

SEVENTH MEETING OF THE WORKING GROUP ON ACCESS AND BENEFIT-SHARING OF THE CONVENTION ON BIOLOGICAL DIVERSITY: 2-8 APRIL 2009

The seventh meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) begins today and will continue until 8 April 2009, at UNESCO headquarters, in Paris, France. The meeting will continue the negotiation of an international regime on ABS, focusing on operational text on the objective, scope, compliance, fair and equitable benefit-sharing, and access.

In accordance with decision IX/12 of the Conference of the Parties (COP), the Working Group is instructed "to finalize the international regime and to submit for consideration and adoption by the Conference of the Parties at its tenth meeting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and its three objectives, without in any way prejudging or precluding any outcome regarding the nature of such instrument/instruments." COP 10 will be held from 18-29 October 2010, in Nagoya, Japan.

A BRIEF HISTORY OF THE CBD AND ABS

Negotiated under the auspices of the UN Environment Programme, the CBD was opened for signature on 5 June 1992, and entered into force on 29 December 1993. There are currently 191 parties to the Convention, which aims to promote the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.

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

The Convention's work on ABS was initiated at COP 4 (May 1998, Bratislava, Slovakia), when parties decided to establish a regionally balanced expert panel on ABS, whose composition and agenda were discussed at an intersessional meeting on the operations of the Convention (June 1999, Montreal, Canada). The first meeting of the expert panel on ABS (October 1999, San José, Costa Rica) developed a set of recommendations including general conclusions and specific points on PIC, MAT, information needs and capacity building. COP 5 (May 2000,

Nairobi, Kenya) established the Working Group on ABS to develop guidelines and other approaches on: PIC; MAT; roles, responsibilities and participation of stakeholders; benefit-sharing mechanisms; and the preservation of traditional knowledge. The second meeting of the expert panel on ABS (March 2001, Montreal, Canada) addressed: user and provider experience in ABS processes; approaches for stakeholder involvement; and complementary options to address ABS within the CBD framework, including possible elements for guidelines.

ABS 1: At its first meeting (October 2001, Bonn, Germany), the Working Group on ABS developed the draft Bonn guidelines on ABS and also: identified elements for a capacity-building action plan; called for an open-ended workshop on capacity building for ABS; 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 also considered the role of IPRs in the implementation of ABS arrangements, 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 negotiation, within the CBD framework, of an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources. The WSSD call was reaffirmed at the 57th session of the UN General Assembly (December 2002, New York) and the 2005 UN World Summit (September 2005, New York), as well as at the subsequent sessions of the UN General Assembly.

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: At its third meeting (February 2005, Bangkok, Thailand), the ABS Working Group produced a document with several options for the design of an international regime on ABS. It also addressed: additional approaches to complement the Bonn

Guidelines on ABS, such as an international certificate of origin/source/legal provenance; measures to ensure compliance with PIC and MAT; and options for indicators for ABS.

ABS 4: At its fourth meeting (January-February 2006, Granada, Spain), the ABS Working Group continued talks on an international ABS regime and agreed on a draft text to serve as the basis for future negotiations. The Working Group also considered an international certificate of origin/source/legal provenance, and measures to support compliance with PIC and MAT.

COP 8: At its eighth meeting (March 2006, Curitiba, Brazil), the COP instructed the ABS Working Group to complete its work with regard to the international ABS regime at the earliest possible time before COP 10, to be held in 2010, under the co-chairmanship of Fernando Casas (Colombia) and Timothy Hodges (Canada). Following a lengthy controversy over the status of the ABS 4 outcome, the COP decided to transmit it to ABS 5, along with the outcomes of a group of technical experts on a certificate of origin/source/legal provenance. 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.

EXPERT GROUP ON THE CERTIFICATE: The group of technical experts on an internationally recognized certificate of origin/source/legal provenance (January 2007, Lima, Peru) discussed the feasibility, implementation challenges and potential costs and benefits of different options for a certificate of origin/source/legal provenance.

ABS 5: At its fifth meeting (October 2007, Montreal, Canada), the ABS Working Group considered substantive elements of an international regime on ABS. Delegates also discussed two informal documents tabled by the Co-Chairs, their notes on proposals made at the meeting and their reflections on progress made, and concluded they were under the sole authority of the Co-Chairs and would be circulated to parties as information documents.

ARTICLE 8(J) WG 5: At its fifth meeting (October 2007, Montreal, Canada), the Working Group on Article 8(j) did not reach agreement on a recommendation on inputs from the Working Group to the negotiation of an international regime on ABS, due to divergence of views with regard to both procedural and substantive issues.

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

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

INTERSESSIONAL HIGHLIGHTS

TRIPS COUNCIL MEETINGS: At the TRIPS Council meetings held on 17 June 2008 and from 29-30 October 2008, in Geneva, Switzerland, issues related to a possible amendment of the TRIPS Agreement to be in line with the CBD remained contentious. Such an amendment would require the disclosure of origin of biological resources or traditional knowledge in patent applications. The TRIPS Council also discussed the issue of granting observer status to the CBD, and noted that consultations on this matter will be held with the CBD Secretariat.

WIPO IGC 13: Held from 13-17 October 2008, in Geneva, Switzerland, the 13th session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization (WIPO) ended with no agreement, due to divergent views on future work, regarding the composition of three proposed intersessional working groups on traditional knowledge, traditional cultural expressions, and genetic resources, the timing of the sessions, and whether or not to make the three meetings concurrent.

WORKSHOP ON ABS IN NON-COMMERCIAL RESEARCH: Held from 17-19 November 2008, in Bonn, Germany, this workshop discussed: the relationship between non-commercial and commercial research; communities of practice involved in non-commercial research; benefits from, and potential risks of, non-commercial research; standardized ABS agreements and procedures for non-commercial research; and actions needed to build trust between researchers and provider countries.

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

VIENNA WORKSHOP ON TRADITIONAL KNOWLEDGE AND ABS: This workshop was held from 15-17 December 2008, in Vienna, Austria. Guided by three fictional ABS scenarios designed to match real-life procedures, participants discussed matters of concern to indigenous peoples and local communities in relation to traditional knowledge and the international ABS regime, and identified issues that will require further discussion.

EXPERT GROUP ON COMPLIANCE: This group of technical and legal experts (27-30 January 2009, Tokyo, Japan) considered public and private international law measures to: facilitate access to justice and access to courts by foreign plaintiffs; support mutual recognition and enforcement of judgments across jurisdictions; and provide remedies and sanctions in civil, commercial and criminal matters, to ensure compliance with national ABS legislation. The group also addressed: voluntary measures to enhance compliance by users of foreign genetic resources; whether an internationally agreed definition of misappropriation and misuse of genetic resources and associated traditional knowledge could support compliance; compliance measures that take account of the customary laws of indigenous and local communities; and compliance measures for research with non-commercial intent.

ABS 7 HIGHLIGHTS: THURSDAY, 2 APRIL 2009

Delegates to the seventh meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met in plenary throughout the day. In the morning, they heard statements and reports, addressed organizational matters and initiated discussions on operational text on the objective of the international regime. An afternoon plenary addressed scope and compliance. Regional consultations were held in the afternoon and evening.

PLENARY

OPENING: Working Group Co-Chair Timothy Hodges (Canada) welcomed delegates, and underscored that the Working Group has 21 days of negotiations left to complete its mandate, time which is limited but sufficient for the task. He welcomed the specificity of COP Decision IX/12 that sets out the basis for negotiations, milestones, a deadline and precise goals.

Jochen Flasbarth, on behalf of the German COP Presidency, underscored the economic value of ecosystems and biodiversity that forms the background to the incumbent negotiations. He called on delegates to negotiate in line with COP Decision IX/12 and in the spirit of cooperation.

CBD Executive Secretary Ahmed Djoghlaif stressed that this meeting is a pivotal juncture in the negotiations of the international ABS regime. He emphasized that in order to plant seeds of change and peace on the way to Nagoya, significant progress must be achieved in Paris.

Walter Erdelen, Assistant Director-General for Natural Sciences, UNESCO, highlighted the long history of collaboration between UNESCO and the CBD, and that UNESCO is a key partner in the implementation of the Convention, including through UNESCO's Man and the Biosphere Programme.

Bakary Kante, on behalf of UNEP Executive Director Achim Steiner, highlighted UNEP's support for the CBD Secretariat and the Bureau, and said UNEP has committed to contribute US\$1 million to the ABS process. Quoting his personal history, he underscored the importance of ecosystem services for livelihoods.

ORGANIZATIONAL MATTERS: Co-Chair Hodges reminded delegates that the COP 9 Bureau serves as the meeting Bureau and nominated Damaso Luna (Mexico) as rapporteur.

Delegates then adopted the meeting's agenda and organization of work (UNEP/CBD/WG-ABS/7/1 and Add.1/Rev.1). Co-Chair Hodges announced that each substantive item would be initially considered in plenary, and contact groups would be established as needed. Delegates agreed to negotiate on the basis of Annex 1 to COP Decision IX/12 (UNEP/CBD/WG-ABS/7/7), also drawing on parties' submissions compiled by the Secretariat (UNEP/CBD/WG-ABS/7/4 and Add.1-3) as well as submissions tabled in plenary.

REGIONAL STATEMENTS: All regional groups expressed their commitment towards a productive meeting and finalizing negotiations by COP 10. Mexico, for the LATIN AMERICA AND THE CARIBBEAN GROUP (GRULAC), reiterated its preference for a binding agreement. Namibia, for the AFRICAN GROUP, recalled that benefit-sharing is key for implementing the Convention's other objectives. The Czech Republic, for the EUROPEAN UNION (EU), preferred conducting negotiations in plenary, rather than in contact groups, because many issues are interlinked. Ukraine, for CENTRAL AND EASTERN EUROPE (CEE), expressed full support for the approach outlined by the Co-Chairs. Brazil, for the LIKE-MINDED MEGADIVERSE COUNTRIES (LMMC), underscored their commitment to recognize the rights of indigenous and local communities to their traditional knowledge, and to negotiate a legally binding instrument to implement the CBD objective on benefit-sharing. Cook Islands, for ASIA AND THE PACIFIC, underlined the importance of completing an effective ABS regime in a timely manner.

EXPERT GROUP REPORTS: Monica Rosell (Peru) and Hiroji Isozaki (Japan), Co-Chairs of the group of legal and technical experts on compliance, reported on the outcomes of the meeting, held from 27-31 January 2009, in Tokyo, Japan (UNEP/CBD/WG-ABS/7/3). Desmond Mahon (Canada) and Pierre du Plessis (Namibia), Co-Chairs of the group of legal and technical experts on concepts, terms, working definitions and sectoral approaches, reported on the meeting, held from 2-5 December 2008, in Windhoek, Namibia (UNEP/CBD/WG-ABS/7/2).

Working Group Co-Chair Fernando Casas (Colombia) announced that the studies commissioned in accordance with COP Decision IX/12 are circulated as information documents and will be presented during side events.

OPERATIONAL TEXT: Objective: The Co-Chairs invited delegates who had not made written submissions to table their proposals or to add to their previous proposals, and announced that all proposals would be collated and distributed before engaging in textual negotiations.

The LMMC proposed to refer to specific articles but not to the three CBD objectives, and pointed to an added element on misuse in their submission. The EU tabled wording, to effectively implement Articles 15 (Access to Genetic Resources) and 8(j) (traditional knowledge), and pursue the CBD objectives by: facilitating access to genetic resources and associated traditional knowledge through a transparent regulatory framework; ensuring the establishment of conditions for fair and equitable sharing of benefits arising out of the utilization of genetic resources and associated traditional knowledge; and supporting compliance with domestic regulatory ABS frameworks, including prior informed consent (PIC) and mutually agreed terms (MAT); and taking into account all rights over those resources, including the rights of indigenous and local communities. THAILAND proposed to refer to: access to genetic resources; ensuring fair and equitable benefit-sharing; and ensuring compliance with national laws, especially with PIC and MAT.

SYRIA asked to refer to genetic resources and/or their derivatives to establish the distinction between the two. ARGENTINA pointed to a lack of common understanding of derivatives and other products. JAPAN proposed to delete references to derivatives and other products.

JAPAN expressed concerns regarding the proposed requirement for user countries to secure compliance with laws in provider countries. The AFRICAN GROUP said that language on securing compliance in user countries should include a reference to existing provisions in international law and refer to providers along with countries of origin. INDONESIA suggested adding a reference to CBD Article 16 (Access to and Transfer of Technology).

Scope: The EU said that the scope should apply to access to genetic resources and the promotion of fair and equitable benefit-sharing in accordance with Article 15 as well as traditional knowledge in accordance with Article 8(j). With others, he stated that certain genetic resources should remain outside the scope of the regime, including: human genetic resources; genetic resources acquired before the CBD's entry into force; plant genetic resources covered by the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR); marine genetic resources outside national jurisdiction; and genetic resources in the Antarctic Treaty area. AUSTRALIA specified that the 1980 Convention on the Conservation of Antarctic Marine Living Resources applies beyond the Antarctic Treaty's 60 degrees South latitude using the Antarctic Convergence as an outer boundary, and should also be excluded from the geographical scope of the regime.

The AFRICAN GROUP argued that the scope of the regime should include: genetic resources; biological resources; and derivatives and products. He proposed excluding exchange and use of traditional knowledge between indigenous and local communities.

The LMMC stated that the regime should apply to genetic resources, derivatives and traditional knowledge. He said a future protocol should be applied in a mutually supportive manner and reinforce the relationship between the CBD and the ITPGR.

SWITZERLAND explained that its tabled proposals are meant to be inclusive and ensure the regime is applied to all genetic resources covered by the Convention, leaving room for existing

international sectoral ABS instruments such as the ITPGR. NORWAY stressed the regime should be without prejudice to the ITPGR and should be implemented in harmony with it, and explained its submitted proposal was based on the provision on scope of the Bonn Guidelines.

JAPAN said that the regime should exclude: derivatives and products; plant genetic resources covered by the ITPGR; and marine genetic resources beyond national jurisdiction. He also called for special consideration of resources addressed under the World Health Organization in relation to the multilateral framework for the sharing of influenza viruses. CANADA pointed to additional language submitted regarding the regime's relationship with existing, current and future agreements.

The EU supported a sectoral approach and suggested that, due to the ambiguity about their definition, derivatives should be addressed in MAT. ARGENTINA said that derivatives can be included in the international regime only if they are clearly defined.

Compliance: JAPAN called for considering the options developed by the group of experts on compliance, noting its submission was based on some of these options and included compliance mechanisms related to these options. NEW ZEALAND said it would submit operational text on compliance with customary law. The AFRICAN GROUP explained their submission contains provisions for countries without national legislation, mandatory disclosure requirements and independent third party verification of certificates of compliance. THAILAND noted that the details of certificates of compliance need further clarification. The WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) drew attention to its work on traditional knowledge, including a traditional knowledge documentation toolkit, and draft objectives and principles for traditional knowledge protection. Discussions will resume on Friday.

IN THE CORRIDORS

With numerous expressions of commitment and good faith, and the Co-Chairs' declared determination to move swiftly into the negotiation of operational text, in line with the roadmap adopted at COP 9, the meeting seemed off to a good start. This was in contrast to some delegates' worries that the amount of operational text submitted could make the meeting fall into a pattern of compiling rather than streamlining and negotiating text.

Yet as the morning was consumed by presentations of more operational text and revisions to existing submissions, some began talking about a "false start." Since informal consultations held before the meeting had left many with the impression that negotiations should begin as a matter of urgency, some were surprised that they were "recalled to the starting line" to set out the latest versions of their text. While some regretted the missed opportunity to capitalize on the pre-meeting momentum to move straight into negotiations, others appreciated this second chance to submit text and clarify their submissions, hailing the meeting's inclusiveness.

The meeting adjourned early to allow time for regional consultations. Whilst delegates were split on the day's procedure, there was agreement that, for the first time in this process, all parties are ready, able and eager to enter into negotiations. There is also agreement that with 20 days left of the time assigned to the Working Group to complete its mandate, the challenge of concluding its work is becoming increasingly pressing.

