

## RESUMED NINTH MEETING OF THE WORKING GROUP ON ACCESS AND BENEFIT-SHARING OF THE CONVENTION ON BIOLOGICAL DIVERSITY: 10-16 JULY 2010

The resumed ninth meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (ABS) of the Convention on Biological Diversity (CBD) begins today in Montreal, Canada. It was preceded by informal, regional and interregional consultations, held from 8-9 July 2010.

The first part of the ninth meeting was held from 22-28 March 2010, in Cali, Colombia. The Working Group suspended the meeting and agreed to resume it at a later date. Negotiations in Montreal are expected to focus on the revised draft protocol tabled by the Working Group Co-Chairs in Cali, to finalize the text by isolating and resolving outstanding issues and identifying and filling any gaps to ensure its integrity and balance. The Working Group aims to finalize the protocol text in time for its possible adoption at the tenth meeting of the Conference of the Parties (COP 10), to be held from 18-29 October 2010, in Nagoya, Japan.

### A BRIEF HISTORY OF THE CBD AND ABS

The CBD, negotiated under the auspices of the UN Environment Programme (UNEP), was opened for signature on 5 June 1992, and entered into force on 29 December 1993. There are currently 193 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.

CBD Article 15 addresses access to genetic resources, including facilitating access, prior informed consent (PIC), mutually agreed terms (MAT) and benefit-sharing. Related articles refer 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 established a regionally-balanced expert panel on ABS. The expert panel held two meetings (October 1999, San José, Costa Rica; and March 2001, Montreal, Canada) and developed a set of recommendations, including on PIC, MAT, approaches for stakeholder involvement and options to address ABS within the CBD framework. COP 5 (May 2000, Nairobi, Kenya) established the Working Group on ABS to develop guidelines and other approaches on: PIC and MAT; participation of stakeholders; benefit-sharing mechanisms; and the preservation of traditional knowledge.

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

**COP 6:** At its sixth meeting (April 2002, The Hague, the Netherlands), the COP adopted the Bonn Guidelines on ABS and 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 of the World Trade Organization.

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

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

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

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

**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. The COP also requested the Working Group on Article 8(j) to contribute to the mandate of the ABS Working Group on issues relevant to traditional knowledge.

**ABS 5 and 6:** At its fifth and sixth meetings (October 2007, Montreal, Canada, and January 2008, Geneva, Switzerland), the ABS Working Group focused on the main components of the international regime on ABS, including fair and equitable sharing

of benefits, access to genetic resources, compliance, traditional knowledge and genetic resources, and capacity building. In Geneva, the Working Group produced 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, and instructed the ABS Working Group to finalize the international regime and to submit an instrument/instruments for consideration and adoption by COP 10. The three expert groups (concepts, terms, working definitions and sectoral approaches; compliance; and traditional knowledge associated with genetic resources) each met once between December 2008 and June 2009.

**ABS 7:** At its seventh meeting (April 2009, Paris, France), the Working Group focused on operational text on the objective, scope, compliance, fair and equitable benefit-sharing, and access. Despite procedural obstacles, mostly related to the structure of the negotiating document, the Working Group proceeded with consolidating submissions on compliance, benefit-sharing and access.

**ARTICLE 8(J) WG 6:** At its sixth meeting (November 2009, Montreal, Canada), the Working Group on Article 8(j) expressed detailed views on the international regime on ABS, for transmission to ABS 8.

**ABS 8:** At its eighth meeting (November 2009, Montreal, Canada), the Working Group addressed operative text on all components of the regime, and discussed its legal nature. The meeting adopted the Montreal Annex, consisting of a single, consolidated draft of the international regime, and a second annex on proposals for operational texts left in abeyance for consideration at ABS 9. The Working Group also established an intersessional process leading up to ABS 9, including: a Friends of the Co-Chairs group; a Co-Chairs’ Inter-regional Informal Consultation; and a series of regional consultations.

**ABS 9 (FIRST PART):** At the first part of its ninth meeting (March 2010, Cali, Colombia), the Working Group conducted negotiations on the basis of a draft protocol, tabled as a Co-Chairs’ text and developed upon a request made during the Co-Chairs’ Informal Inter-regional Consultation held prior to the meeting. Following three days of contact group discussions which achieved progress on a number of issues, including benefit-sharing from derivatives and an internationally recognized certificate of compliance, an inter-regional group was established. Due to procedural wrangling, the inter-regional group did not enter into text-based negotiations. The Working Group eventually agreed to: suspend the meeting and convene a resumed session in July 2010; and forward the draft protocol text as revised during the meeting to the resumed session, with the understanding that the draft was not negotiated, is without prejudice to the rights of parties to make further amendments and additions to the text, and should be read together with the ABS 9 report reflecting parties’ views expressed at the meeting. After the meeting, the draft protocol was circulated to parties, in accordance with Article 28 of the Convention (Adoption of Protocols).

