanisms under CBD Article 27. They shall: be non-adversarial, cooperative, simple, expeditious, advisory, facilitative, flexible and cost-effective; be guided by the principles of fairness, due process, rule of law, non-discrimination, transparency, accountability, predictability, good faith and effectiveness; and pay particular attention to the special needs of developing country parties.

The agreed institutional mechanism established is a compliance committee, consisting of 15 members nominated by parties, on the basis of three members endorsed by each of the five UN regional groups. Options on participation of ILC representatives remain in brackets. Members shall have recognized competence, and serve objectively, in the best interests of the Protocol and in their individual expert capacity. They shall be elected by the COP/MOP for a period of four years. The committee shall meet at least once during each intersessional period, and may, as necessary and subject to the availability of financial resources, hold additional meetings. Two-thirds of the committee members shall constitute a quorum. Text on decision-making by qualified majority in the case no agreement by consensus can be reached remains in brackets.

The meetings of the committee shall be open, unless the committee decides otherwise. When the committee deals with individual cases of parties whose compliance is under consideration, the meetings shall be open to parties and closed to the public, unless the party concerned agrees otherwise.

With regard to the committee’s functions, bracketed language refers to exclusions of questions related to: interpretation, implementation or compliance with MAT; compliance with national law; non-compliance arising from failure to put in place national law due to lack of capacity and resources; and conservation, exploration, collection, characterization, evaluation and documentation of plant genetic resources.

It is agreed that the committee shall receive submissions from any party with respect to itself; any party with respect to another party; and the COP/MOP. References to the Secretariat, members of the public and ILCs remain in brackets. According to a bracketed paragraph, the committee may consider questions of compliance, including systemic issues of non-compliance, on the basis of national reports or any other relevant information, particularly provided by members of the public, including ILCs.

Agreed measures to be taken by the committee or the COP/MOP to promote compliance and address cases of non-compliance include: offering advice or facilitating assistance to the party concerned; requesting or assisting the party concerned to develop a compliance plan; and inviting the party concerned to submit progress reports on its efforts to comply. The committee shall take into account: the capacity of the party concerned; the special needs of developing country parties; and such factors as the cause, type, degree and frequency of non-compliance. In addition, the COP may facilitate access to financial and technical assistance and capacity-building measures and issue a written caution, statement of concern or a declaration of non-compliance. Bracketed language addresses measures in cases of grave or repeated non-compliance, including suspension of rights and privileges in accordance with the applicable rules of international law.

A paragraph on an ABS ombudsman to provide assistance to developing countries and ILCs remains bracketed.

MONITORING AND REPORTING

On Tuesday, Chair Lowe invited comments on the proposed reporting intervals and development of a reporting format, for approval at COP/MOP 1 (UNEP/CBD/ICNP/3/9). Japan and Canada supported submitting an interim report on national implementation at the end of 2015. The EU preferred that parties submit their first national report in 2017. Canada questioned including indicators in the interim report, saying this may slow down preparation. Switzerland and the EU stressed the need for efficiency and reducing administrative burdens.

On Thursday, delegates adopted a draft recommendation, amending it to, *inter alia*, request the Secretariat to consolidate information contained in the interim national reports and published in the ABS Clearing-House for COP/MOP 3 consideration, as a contribution to the review of the effectiveness of the Protocol (Article 31). Delegates agreed that the Secretariat prepare a reporting format for consideration at COP/MOP 1.

Final Outcome: In the recommendation (UNEP/CBD/ICNP/3/L.3), the ICNP, *inter alia*, requests the Secretariat to prepare a draft format for an interim national report for consideration by COP/MOP 1. The draft format should: avoid duplication in relation to the submission of information already made available through the ABS Clearing-House and national reports under the Convention; consist of simple structured questions allowing for flexibility to respond to checkboxes; provide narrative information on difficulties in Protocol implementation; and allow for submission of information through the ABS Clearing-House, including the option to submit information offline. It also recommends that COP/MOP 1 adopt a decision that, among others:

- requests the Secretariat to make the format for the interim national report available through the ABS Clearing-House, including the option to submit information offline, and to consolidate information contained in the interim national reports received and information published in the Clearing-House for the consideration of COP/MOP 3, as part of the assessment and review of the effectiveness of the Protocol;
- invites governments to submit an interim national report on the implementation of their obligations under the Protocol in

an official UN language, through the Clearing-House, and 12 months before COP/MOP 3.