ABS 7 HIGHLIGHTS: FRIDAY, 3 APRIL 2009

Delegates to the seventh meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met in a morning plenary to address compliance, benefit-sharing, and access. A contact group met in the afternoon and evening to negotiate operational text on the objective of the international regime.

PLENARY

COP 9 President Jochen Flasbarth (Germany) informed delegates that their colleague Ben Donnie (Liberia) had suddenly passed away. Delegates observed one minute of silence.

Working Group Co-Chair Timothy Hodges (Canada) announced deadlines for the submission of operational text on compliance, benefit-sharing and access, following the conclusion of the initial discussion on each item. He also announced that two non-papers on objective and scope compiling all submissions of operational text had been tabled to facilitate discussions in a contact group. Plenary elected Birthe Ivars (Norway) and David Hafashimana (Uganda) as Co-Chairs of the contact group on the objective and scope.

At the end of the morning plenary, NORWAY presented on its proposed national law on ABS.

COMPLIANCE: Brazil, for the LIKE-MINDED MEGADIVERSE COUNTRIES (LMMC), proposed an additional provision, that the governing body of the future protocol shall consider, at its first meeting at the latest, measures to support effective implementation, including by providing assistance to parties upon request in litigation of cases of non-compliance. NEW ZEALAND explained its proposal on measures to ensure compliance with customary law, noting that it is based on local belief systems and does not derive its legitimacy from other legal systems. The EU stressed the linkage between compliance measures for benefit-sharing and access, and the need to ensure fairness, equality and transparency by facilitating compliance measures across jurisdictions, such as internationally recognized certificates of compliance, especially to verify the prior informed consent (PIC) of the competent national authority. He also pointed to model national legislation; best practice guidelines; and awareness-raising.

The INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY congratulated the government of Australia for endorsing the UN Declaration on the Rights of Indigenous Peoples. He highlighted the need for parties to take measures to recognize the rights of indigenous peoples and local communities to genetic resources and associated traditional knowledge, and stated that certificates should reference community protocols and customary laws.

BENEFIT-SHARING: The LMMC proposed additional text linking access to benefit-sharing, stating that: PIC for access to genetic resources, their derivatives and associated traditional knowledge shall be obtained from the party of origin, in accordance with the CBD, through its competent authorities; and subject to national legislation, where access is sought to traditional knowledge, users shall obtain PIC from the indigenous and local communities in accordance with Article 8(j) (traditional knowledge).

The EU and JAPAN underscored that benefit-sharing should be subject to mutually agreed terms (MAT). The EU suggested that model clauses and inventories could contribute to a level-playing field between providers and users. SWITZERLAND further suggested identifying three specific categories of activity: research not aiming at commercialization; research and development; and commercialization. THAILAND stated that benefits should be determined according to MAT, and include monetary and non-monetary benefits, while encouraging transfer of technology and research in the non-commercial sector. The AFRICAN GROUP noted that benefits should include those derived from genetic resources accessed before the CBD's entry into force. Haiti, for SMALL ISLAND DEVELOPING STATES, said that benefits should be social and monetary.

ACCESS: The LMMC presented additional text, stating that parties shall take the necessary measures to establish an appropriate national regulatory framework to protect their sovereignty over genetic resources, their derivatives and associated traditional knowledge, and to ensure benefit-sharing.

The EU explained that its submitted proposals build mainly on the Convention's text, including Article 15.2 (facilitating access for environmentally sound uses), calling for specific measures to ensure legal certainty, clarity and transparency of national access frameworks. He stressed the link between access and compliance across jurisdictions, as well as the need for:

simplified access rules for non-commercial biodiversity research; non-discrimination of access rules; and strengthening capacity for development of national ABS frameworks.

THAILAND proposed that parties take national measures to promote awareness and access to information on ABS.

CONTACT GROUP

OBJECTIVE: Contact group Co-Chairs Ivars and Hafashimana asked delegates to make proposals on the basis of the text on the objective contained in the annex of COP Decision IX/12.

Delegates first discussed which CBD articles to refer to in the chapeau of the provision stating the regime's objective. Most developed countries favored referencing only Articles 15 (Access to Genetic Resources) and 8(j), along with the three objectives of the Convention. Several developing country regional groups proposed also referencing Articles 16 (Access to and Transfer of Technology) and 19.2 (access to results and benefits from biotechnologies). One developing country regional group suggested adding reference to Articles 3 (Principle), 4 (Jurisdictional Scope), 8 (*In-situ* conservation), 17 (Exchange of Information), 18 (Technical and Scientific Cooperation), 20 (Financial Resources), and 22 (Relationship with Other International Conventions), arguing that these articles contain important guidance for the elaboration of the regime.

Parties agreed on referencing Articles 1 (Objectives) and 15, but agreement on references to other CBD provisions remained outstanding. With regard to the CBD objectives, parties disagreed as to whether the regime should "effectively implement" or "pursue" them. On reference to Article 8(j), one delegate noted that the scope of the provision expands beyond genetic resources, and asked to limit the reference by adding "as it relates to genetic resources." An indigenous representative, supported by several delegates, proposed also referencing associated traditional knowledge. Other delegates then called for referencing biological resources, and derivatives, while others argued against the need to narrow the reference to Article 8(j). The issue remained pending.

Delegates then addressed a paragraph on facilitating access to genetic resources, their derivatives and associated traditional knowledge. Several developing countries called for its deletion, noting that it goes against the intent of Article 15. Others argued that such language clarifies that the regime should specifically implement Articles 15.1 (sovereign rights of States over natural resources) and 15.2 so as to facilitate access. Many developing countries stressed the regime should implement benefit-sharing, rather than facilitate access. Some parties supported that access should be regulated and transparent, but others opposed such a reference.

Delegates also debated reference to traditional knowledge. Some argued that their national legislation did not provide for facilitating access to traditional knowledge as it is the prerogative of indigenous and local communities. On the request of one party, the reference was retained. Others preferred specifying that access to traditional knowledge should be facilitated "where appropriate."

Delegates then addressed a paragraph on ensuring fair and equitable sharing of benefits and agreed to remove the brackets around associated traditional knowledge in the paragraph.

A group of developed countries proposed to refer to the establishment of conditions for benefit-sharing, noting that these conditions will be set out mainly in contracts and MAT.

A group of developing countries suggested having a separate paragraph on misappropriation and misuse. A number of developed countries, while acknowledging the importance of the issue, felt this should be addressed in the components of the regime, rather than its objective. Many developing countries recited cases of misuse and misappropriation, and considered their prevention a key objective of the international regime. Others referred to the effectiveness of contracts and said that misappropriation had occurred in the absence of any contracts, whereas developing countries pointed to cases where contracts had not been honored. They also stressed that the international regime was to establish international rules and procedures that ensure fair and equitable benefit-sharing, rather than rely on contracts. Others proposed to have a minimalist objective, and said it was difficult to set out the objective in the absence of definitions.

Regarding a paragraph on securing compliance in user countries with national laws and requirements in provider countries, delegates discussed a proposal by a group of developed countries to refer to "compliance with domestic regulatory ABS frameworks," so as to also address non-legal compliance measures such as awareness raising or voluntary codes of conduct. While many developed countries supported the proposal, developing countries generally opposed it, with many arguing that the proposal was too vague and that language on compliance should focus on compliance with the international regime and enforcement of national ABS laws in provider countries. Several developed countries raised concerns about making reference to compliance under the regime's objective, whereas developing countries explained that addressing compliance across jurisdictions is at the heart of the international regime and should therefore be part of its objective.

Delegates then discussed a paragraph addressing rights over genetic resources, including the rights of indigenous and local communities, and ensuring compliance with PIC. Discussions continued into the night.

IN THE CORRIDORS

With 20 days left for the Working Group to fulfil its mandate and finalize a regime before COP 10, most delegates were enthusiastic to start negotiating operational text or, as a seasoned participant put it "drop the politeness and get straight to the tug war on substance, because we have to go through this, one way or the other."

Just prior to the start of the contact group on objective and scope, delegates were split on how it would go. "Revisiting the submissions was good for transparency," said one delegate, "but it revealed that huge differences still exist." Others reckoned that "the warm-up is over, the marathon is about to begin." As deliberations on the objective revived a long-standing clash over whether the regime should facilitate or regulate access, or even address access at all, some expressed concerns on whether there is room for compromise. Another pointed to the upside, noting that "the main thing is that we are discussing substance and parties are engaging."

ABS 7 HIGHLIGHTS: SATURDAY, 4 APRIL 2009

Delegates to the seventh meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met in a brief morning plenary to hear a report about the contact group deliberations on the objective of the international regime. A contact group on compliance met throughout the day, followed by an evening contact group that addressed the scope of the regime.

PLENARY

Working Group Co-Chair Fernando Casas (Colombia) outlined the organization of work for the day and noted circulation of three non-papers compiling proposals on compliance, access, and benefit-sharing under the structure of the annex to COP Decision IX/12.

Contact group Co-Chair Birthe Ivars (Norway) reported that the contact group had engaged in a first reading of the objective of the international regime, and recommended to proceed to a first reading of scope. Delegates agreed to reconvene the contact group on objective and scope in the evening.

Noting that delegates are eager to start working on the components of the regime, Working Group Co-Chair Timothy Hodges (Canada) proposed to establish a contact group on compliance to be co-chaired by Pierre Du Plessis (Namibia) and René Lefebvre (the Netherlands). He suggested that the mandate of the contact group be to consolidate and review the operational text contained in the non-paper on compliance. The LMMC stressed the need to negotiate operational text, and consolidate, if not agree on, options.

CONTACT GROUP ON COMPLIANCE

Contact group Co-Chair Lefebvre explained the group would base its work on a non-paper compiling submissions made before and during the meeting, suggesting to consolidate proposals first and then negotiate the text, as well as to defer the discussion on preambular text. The AFRICAN GROUP asked to include its proposals on traditional knowledge, including references to customary laws, and to refer to biological resources along with genetic resources throughout the text.

The contact group then began consideration of tools to encourage compliance, already defined as components to be further elaborated with the aim of incorporating them in the international regime (bricks), and considered each brick separately in order to decide on which submission to base the negotiations.

Regarding measures on awareness-raising activities, delegates agreed to base negotiations on text submitted by Japan. The LMMC proposed specifying that awareness raising is “an important supplementary tool which cannot substitute mandatory measures for benefit-sharing.” AUSTRALIA noted that lack of awareness about ABS frameworks is the key source of non-compliance. JAPAN emphasized help-desks for stakeholders and web-portals as key activities for awareness raising.

Delegates then discussed a Norwegian proposal concerning the development of tools to monitor compliance. Many noted its comprehensiveness and, following a suggestion by Malaysia, delegates agreed to take note of the proposal, identify overlap with other provisions, and then decide the most appropriate provision where its elements should be incorporated.

Regarding text on mechanisms for information exchange, following a brief discussion, delegates agreed to work on the basis of the LMMC proposal that makes reference to an ABS clearing-house.

On a paragraph on competent national authorities and national focal points, parties were divided over whether to include it under internationally recognized certificates or to locate it elsewhere in the document. The LMMC, the AFRICAN GROUP, ARGENTINA and the SMALL ISLAND DEVELOPING STATES (SIDS) preferred the former option. AUSTRALIA, the EU, CANADA, JAPAN and NORWAY opted for locating the paragraph elsewhere, arguing that competent national authorities will engage in a broader set of activities than issuing certificates. The issue was set aside, with a footnote explaining the reasons.

Regarding internationally recognized certificates, delegates debated whether to use an African Group or a Norwegian proposal as the basis for further work. The AFRICAN GROUP, the LMMC, SIDS, GRULAC and indigenous representatives preferred the African proposal, on the basis that it provided a comprehensive range of elements that could be reduced during negotiations. The Norwegian proposal was favored by the EU, JAPAN, NORWAY and SWITZERLAND on the basis that it was drafted in a more general manner and could be made more specific. The EU added that certain elements of the African proposal regarding checkpoints, tracking and reporting systems, and disclosure requirements should be discussed at a later stage. The LMMC and the AFRICAN GROUP then suggested merging the two proposals, but the group agreed to retain both options and integrate them during the second reading.

Delegates then initiated discussion on components for further consideration (bullets). CANADA and NEW ZEALAND sought clarification on whether the group would negotiate operational text for these components too, and raised concerns on their

location in the text. Contact group Co-Chair du Plessis said that operational text will be developed for both bricks and bullets, and that bullets will be changed into bricks only if there is consensus. MALAYSIA and PERU confirmed that both are essential components of the international regime.

Delegates discussed whether to retain the attributions to the parties who submitted the texts that will form the basis of negotiations. The EU wanted to keep the attributions, while the AFRICAN GROUP and the LMMC suggested deleting them to ensure the group feels ownership over the text. Delegates agreed to remove all attributions and introduce a footnote in cases where the location of a paragraph in the text requires further consideration.

Delegates then discussed the elements under development of tools to encourage compliance. Regarding an international understanding of misappropriation/misuse, the EU noted that the sole text, submitted by Norway, did not entail a definition but rather stated the goal of preventing misappropriation and said the text might have to be located elsewhere. Regarding sectoral menus of model clauses for material transfer agreements, delegates agreed to work on the basis of the EU proposal, which includes references to inventories/catalogues of typical utilizations and legal procedures for developing model clauses. Regarding codes of conduct for important user groups, they agreed to use the Australian proposal.

On identification of best-practice codes of conduct and on international access standards to support compliance across jurisdictions, delegates decided to negotiate on the basis of the sole EU proposal. On research funding agencies to oblige users to comply with specific ABS requirements, they agreed to use the sole LMMC proposal, and on tracking and reporting systems the sole proposal of the African Group, which provides for monitoring systems that identify breaches of contractual obligations or misappropriation.

On disclosure requirements, NORWAY and INDIA withdrew their submissions, leaving a more elaborate LMMC proposal as the basis for further discussion. JAPAN and ARGENTINA preferred keeping the Norwegian proposal providing for national measures aiming at ensuring disclosure of origin of genetic resources and traditional knowledge in applications for intellectual property rights, which was opposed by the LMMC and the AFRICAN GROUP for procedural reasons. JAPAN eventually agreed to the deletion and said they would reintroduce language similar to the Norwegian proposal during the second reading.

On measures to ensure access to justice, delegates decided to: retain a proposal by the African Group on an international ombudsman; delete a similar but more detailed proposal by the International Indigenous Forum on Biodiversity; and move an LMMC proposal on providing support for litigation to this section. On alternative dispute resolution, delegates agreed to work on the basis of a proposal by the African Group providing for dispute resolution mechanisms to be guided by principles of equity drawn from a wide range of legal sources, including customary law and practices of indigenous and local communities. On enforcement of judgments and remedies and sanctions, delegates agreed to retain all existing proposals since they are complementary. On measures to ensure compliance with customary law and on local systems of protection, delegates agreed to use text submitted by the African Group and New Zealand as basis for further negotiations.

CONTACT GROUP ON SCOPE

The contact group decided to work on the basis of the first option on scope included in the annex to COP Decision IX/12 (consolidated text of submissions made at ABS 6). On process,

delegates decided to avoid negotiation, but to ensure that the consolidated text contains the extent of each party's latest submissions and to resolve any ambiguities.

On a paragraph setting out what the international regime applies to, the LMMC suggested the international regime be referred to as a protocol. After some debate it was decided that a footnote would state that the issue would be revisited following discussion on the nature of the regime. The AFRICAN GROUP added that the regime should apply to all biological resources, derivatives and products for environmentally sound uses.

CANADA said the regime should be subject to other international obligations, while INDIA and SIDS said the regime and other international agreements should be mutually supportive. MEXICO, supported by CANADA, suggested moving this issue to a separate paragraph, but the issue remained undecided.

Noting that a second paragraph on the scope of the international regime was redundant, the EU proposed its deletion, opposed by the AFRICAN GROUP and SIDS, who suggested adding a reference to "access to and transfer of technology."