### INTERSESSIONAL HIGHLIGHTS

**WIPO IGC 16:** The 16th session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World

Intellectual Property Organization (WIPO) (3-7 May 2010, Geneva, Switzerland) agreed on arrangements for intersessional working groups to support the IGC negotiations on an international instrument or instruments ensuring the effective protection of traditional knowledge, traditional cultural expressions and genetic resources.

**SBSTTA 14:** The 14th meeting of the CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) (10-21 May 2010, Nairobi, Kenya) witnessed the launch of the third edition of the Global Biodiversity Outlook and adopted 18 recommendations to COP 10, including on: in-depth reviews of implementation of the programmes of work on mountain biodiversity, inland waters biodiversity, marine and coastal biodiversity, protected areas, biodiversity and climate change, and Article 10 (sustainable use); agricultural biodiversity, including biofuels; biodiversity of dry and sub-humid lands; forest biodiversity; invasive alien species; post-2010 outcome-oriented goals and targets; incentive measures; the Global Taxonomy Initiative; and the Global Strategy for Plant Conservation.

**WGRI 3:** The third meeting of the CBD Working Group on Review of Implementation of the Convention (WGRI) (24-28 May 2010, Nairobi), adopted 12 recommendations to COP 10, including: an updated and revised strategic plan for the post-2010 period, which remains bracketed pending resolution of financial issues and negotiations on ABS; a proposed UN decade on biodiversity 2011-2020; business engagement; a proposed biodiversity technology initiative; the multi-year programme of work of the Convention for the period 2011-2020; integration of biodiversity into poverty eradication and development; and a science-policy interface on biodiversity, ecosystem services and human well being.

**UNPFII 9:** Held under the special theme “Development with culture and identity,” the ninth session of the UN Permanent Forum on Indigenous Issues (UNPFII 9) (19-30 April 2010, New York) recommended that ongoing processes, including the ABS negotiations, recognize and integrate the relevance of indigenous knowledge systems, in accordance with the UN Declaration on the Rights of Indigenous Peoples; and reiterated to the CBD parties that recognition of the rights of indigenous peoples to control access to the genetic resources that originate in their lands and waters and to any associated traditional knowledge must be a key element of the proposed international regime on ABS.

**INTERNATIONAL CONFERENCE ON BIOLOGICAL AND CULTURAL DIVERSITY:** The “International Conference on Biological and Cultural Diversity: Diversity for Development – Development for Diversity” (8-10 June 2010, Montreal, Canada) adopted elements for a programme of work to be jointly implemented by UNESCO, the CBD Secretariat and other partners, on the links between biological and cultural diversity.

**AMCEN 13:** The 13th Session of the African Ministers’ Conference on Environment (AMCEN) (20-25 June 2010, Bamako, Mali) concluded with the adoption of the Bamako Declaration, developed to serve as the continent’s new roadmap for sustainable development and basis for strengthening the common negotiating position on climate change and biodiversity. A ministerial dialogue reviewed progress towards, *inter alia*, Africa’s development of a common negotiating position on ABS.

## RESUMED ABS 9 HIGHLIGHTS: SATURDAY, 10 JULY 2010

Delegates to the resumed ninth 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 regional statements and address organizational matters, including reconvening the inter-regional negotiating group established during the first part of the meeting in Cali, Colombia. In the afternoon, the inter-regional group started negotiating the draft protocol article by article.

### PLENARY

Working Group Co-Chair Timothy Hodges (Canada) welcomed delegates and thanked: Japan for funding the resumed ABS 9 session; Canada, Spain and Switzerland for funding developing country participation; and Norway for funding ENB coverage, underlining its importance for the transparency of the process. In a video message, UN Goodwill Ambassador for Biodiversity Edward Norton reminded delegates that all need to accept special responsibility to act now to prevent irreversible biodiversity loss. Working Group Co-Chair Fernando Casas (Colombia) said he expects high-level commitment from delegates to reach a definitive agreement. Noting previous successes in CBD negotiations held in Montreal, Hodges called for negotiations in good faith in the spirit of compromise, and stressed that postponing difficult issues to be resolved by the Conference of the Parties (COP) is not an option.

COP 10 Ambassador Kiyoshi Araki (Japan) called on delegates to engage in text-based negotiations and tackle difficult issues, so that any outstanding issues can be addressed through involvement of ministers at COP 10. Brazil, for the LIKE-MINDED MEGADIVERSE COUNTRIES (LMMC), stressed the need to maintain the integrity of the draft protocol contained in the Cali Annex (UNEP/CBD/WG-ABS/9/3, Annex I). He said that balance needs to be achieved in the negotiation of every article, stressing the importance of inclusion of derivatives and appropriate treatment of traditional knowledge (TK). Malawi, for the AFRICAN GROUP, and Mexico, for the LATIN AMERICAN AND CARIBBEAN GROUP (GRULAC), reiterated the need for a legally binding ABS protocol. The AFRICAN GROUP called for clear rules of engagement for the negotiations.

Serbia, for CENTRAL AND EASTERN EUROPE (CEE), prioritized: a legally binding instrument focusing on the utilization of genetic resources and derivatives, compliance,

capacity building, and benefit-sharing, taking into account conservation and sustainable use; and harmony with other processes in other international fora. SAUDI ARABIA emphasized technology transfer.