- invites the GEF to make financial resources available to assist eligible parties to prepare their national reports; and
- decides to consider the intervals for reporting at COP/MOP 3, and to keep the format of the national report under review, based on experience gained and feedback received from parties.

MODEL CONTRACTUAL CLAUSES, CODES OF CONDUCT, GUIDELINES, BEST PRACTICES AND/OR STANDARDS

On Wednesday, delegates engaged in an exchange of views on the subject, beginning with presentations by three panelists. Rodrigo Gonzales Videla, Argentina, described Argentina's efforts in regulating ABS, including the 2010 guidelines for import, export and registration of activities relating to genetic resources and benefit-sharing. China Williams, Royal Botanic Gardens, Kew, UK, said using model agreements and clauses introduces some predictability; however, monitoring compliance is also needed. She highlighted the challenge of remaining flexible based on experience with use, and the changing legal framework.

Geoff Burton, United Nations University Institute of Advanced Studies (UNU-IAS), referred delegates to the UNU-IAS survey of model clauses (UNEP/CBD/ICNP/3/INF/2) and outcomes of an informal meeting for the implementation of Articles 19 and 20, organized by Japan, the CBD Secretariat, and UNU-IAS (UNEP/CBD/ICNP/3/INF/3). He said the survey found that most permits involve non-commercial use, and that more clarity is needed about "change of intent" and "change of use." He noted the databases of the ABS Clearing-House and the World Intellectual Property Organization (WIPO) should be mutually supportive.

Delegates raised questions about: the challenges for smaller institutions, definitions of commercial versus non-commercial use, how to recognize the "trigger points" when PIC and MAT will be required; and monitoring of MAT. Burton noted that inconsistency occurs in identifying the trigger point of commercialization, which may be a change of intent, change of action, or securing IPR, saying more work is needed on such transitions. He added that "commercialization" can mean producing a profit, or producing an economic return (such as in the case of vaccines sold for non-profit purposes), arguing that providers of genetic material should still benefit in the latter case. He noted an emerging gray area where guidelines are becoming *de facto* regulations, and he suggested that materials include a statement of provenance, when transferred.

Responding to a question from China, Williams noted that Kew Gardens shares non-monetary benefits with counterpart institutions, including information sharing, technology transfer, training and capacity building. Videla highlighted Argentina's efforts to consult with indigenous peoples and the challenge of building trust, and Burton noted existing models and relevant initiatives from ILCs.

The Third World Network stressed that the work of university researchers in most developed countries is subject to mandatory IPR policies when commercialized, and Burton referred to Article 8(a) on taking into account change of intent and use.

Delegates then discussed a note by the Secretariat (UNEP/CBD/ICNP/3/10). Canada supported having the COP/MOP take stock of the use of model contractual clauses and other voluntary instruments four years after the Protocol's entry into force, while the EU, Argentina and Brazil preferred considering them at later COP/MOPs, saying more practical experience is needed. Switzerland expressed concern that such tools could lead to cases of non-compliance if they are not up to date, consistent and flexible; and, with the African Union, said they should be developed through collaborative efforts between users and providers.

The FAO reported on the process agreed upon by the Commission on Genetic Resources for Food and Agriculture (CGRFA) for the development of ABS elements for different sub-sectors of genetic resources for food and agriculture. The IIFB requested reference to the ongoing work of the Working Group on Article 8(j) on guidelines regarding prior informed approval by ILCs for access to, benefit-sharing from, and reporting and prevention of unlawful appropriation of TK. WIPO drew attention to its development of relevant tools, particularly regarding IPR considerations.

On Thursday, delegates discussed a draft recommendation. Adding to a reference to the Working Group on CBD Article 8(j) concerning standards and guidelines, Argentina proposed another paragraph, to which delegates agreed, to also take into account the work of parties, international organizations and ILCs in this area.

The EU, supported by Canada, proposed encouraging the Executive Secretary to engage with the ABS process launched at CGRFA 14. Namibia said that: the CGRFA process should not be singled out, as other international processes are also relevant; CGRFA's guidance to governments does not relate to model contractual clauses; and it is not yet known whether the CGRFA's work will be relevant to Articles 19 and 20. Responding to queries, FAO suggested referring to the specific process of the CGRFA, namely the development of "draft elements to facilitate domestic implementation of ABS for different sub-sectors of genetic resources for food and agriculture." Delegates agreed to include an additional preambular paragraph, "recognizing the need for the Executive Secretary to engage with relevant international processes, as appropriate, relevant to Articles 19 and 20," and approved the recommendation with this amendment.