On the temporal scope of application, CANADA proposed that the international regime shall apply to genetic resources acquired after "the effective date" of the entry into force of the regime and the EU added that any additional obligations under the international regime shall not apply retroactively. These proposals were countered by the AFRICAN GROUP, suggesting that continuing benefits and benefits from new uses arising from commercial and other utilization of genetic resources, biological resources, products, derivatives and associated traditional knowledge, including those previously made available by the country of origin, shall be covered by the regime.

The EU, AUSTRALIA and PERU suggested different formulations of a paragraph concerning plant genetic resources for food and agriculture (PGRFA) covered by the Multilateral System (MLS) under the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR), with the EU proposing the broadest exclusion comprising not only PGRFA accessed under the MLS, but also other PGRFA which an ITPGR party or an international agricultural research center has subjected to the ITPGR.

Delegates continued to discuss limitations in scope late into the evening.

IN THE CORRIDORS

The famous French sculptor Auguste Rodin was a master of turning formless blocs of marble into sculptures of endless beauty. In close proximity to the Rodin Museum, delegates at UNESCO today began an equally challenging exercise in a contact group on compliance: sculpting the parties' numerous submissions into a manageable text to form the basis of negotiations. Overall the day secured a dramatic reduction of text, with the contact group completing a first reading and deleting many alternative proposals. Yet delegates seemed circumspect about the progress, with one describing proceedings as "cautious." There was much focus on procedure, which one delegate explained was to ensure that no one "falls off the bus," a move considered "essential" at this early stage of the negotiations. While the contact group on compliance achieved the first step of sorting out the building blocks, some felt it is still a long way from creating a solid structure that will ensure compliance with the final ABS arrangement, whichever form it may take. Many commented that the evening's session on scope was less constructive, with delegates "using up the alphabet" as one put it, by adding their different takes on scope and its limitations to an expanding collage of options.

ABS 7 HIGHLIGHTS: SUNDAY, 5 APRIL 2009

Delegates to the seventh meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met in a brief morning plenary to hear reports about contact group deliberations on the scope of the international regime and compliance. A contact group met throughout the day to conduct a first reading of non-papers on benefit-sharing and access.

PLENARY

Contact group Co-Chair David Hafashimana (Uganda) explained that the contact group on the objective and scope had concluded a first reading of the scope of the regime, on the basis of the first option included in the annex to COP Decision IX/12 (consolidated text of submissions made at ABS 6), which had resulted in a consolidated text for further negotiations.

Contact group Co-Chair René Lefeber (the Netherlands) reported on deliberations on compliance. He said the group identified the basis for further work, notwithstanding having set aside proposals on preambular text. He described the undertaking as a “significant step forward.”

Working Group Co-Chair Timothy Hodges (Canada) proposed to mandate the contact group dealing with components of the international regime to address benefit-sharing and access. He suggested that its mandate be to identify the basis for further work, consolidate parties’ views and negotiate text. Following a question by the Like-Minded Megadiverse Countries (LMMC) on the status of non-papers, Co-Chair Hodges confirmed that from now on, documents would be issued as conference room papers (CRP).

CONTACT GROUP

BENEFIT-SHARING: The contact group started discussions on the basis of a non-paper on benefit-sharing, compiling country submissions according to the structure of the annex to COP Decision IX/12. Delegates first addressed components to be further elaborated with the aim of incorporating them in the international regime (bricks).

On linkage of access to the fair and equitable sharing of benefits, delegates considered three proposals by: the LMMC with an emphasis on prior informed consent (PIC); the EU on measures to encourage benefit-sharing in mutually agreed terms (MAT); and Norway focusing on providing information to, and ensure compliance of, users of genetic resources with national legislation in the providing country. Discussions revolved around

whether PIC should be dealt with under benefit-sharing, access, or both, with parties deciding to address the element under both. They also decided that the three proposals are not mutually exclusive, and that they should be kept as separate paragraphs under the brick on linkage of access to benefit-sharing, while deleting country attributions.

On benefits to be shared under MAT, SWITZERLAND supported an EU proposal referring to model clauses and inventories/catalogues of typical utilizations of genetic resources and related benefits when establishing MAT. The LMMC requested retaining its language on national legislative measures and the use of associated traditional knowledge and, with SIDS, suggested merging these proposals, and adding an African proposal making reference to Article 15.7 (measures for benefit-sharing). The LMMC also suggested retaining a Norwegian proposal making reference to the indicative list of MAT contained in the Bonn Guidelines on ABS. Delegates agreed to merge the text of all four proposals.

On monetary and non-monetary benefits, the EU, supported by the LMMC, suggested combining its own proposal stating that MAT may identify the types of monetary and non-monetary benefits to be shared, with an Indian proposal providing for an indicative list of such benefits. JAPAN preferred a proposal by Norway making direct reference to the Bonn Guidelines. The PHILIPPINES, supported by SIDS and AFRICA, asked to retain language of the SIDS proposal stating that benefit-sharing should include, as far as possible, all forms of utilization of genetic resources, their derivatives and associated traditional knowledge. Delegates agreed to merge text from the proposals by the EU, India, SIDS, and Norway, and delete the submissions by the African Group and Thailand.

On access to and transfer of technology, the EU and CANADA supported retaining the EU proposal stating that parties requiring PIC for access should take measures to encourage providers and users to consider access to and transfer of technology making use of those resources. The LMMC, supported by the AFRICAN GROUP, argued that their proposal, calling for facilitating access to, joint development and transfer of technologies to countries of origin, is a reflection of the Convention text. Delegates decided to retain both the EU and the LMMC proposals as two distinct options, and delete a proposal by Thailand.

On sharing of results of research and development on MAT, the LMMC, supported by the AFRICAN GROUP, proposed retaining their more comprehensive proposal, while the EU

and CANADA supported the EU submission stating that parties requiring PIC for access should take measures to encourage providers and users to consider sharing of results of research and development when establishing MAT. Delegates agreed to keep both proposals.

On effective participation in research activities, and/or joint development in research activities, the EU proposed to reintroduce its submission made under the brick on benefits to be shared under MAT, which refers to measures by parties requiring PIC for access to encourage providers and users to consider the effective participation of providers of genetic resources in research activities and/or to facilitate the joint development of research activities. The LMMC opposed this repetition, noting that it creates imbalance in the negotiating text. The AFRICAN GROUP also asked to add text accepted under previous sections with additions. The EU noted that a cross-reference to their previous submission was included in the compilation. Contact group Co-Chair Pierre du Plessis (Namibia) ruled that due to lack of agreement, the section would be left blank and parties could submit text during the second reading.

On mechanisms to promote equality in negotiations, delegates accepted merging an EU proposal regarding supporting the capacity of providers and users to negotiate MAT with a Norwegian proposal on ensuring participation by indigenous peoples and local communities in access procedures. The AFRICAN GROUP observed that their submission included in the collation of operative texts submitted by parties (UNEP/CBD/WG-ABS/7/4) had been omitted from the compilation, and asked that it be included in this section. After some discussion they agreed to resubmit the text under the component for further consideration (bullet) on development of international minimum conditions and standards.

On an EU proposal on awareness raising, the LMMC observed that it duplicated text in the section on compliance, again cautioning this could unbalance the text. CANADA suggested that there could be similar awareness-raising instruments under compliance and benefit-sharing. Delegates agreed to retain the proposal, adding a reference to other sections on awareness raising and noting that more nuanced approaches may be developed.

On measures to ensure participation of indigenous and local communities in MAT, and benefit-sharing with traditional knowledge holders, NEW ZEALAND and the EU asked for flexibility to make further submissions after the meeting of the technical expert group on traditional knowledge. Delegates agreed to merge the existing proposals by the LMMC, the African Group and Norway into a single text.

On mechanisms to encourage benefits to be directed towards conservation and sustainable use of biodiversity, parties agreed to retain the Australian proposal that references Article 1 of the CBD (Objectives).

Delegates then addressed bullet elements. On development of international minimum conditions and standards, a text submitted by India was retained. The AFRICAN GROUP asked to introduce text from the collation of operative texts submitted by parties, with a note that they may decide to move it under mechanisms to promote equality in negotiations. After some discussion, this was accepted.

Regarding multilateral benefit-sharing options when the origin is not clear or in transboundary situations, and establishment of trust funds to address transboundary situations, delegates agreed to use the sole African proposal in both cases. On development of menus of model clauses for potential inclusion in material transfer agreements, the LMMC preferred to have no text, but delegates agreed to maintain the EU and Swiss proposals as

two alternative options. Regarding enhanced utilization of the Bonn Guidelines, AUSTRALIA agreed to remove its proposal and the EU said they would rework its preambular language into operational text during the second reading.

Regarding other proposals put forward, delegates considered a proposal, which the LMMC said had been misplaced, that parties shall establish a financial mechanism for the international regime including a trust fund for benefit-sharing arrangements. Delegates agreed to retain the text and reconsider its appropriate location during the second reading.

ACCESS: Delegates then proceeded to a first reading of the non-paper on access. The INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY said their proposal that access to genetic resources and associated traditional knowledge is subject to the free PIC of indigenous peoples and local communities should be included, and the AFRICAN GROUP sponsored it. Regarding brick elements, some delegates said parts of their proposals had been misplaced and asked to relocate them. On recognition of the sovereign rights and the authority of parties to determine access, delegates agreed to work on the basis of the African proposal, and to retain the second part of the Norwegian proposal under the separate heading on domestic competent authority.

On linkage of access to fair and equitable sharing of benefits, delegates agreed to merge proposals by the LMMC, the EU, the African Group and India, noting that similarities in parts of them will have to be streamlined during the second reading. On legal certainty, clarity and transparency of access rules, INDIA withdrew its proposal, and delegates decided to retain proposals by the African Group, the EU and Norway in distinct paragraphs.

Delegates then addressed bullet elements. On non-discrimination of access rules, delegates retained the sole EU proposal. On international access standards to support compliance across jurisdictions, delegates agreed to work on the basis of an EU proposal. On internationally developed domestic legislation, the group decided to merge proposals by the EU and Australia. On simplified access rules for non-commercial research, AUSTRALIA withdrew its proposal, thus leaving proposals by the EU and Norway for further consideration.

Co-Chair Lefebvre announced that CRPs on benefit-sharing and access would be prepared, and that plenary would consider CRPs on the objective and scope on Monday morning.

IN THE CORRIDORS

In many parts of the world Sunday is a day of rest, not so this Sunday in Paris. As over 37,000 participants to the Paris marathon embarked on their 42 kilometer circuit, delegates continued their triathlon of proposing, merging and consolidating operational text to form the basis for the further negotiation of the international ABS regime. Referring to the procedure which will allow countries to re-table in the second reading any proposal lost during the consolidation, one delegate felt that the working group, like marathon participants, is running in a giant circle, "just that the marathon runners go around only once." Others saw symptoms of the "Granada syndrome" as one seasoned delegate put it, alluding to a collective fear that disagreements between parties could lead to the unraveling of the tentative agreement about process, reminiscent of the prolonged procedural debates at COP 8 regarding whether the outcome of the ABS 4 negotiations at Granada would form the basis of further negotiations. Many delegates nevertheless commended the return of the collaborative spirit as the contact group wrapped up discussions on the text on access in merely 35 minutes, with one quipping, "after this sprint we are more than ready for the next lap."

ABS 7 HIGHLIGHTS: MONDAY, 6 APRIL 2009

Delegates to the seventh meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met in brief morning and afternoon plenary sessions to hear reports from the contact groups. Contact groups on the objective and scope of the regime, and on compliance met throughout the day and late into the evening.

PLENARY

In the morning, René Lefebvre (the Netherlands), Co-Chair of the contact group on benefit-sharing and access, reported on progress achieved on Sunday. Working Group Co-Chair Fernando Casas (Colombia) outlined the schedule for contact group meetings on the objective and scope, compliance, benefit-sharing, and access. He also stated that the meeting's outcome would be annexed to the report, which was accepted.

In the afternoon, Birthe Ivars (Norway), Co-Chair of the contact group on the objective and scope, reported on deliberations on the objective. Reporting on deliberations on compliance, contact group Co-Chair Lefebvre said that delegates had agreed on the ground rules for the process, and recommended to continue revising the non-paper to produce a conference room paper (CRP).

CONTACT GROUP ON THE OBJECTIVE AND SCOPE

OBJECTIVE: Co-Chair Ivars asked delegates whether there was agreement with developing a short and precise objective. The EU, JAPAN, the REPUBLIC OF KOREA, NEW ZEALAND and SWITZERLAND supported this, while ARGENTINA, EGYPT and the LMMC preferred a version setting out more details.

Regarding the chapeau, which references the CBD objectives and a number of CBD provisions, delegates debated whether to state that the international regime should pursue all three CBD objectives, or just its third (benefit-sharing), with the LMMC and the AFRICAN GROUP preferring the former and CANADA preferring the latter. CANADA made a proposal to integrate the chapeau and more detailed points listed in the CRP into one more concise paragraph. This proposal was opposed by the LMMC and others, who preferred to keep a more detailed text. The LMMC, supported by many, presented a shorter chapeau referencing the three CBD objectives and Articles 8(j) (traditional knowledge) and 15 (Access to Genetic Resources), with Articles 1 (Objectives), 16 (Access to and Transfer of Technology) and 19 (Handling of Biotechnology

and Distribution of its Benefits) remaining bracketed. NEW ZEALAND, supported by NORWAY, proposed a text for the chapeau not referring to CBD Articles but rather naming the concepts enshrined in them, which was opposed by the LMMC. ARGENTINA suggested, and delegates agreed to, retain the LMMC proposal in brackets as the chapeau text.

On a sub-paragraph dealing with access to genetic resources, delegates agreed to merge two options to include a reference to the sovereign rights of states to their genetic resources. They debated whether to reference associated traditional knowledge, with CANADA, the EU, and GRULAC arguing that Article 8(j) does not refer to facilitated access to traditional knowledge. Following a suggestion by ARGENTINA, the reference was moved to another sub-paragraph dealing with traditional knowledge, and the issue remains to be addressed. The AFRICAN GROUP reserved its right to address the issue in a separate sub-paragraph.

Delegates were divided over whether to state that access to genetic resources should be facilitated or regulated, with ARGENTINA, CANADA, the EU, JAPAN, KOREA and SWITZERLAND favoring the former, and the AFRICAN GROUP preferring the latter formulation. NEW ZEALAND, supported by the AFRICAN GROUP, the LMMC and NORWAY, suggested replacing both references with a reference to "appropriate access," but the issue remains unresolved.

Regarding a sub-paragraph on benefit-sharing, delegates agreed to delete the reference to misappropriation and address it in a separate sub-paragraph. Following lengthy discussions, delegates kept additional wording on "the establishment of enabling conditions for benefit-sharing" in brackets, but agreed to include associated traditional knowledge under "effective" benefit-sharing.

On a sub-paragraph on preventing the misappropriation and misuse of genetic resources, their derivatives and associated traditional knowledge, CANADA and JAPAN, opposed by the AFRICAN GROUP and the LMMC, argued that the text as formulated is an outcome and not an objective. NEW ZEALAND, supported by the AFRICAN GROUP, AUSTRALIA and CANADA, but opposed by the LMMC, suggested that misuse and misappropriation be defined. On the suggestion by the African Group, a footnote was inserted to say that the terms "may need to be articulated."

Regarding four possible options for a sub-paragraph on compliance, delegates agreed to work on the basis of the most comprehensive text. The EU, supported by SWITZERLAND and AUSTRALIA, but opposed by the AFRICAN GROUP and the LMMC, proposed to replace "securing" compliance

with “supporting” it, and called for reference to national laws and requirements rather than to domestic regulatory ABS frameworks. They also called for referring to both user and provider countries or for deleting both references, and for deleting a further specification regarding the country of origin. CANADA suggested limiting PIC by specifying “unless otherwise determined by that party.” Discussions continued into the night.

CONTACT GROUP ON COMPLIANCE

Contact group Co-Chair Lefeber explained the revised non-paper constituting the working document, noting: mention of both genetic and biological resources in brackets; neutral formulations with regard to the choice of instrument; and a footnote that the placement of paragraphs must be further considered. Delegates discussed the latter issue, and clarified that elements identified as components to be further elaborated (bricks) and components for further consideration (bullets) remain as such, but agreement is needed on the proper placement of different paragraphs.

On awareness-raising activities to encourage compliance, parties proposed additional tools, including: an ABS clearing-house mechanism (CHM); best-practice tools; measures to promote a wider understanding of the concept of misappropriation, misuse and biopiracy; and the recognition of the contribution made by indigenous and local communities to biodiversity. The AFRICAN GROUP suggested that parties raise awareness to promote application of traditional knowledge by involving indigenous and local communities in various research and education activities.

On development of tools to monitor compliance, delegates discussed whether the chapeau should refer to “measures,” “appropriate legal, administrative or policy measures,” or “measures to support” tools to monitor compliance, and whether the sub-paragraphs should reference the introduction of rules and requirements or to refer to tools only. They decided to bracket all sub-paragraphs. Parties made additional proposals on capacity-building measures to develop tools to monitor compliance, and on requiring compliance with national legislation in the country of origin and the mutually agreed terms (MAT) on which access was granted, including requirements for benefit-sharing. Delegates also inserted a footnote reflecting the African Group’s position that reference to genetic resources is without prejudice to the scope of the regime, in particular the potential inclusion of biological resources, derivatives and products, with the EU observing that this issue is not related to compliance. When the contact group reconvened, following the evening plenary and an hour of regional consultations, delegates decided to delete the footnote, noting that text would need to be introduced on a case by case basis.

On mechanisms for information exchange, parties proposed adding references to: non-internet means; and facilitating funding, capacity building and participation in the ABS CHM. Regarding the types of information to be made available by parties, new paragraphs were added on: information about model ABS legislation and menus of model clauses; experiences in the development of electronic tools for the tracking of genetic resources; community protocols; and codes of conduct and best practices. The EU said that monitoring compliance should not be a CHM function, and proposed that the CHM support users of genetic resources in accessing information, and the exchange of information for non-commercial research.

On the domestic competent authority, the EU and NEW ZEALAND, supported by CANADA and AUSTRALIA, reiterated that the text should be placed in the CRP on access. The EU, JAPAN and CANADA requested bracketing a reference to emission of certificates of compliance as part of the authority’s functions. The EU proposed a new function on helping providers

of genetic resources to obtain relevant information, including in cases of alleged infringements of provider country requirements in relation to PIC and MAT.

On an internationally recognized certificate of compliance, delegates discussed: first an elaborate option including minimum information requirements, checkpoints, technologies to facilitate certification, and disclosure requirements in intellectual property right (IPR) applications; and second a short option requiring provider parties to issue a certificate on the country of origin and compliance with national ABS legislation.

The AFRICAN GROUP, the LMMC, SIDS, the EU, SWITZERLAND, CANADA and NEW ZEALAND made amendments on the first option, including on: geographic location of access activities or source; tracking procedures; checkpoints; and disclosure requirements. AUSTRALIA, NORWAY and COLOMBIA commented on the second option including amendments to the effect that certificates would be a voluntary measure, and be issued by a national competent authority. Delegates debated at length whether to refer to “provider countries,” or to quote CBD Article 15.3 stipulating that genetic resources are resources provided by parties that are countries of origin of such resources or that have acquired the resources in accordance with the Convention, as the definition of provider countries.

Regarding enforcement of national ABS legislation under a brick on tools for compliance, NORWAY suggested additional tools, including compliance with PIC for imports of genetic resources and documentation accompanying genetic resources for research and commercialization. PERU suggested reference to safeguarding and respecting the genetic and traditional knowledge heritage of countries of origin in the granting of any right, in particular in relation to IPR and product approvals. CANADA and the EU raised concerns that text introduced contained elements that had been agreed to be bullets. The EU subsequently introduced language on compliance with international access standards as a precondition for compliance with national ABS legislation; and CANADA on facilitated access to genetic resources and ensuring non-discrimination among users accessing these resources. PERU, the LMMC and the AFRICAN GROUP opposed the introduction of reference to international access standards, arguing this upgrades bullets into bricks. Following a lengthy discussion, parties supported a proposal by Co-Chair Lefeber, to resolve the issue in a closed-doors meeting with the spokespersons of negotiating groups, which was held late into the night.

IN THE CORRIDORS

Day 5 started with reminders that delegates were running out of time to reach a substantive outcome at this meeting - and it ended with a bang! In the morning, many commented that negotiating groups were not yet ready to give up anything yet, but were still engaged in the process of staking out positions for negotiating package deals at a later stage. Still, with the biggest challenges awaiting the Working Group at ABS 8, one delegate noted that “once we get to the real tough nuts to crack, harvesting the low-hanging fruits of objective and scope will be a breeze.”

Tempers rose in the evening contact group on compliance with groups accusing each other of sabotaging the process by trying to promote bullets to bricks “by stealth,” and quickly reached the melting point, after which the group had to be adjourned to allow for closed-door discussions among the major negotiating groups. As the smoke cleared in the conference room, some said they had seen the “iceberg” coming, but knew it was too late, while one whispered “I think this clash was needed.” Another added “maybe this way we can get rid of the bricks and bullets,” noting that the stroke of genius that had brought the breakthrough at ABS 6 was now increasingly seen as “an invitation to cheat.”

ABS 7 HIGHLIGHTS: TUESDAY, 7 APRIL 2009

Delegates to the seventh meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) met in a morning plenary to hear reports from the contact groups and informal consultations, resolve procedural issues and determine the way forward. Contact groups on compliance, benefit-sharing and access, and scope met in the afternoon and evening.

PLENARY

Working Group Co-Chair Fernando Casas (Colombia) reminded delegates that this was the last day to make substantial progress. David Hafashimana (Uganda), Co-Chair of the contact group on the objective and scope, reported on progress made in reducing options and operational texts on objective, and recommended the group move on to scope.

René Lefeber (the Netherlands), Co-Chair of the contact group on compliance, reported that the group had arrived at a deadlock over a brick on measures to ensure compliance, making it impossible to continue working on the basis of its current rules of engagement. He said the group suspended work to convene a closed-door meeting with the main spokespersons of the negotiating groups to discuss the way forward. They considered a “minimalist approach” demoting the brick to a bullet, and a “maximalist approach” of removing the distinction between bricks and bullets throughout the documents on compliance, benefit-sharing and access. He reported that the majority of participants preferred the maximalist approach while some had to seek instructions from capitals.

CANADA, the EU, the LMMC, the AFRICAN GROUP, NEW ZEALAND, NORWAY and JAPAN, among others, supported the maximalist approach. CANADA requested clarification that the three-step approach to negotiations – submitting and consolidating proposals, bracketing and amending text to ensure adequate reflection of positions, and negotiating text – would be maintained and consistently applied across all contact groups. The EU emphasized the merit of removing duplicate proposals under different headings. NEW ZEALAND sought clarification whether the removal of the distinction between bricks and bullets implied that all text would be on the same footing. The LMMC emphasised the importance of keeping proceeding on the basis of the existing structure, notwithstanding the removal of bricks and bullets.

Pierre du Plessis (Namibia), Co-Chair of the contact group on compliance, underscored that the bricks and bullets illustrated the state of play at ABS 6, but that a new approach is needed to forge consensus by COP 10.

Co-Chair Timothy Hodges (Canada) and contact group Co-Chair Lefeber confirmed that the removal of the bricks and bullets results in all elements in the text having the same status. Lefeber explained parties could bracket text, but the structure as set out in the headings would be maintained. CHINA urged delegates to focus remaining discussions on substance rather than process.

CONTACT GROUP ON THE OBJECTIVE AND SCOPE

SCOPE: On a paragraph on exclusions from scope, the EU, supported by AUSTRALIA and CANADA, proposed a footnote stating that it reserves its position because of ongoing internal discussions on pathogens. A lengthy discussion on process ensued. The AFRICAN GROUP, the LMMC and GRULAC rejected the footnote, noting that the purpose of this stage of negotiation is to work on the text, and that the definition of “pathogen” is not well understood. Co-Chair Hafashimana proposed the EU bracket the reference in the text and make a statement during the closing plenary, but this was rejected by the EU who suggested the footnote be bracketed instead. Following consultation with the Working Group Co-Chairs, Co-Chair Ivars noted that at this stage parties could make submissions on text only. The EU insisted on a footnote and the issue was set aside.

In a paragraph on the overall scope of the international regime, the AFRICAN GROUP agreed to delete a reference to environmentally sound uses, but insisted on retaining “biological resources” that BRAZIL and CHILE sought to delete. SWITZERLAND supported a reference to “all” genetic resources. JAPAN, opposed by the PHILIPPINES, proposed stating that the regime applies to genetic resources, and deleting any specifications. PERU and ARGENTINA proposed deleting reference to “transboundary nature” and, with the EU and the AFRICAN GROUP, but opposed by JAPAN, to “other international obligations,” noting that these issues are covered in subsequent paragraphs.

PERU introduced a paragraph that the international regime will also apply to genetic resources of migratory species that for natural reasons are found in the territories of parties. Delegates agreed that this should be merged with the paragraph on overall scope.

CANADA, supported by many and opposed by the AFRICAN GROUP, suggested deleting three sub-paragraphs addressing: benefits arising from utilization of genetic resources

acquired after the CBD's entry into force; continuing benefits from utilization of resources taken prior to the CBD's coming into force; and intellectual property rights (IPR) associated with research and technology arising from the use of genetic resources. The sub-paragraphs were retained in brackets.

Delegates then debated a paragraph listing exemptions to scope, focusing on plant genetic resources for food and agriculture covered under the International Treaty on Plant Genetic Resources for Food and Agriculture, and on genetic resources acquired before the CBD's entry into force. Different options were retained. Discussions continued into the night.

CONTACT GROUP ON COMPLIANCE

Delegates addressed development of tools to enforce compliance. The contact group upheld a suggestion by NORWAY to move its proposal on development of tools to monitor compliance to this section. The EU proposed to entirely bracket provisions on: ensuring compliance with the national legislation of the country of origin; remedies and sanctions, which should be discussed together with their triggers; and cooperation in the investigation of alleged violations of national ABS legislation. SIDS suggested adding a new paragraph providing that user parties shall provide financial assistance for the settlement of legal disputes.

Delegates then addressed tools to encourage compliance. CANADA bracketed a paragraph on international understanding of misappropriation and misuse. Others indicated their intention to submit new text during the third reading of the document. On sectoral menus of model clauses for material transfer agreements, the AFRICAN GROUP proposed that parties should also ensure binding compliance measures. JAPAN requested bracketing reference to sectoral menus and suggested that users and providers take into account the common elements of various sectors and the particularity of each sector. The LMMC bracketed the entire element and added language to ensure that access is addressed at the national level. CANADA supported that parties submit a compilation of model clauses to the clearing-house mechanism. On codes of conduct for important groups of users, the AFRICAN GROUP called for ensuring the communication of codes of conduct and best-practice standards to the relevant user groups.

On international access standards (that do not require harmonization of domestic access legislation) to support compliance across jurisdictions, the LMMC proposed moving all the text into the CRP on access. The EU stressed the need for a linking clause on access-related tools to enforce compliance, either as a self-standing provision or within key compliance-related provisions. Upon the suggestion by the LMMC to provide for the link, but to avoid duplication of text, the EU agreed to include only an "open" cross-reference, which was subsequently bracketed by the LMMC.

Delegates discussed tools to monitor compliance. On tracking and reporting systems, AUSTRALIA suggested language on information exchange, and including monitoring and tracking in ABS contracts. NEW ZEALAND and JAPAN bracketed paragraphs on disclosure requirements, while the EU bracketed references to disclosure in product approval applications. On identification of checkpoints, the AFRICAN GROUP introduced language requesting parties to establish checkpoints at IPR offices, market approval authorities and entities funding research, which should cover all uses.

Delegates then addressed tools to enforce compliance. On measures to ensure access to justice, SIDS proposed stating that such measures should be in accordance with Principle 10 of the Rio Declaration (participation and access to justice). CANADA and the LMMC requested bracketing a paragraph on

an international ombudsman. CANADA also bracketed a section on alternative dispute resolution, suggesting that parties should encourage users and providers to use existing mechanisms.

On enforcement of judgments, the EU and CANADA requested bracketing language on enforcing decisions of the courts of provider countries. CANADA added reference to a provision on the applicable law in ABS contracts. On information exchange procedures between national focal points, the AFRICAN GROUP provided text on the international ombudsman facilitating information exchange on infringement of PIC requirements. On remedies and sanctions, JAPAN requested bracketing a paragraph addressing IPR, while CANADA and AUSTRALIA bracketed paragraphs on systems to seek redress in cases of breach of contractual obligations or misappropriation, and on cooperation between parties on addressing infringements of ABS agreements.

CONTACT GROUP ON BENEFIT-SHARING AND ACCESS

In the evening, delegates addressed a CRP on benefit-sharing. On the linkage of access to the fair and equitable sharing of benefits, CANADA bracketed provisions referring to: PIC, including for use changes and unforeseen uses; indigenous and local communities; and measures requiring users to comply with ABS legislation of provider countries.

On benefits to be shared under mutually agreed terms (MAT), PERU proposed language stating that the absence of MAT must not constitute grounds for the denial of benefit-sharing. AUSTRALIA preferred reference to the party providing the resources, rather than the country of origin, while the LMMC favoured the opposite. An indigenous representative called for reference to community protocols and customary laws along with national legislation.

On monetary and non-monetary benefits, CANADA bracketed language on ensuring that benefit-sharing includes all forms of resource utilization. The AFRICAN GROUP proposed that parties take measures to share the benefits of research and technology linked to conservation and sustainable use irrespective of access. Discussions continued into the night.

IN THE CORRIDORS

Delegates arrived red-eyed on Tuesday morning as many had worked late into the night to clean up the debris of Monday's crash. They were reassured in the morning plenary that the process was still on the tracks, but as one delegate stated: "the goodwill has been damaged." The main effect of the ceasefire on procedure was that delegates were now free to add text and brackets reflecting their positions, which substantially accelerated deliberations on compliance and benefit-sharing. Even so, skirmishes moved from fighting over "bricks and bullets" to "brackets and footnotes" evidenced on seemingly minor issues such as whether contact group procedures allowed for the introduction and bracketing of footnotes, leading one delegate to joke that "the devil is not in the detail, but in the footnotes."

Despite applause at the completion of the document on compliance, delegates were reluctant to speak of progress. While one participant suggested that "we are now working towards consensus by exhaustion" another attempted a more serious assessment noting, "in past meetings, it was unclear how much convergence there was between parties, after ABS 7 we are at least finally clear about the depth of the divergence that remains."

ENB SUMMARY AND ANALYSIS: The *Earth Negotiations Bulletin* summary and analysis of ABS 7 will be available on Saturday, 11 April 2009 online at: <http://www.iisd.ca/biodiv/abs7/>

**SUMMARY OF THE SEVENTH MEETING
OF THE WORKING GROUP ON ACCESS AND
BENEFIT-SHARING OF THE CONVENTION
ON BIOLOGICAL DIVERSITY:
2-8 APRIL 2009**

The seventh meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) was held from 2-8 April 2009, at UNESCO headquarters, in Paris, France. The meeting continued the negotiation of an international regime on ABS, focusing on operational text on the objective, scope, compliance, fair and equitable benefit-sharing, and access.

In accordance with Decision IX/12 of the Conference of the Parties (COP), the Working Group is instructed “to finalize the international regime and to submit for consideration and adoption by the COP at its tenth meeting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and its three objectives, without in any way prejudging or precluding any outcome regarding the nature of such instrument/instruments.” COP 10 will be held from 18-29 October 2010, in Nagoya, Japan.

The Working Group encountered several procedural obstacles, most of which related to the structure of the negotiating document agreed upon at ABS 6 and ratified by CBD COP 9, consisting of sections on the main components, and lists of items “to be further elaborated with the aim of incorporating them in the international regime” in the case of agreement in principle (“bricks”), or “for further consideration,” in the case of disagreement or need for further clarification (“bullets”). Although this structure had assisted negotiations in the past, it provoked prolonged procedural debates in Paris, with regional groups accusing each other of trying to promote bullets to bricks through their textual proposals under different items. Two days before the end of the meeting, the Working Group agreed to abandon the bricks and bullets concept and work on textual proposals under the structure set out in the annex to COP Decision IX/12. With regard to substance, the most controversial debate concerned whether to include viruses and pathogens in the scope of the regime.