Final Outcome: In the recommendation (UNEP/CBD/ICNP/3/L.7), the ICNP recognizes the need for the Executive Secretary to engage, as appropriate, with relevant international processes, and recommends that COP/MOP 1:

- encourage parties and others to submit model contractual clauses, codes of conduct and other such tools to the ABS Clearing-House;
- encourage the updating of tools developed prior to the Protocol; and
- decide to take stock of the use of these tools four years after the Protocol has entered into force, in conjunction with the first assessment and review of the Protocol.

A report of the panel presentations and question-and-answer session was annexed to the report of the meeting (UNEP/CBD/ICNP/3/L.1/Add.1).

EXCHANGE OF VIEWS ON THE STATE OF IMPLEMENTATION

On Monday, Hem Pande, India, presented on ABS implementation in India, describing the legal nature and activities of the country's National Biodiversity Authority. With examples of ABS agreements on the ground, he noted that in determining equitable benefit-sharing, criteria are considered case-by-case.

Hugo Schally, EU, presented the proposed EU regulation, currently in the final stages of approval, noting that it focuses on compliance measures, providing for a due diligence requirement for users and establishing two checkpoints, one at the beginning and one at the end of the value chain. He said access requirements and penalties for non-compliance will be regulated at the member state level.

Preston Hardison, Tulalip Tribes, presented on assessing culture-related risks in specific ABS transactions. He said the Protocol does not provide for consideration of the risks of sharing TK, noting that such risks can be significant in the context of survival challenges for many indigenous peoples. He stressed the need to ensure respect for community biocultural protocols in domestic legal systems, and to improve mutual supportiveness between ABS and other TK-related measures.

Sélim Louafi, CIRAD (French Agricultural Research Centre for International Development), discussed challenges faced by the research sector in complying with ABS rules and procedures. He commented that the ABS narrative is built around access to genetic resources by the private sector, but most transactions occur within the research sector, for example, in the context of conservation, breeding and knowledge generation. He proposed documenting existing exchange and use practices. He highlighted the possibility of long-term partnerships for non-monetary benefit-sharing, which do not preclude the possibility of monetary benefits, for example, through supporting PhD research and hosting visiting scholars.

Maria Julia Oliva, Union for Ethical BioTrade, noted that a growing number of companies are reporting on their biodiversity-sourcing practices. She encouraged countries to: focus on providing legal certainty; develop a coherent interpretation of the Protocol; and identify what specific practices are covered under ABS. She highlighted the need to support companies that are pioneering good practices, and proposed a platform for business to discuss and engage in ABS.

Ensuing discussions focused on: users' due diligence obligations in providing information to checkpoints at different stages of the value chain; the usefulness of voluntary instruments to communicate regulatory requirements effectively to users and identify workable approaches to ensure users' compliance and avoid reputational risk; good practices and challenges within the research community; sanctions for users' non-compliance with their due diligence obligations, and recourse to domestic courts for breaches of MAT; choice and structure of competent national authorities; IPRs and prevention of biopiracy; and predicted timing of the ratification by the EU and its member states.

France expressed the intention to ratify the Protocol soon after EU legislation is finalized. Germany drew attention to a draft legislative package, highlighting challenges regarding setting up a competent national authority in view of the country's federal system, and ongoing discussions on certain access regulations.

Australia underlined efforts to simplify and streamline the process of requesting access permits for scientific research, including through negotiating institutional-level benefit-sharing agreements and attaching a benefit-sharing agreement to a permit. Peru highlighted ongoing preparations, including at the ILC level, and challenges regarding compliance by the research sector, *ex situ* collections, and interlinkages with other treaties, including free trade agreements with provisions on IPRs. The UK noted challenges leading up to ratification, including assent from its Foreign Office.

Morocco noted a domestic study on the most strategic mode of implementing the Protocol. Norway drew attention to disclosure requirements in IP legislation and development of legislation on TK. Switzerland described their centralized checkpoint, which he said is user-friendly and simple. Brazil noted efforts to improve their 2001 ABS legislation, and share experiences in implementation with India and South Africa.