Although time and energy spent on the procedural “rules of engagement” has damaged the trust between negotiating groups, the outcome of the meeting, consisting of a streamlined working document on the objective, scope, compliance, benefit-sharing, and access, albeit highly bracketed, provides draft language on most items, and sets out parties’ preferences and points of divergence. This collective outcome will form the basis for negotiations at ABS 8, to be held from 9-15 November 2009, in Montreal, Canada, where delegates will address the nature of the regime, traditional knowledge associated with genetic resources, and capacity building.

A BRIEF HISTORY OF THE CBD AND ABS

Negotiated under the auspices of the UN Environment Programme, the CBD was opened for signature on 5 June 1992, and entered into force on 29 December 1993. There are currently 191 parties to the Convention, which aims to promote the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.

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

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was initiated at COP 4 (May 1998, Bratislava, Slovakia), when parties decided to establish a regionally balanced expert panel on ABS, whose composition and agenda were discussed at an intersessional meeting on the operations of the Convention (June 1999, Montreal, Canada). The first meeting of the expert panel on ABS (October 1999, San José, Costa Rica) developed a set of recommendations including general conclusions and specific points on PIC, MAT, information needs and capacity building. COP 5 (May 2000, Nairobi, Kenya) established the Working Group on ABS to develop guidelines and other approaches on: PIC; MAT; roles, responsibilities and participation of stakeholders; benefit-sharing mechanisms; and the preservation of traditional knowledge. The second meeting of the expert panel on ABS (March 2001, Montreal, Canada) addressed: user and provider experience in ABS processes; approaches for stakeholder involvement; and complementary options to address ABS within the CBD framework, including possible elements for guidelines.

ABS 1: At its first meeting (October 2001, Bonn, Germany), the Working Group on ABS developed the draft Bonn guidelines on ABS and also: identified elements for a capacity-building action plan; called for an open-ended workshop on capacity building for ABS; 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 also considered the role of IPRs in the implementation of ABS arrangements, 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 negotiation, within the CBD framework, of an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources. The WSSD call was reaffirmed at the 57th session of the UN General Assembly (December 2002, New York) and the 2005 UN World Summit (September 2005, New York), as well as at the subsequent sessions of the UN General Assembly.

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

ABS 4: At its fourth meeting (January-February 2006, Granada, Spain), the ABS Working Group continued talks on an international ABS regime and agreed on a draft text to serve

as the basis for future negotiations. The Working Group also considered an international certificate of origin/source/legal provenance, and measures to support compliance with PIC and MAT.

COP 8: At its eighth meeting (March 2006, Curitiba, Brazil), the COP instructed the ABS Working Group to complete its work with regard to the international ABS regime at the earliest possible time before COP 10, to be held in 2010, under the co-chairmanship of Fernando Casas (Colombia) and Timothy Hodges (Canada). Following a lengthy controversy over the status of the ABS 4 outcome, the COP decided to transmit it to ABS 5, along with the outcomes of a group of technical experts on a certificate of origin/source/legal provenance. 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.

EXPERT GROUP ON THE CERTIFICATE: The group of technical experts on an internationally recognized certificate of origin/source/legal provenance (January 2007, Lima, Peru) discussed the feasibility, implementation challenges and potential costs and benefits of different options for a certificate of origin/source/legal provenance.

ABS 5: At its fifth meeting (October 2007, Montreal, Canada), the ABS Working Group considered substantive elements of an international regime on ABS. Delegates also discussed two informal documents tabled by the Co-Chairs, their notes on proposals made at the meeting and their reflections on progress made, and concluded they were under the sole authority of the Co-Chairs and would be circulated to parties as information documents.

ARTICLE 8(J) WG 5: At its fifth meeting (October 2007, Montreal, Canada), the Working Group on Article 8(j) did not reach agreement on a recommendation on inputs from the Working Group to the negotiation of an international regime on ABS, due to divergence of views with regard to both procedural and substantive issues.

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

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

ABS 7 REPORT

On Thursday, 2 April 2009, ABS Working Group Co-Chair Timothy Hodges (Canada) welcomed delegates, and underscored that the Working Group has 21 days of negotiations left to complete its mandate, time which he described as limited but sufficient for the task. He reminded delegates about the specificity of Decision IX/12 that sets out the basis for negotiations, milestones, a deadline and precise goals.

Jochen Flasbarth, on behalf of the German Presidency of the COP, underscored the economic value of ecosystems and biodiversity that forms the background to the incumbent negotiations. CBD Executive Secretary Ahmed Djoghlaif stressed that this meeting is a pivotal juncture in the negotiations of the international regime on access and benefit-sharing. Walter Erdelien, Assistant Director-General for Natural Sciences, UNESCO, highlighted the long history of collaboration between UNESCO and the CBD. Bakary Kante, on behalf of UNEP Executive Director Achim Steiner, said UNEP has committed to contribute US\$1 million to the ABS process. All regional groups expressed their commitment towards a productive meeting and finalizing negotiations by COP 10. Monica Rosell (Peru) and Hiroji Isovaki (Japan), Co-Chairs of the group of legal and technical experts on compliance, reported on the outcomes of the meeting, held from 27-31 January 2009, in Tokyo, Japan (UNEP/CBD/WG-ABS/7/3). Desmond Mahon (Canada) and Pierre du Plessis (Namibia), Co-Chairs of the group of legal and technical experts on concepts, terms, working definitions and sectoral approaches, reported on the meeting held from 2-5 December 2008, in Windhoek, Namibia (UNEP/CBD/WG-ABS/7/2). Working Group Co-Chair Fernando Casas (Colombia) announced that the studies commissioned in accordance with COP Decision IX/12 are circulated as information documents and will be presented during side events.

ORGANIZATIONAL MATTERS: Working Group Co-Chair Hodges reminded delegates that the COP 9 Bureau serves as the meeting Bureau and nominated Damaso Luna (Mexico) as rapporteur. Delegates then adopted the meeting's agenda and organization of work (UNEP/CBD/WG-ABS/7/1 and Add.1/Rev.1). Co-Chair Hodges announced that each substantive item would be initially considered in plenary, and contact groups would be established as needed. Delegates agreed to negotiate on the basis of Annex 1 to COP Decision IX/12 (UNEP/CBD/WG-ABS/7/7), consisting of sections on the main components, and lists of items "to be further elaborated with the aim of incorporating them in the international regime" in the case of agreement in principle ("bricks"), or "for further consideration," in the case of disagreement or need for further clarification ("bullets"). They further agreed to draw on parties' submissions compiled by the Secretariat (UNEP/CBD/WG-ABS/7/4 and Add.1-3) as well as submissions tabled in plenary.

Plenary met every day to hold initial discussions on all agenda items, review progress achieved in contact groups and resolve procedural issues. On Friday, 3 April, plenary established a contact group on the objective and scope of the regime, co-chaired by Birthe Ivars (Norway) and David Hafashimana (Uganda), which met from 3-4 April and from Monday, 6 April to the early morning hours of Wednesday, 8 April. On Saturday, 4 April, another contact group was established to address compliance, benefit-sharing, and access, co-chaired by Pierre

du Plessis (Namibia) and René Lefeber (the Netherlands), which met from Saturday, 4 April to the early morning hours of Wednesday, 8 April. The procedural rules of engagement of the latter contact group provided for a three-step approach: identifying the basis for further work on each brick and bullet; consolidating parties' views; and negotiating text.

On Tuesday, 7 April, contact group Co-Chair Lefeber reported to plenary that the contact group had arrived at a deadlock over a brick on measures to ensure compliance, making it impossible to continue working on the basis of its current procedural rules of engagement. He said the group suspended work to convene a closed-door meeting with the main spokespersons of the negotiating groups to discuss the way forward. They considered a "minimalist approach" demoting the brick to a bullet, and a "maximalist approach" of removing the distinction between bricks and bullets throughout the documents on compliance, benefit-sharing and access. He reported that the majority of participants preferred the maximalist approach while some had to seek instructions from capitals. Canada, the European Union (EU), the Like-Minded Megadiverse Countries (LMMC), the African Group, New Zealand, Norway and Japan, among others, supported the maximalist approach. Contact group Co-Chair du Plessis underscored that the bricks and bullets illustrated the state of play at ABS 6, but that a new approach was needed to forge consensus by COP 10. Working Group Co-Chair Hodges and contact group Co-Chair Lefeber confirmed that the removal of the bricks and bullets results in all elements in the text having the same status. Lefeber explained parties could bracket text, but the structure as set out in the headings would be maintained.

This report outlines discussions and summarizes the outcome of negotiations of operational text on the objective of the international regime, its scope, compliance, benefit-sharing, and access.

INTERNATIONAL ABS REGIME: NEGOTIATION OF OPERATIONAL TEXT

OBJECTIVE: The objective of the international regime was discussed in plenary on Thursday, 2 April, when delegates were invited to table additional proposals for operational text that had not been submitted in writing prior to the meeting. The operational text for the objective was negotiated in the contact group on the objective and scope from Thursday to Friday, 2-3 April, and on Monday, 6 April.

The EU, Japan, the Republic of Korea, New Zealand and Switzerland supported developing a short and precise objective, while Argentina, Egypt and the LMMC preferred a version setting out more details. Canada made a proposal to integrate the chapeau and more detailed points into one more concise paragraph, which was opposed by the LMMC and others, who preferred to keep a more detailed text. New Zealand, supported by Norway, proposed a text for the chapeau not referring to CBD provisions but rather naming the concepts enshrined in them, which was opposed by the LMMC.

The LMMC stressed all their submissions refer to a protocol on ABS. The African Group requested reference to biological resources along with genetic resources throughout the text, as well as to their derivatives and products. Argentina pointed to a lack of common understanding of derivatives and products, and Japan proposed deletion. References to biological resources, derivatives and products remain bracketed throughout the text.

Regarding the chapeau, which references the CBD objectives and a number of CBD provisions, delegates debated whether to state that the international regime should pursue all three CBD objectives, or just its third (benefit-sharing). Following lengthy debates, delegates agreed that the objective of the regime was to effectively implement relevant CBD provisions and to “pursue” the three CBD objectives. Delegates further debated whether to refer to specific CBD Articles in the objective, with delegates agreeing to references to Articles 15 (Access to Genetic Resources) and 8(j) (traditional knowledge), and remaining divided over whether to also refer to others: Article 1 (Objectives), Article 3 (Principles); Article 16 (Access to and Transfer of Technology) and Article 19.2 (access to results and benefits from biotechnologies).

Several developing countries called for the deletion of a sub-paragraph on facilitating access to genetic resources, their derivatives and associated traditional knowledge, noting that it goes against the intent of Article 15. Others argued that such language clarifies that the regime should specifically implement Articles 15.1 (sovereign rights of states over natural resources) and 15.2 (facilitating access for environmentally sound uses) so as to facilitate access. Many developing countries stressed the regime should implement benefit-sharing, rather than facilitate access. Many said that access should be regulated and transparent, but others opposed such a reference. Delegates agreed to merge two options to include a reference to the sovereign rights of states to their genetic resources, but remained divided over whether to state that access to genetic resources should be facilitated or regulated, with Argentina, Canada, the EU, Japan, the Republic of Korea and Switzerland favoring the former, and the African Group preferring the latter formulation. New Zealand, supported by the African Group, the LMMC and Norway, suggested replacing both references with a reference to “appropriate access,” but the issue remains unresolved. They debated whether to reference associated traditional knowledge, with Canada, the EU, and the Latin America and the Caribbean Group (GRULAC) arguing that Article 8(j) does not refer to facilitated access to traditional knowledge. Following a suggestion by Argentina, the reference was moved to the final paragraph dealing with traditional knowledge. The African Group reserved its right to address the issue in a separate sub-paragraph.

Regarding a sub-paragraph on ensuring fair and equitable sharing of benefits, many developed countries proposed to refer to the establishment of conditions for benefit-sharing, noting that these conditions will be set out mainly in contracts and mutually agreed terms (MAT). Many developing countries stressed that the international regime is intended to establish international rules and procedures that ensure fair and equitable benefit-sharing, rather than rely on contracts. Following lengthy discussions, delegates kept additional wording on “the establishment of enabling conditions for benefit-sharing” in brackets, but agreed to include associated traditional knowledge under “effective” benefit-sharing.

The LMMC, supported by many, suggested having a separate sub-paragraph on misappropriation and misuse. A number of developed countries, while acknowledging the importance of the issue, felt this should be addressed in the components of the regime, rather than its objective. Many developing countries recited cases of misuse and misappropriation, and considered

their prevention a key objective of the international regime. Others referred to the effectiveness of contracts, whereas developing countries pointed to cases where contracts had not been honored and misappropriation had occurred in the absence of contracts. New Zealand, supported by the African Group, Australia and Canada, but opposed by the LMMC, suggested that misuse and misappropriation be defined. On the suggestion by the African Group, a footnote was inserted stating that the terms “may need to be articulated.”

Regarding a sub-paragraph on securing compliance in user countries with national laws and requirements in provider countries, delegates discussed an EU proposal to refer to “compliance with domestic regulatory ABS frameworks,” so as to also address non-legal compliance measures such as awareness raising or voluntary codes of conduct. While many developed countries supported the proposal, developing countries generally opposed it, with many arguing that the proposal was too vague and that language on compliance should specifically focus on compliance with the international regime and enforcement of national ABS laws in provider countries. Several developed countries raised concerns about making reference to compliance under the regime’s objective, whereas the LMMC explained that addressing compliance across jurisdictions is at the heart of the international regime and should therefore be part of its objective. Regarding four possible options for the paragraph, delegates agreed to work on the basis of the most comprehensive text. Japan expressed concerns regarding the proposed requirement for user countries to secure compliance with laws in provider countries. The African Group said that language on securing compliance in user countries should include a reference to existing provisions in international law and refer to providers along with countries of origin. The EU, supported by Switzerland and Australia, but opposed by the African Group and the LMMC, proposed to replace “securing” compliance with “supporting” it, and called for reference to national laws and requirements rather than to domestic regulatory ABS frameworks.

Delegates also discussed a paragraph addressing rights over genetic resources, including the rights of indigenous and local communities, and ensuring compliance with prior informed consent (PIC), and included a reference to the UN Declaration on the Rights of Indigenous Peoples, with the specification “where appropriate” both in brackets.

During the closing plenary, the outcome document on objective was adopted without amendments.

Final Outcome: The outcome document on objective (UNEP/CBD/WG-ABS/7/L.2) remains heavily bracketed. The chapeau states that the objective of the international regime is to effectively implement the provisions in Articles 1, 3, 8(j), 15, 16 and 19.2 of the CBD and pursue its three objectives. Agreed references include Articles 8(j) and 15 and the three objectives. The following sub-paragraphs, which include alternative language and remain heavily bracketed, address:

- facilitating/regulating access to genetic resources/biological resources/derivatives and products, through a transparent regulatory framework for environmentally sound uses recognizing the sovereign rights of states over their natural resources and that the authority to determine access to genetic resources, their derivatives and products, rests with the national government and is subject to national legislation;

- ensuring fair and equitable sharing of benefits arising out of the utilization of genetic resources and associated traditional knowledge;
- preventing the misappropriation and misuse of genetic resources and/or associated traditional knowledge; and
- securing/supporting compliance in user countries with the international regime/national laws and requirements/domestic regulatory ABS frameworks in provider countries, including PIC and MAT of the country of origin providing such resources or of the party that has acquired those resources in accordance with the CBD.

The final paragraph addresses the rights over those resources or all sovereign rights of states over their natural resources, including the rights of indigenous and local communities, subject to national legislation, and the UN Declaration on the Rights of Indigenous Peoples, where appropriate.

SCOPE: The Working Group made general comments about the scope of the regime in plenary on Thursday, 2 April, and Wednesday, 8 April, and conducted two readings of the issue on Saturday, 4 April, and Tuesday, 7 April, in a contact group. Major issues included: what should be included in a paragraph on the overall scope; what should remain outside the scope; the regime's relationship to other international legal instruments; and whether pathogens should be included.

In plenary, the EU said that the scope should apply to access to genetic resources and the promotion of fair and equitable benefit-sharing in accordance with Article 15 as well as traditional knowledge in accordance with Article 8(j). With others, he stated that certain genetic resources should remain outside the scope of the regime, including: human genetic resources; genetic resources acquired before the CBD's entry into force; plant genetic resources covered by the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR); marine genetic resources outside national jurisdiction; and genetic resources in the Antarctic Treaty area.

The African Group argued that the scope should include: genetic resources; biological resources; and derivatives and products. He proposed excluding exchange and use of traditional knowledge between indigenous and local communities. The LMMC stated that the regime should apply to genetic resources, derivatives and traditional knowledge, and reinforce the relationship between the CBD and the ITPGR.

Switzerland explained that its tabled proposals are meant to be inclusive and ensure the regime is applied to all genetic resources covered by the CBD, leaving room for existing international sectoral ABS instruments such as the ITPGR. Norway stressed the regime should be without prejudice to the ITPGR and should be implemented in harmony with it, and explained its submitted proposal was based on the provision on scope of the Bonn Guidelines on ABS.

Japan said that the regime should exclude: derivatives and products; plant genetic resources covered by the ITPGR; and marine genetic resources beyond national jurisdiction. He also called for special consideration of resources addressed under the World Health Organization (WHO) in relation to the multilateral framework for pandemic influenza preparedness regarding the sharing of influenza viruses. Canada pointed to additional language submitted regarding the regime's relationship with existing, current and future agreements.

The contact group worked on the basis of the option on scope included in the annex to COP Decision IX/12. On a paragraph on the overall scope of the regime, delegates debated whether to include reference to biological resources, with the African Group insisting on retaining and the LMMC and Chile requesting deletion. Japan proposed stating that the regime applies to genetic resources and deleting references to biological resources, derivatives and products. Peru added language that the international regime will also apply to genetic resources of migratory species that for natural reasons are found in the territories of parties.

On three sub-paragraphs setting out that the international regime apply to: benefits arising from utilization of genetic resources acquired after the CBD's entry into force; continuing benefits from utilization of resources accessed prior to the CBD's entry into force; and intellectual property rights (IPR) associated with research and technology arising from the use of genetic resources, Canada, supported by many and opposed by the African Group, suggested all three be deleted. The sub-paragraphs were retained in brackets.

Regarding pathogens, the EU, supported by Australia and Canada, proposed a footnote stating that it reserves its position because of ongoing internal discussions. This led to a protracted discussion on process. The African Group, the LMMC and GRULAC rejected the footnote, noting that the purpose of this stage of negotiation is to work on the text, and that the definition of "pathogen" is not well understood. The EU agreed to drop the footnote, but requested to reflect its concern in the report of the meeting.

During the last meeting of the contact group in the early morning hours of Wednesday, 8 April, delegates held a debate on pathogens, which resulted in the introduction and bracketing of text stating that the international regime applies to viruses and other pathogenic, as well as potentially pathogenic, organisms and genetic sequences regardless of their origin.

In the closing plenary, Co-Chair Ivars presented the work of the contact group on the objective and scope, describing it as a "frustrating process" and called on delegates to revisit their positions in order to advance before ABS 8. The outcome document on scope was adopted with minor amendments. The LMMC, the African Group and the EU made statements with regard to pathogens, which are reflected in this report under the section on the closing plenary.

Final Outcome: The outcome document (UNEP/CBD/WG-ABS/7/L.3) is heavily bracketed, including brackets around entire paragraphs and items within each paragraph.

The document addresses the following issues related to the scope of the regime, in brackets:

- The international regime applies to all genetic resources, biological resources, viruses and other pathogens, as well as potentially pathogenic organisms and genetic sequences regardless of their origin, derivatives and products, associated traditional knowledge, and genetic resources of migratory species;
- The international regime applies to: benefits arising from utilization of resources acquired after the entry into force of the CBD; continuing benefits arising from the utilization of genetic resources and associated traditional knowledge arising

from commercial use taken prior to the entry into force of the CBD; and IPR associated with research and technology arising from the use of all genetic resources;

- The international regime does not apply to, *inter alia*: human genetic resources; genetic resources acquired before the entry into force of the international regime; genetic resources that a party decides to offer without access requirements or benefit-sharing; species/crops listed in Annex I of the ITPGR; genetic resources, including marine genetic resources in areas beyond national jurisdiction; biological resources located in the Antarctic Treaty Area; commodities in trade; and specific uses of pathogens;
- Three options on the relationship of the international regime to other international agreements, including one stating the international regime should allow for the implementation and potential development of more specialized international ABS systems;
- The relationship with the ITPGR and its Multilateral System, with agreed language stating that the international regime should reinforce the relationship between CBD and the ITPGR; and
- The international regime will be implemented in harmony with other relevant treaties.

COMPLIANCE: Delegates addressed compliance in plenary from Thursday to Friday, 2-3 April, and in a contact group from Sunday to the early hours of Wednesday, 5-8 April. Delegates did not reach the stage of seeking agreement on text, but reviewed submissions and identified the basis for further work under each item according to the structure contained in the annex to the COP Decision IX/12, consolidated parties' views and worked on text making further textual proposals or bracketing text.

In plenary, the African Group explained their submission contains provisions for countries without national legislation, mandatory disclosure requirements and independent third party verification of certificates of compliance. Japan noted its submission was based on some of the options developed by the group of experts on compliance. The LMMC proposed an additional provision, that the governing body of the future protocol shall consider measures to support effective implementation, including by providing assistance to parties in litigation of cases of non-compliance. New Zealand submitted a proposal on measures to ensure compliance with customary law. The EU stressed the linkage between compliance measures for benefit-sharing and access, and the need to ensure fairness, equality and transparency by facilitating compliance measures across jurisdictions, such as internationally recognized certificates of compliance, especially to verify the PIC of the competent national authority. The International Indigenous Forum on Biodiversity (IIFB) congratulated the government of Australia for endorsing the UN Declaration on the Rights of Indigenous Peoples. He highlighted the need for parties to take measures to recognize the rights of indigenous peoples and local communities to genetic resources and associated traditional knowledge, and stated that certificates should reference community protocols and customary laws.

The contact group based its work on a non-paper compiling submissions made before and during the meeting, aiming to consolidate proposals first, and then revise the text, while deferring discussion on preambular text. They also agreed to remove all attributions to the parties who submitted the proposals

from the text, and use footnotes in cases where the location of a paragraph in the text requires further consideration. The African Group requested reference to biological resources along with genetic resources throughout the text.

Discussions began with tools to encourage compliance, already defined as bricks. The contact group considered each brick separately in order to decide on which submission to base the negotiations.

Regarding measures on awareness-raising activities, delegates agreed to base negotiations on text submitted by Japan. The LMMC proposed specifying that awareness raising is "an important supplementary tool which cannot substitute mandatory measures for benefit-sharing." Australia noted that lack of awareness about ABS frameworks is the key source of non-compliance. Japan emphasized help-desks for stakeholders and web-portals as key activities for awareness raising.

Delegates then discussed a Norwegian proposal concerning the development of tools to monitor compliance, and agreed to identify overlap with other provisions, and then decide on the most appropriate provision where its elements should be incorporated.

Following a brief discussion on mechanisms for information exchange, delegates agreed to work on the basis of the LMMC proposal that makes reference to an ABS clearing-house mechanism (CHM). Parties debated whether to locate a paragraph on competent national authorities and national focal points under a section on internationally recognized certificates or elsewhere in the document, without reaching agreement. Regarding internationally recognized certificates, delegates debated whether to use an African Group proposal containing a comprehensive range of elements, or a more general Norwegian proposal, and finally agreed to retain both options.

Regarding an international understanding of misappropriation/misuse, the EU noted that the sole text, submitted by Norway, did not entail a definition but rather stated the goal of preventing misappropriation. Regarding sectoral menus of model clauses for material transfer agreements, delegates agreed to work on the basis of the EU proposal, which includes references to inventories/catalogues of typical utilizations and legal procedures for developing model clauses. On requesting research funding agencies to oblige users to comply with specific ABS requirements, they agreed to use the sole LMMC proposal; and on tracking and reporting systems they agreed to use the sole proposal of the African Group, which provides for monitoring systems that identify breaches of contractual obligations or misappropriation.

On disclosure requirements, Norway and India withdrew their submissions and, following a discussion on process due to support from Japan and Argentina for the withdrawn Norwegian proposal, delegates agreed to keep a more elaborate LMMC proposal as the basis for further discussion.

On measures to ensure access to justice, delegates decided to: retain a proposal by the African Group on an international ombudsman; delete a similar but more detailed proposal by the IIFB; and move an LMMC proposal on providing support for litigation to this section. On alternative dispute resolution, delegates agreed to work on the basis of a proposal by the African Group providing for dispute resolution mechanisms to be guided by principles of equity drawn from a wide range of legal sources, including customary law and practices of indigenous

and local communities. On enforcement of judgments and remedies and sanctions, delegates agreed to retain all existing proposals since they are complementary. On measures to ensure compliance with customary law and on local systems of protection, delegates agreed to use text submitted by the African Group and New Zealand as basis for further negotiations.

A revised non-paper was drafted as a result of deliberations, which, as explained by contact group Co-Chair Lefeber, included: mention of both genetic and biological resources in brackets; neutral formulations with regard to the choice of instrument; and a footnote that the placement of paragraphs must be further considered under the items, which at the time were still divided into bricks and bullets. Delegates proceeded to further consolidate operational text.

On awareness-raising activities to encourage compliance, parties proposed additional tools, including: an ABS CHM; best-practice tools; measures to promote a wider understanding of the concept of misappropriation, misuse and biopiracy; and the recognition of the contribution made by indigenous and local communities to biodiversity. The African Group suggested that parties raise awareness to promote application of traditional knowledge by involving indigenous and local communities in various research and education activities.

Delegates bracketed all paragraphs under development of tools to monitor compliance. Parties made additional proposals on capacity-building measures to develop tools to monitor compliance, and on requiring compliance with national legislation in the country of origin and the MAT on which access was granted, including requirements for benefit-sharing. On mechanisms for information exchange, parties proposed adding references to: non-internet means; and facilitating funding, capacity building and participation in the ABS CHM. Regarding the types of information to be made available by parties, new paragraphs were added on: information about model ABS legislation and menus of model clauses; experiences in the development of electronic tools for the tracking of genetic resources; community protocols; and codes of conduct and best practices. The EU said that monitoring compliance should not be a CHM function, and proposed that the CHM support users of genetic resources in accessing information, and the exchange of information for non-commercial research.

Delegates then debated a section on the domestic competent authority, with the EU and others reiterating that the text should be placed in the document on access, and bracketing a reference to the issuance of certificates of compliance as part of the authority's functions. The EU proposed a new function on helping providers of genetic resources to obtain relevant information, including in cases of alleged infringements of provider country requirements in relation to PIC and MAT.

On an internationally recognized certificate of compliance, delegates discussed and made textual amendments on: both an elaborate option, including minimum information requirements, checkpoints, technologies to facilitate certification, and disclosure requirements in IPR applications; and a short option requiring provider parties to issue a certificate on the country of origin and compliance with national ABS legislation. Reference to provider countries was debated at length.

Delegates debated whether to refer to provider countries, or to quote CBD Article 15.3 referring to countries of origin or to countries that have acquired the resources in accordance with the Convention.

Regarding enforcement of national ABS legislation under a section on tools for compliance, Norway suggested additional tools, including compliance with PIC for import of genetic resources and documentation accompanying genetic resources for research and commercialization. Peru suggested a reference to safeguarding and respecting the genetic and traditional knowledge heritage of countries of origin in the granting of any right, in particular in relation to IPR and product approvals. Canada and the EU raised concerns that text introduced contained elements that had been classified as bullets. The EU subsequently introduced language on compliance with international access standards as a precondition for compliance with national ABS legislation; and Canada on facilitated access to genetic resources and ensuring non-discrimination among users accessing these resources. The LMMC and the African Group opposed the introduction of compliance with reference to international access standards, arguing that this would upgrade bullets into bricks. Following a lengthy discussion, parties supported a proposal by Co-Chair Lefeber to resolve the issue in a closed-door meeting with the spokespersons of negotiating groups. Following the late-night consultations, delegates agreed that the bricks and bullets structure should be removed. (See page 3 under Organizational Matters.)

The contact group then continued its deliberations addressing development of tools to enforce compliance. The group upheld a suggestion by Norway to move its proposal on development of tools to monitor compliance to this section. The EU proposed to entirely bracket provisions on: ensuring compliance with the national legislation of the country of origin; remedies and sanctions, which should be discussed together with their triggers; and cooperation in the investigation of alleged violations of national ABS legislation. Small island developing states (SIDS) suggested adding a new paragraph providing that user parties shall provide financial assistance for the settlement of legal disputes.

On tools to encourage compliance, Canada bracketed a paragraph on international understanding of misappropriation and misuse. On sectoral menus of model clauses for material transfer agreements, the African Group proposed that parties should also ensure binding compliance measures. Japan requested bracketing reference to sectoral menus and suggested that users and providers take into account the common elements of various sectors and the particularity of each sector. The LMMC bracketed the entire element and added language to ensure that access is addressed at the national level. Canada supported that parties submit a compilation of model clauses to the clearing-house mechanism. On codes of conduct for important groups of users, the African Group called for ensuring the communication of codes of conduct and best-practice standards to the relevant user groups.

On international access standards (that do not require harmonization of domestic access legislation) to support compliance across jurisdictions, the LMMC proposed moving all the text into the document on access. The EU stressed the need for a linking clause on access-related tools to enforce compliance and included an "open" cross-reference, which was subsequently bracketed by the LMMC.

Delegates discussed tools to monitor compliance. On tracking and reporting systems, Australia suggested language on information exchange, and including monitoring and tracking in

ABS contracts. New Zealand and Japan bracketed paragraphs on disclosure requirements, while the EU bracketed references to disclosure in product approval applications. On identification of checkpoints, the African Group introduced language requesting parties to establish checkpoints at IPR offices, market approval authorities and entities funding research, which should cover all uses.

Delegates then addressed tools to enforce compliance. On measures to ensure access to justice, SIDS introduced reference to Principle 10 of the Rio Declaration (participation and access to justice). Canada and the LMMC requested bracketing a paragraph on an international ombudsman. Canada also bracketed a section on alternative dispute resolution, suggesting that parties should encourage users and providers to use existing mechanisms.

On enforcement of judgments, the EU and Canada requested bracketing language on enforcing decisions of the courts of provider countries. On information exchange procedures between national focal points, the African Group provided text on the international ombudsman facilitating information exchange on infringement of PIC requirements. On remedies and sanctions, Japan requested bracketing a paragraph addressing IPR, while Canada and Australia bracketed paragraphs on systems to seek redress in cases of breach of contractual obligations or misappropriation, and on cooperation between parties on addressing infringements of ABS agreements. A third reading of the document was concluded during the early hours of Wednesday, 8 April.

During the closing plenary, Co-Chair du Plessis presented the outcome document and introduced editorial corrections, noting that some parties have reserved their right to propose text at a later stage.

The LMMC noted that sub-headings on domestic competent authority and internationally recognized certificates had not been agreed upon by the Working Group or the COP, and suggested they be deleted. With regard to footnotes referring to sub-headings on domestic competent authority and on development of tools to enforce compliance, he suggested adding a statement after the respective operational text, that the placement of the paragraphs must be further considered. The document was adopted with these amendments.

Final Outcome: The outcome document (UNEP/CBD/WG-ABS/7/L.4) is heavily bracketed, including brackets around entire paragraphs and items within each paragraph.