Thailand drew attention to four competent national authorities, on plants, traditional medicine, micro-organism collections and protected animals. Indonesia said a national authority will be established by 2015, noting that more time is needed to build stakeholder awareness. Costa Rica said countries should concentrate not only on access, but also on compiling information about monetary and non-monetary benefits. Ethiopia said its first ABS agreement on teff failed due to the user company's "inconsistency."

Colombia underscored the need to factor in the time for consultations with ILCs into national ratification processes. Japan reported on a study on benefit-sharing in different sectors as a basis for inter-ministerial and stakeholder consultations. Malaysia pointed to the need to persuade ABS stakeholders of the added value of ratifying the Protocol. He suggested provider countries can differentiate between access applications, depending on whether user countries have sufficient domestic measures on users' compliance. South Africa reported on the review of its pre-existing framework on ABS with a view to including measures on checkpoints and on users' compliance, among other provisions.

Final Outcome: A summary of panel presentations and discussions was annexed to the meeting report (UNEP/CBD/ICNP/3/L.1/Add.1).

CLOSING PLENARY

On Friday morning, under the agenda item on "other matters," ICNP 3 took note of the outcomes of the eighth meeting of the Working Group on Article 8(j) on tasks 7, 10 and 12 of the programme of work on Article 8(j) (UNEP/CBD/ICNP/3/INF/1). Namibia emphasized the need for funding the participation of an additional developing country representative at COP/MOP 1. Norway acknowledged Namibia's concerns, noting it will consider possibilities to accommodate them and urging countries to take them into account.

The EU introduced a proposal for an ICNP intersessional expert group meeting to focus on: how to utilize the expertise of ILC representatives in promoting compliance and addressing cases of non-compliance; different options for ILCs to raise compliance-related issues; and different procedures for ILC participation in compliance-related work. Uganda noted the proposed participation of two ILC representatives in the expert

group is not adequate to build their capacity or represent their diversity. Brazil, for GRULAC, supported by China, noted procedural concerns due to the late circulation of the proposal in English only, and lack of time to negotiate the terms of reference for the group. GRULAC, supported by Malaysia, suggested the EU convene the meeting on its own initiative. Norway and an ILC representative supported the EU proposal, with the ILC representative, Colombia and Malaysia querying how the outcome of the expert group would affect the current negotiating text on compliance. Following the discussion, the EU withdrew the proposal, noting the possibility of organizing a meeting on their own initiative.

Plenary then adopted eight recommendations and the report of the meeting (UNEP/CBD/ICNP/3/L.1), including an annexed summary of the panel presentations and discussions on model contractual clauses and voluntary instruments, and the exchange of views on the state of implementation of the Protocol.

CBD Executive Secretary Dias congratulated delegates on their cooperative energy and their feedback on the Clearing-House pilot phase, underscored that the proposed capacity-building strategic framework will be a cornerstone of implementation, and pointed to benefit-sharing as a tool to build trust as a foundation for sustainable development and human well-being. He expressed the wish that COP/MOP 1 be held in Pyeongchang in October 2014. Co-Chair Lowe thanked delegates for having provided COP/MOP 1 "with the best possible start," and urged them to continue their efforts towards ratification because "we are on track to achieve the fifty ratifications needed for entry into force, but this is by no means guaranteed." The Republic of Korea congratulated ICNP 3 for keeping the momentum towards entry into force and expressed commitment to ensure that COP 12 contributes to the achievement of the Aichi targets.

Peru, for GRULAC, welcomed the exchange of ideas on compliance that led to a more structured document for COP/MOP 1 consideration, noting that it "starts going in the right direction but much remains to be done." Uganda, for the African Group, emphasized regional efforts to ensure a coherent and coordinated approach to ABS and called on parties to put in place the necessary measures to ensure fair and equitable benefit-sharing, as well as to support conservation and sustainable use of biodiversity. South Africa, for the LMCC, expressed satisfaction at the progress made and cooperation shown at ICNP 3.

Armenia, for Central and Eastern Europe, welcomed constructive deliberations on capacity building and compliance, and expressed willingness to participate in the testing of the Clearing-House. India expressed high expectations that COP/MOP 1 will be held in October 2014, underscoring that "large sections of our population stand to benefit from an early entry into force."

The IIFB recommended: setting up an ILCs' independent advisory committee to advise on genetic resources held by ILCs and TK in relation to the Clearing-House; holding regional capacity-building workshops for ILCs; and including at least two ILC representatives from each UN region on the compliance committee as full members, and at least one ILC member from each region as an observer.