Under development of tools to encourage compliance, the document addresses:

- Awareness-raising activities, including stakeholder meetings, an ABS CHM, promotion of codes of conduct, and awareness raising regarding the wider application of traditional knowledge;
- An international understanding of misappropriation/misuse;
- Sectoral menus of model clauses for material transfer agreements, including on encouraging providers and users to consider relevant inventories/catalogues of typical utilizations and related benefits, identifying sectors for which model clauses and inventories should be developed; identifying issues to be addressed in model clauses; and encouraging the use of model clauses to be included in MAT for research not aiming at commercialization, research and development aiming at commercialization, and commercialization;

- Codes of conduct for important groups of users, including that parties support the development of ABS codes of conduct for users, and ensure communication, education and awareness;
- Identification of best-practice codes of conduct, including establishing a procedure for identifying and regularly reviewing ABS codes of conduct and guidelines that constitute best-practice;
- Research funding agencies to oblige users receiving research funds to comply with specific ABS requirements, including asking for the unique identifier code referred to in the certificate of compliance or evidence of compliance with relevant national law;
- Unilateral declaration by users; and
- International access standards (that do not require harmonization of domestic access legislation) to support compliance across jurisdictions.

Under development of tools to monitor compliance, the document addresses:

- Mechanisms for information exchange, including: collaboration to facilitate information exchange to monitor or support compliance with national ABS legislation, facilitate exchange of scientific, technical, environmental and legal information, facilitate adequate funding and capacity building, and assist parties to implementation; and an ABS CHM, information to be made available to it and its operation requirements;
- Internationally recognized certificate issued by a domestic competent authority, including on: designation of national focal points for ABS; designation of a national competent authority and its functions; and a certification system, including its aims, minimum information, checkpoints, facilitation of the certification process through the use of new technology and other measures;
- Tracking and reporting systems, including to identify breaches of contractual obligations or misappropriation;
- Information technology for tracking;
- Disclosure requirements, including on IPR and product approval applications, enforcement procedures and compliance with national legislation in the country of origin; and
- Identification of checkpoints, including on establishing supporting mechanisms for compliance and checkpoints at IPR offices.

Under development of tools to enforce compliance, the document addresses:

- Compliance with national legislation of the country of origin;
- Use for purposes consistent with the access terms and conditions;
- Rules for genetic resources covered by ITPGR;
- Sanctions and remedies;
- Cooperation in the investigation and follow up of cases of alleged violations of national ABS legislation in the country of origin; and
- Financial assistance for the settlement of legal disputes.

Further tools to enforce compliance include:

- measures to ensure access to justice with the aim of enforcing ABS arrangements, including measures to support effective implementation and an international ABS ombudsman;
- dispute settlement mechanisms, including on inter-state, private international law and alternative dispute resolution;

- enforcement of judgments and arbitral awards across jurisdictions, including on enforcement of the decisions of courts of the country of origin/provider countries;
- information exchange procedures between national ABS focal points to help providers obtain relevant information in specific cases of alleged infringements of PIC requirements, including through the international ombudsman;
- remedies and sanctions, including on development of systems to initiate actions to prevent, mitigate or seek redress in cases of breach of contractual obligations or misappropriation; and
- measures to ensure compliance with customary law and local systems of protection, including on recognizing the rights of indigenous peoples and local communities, and supporting the development of community protocols.

FAIR AND EQUITABLE BENEFIT-SHARING: The Working Group considered benefit-sharing in plenary on Friday, 3 April. The contact group addressed the issue on Sunday, 5 April, and Tuesday, 7 April.

In plenary, the LMMC proposed additional text linking access to benefit-sharing, stating that: PIC for access to genetic resources, their derivatives and associated traditional knowledge shall be obtained from the party of origin, in accordance with the CBD, through its competent authorities; and subject to national legislation, where access is sought to traditional knowledge, users shall obtain PIC from the indigenous and local communities in accordance with Article 8(j). The EU and Japan underscored that benefit-sharing should be subject to MAT. The EU suggested that model clauses and inventories could contribute to a level-playing field between providers and users. Switzerland suggested identifying three specific categories of activity: research not aiming at commercialization; research and development; and commercialization.

The contact group started discussions on the basis of a non-paper on benefit-sharing, compiling country submissions according to the structure of the annex to COP Decision IX/12, with delegates identifying the submissions to be used as a basis for further work.

On linkage of access to the fair and equitable sharing of benefits, delegates considered proposals on: PIC; measures to encourage benefit-sharing in MAT; and providing information to, and ensure compliance of, users of genetic resources with national legislation in the providing country. Discussions revolved around whether PIC should be dealt with under benefit-sharing, access, or both, with parties deciding to address the element under both. They also decided that the proposals were not mutually exclusive, and that they should be retained as separate paragraphs in the text.

On benefits to be shared under MAT, Switzerland supported an EU proposal referring to model clauses and inventories/catalogues of typical utilizations of genetic resources and related benefits when establishing MAT. The LMMC requested retaining its language on national legislative measures and the use of associated traditional knowledge and, with SIDS, suggested merging these proposals. The LMMC also suggested retaining a Norwegian proposal making reference to the indicative list of MAT contained in the Bonn Guidelines on ABS. Delegates agreed to merge the text of all proposals.

On monetary and non-monetary benefits, the EU, supported by the LMMC, suggested combining its own proposal stating that MAT may identify the types of monetary and non-monetary

benefits to be shared, with an Indian proposal providing for an indicative list of such benefits. Japan preferred a proposal by Norway making direct reference to the Bonn Guidelines. The Philippines, SIDS and the African Group asked to retain SIDS' language stating that benefit-sharing should include all forms of utilization of genetic resources, their derivatives and associated traditional knowledge. Delegates agreed to merge text from the proposals by the EU, India, SIDS and Norway.

On access to and transfer of technology, the EU and Canada supported retaining the EU proposal stating that parties requiring PIC for access to take measures to encourage providers and users to consider access to and transfer of technology making use of those resources. The LMMC argued that their proposal, calling for facilitating access to joint development and transfer of technologies to countries of origin, is a reflection of the Convention text. Delegates decided to retain both the EU and the LMMC proposals as two distinct options.

On sharing of results of research and development on MAT, delegates decided to retain both a more comprehensive LMMC proposal and an EU submission stating that parties requiring PIC for access should take measures to encourage providers and users to consider sharing of results of research and development when establishing MAT.

On mechanisms to promote equality in negotiations, delegates accepted merging an EU proposal regarding supporting the capacity of providers and users to negotiate MAT with a Norwegian proposal on ensuring participation by indigenous peoples and local communities in access procedures.

On an EU proposal on awareness raising, the LMMC observed that it duplicated text in the section on compliance, cautioning this could unbalance the text. Canada suggested that there could be similar awareness-raising instruments under compliance and benefit-sharing.

On measures to ensure participation of indigenous and local communities in MAT, and benefit-sharing with traditional knowledge holders, delegates agreed to merge the existing proposals by the LMMC, the African Group and Norway into a single text.

On development of menus of model clauses for potential inclusion in material transfer agreements, delegates agreed to maintain the EU and Swiss proposals as two alternative options. Regarding enhanced utilization of the Bonn Guidelines, the EU said they would rework its preambular language into operational text during the second reading.

On Tuesday, 7 April, delegates addressed a conference room paper (CRP) on benefit-sharing and proceeded to consolidate positions by proposing and bracketing text. On the linkage of access to the fair and equitable sharing of benefits, Canada bracketed provisions referring to: PIC, including for changes in use of genetic resources for which access has been previously granted, and unforeseen uses; indigenous and local communities; and measures requiring users to comply with ABS legislation of provider countries.

On benefits to be shared under MAT, Peru proposed language stating that the absence of MAT must not constitute grounds for the denial of benefit-sharing. Australia preferred reference to the party providing the resources, rather than the country of origin, while the LMMC favored the opposite. The IIFB called for reference to community protocols and customary laws along with national legislation.

On monetary and non-monetary benefits, Canada bracketed language on ensuring that benefit-sharing includes all forms of resource utilization. The African Group proposed that parties take measures to share the benefits of research and technology linked to conservation and sustainable use irrespective of access.

In the closing plenary, contact group Co-Chair du Plessis reported that many of the issues are interconnected and will remain bracketed until they are clarified. The outcome document was approved with minor editorial amendments.

Final Outcome: The outcome document (UNEP/CBD/WG-ABS/7/L.5) is heavily bracketed, including brackets around entire paragraphs and items within each paragraph.

The document addresses the following issues:

- Linkage of access to the fair and equitable sharing of benefits, including: PIC for access to genetic resources and associated traditional knowledge from the country of origin; PIC of indigenous and local communities holding traditional knowledge; stipulation of permitted uses in MAT; measures for the sharing of benefits arising from research and development, and commercialization; and mechanisms to provide information to users concerning their obligations regarding access;
- Benefits to be shared on MAT, including measures to encourage providers and users to provide for benefit-sharing in MAT, such as model clauses, sharing of results of research and development, and access to and transfer of technology;
- Monetary and/or non-monetary benefits, including those listed in Appendix II of the Bonn Guidelines, transfer of the technology developed using genetic resources, including biotechnology, and capacity strengthening to enable effective technology transfer;
- Access to and transfer of technology, including technologies relevant for the conservation of and sustainable use of genetic resources;
- Sharing of results of research and development on MAT, including facilitated access to the results of research and development, including technologies protected by patents and other IPRs;
- Effective participation and/or joint development in research activities, including measures to: strengthen research capability and ensure effective involvement of national counterparts, and ensure that the private sector facilitates joint development of technologies;
- Mechanisms to promote equality in negotiations, including by: making information available through the designated ABS focal point in a timely manner; supporting the capacity of providers and users; and adopting measures to ensure appropriate participation by indigenous peoples and local communities in access procedures;
- Awareness-raising, including measures to make available information about domestic ABS frameworks; steps to promote the international regime; organization of stakeholders meetings; establishment of helpdesks; and promotion of codes of conduct;
- Measures to ensure participation and involvement of indigenous and local communities in MAT and sharing of benefits with traditional knowledge holders, including: community protocols and *sui generis* systems for the protection of traditional knowledge; recognition of the rights of indigenous and local communities; and sharing of benefits

in accordance with Article 8(j) of the CBD, including benefits to humanity in general and benefits to indigenous and local communities;

- Mechanisms to encourage benefits to be directed toward conservation and sustainable use of biodiversity and socioeconomic development, in particular the Millennium Development Goals, in accordance with national legislation;
- Development of international minimum conditions and standards, including strengthening the situation of the less powerful party at all levels, not interfering with customary benefit-sharing mechanisms, and allowing participation in policy decisions;
- Benefit-sharing for every use;
- Multilateral benefit-sharing options when origin is not clear or in transboundary situations, including the development of: a multilateral system of exchange; and bilateral and multilateral agreements to ensure the sharing of the benefits arising from transboundary genetic resource;
- Establishment of trust funds to be administered by representatives of indigenous and local communities to address transboundary situations, in cases where the origin of traditional knowledge is unclear;
- Development of menus of model clauses for potential inclusion in material transfer agreements, including measures to: encourage providers and users to include them in MAT; identify sectors for which model clauses, inventories and catalogues of utilization should be developed; and enable the submission of compilations of model clauses to the ABS CHM; and
- Enhanced utilization of the Bonn Guidelines.

ACCESS: The Working Group considered access in plenary on Friday, 3 April. A contact group conducted a first reading of a non-paper on access on Sunday, 5 April, and a second reading on the basis of a CRP in the early morning hours of Wednesday, 8 April.

Major issues included linkage of access to fair and equitable sharing of benefits; and international access standards; and simplified access rules for non-commercial research.

In plenary, the LMMC presented additional text, stating that parties shall take the necessary measures to establish an appropriate national regulatory framework to protect their sovereignty over genetic resources, their derivatives and associated traditional knowledge, and to ensure benefit-sharing.

The EU explained that its submitted proposals build mainly on the Convention text, including Article 15.2, calling for specific measures to ensure legal certainty, clarity and transparency of national access frameworks. He stressed the link between access and compliance across jurisdictions, as well as the need for: simplified access rules for non-commercial biodiversity research; non-discrimination of access rules; and strengthening capacity for development of national ABS frameworks.

In the contact group, the IIFB said their proposal that access to genetic resources and associated traditional knowledge is subject to the free PIC of indigenous peoples and local communities should be included, and the African Group sponsored it.

On linkage of access to fair and equitable sharing of benefits, delegates agreed to merge proposals by the LMMC, the EU, the African Group and India, noting that similarities in parts of them will have to be streamlined during the second reading. On

legal certainty, clarity and transparency of access rules, delegates decided to retain proposals by the African Group, the EU and Norway in distinct paragraphs.

On both non-discrimination of access rules and international access standards to support compliance across jurisdictions, delegates agreed to work on the basis of EU proposals. On internationally developed domestic legislation, the group decided to merge proposals by the EU and Australia. On simplified access rules for non-commercial research, proposals by the EU and Norway were retained for further consideration.

In the closing plenary Co-Chair du Plessis reported on the work of the contact group on access and introduced editorial corrections. The plenary approved the outcome document as amended.

Final Outcome: The outcome document (UNEP/CBD/WG-ABS/7/L.6) is heavily bracketed, including brackets around entire paragraphs and items within each paragraph.

The document addresses the following issues related to access under the regime:

- The recognition of sovereign rights and the authority of parties to determine access, including that: parties have sovereign rights over their natural resources and the authority to determine access rests with their national governments; the role of indigenous and local communities in determining access to traditional knowledge related to genetic resources and the requirement for their free PIC; and domestic competent authority, including national focal points, references to their designation and procedures and handling of access applications;
- Linkage of access to fair and equitable sharing of benefits, including establishment of the necessary national regulatory framework to protect parties' rights over genetic resources; requirements for PIC and MAT, new uses of genetic resources, consequences for violations, and measures to facilitate access for environmentally sound uses and benefit-sharing;
- Legal certainty, clarity and transparency of access rules, including creation of conditions of legal certainty to facilitate access to genetic resources avoiding imposition of restrictions that run counter to the CBD objectives and procedures for countries of origin or other countries that have acquired the genetic resources in accordance with the CBD;
- Non-discrimination of access rules, providing that each party when applying its domestic ABS framework shall/should not arbitrarily discriminate between users from other contracting parties;
- International access standards (that do not require harmonization of domestic access legislation) to support compliance across jurisdictions aiming at the creation of conditions to support compliance with ABS-related obligations across jurisdictions, including clear rules on access, procedures for applying for PIC, simplified access for non-commercial research, information on domestic ABS frameworks, clear procedures for national competent authorities, and appeal procedures;
- Internationally developed model domestic legislation, including collection of examples of model provisions for domestic legislation, and compilation of model provisions consistent with international access standards;
- Minimization of administration and transaction costs; and

- Simplified access rules for non-commercial research, setting out specific possible procedures, use of electronic tools, and exchange of information on best practices.

CLOSING PLENARY

The closing plenary convened at 3:00 pm on Wednesday, 8 April, to adopt the report of the meeting and the outcome documents regarding the objective of the regime, its scope, compliance, benefit-sharing and access. Contact group Co-Chairs du Plessis and Ivars presented the outcomes of their respective groups.

Working Group Co-Chair Hodges thanked delegates for their hard work and dedication and said in this meeting the Working Group made a "big leap" in elaborating the negotiating text for compliance, benefit-sharing and access. He clarified that the final documents (UNEP/CBD/WG-ABS/7/L.2-6) will constitute one single annex to the report and form the basis for future negotiation of those issues. He further clarified that ABS 8 will engage in negotiations on the nature of the international instrument, traditional knowledge and capacity building, on the basis of Annex 1 to COP Decision IX/12, and invited submission of views and proposals on these items. He also expressed his appreciation to the Global Environment Facility for its ongoing support of ABS capacity-building activities.

The LMMC stressed that while the bricks and bullets methodology was abandoned, the elements that parties had already agreed would form part of the regime would remain. The EU confirmed their understanding that following the removal of bricks and bullets, all text stands on an equal footing. The LMMC called for clarification on whether this implies putting into question elements already agreed upon, with the EU noting that the removal of bricks and bullets is a major step forward and does not imply a roll-back on the commitment to seriously negotiate towards COP 10.