Chair Lowe gavelled the meeting to a close at 12:22 pm.

A BRIEF ANALYSIS OF THE MEETING

SO MANY QUESTIONS, SO LITTLE TIME

“Extinction is loss of biodiversity, but the disappearance of the ICNP will be a positive development for the international biodiversity regime,” joked Chair Janet Lowe. With hopes running high that the Nagoya Protocol will attract the necessary number of ratifications in time to hold the first COP/MOP in 2014, ICNP 3 was expected to be the last opportunity to prepare for entry into force of the Protocol.

Gathering in snow-covered Pyeongchang, the venue of the 2018 Winter Olympics, delegates worked steadily and cooperatively to give the Protocol a good head-start. While they succeeded in forwarding a manageable workload to the future COP/MOP, they also stumbled on several recurring and new questions about the Protocol’s operations. This brief analysis will outline these questions on the nuts and bolts of the Protocol that will keep delegates busy at COP/MOP 1 or, if the Protocol doesn’t enter in force in 2014, in an alternative scenario.

BURNING QUESTIONS

Several of the basic building blocks of the Protocol, the details of which delegates have been working on for the past three years, continue to puzzle. One example is the ABS Clearing-House, which is the international information hub for the Protocol and will allow ABS stakeholders to learn about parties’ national legislation on ABS, signal the conclusion of specific ABS transactions, and share useful capacity-building and awareness-raising materials. ICNP 3 delegates appreciated the ABS Clearing-House capacity-building workshop held prior to the meeting, the progress made in the pilot phase, and the opportunity to provide feedback for further improvements. Nonetheless, some questions remained as to which information is mandatory or voluntary, even if the Protocol provides indications as to what information must and should be provided to the Clearing-House. More fundamentally for the compliance pillar of the Protocol, there appears to be a divergence of views as to whether national permits must be posted in the Clearing-House, which “elevates” them to the status of internationally recognized certificates of compliance. This uncertainty is quite critical, as the certificates will provide evidence across different countries of the “legality” of ABS transactions (i.e. that PIC requirements were respected and MAT established). Some participants questioned if forwarding all their permits to the ABS Clearing-House is useful, noting that it often adds unnecessary layers of bureaucracy and complicates some otherwise simple transactions. On the other side, those favoring the mandatory nature of the certificate highlighted its advantages in promoting legal certainty—one of the issues that the Protocol was expected to fix.

Many key questions also remain open in relation to the compliance procedures of the Protocol. The hard-working contact group at ICNP 3 concentrated on eliminating “low-hanging-fruit” brackets in a draft transmitted from ICNP 2, but did not attempt to resolve some of the more politically charged issues, notably participation of ILC representatives in the future compliance committee, decision-making, triggers, and the possibility to impose sanctions. In addition, delegates continue to hold diverging opinions as to whether the future

compliance committee should consider questions of compliance with national laws, and whether there should be an ombudsman to assist developing countries and ILCs in identifying instances of non-compliance and making submissions to the committee. While delegates agreed that the draft going to the COP/MOP is much cleaner and structured, some of the remaining questions on compliance appear daunting. In this context, a last-minute proposal from the EU to hold an expert meeting to focus on issues related to ILC input and participation did not receive a warm welcome, and was eventually withdrawn, as delegates wondered how this meeting’s outcome would feed into the negotiating document and feared it might disrupt the progress achieved so far. Clearly there is a need to further reflect on possible solutions to the still pending questions on ILCs and compliance under the Protocol, but many more participants than can be accommodated in an expert group wish to weigh in at this critical stage. As one seasoned observer commented, at least now all the options for ILCs’ participation in the compliance committee are still on the table.

WHERE TO LOOK FOR ANSWERS?

To some extent, it is expected that some questions about the Protocol will be addressed through learning by doing. The Protocol itself points to a multiplicity of activities that may help identify good answers with inputs from stakeholders at various levels. These include model contractual clauses and voluntary instruments such as codes of conduct and guidelines. Many delegations stressed that this is a practical way for multilateral negotiations to capitalize on experience already accrued on the ground. At the same time, however, these instruments raise questions of their own. In one of the side-events, several uncertainties were pointed out vis-à-vis the role of the COP/MOP in “taking stock” of model contractual clauses and codes of conduct, and possibly even “consider the adoption” of the latter, as outlined in Articles 19 and 20. Will the COP/MOP have the time, skill or political will to undertake a systematic assessment of whether the many voluntary instruments “out there” comply with the Protocol and facilitate its implementation? Would the COP/MOP need to create a subsidiary body or technical process to that end? What about instruments that have been intergovernmentally approved in other fora? And what would be the fate of those instruments that are considered non-compliant?