The LMMC made a declaration regarding the ongoing negotiations under the auspices of the WHO on pandemic influenza preparedness, clarifying that China is still undergoing consultations regarding the endorsement of this declaration. He stressed, among other things that: the WHO negotiations are inconsistent with the scope of the CBD; the objectives and provisions of the CBD should be recognized; and those negotiations should not prejudice the outcome of negotiations under the CBD.

Egypt, on behalf of the African Group, expressed its support for the declaration made by the LMMC, noting a tendency to subordinate the CBD to international non-environmental instruments. He called for consideration of the interdependence of the three CBD objectives, the advancing rate of biodiversity loss, regression in sustainable use of, and scientific research on, biodiversity, and as a result regression in biodiversity's contribution to poverty reduction. He cautioned against sectoralizing the international ABS regime and expanding the list of exclusions from its scope, noting it risks being an empty instrument.

Venezuela reminded that there is no international instrument covering the exploitation of marine resources outside areas of national jurisdiction, and called for those resources to be covered by the international regime.

Rapporteur Damaso Luna (Mexico) introduced the meeting's report (UNEP/CBD/WG-ABS/7/L.1). The EU requested a clear statement regarding the possibility for additional submissions of

views and operational text for the next meeting of the Working Group, adding that all submissions must respect the state of play and expressed intent to make suggestions on tools to enforce compliance.

The Secretariat noted that an EU statement on scope had been inadvertently omitted from the report, which read that the EU reserved its position with regard to the exclusion of specific uses of pathogens of particular public concern for the health of humans, animals or plants from the scope of the international regime, and further indicated that they were consulting internally on how to address this issue and that they would present a proposal as soon as the internal consultations are completed.

The Secretariat also introduced text related to the proceedings of the contact group on compliance, stating that following discussions, the Working Group Co-Chairs confirmed the understanding that the distinction between bricks and bullets had outlived its usefulness and therefore would no longer be applied to the main components.

Brazil requested an amendment to a paragraph to properly reflect his statement that it is time to devise an effective instrument to recognize the rights of indigenous and local communities to their knowledge “as a tool to promote sustainable development.”

Discussions between the LMMC, the EU and others arose as to whether the report should include language referring to the removal of “the bricks and bullets methodology” instead of “the distinction between bricks and bullets.” Working Group Co-Chair Hodges agreed to consult with the contact group Co-Chairs to ensure that the report is factually accurate, and the term “methodology” was not added. Contact group Co-Chair du Plessis set out the compromise as elaborated in closed-door negotiations to: delete the headings referring to bricks and bullets; withdraw certain duplicative texts; and apply this approach to all three papers on compliance, benefit-sharing and access. He further asked to include a paragraph in the final report setting out his understanding that the bricks and bullets helped secure consensus at ABS 6, but the Working Group needed to move away from this in order to make progress at ABS 7. New Zealand asked to remove New Zealand and Norway from the list in the paragraph on support for removal of the bricks and bullets and to instead add a reference in the following paragraph setting out that New Zealand and Norway observed that what constituted duplication in this context was not always clear cut. Co-Chair Hodges stressed the importance of clarity on the final compromise as stated in the report, noting that “the Co-Chairs of the Working Group confirmed the understanding that the distinction between bricks and bullets had outlived its usefulness and therefore would no longer be applied to the main components.” The LMMC asked to add a further paragraph to the report to reiterate that the removal of the distinction between bricks and bullets refers to the removal of the methodology of bricks and bullets, but not to the reversal of the agreements reached at ABS 6 and ratified by COP Decision IX/12.

The report of the meeting was then adopted as amended.

Haiti, for GRULAC, emphasized the need to finalize an international instrument on ABS by COP 10. Ukraine, for Central and Eastern Europe, highlighted the need for preparatory work before the next meeting. Namibia, for the African Group, urged parties to prepare thoroughly in the intersessional period, with a view to engaging in good faith at ABS 8. The EU underscored

the future negotiating challenges and called on parties to engage with the work ahead. The LMMC expressed “cautious optimism” and suggested that constructive work on the outcome documents will assist progress at ABS 8.

The IIFB stated that indigenous peoples’ and local communities’ participation at the international, national and local levels is critical for securing recognition of their rights. She reminded that MAT are contingent on PIC and that respect for customary law is critical to this end.

John Scott, CBD Secretariat, thanked the Government of Spain for supporting capacity development work in the Latin American and Caribbean region. CBD Executive Secretary Ahmed Djoghlaif and representatives of the Women’s Biodiversity Network signed a Memorandum of Understanding to initiate a three-year strategy to build capacity for implementing Articles 8(j) and 15.

Djoghlaif described the meeting as a success, thanked the Co-Chairs of the Working Group and contact groups, and underscored his gratitude to the Global Environment Facility for its continued funding and Montréal International for its support of the CBD’s meetings held in Montreal.

Working Group Co-Chair Casas noted that despite progress made, pressure is building towards completing operational text on all the main components of the regime. He underscored the importance of regional and interregional consultations to advance the negotiations, and noted encouraging discussions with UNEP and donors to ensure funding for these consultations.

Working Group Co-Chair Hodges then gavelled the meeting to a close at 7:39 pm.

A BRIEF ANALYSIS OF ABS 7

ABS 7 took another step forward in the negotiation of an international regime on access and benefit-sharing. In Paris, delegates undertook the first round of “real” negotiations on operational text regarding a number of the core components of the future regime – objective, scope, access, benefit-sharing and compliance – and adopted negotiating documents on these elements. However, in terms of negotiating spirit, it represents a rollback to ABS 5. While most delegates expressed the belief that some progress was achieved with regard to substance, the great majority expressed their concern about the repeated clashes between the major negotiating groups and the fact that most of the negotiating time was lost in protracted and, in the eyes of many, unnecessary procedural debates. This brief analysis assesses the outcome, revisits the negotiating dynamics that prevented further progress and explores the prospects for meeting the COP 10 deadline.

STACKING BARGAINING CHIPS – FOR BETTER OR FOR WORSE

Most delegates arrived in Paris optimistic that the collaborative atmosphere that had prevailed during ABS 6 and COP 9 would continue. After all, ABS 6 had put the negotiating structure in place, and many hoped that the new insights and recommendations stemming from two intersessional expert meetings and numerous studies on technical and legal issues such as concepts, definitions and scope, compliance and monitoring, and tracking would give a boost to the negotiations. However this optimism quickly dissipated and the atmosphere notably soured as parties lost faith in each others’ goodwill.

Delegates staked out their negotiating positions in the text, and the main negotiating groups seemed to fall back on many issues into positions close to those they had put forward at the beginning of the process at ABS 3 and 4.

The African Group, for example, inserted language throughout the text to note that the regime's scope covers not only genetic resources but the broader concepts of biological resources, derivatives, and products. The African delegates also sought links to other CBD work programmes, such as funding for conservation work and protected area management, which others perceived as being clearly outside of the Working Group's mandate. The EU insisted on references to compliance with international access standards, and the LMMC inserted references to a future protocol, implying the instrument's legally binding nature, access in accordance with national legislation, and disclosure requirements in patent applications – all measures they knew the Working Group would not agree upon.

Most delegates explained this behavior as “stacking bargaining chips” as leverage for striking deals in future meetings, however many expressed concerns that the major negotiating groups were taking the game too far, which could lead to a collapse of the fragile progress made to date. Another aspect of this strategy was the introduction of new, widely divergent proposals into the regime's scope. Positions have always differed regarding the inclusion of derivatives and products, however during this meeting new gaps emerged on exemptions to the regime, with regard in particular to viruses and pathogens. An EU statement noting that they are still considering their position on the issue led to a passionate late-night debate in the contact group on scope, and a series of declarations during the closing plenary. The African Group, for instance, elaborated on the danger of “sectoralizing” the regime, meaning that more and more elements of the scope are referred to in other agreements such as the ITPGR or the World Health Organization's negotiation of a multilateral framework for the sharing of influenza viruses, which could lead not only to an “empty regime” but also to subordinating the CBD to non-environmental agreements. Even the generally agreed exception of human genetic resources was questioned in a similar way, giving the impression that positions on scope are drifting ever further apart.

The result of the ABS 7 deliberations is a set of documents that total 47 pages containing more than 2,000 brackets and numerous alternative proposals. As set out in the Bonn Roadmap adopted at COP 9, ABS 7 covered objective, scope, compliance, benefit-sharing and access, whereas ABS 8 should focus on nature, traditional knowledge and capacity building. On compliance, benefit-sharing and access, however, delegates will have an opportunity to submit further text proposals, resulting in an agenda that many described as a truly herculean task.

THE GRANADA SYNDROME AND THE CURSE OF THE BRICKS AND BULLETS

The defining element of ABS 7 was the repeated and often painfully protracted discussions on procedure and the “rules of engagement” put forward by the different sets of Co-Chairs, which consumed the majority of negotiating time and prevented the meeting from moving into actual negotiations on substance.

Participants developed two complementary theories for explaining this problem: the “Granada Syndrome” and the “curse of the bricks and bullets.” The Granada Syndrome refers to the

endless debates on the status of the ABS 4 outcome document for further negotiations during COP 8 and ABS 5. While developing countries wanted to use a text compiling views expressed during ABS 4 as basis for negotiations, developed countries refused to accord the text such a status arguing that they were not yet prepared to enter formal negotiations on an international regime.

Ever since, delegates have been keen on maintaining control of the negotiating document and have repeatedly questioned the Working Group Co-Chairs' decisions on procedure, giving them little room to maneuver. The suspicion that any text coming out of a Working Group meeting could prejudge further discussions led the Co-Chairs to adopt a party-driven strategy and prevented bold moves, such as the tabling of a new Co-Chairs' text in order to move issues forward. This has created a collective need to keep confirming the procedural rules of engagement and secure negotiating positions under all possibly related items.

At past meetings, the Granada Syndrome arguably kept delegates trapped and unable to agree on a structure for a negotiating text, while the absence of such a structure prevented progress in the elaboration of the regime's future components. The invention of the system of bricks and bullets at ABS 6 made it possible to escape this vicious circle: in this way, delegates were able to list components they all agreed would form part of the regime (bricks), as well as components that required further consideration (bullets).

Notwithstanding its importance for breaking the deadlock in Geneva, the bricks and bullets approach haunted the discussion on operational text in Paris. From the outset it proved difficult to decide whether countries' submissions would be more adequately placed under bricks or bullets, since many text proposals cut across several issues, and interpretations as to what should be a brick and what should be bullet differed among groups. During the first half of ABS 7, delegates therefore engaged in intricate operations of moving text between bricks and bullets, often duplicating paragraphs.

The resulting debates about procedure and the adequate placement of text escalated inexorably into mutual accusations of attempting to undermine the Geneva agreement and graduate bullets into bricks “by stealth.” Delegates in the corridors began accusing each other of bad faith. As tensions rose, more and more participants realized that the bricks and bullets approach had outlived its usefulness and needed to be removed. Nevertheless, the dynamic of confrontation had begun to spiral out of control and resulted in a powerful clash between the LMMC and the EU. The crisis opened the way towards retiring the bricks and bullets approach and moving ahead with compiling and consolidating operational texts, but left many parties gravely concerned about the deterioration of the cooperative spirit and the impact on future negotiating dynamics. One delegate commented that “we have invested all this time at ABS 6 and COP 8 in building mutual understanding and collaborative relations among delegates, and now we seem to have squandered this capital.”

The parties who used to be reluctant to engage in the negotiations, such as Australia and Canada, seemed the most taken aback by these developments, since they came to Paris ready to participate more constructively. Yet, some had not expected to enter into negotiations on elements previously identified as bullets, and reacted by “blanket bracketing” entire

sections throughout the text and suggesting language that would make many of the regime's core components voluntary rather than binding.

FINDING A WAY FORWARD?

Taken together, the effect of the maximalist strategies pursued by the negotiating groups and the fallout of the meltdown over the bricks and bullets approach could place a significant burden on future negotiations. It will take time and effort to mend the working relationships among the negotiating groups. Both the stacking of bargaining chips and the removal of the bricks and bullets contributed to the adoption of negotiating document that is lengthy and confusing, as parties' strategies resulted in duplication of proposals and the proliferation of text.

Although the structure of elements remains, the text now contains brackets throughout and around entire paragraphs covering up a large number of potential pitfalls, as virtually none of the most controversial issues have been addressed so far, and a number of new ones have been added.

Two interpretations prevailed as delegates left Paris. Looking back, many welcomed the outcome as an important step towards a consolidated negotiating text, which, in view of the difficulties of agreeing to any outcome at past meetings, was perceived as a success in itself. Looking forward, others expressed strong doubts about the prospects of completing negotiations before COP 10, with some suggesting that COP 10 would have to establish a negotiating committee to sort out the details of the regime. One participant hoped delegates would not attempt to rush the negotiations towards COP 10, since the complexities of ABS require a careful and well balanced legal framework to ensure that the regime will be effective.

Opinions differ on whether the outcome of ABS 7 is more or less on track with the Bonn Roadmap. Many expressed doubts whether the negotiations will be completed on time, while others said it is too early to predict what outcome will be presented to COP 10. The quest now begins for a novel negotiating tool and hopefully a vision to allow for the development of a meaningful ABS regime.

UPCOMING MEETINGS

ITPGR GB 3: The third session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture will be held from 1-5 June 2009 in Tunis, Tunisia. For more information, contact: ITPGR Secretariat; tel: +39-06-570-53441; fax: +39-06-570-56347; e-mail: pgrfa-treaty@fao.org; internet: http://www.planttreaty.org/meetings/gb3_en.htm

EXPERT GROUP ON TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES: The expert group on traditional knowledge associated with genetic resources, established within the framework of the negotiations for an international ABS regime, will take place from 16-19 June 2009 in Hyderabad, India. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/meetings/>

CGRFA 12: The 12th regular session of the FAO Commission on Genetic Resources for Food and Agriculture (CGRFA) will be held from 19-23 October 2009, at FAO headquarters in Rome, Italy. For more information, contact: CGRFA Secretariat; tel: +39-06-570-55480; fax: +39-06-570-53057; e-mail: cgrfa@fao.org; internet: <http://www.fao.org/ag/cgrfa/>

SIXTH MEETING OF THE CBD WORKING GROUP ON ARTICLE 8(J) AND RELATED PROVISIONS: This meeting is scheduled to be held from 2-6 November 2009, in Montreal, Canada. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/doc/?meeting=WG8J-06>

ABS 8: The eighth meeting of the CBD Working Group on Access and Benefit-sharing is scheduled to be held from 9-15 November 2009, in Montreal, Canada. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/meetings/>

ABS 9: The ninth meeting of the CBD Working Group on Access and Benefit-sharing is scheduled to be held from 18-24 March 2010. The venue remains to be determined. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/meetings/>

CBD SBSTTA 14: The fourteenth meeting of the CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) will be held from 13-21 May 2010. The venue remains to be determined. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/meetings/>

CBD WORKING GROUP ON REVIEW OF IMPLEMENTATION OF THE CONVENTION (WGRI 3): This meeting will be held from 24-28 May 2010. The venue remains to be determined. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/meetings/>

CBD COP 10: The tenth Conference of the Parties to the CBD will be held from 18-29 October 2010, in Nagoya, Japan. COP 10 is expected to: assess achievement of the 2010 target to reduce significantly the rate of biodiversity loss; adopt an international ABS regime; adopt an instrument on liability and redress in the context of the Cartagena Protocol on Biosafety; and celebrate the International Year of Biodiversity 2010. The High-level Segment will be held from 27-29 October 2010. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/meetings/>

GLOSSARY

ABS	Access and Benefit-sharing
CBD	Convention on Biological Diversity
CHM	Clearing-House Mechanism
COP	Conference of the Parties
GRULAC	Latin American and the Caribbean Group
IIFB	International Indigenous Forum on Biodiversity
IPR	Intellectual Property Rights
ITPGR	International Treaty on Plant Genetic Resources for Food and Agriculture
LMMC	Like-minded Megadiverse Countries
MAT	Mutually Agreed Terms
PIC	Prior Informed Consent
SIDS	Small Island Developing States
WHO	World Health Organization