Some answers may also arise from the capacity-building activities already in progress. But, in light of the many uncertainties about the Protocol, some delegations sounded the alarm that the much-needed ABS capacity-building activities may be disseminating different answers and even contradictory interpretations of the Protocol. To assuage these concerns, developing countries proposed the creation of an advisory committee that could monitor and possibly even coordinate disparate capacity-building activities with a view to safeguarding a yet to be achieved, common understanding of the Protocol. To some extent, some also argued that a “global capacity-building programme” could contribute to that end. Mention of a global programme, however, was not retained in the final text, as other delegates considered it too centralized an approach. Instead, they recommended creation of an informal committee to provide advice to the Secretariat on the implementation of the strategic framework on capacity building.

MILLION-DOLLAR QUESTIONS

To be sure, the one provision in the Protocol that raises the most uncertainties is Article 10, which in itself is a combination of question marks: is there a need for a global multilateral benefit-sharing system? And if so, what should it cover and how should it work? Behind these questions, fundamental divergences of views compete as to whether Article 10 may re-open the temporal and spatial scope of the Protocol, and its relationships with other multilateral processes. Could the mechanism apply to genetic resources in *ex situ* collections, in marine areas beyond national jurisdiction or in Antarctica? Could the mechanism apply to traditional knowledge in the public domain? Or to cases of shared genetic resources and traditional knowledge falling under Article 11 of the Protocol calling for transboundary cooperation? What kind of benefits will it provide and to whom?

CBD parties so far have only found common ground in establishing that, if a mechanism is to be created, it should not undermine national sovereignty and should not compete with—but rather complement—the bilateral approach to ABS that is supported by other provisions of the Protocol. Some say that efforts need to focus first on understanding whether such a mechanism is necessary, and that to do so more time is needed to gain experience in implementation of the Protocol. Others, however, argue that establishing the need is a no-brainer. Instead, they point to areas that cannot be fairly addressed through the Protocol's bilateral approach, such as shared genetic resources or shared traditional knowledge, which, as was pointed out in plenary, represent “the rule rather than the exception.” These areas, they say, need to be tackled urgently.

At ICNP 3, it soon became clear that more groundwork is needed, with many acknowledging that answers cannot reasonably be expected before COP/MOP 2. So delegates ended up asking “questions about the right questions” that should be asked to inform further discussions. Should specific processes, such as under the World Health Organization, the International Treaty on Plant Genetic Resources for Food and Agriculture, the UN General Assembly's Working Group on marine biological diversity in areas beyond national jurisdiction, the Antarctic Treaty System or the FAO Commission on Genetic Resources for Food and Agriculture, be examined? This discussion turned out to be quite contentious, with the result that bracketed text was forwarded to COP/MOP 1 on the specifics and funding of a study to be commissioned to analyze experience gained in implementation of the Protocol, development and implementation of other multilateral processes, and the potential relevance of ongoing work on *ex situ* and *in situ* genetic resources, traditional knowledge and transboundary situations.

BUYING TIME OR ASKING QUESTIONS LATER?

At this juncture in the process, it is anyone's guess whether the Protocol will enter into force in time for COP/MOP 1 to be held in October 2014. In corridor discussions, some delegations said even one week's delay in their internal processes may result in missing the fast-approaching deadline in July. On the one hand, early entry into force may help to maintain the momentum toward the Protocol's implementation and register a victory for the Aichi Targets. For these reasons alone, some delegations do not even wish to contemplate a plan B—“if you really want it

to happen, you can't stop believing that it will,” commented one fervent participant.

On the other hand, many delegates noted that it may not be wise to ratify the Protocol before national implementing measures are in place, since their existence is an essential element for countries to benefit from the international architecture for ABS transactions created by the Protocol. And setting appropriate implementing measures is a task that requires time, considering that many complex questions need to be resolved at the national and sub-national levels, such as the implications of the Protocol for various sectors of governments and of industry, and effective consultations must take place with ILCs.

Ultimately, whether or not these steps can take place in time to convene COP/MOP 1 in 2014, the current efforts towards ratification are not in vain. By accruing experience, these efforts will certainly provide more food for thought to address outstanding questions at the multilateral level. And work at the multilateral level does not need to stop in the absence of a COP/MOP: the ICNP may be revived, or the CBD COP could still commission studies on the questions identified at ICNP 3 for the next biennium. One way or another, CBD parties and ABS stakeholders will keep busy learning and doing, in their search for workable answers for a coherent, functional and fair international ABS regime.

UPCOMING MEETINGS

Regional Capacity-building Workshop for Latin America on the Nagoya Protocol on Access and Benefit-sharing: This regional workshop aims to assist participants to build capacity towards the implementation of the Nagoya Protocol, in particular the provisions concerning traditional knowledge associated with genetic resources. **dates:** 24-28 March 2014 **location:** Montevideo, Uruguay **contact:** CBD Secretariat **phone:** +1-514-288-2220 **fax:** +1-514-288-6588 **email:** secretariat@cbd.int **www:** <http://www.cbd.int/doc/?meeting=ABSWS-2014-02>

WIPO IGC 27: At its 27th meeting, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization will hold a 10-day text-based negotiating session focusing on traditional knowledge and traditional cultural expressions. **dates:** 24 March - 4 April 2014 **location:** Geneva, Switzerland **contact:** WIPO Secretariat **phone:** +41-22-338-9111 **fax:** +41-22-733 5428 **email:** grtkf@wipo.int **www:** http://www.wipo.int/meetings/en/details.jsp?meeting_id=32089

Regional Capacity-building Workshop for the African Region on Traditional Knowledge and Customary Sustainable Use under the CBD: This workshop will provide the opportunity to build and strengthen the capacity of representatives of indigenous and local communities and government officials working on issues related to traditional knowledge, and advance further national implementation of Article 8(j) and related CBD provisions, particularly Aichi Target 18 on traditional knowledge. **dates:** 26-28 March 2014 **location:** Nairobi, Kenya **contact:** CBD Secretariat **phone:** +1-514-288-2220 **fax:** +1-514-288-6588 **email:** secretariat@cbd.int **www:** <http://www.cbd.int/doc/?meeting=8JWS-2014-01>

Sub-regional Capacity-building Workshop on the Nagoya Protocol for Central and Eastern Europe and Central Asia:

This workshop aims to promote awareness of the core provisions of the Nagoya Protocol and strengthen the capacity of participating countries to undertake the necessary steps to ratify/accede to the Protocol and prepare for its effective implementation, with a view to contributing to the achievement of Aichi Biodiversity Target 16 on the Protocol. **dates:** 31 March - 4 April 2014 **location:** Minsk, Belarus **contact:** CBD Secretariat **phone:** +1-514-288-2220 **fax:** +1-514-288-6588 **email:** secretariat@cbd.int **www:** <http://www.cbd.int/doc/?meeting=ABSWS-2014-03>

CBD Second Dialogue Seminar on Scaling up Finance for Biodiversity: Convened jointly by the Governments of Ecuador, India, Japan, Norway, the Republic of Korea, Sweden, Uganda and the European Commission, the second dialogue seminar aims to enhance mutual understanding of the different views and perspectives on financing for biodiversity. It will focus on the implementation of Aichi targets 2, 3 and 20 in the context of Decision XI/4 on resource mobilization. **dates:** 9-12 April 2014 **location:** Quito, Ecuador **contact:** CBD Secretariat **phone:** +1-514-288-2220 **fax:** +1-514-288-6588 **email:** secretariat@cbd.int **www:** <http://www.cbd.int/doc/?meeting=DS-FB-02>

46th GEF Council Meeting and GEF Assembly: The Global Environment Facility Assembly will be held back-to-back with the 46th GEF Council meeting in Mexico. The CSO Consultation, GEF Council and LDCF/SCCF Council Meetings will convene from 25-27 May, with the Council meeting beginning on 25 May and overlapping for half a day on 27 May with the CSO Consultation. The Assembly will convene from 28-30 May. The GEF Assembly meets every four years to take major decisions, including endorsement of the next four-year GEF replenishment package. **dates:** 25-30 May 2014 **location:** Cancun, Mexico **contact:** GEF Secretariat **phone:** +1-202-473-0508 **fax:** +1-202-522-3240/3245 **email:** secretariat@thegef.org **www:** <http://www.thegef.org/gef/node/10134>

CBD WGRI 5: At its fifth meeting, the CBD Working Group on the Review of Implementation is expected to address, among other issues, implementation of the Strategy for Resource Mobilization, the efficiency of structures and processes under the Convention and its protocols, and biodiversity and development. **dates:** 16-20 June 2014 **location:** Montreal, Canada **contact:** CBD Secretariat **phone:** +1-514-288-2220 **fax:** +1-514-288-6588 **email:** secretariat@cbd.int **www:** <http://www.cbd.int/doc/?meeting=WGRI-05>

CBD SBSTTA 18: At its eighteenth meeting, the Subsidiary Body on Scientific, Technical and Technological Advice of the Convention on Biological Diversity is expected to address, among others, issues related to marine and coastal biodiversity, biodiversity and climate change, and the relationship with IPBES. **dates:** 23-28 June 2014 **location:** Montreal, Quebec, Canada **contact:** CBD Secretariat **phone:** +1-514-288-2220 **fax:** +1-514-288-6588 **email:** secretariat@cbd.int **www:** <http://www.cbd.int/doc/?meeting=SBSTTA-18>

2014 World Conference on Indigenous Peoples: The World Conference on Indigenous Peoples 2014 will be organized as a high-level plenary meeting of the 69th session of the UN General Assembly and supported by the UN Permanent Forum

on Indigenous Issues, to share perspectives and best practices on the realization of the rights of indigenous peoples and to pursue the objectives of the UN Declaration on the Rights of Indigenous Peoples. **dates:** 22-23 September 2014 **location:** UN Headquarters, New York **contact:** Nilla Bernardi, Secretariat, Permanent Forum on Indigenous Issues **phone:** +1-212-963-8379 **email:** bernardi@un.org **www:** <http://wcip2014.org/>

Biosafety COP/MOP 7: The seventh Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety to the CBD will hold a special session on exchange of experiences and challenges in the implementation of the Protocol, focusing on the integration of biosafety into national development plans and programmes. The meeting will further address a range of issues, including on handling, transport, packaging and identification, socioeconomic considerations, and the Supplementary Protocol on liability and redress. **dates:** 29 September - 3 October 2014 **location:** Pyeongchang, Republic of Korea **contact:** CBD Secretariat **phone:** +1-514-288-2220 **fax:** +1-514-288-6588 **email:** secretariat@cbd.int **www:** <http://www.cbd.int/doc/?meeting=MOP-07>

CBD COP 12: The twelfth meeting of the Conference of the Parties to the CBD will engage in a mid-term review of the implementation of the Strategic Plan and the Aichi targets, and will consider a range of cross-cutting, thematic, administrative and financial issues. **dates:** 6-17 October 2014 **location:** Pyeongchang, Republic of Korea **contact:** CBD Secretariat **phone:** +1-514-288-2220 **fax:** +1-514-288-6588 **email:** secretariat@cbd.int **www:** <http://www.cbd.int/doc/?meeting=COP-12>

COP/MOP 1 of the Nagoya Protocol on ABS: The first Conference of the Parties serving as a Meeting of the Parties to the CBD Nagoya Protocol on ABS is tentatively scheduled to be held concurrently with CBD COP 12 in October 2014, dependent upon the ratification status of the Convention. **dates:** 6-17 October 2014 (tentative) **location:** Pyeongchang, Republic of Korea **contact:** CBD Secretariat **phone:** +1-514-288-2220 **fax:** +1-514-288-6588 **email:** secretariat@cbd.int **www:** <http://www.cbd.int/meetings/>

GLOSSARY

ABS	Access and benefit-sharing
CBD	Convention on Biological Diversity
COP	Conference of the Parties
COP/MOP	Conference of the Parties serving as the Meeting of the Parties
FAO	Food and Agriculture Organization
GEF	Global Environment Facility
ICNP	Intergovernmental Committee for the Nagoya Protocol
IIFB	International Indigenous Forum on Biodiversity
ILC	Indigenous and local community
IPRs	Intellectual property rights
LMMC	Like-Minded Megadiverse Countries
MAT	Mutually agreed terms
PIC	Prior informed consent
TK	Traditional knowledge
WIPO	World Intellectual Property Organization