New Zealand, for the LIKE-MINDED IN SPIRIT GROUP OF WOMEN, underscored the need to reflect a gender perspective in the text of international regime and to ensure women's full and effective participation at all levels of policy-making and implementation of the CBD objectives. Malaysia, on behalf of the LIKE-MINDED ASIA-PACIFIC GROUP OF DEVELOPING COUNTRIES, emphasized compliance as the reason for existence and value added of an ABS protocol. The EUROPEAN UNION (EU) called for balance of rights and obligations under the instrument, as well as vis-à-vis other international instruments.

**ORGANIZATIONAL MATTERS:** Co-Chair Hodges explained that meeting officers remain as elected in Cali, with the COP Bureau serving as the meeting Bureau and Somaly Chan (Cambodia) as the meeting rapporteur. The Working Group then adopted the agenda (UNEP/CBD/WG-ABS/9/1/Rev.1).

Regarding the organization of work, Hodges proposed that negotiations continue on the basis of the Cali Annex, aiming to improve consensus text. He suggested reconvening the inter-regional negotiating group formed in Cali, to work in a roundtable format and comprise: five representatives for each UN region; two representatives each for indigenous and local communities, civil society, industry and public research; and the representatives of the current and upcoming COP Presidencies. He explained spokespersons and representatives can change freely, and discussions will be open to the attendance of all Working Group participants. The Working Group approved reconvening the inter-regional group, to be co-chaired by the Working Group Co-Chairs.

Co-Chair Casas then presented the rules of engagement, according to which: parties are expected to start negotiating the draft protocol article by article; and an article will be considered agreed if there are no objections, bearing in mind that nothing is agreed until everything is agreed. Calling on parties to "exercise maximum restraint" and propose text that will also accommodate the views of others, he suggested using brackets if there is no compromise, for further consideration at a later stage. He proposed that: the inter-regional group addresses Articles 1-19, with the exception of use of terms (Article 2), during the next three days; a plenary is held on Tuesday, 13 July 2010, to

assess progress; and the inter-regional group resumes to finalize negotiations, including the preamble, use of terms and final clauses (Articles 20-31).

Responding to Canada's questions, Co-Chair Casas clarified that delegates may propose new text or text based on submissions recorded in the Cali meeting report, but explain how this will improve the draft protocol. In response to a question by the EU, he confirmed that parties can bracket entire articles. Regarding Brazil's concerns, Casas reiterated that parties should not suggest language that reflects only their own positions, since doing so would lead to heavily bracketed text rather than compromise.

### **INTER-REGIONAL NEGOTIATING GROUP**

**OBJECTIVE (ARTICLE 1):** GRULAC, the CEE and the LMMC supported the text in its current form on ensuring fair and equitable benefit-sharing from the utilization of genetic resources, with the PHILIPPINES requesting to add derivatives. The EU and the REPUBLIC OF KOREA proposed adding reference to facilitation of access to genetic resources. The AFRICAN GROUP, supported by GRULAC, proposed instead using the wording of the third objective in CBD Article 1 (Objectives). NEW ZEALAND pointed to the interconnectedness of the CBD objectives, with CANADA proposing to clarify that the objective is benefit-sharing, rather than "ensuring" benefit-sharing, and to add reference to contributing to the first and second CBD objectives at the end of the article. Delegates agreed on the objective of the protocol being "the fair and equitable sharing of benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and sustainable use of its components."

**SCOPE (ARTICLE 3):** The LMMC, the LIKE-MINDED ASIA-PACIFIC and the CEE requested reference to derivatives. NEW ZEALAND opposed extending the scope to biological resources, derivatives and products. NORWAY suggested derivatives are covered under reference to "any utilization" of genetic resources.

The EU proposed that the protocol apply to genetic resources acquired after the protocol's entry into force, with JAPAN and NEW ZEALAND opposing retroactive application of the protocol. The AFRICAN GROUP said users have a moral obligation to share benefits from new and continued uses, adding that coverage of uses after the protocol's entry into force does not suggest retroactivity. NORWAY suggested that parties "encourage" users to do so. The LIKE-MINDED ASIA-PACIFIC and PERU reminded delegates that there has been a benefit-sharing obligation since the CBD's entry into force.

CANADA proposed excluding from the protocol's scope: genetic resources beyond national jurisdiction; genetic resources falling under Annex I of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) for CBD parties that are ITPGR parties; genetic resources when "utilized solely as a commodity"; and TK associated with genetic resources acquired prior to the protocol's entry into force. The AFRICAN GROUP cautioned against undermining the comprehensiveness of the regime and violating CBD Article 3 on states' responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of areas beyond national jurisdiction; and recommended extending the scope to pre-CBD accessions to ensure coverage of *ex situ* collections. The EU suggested exclusion of genetic resources beyond the

limits of national jurisdiction or those located in the Antarctic Treaty Area; and addressing the relationship with the ITPGR and the issue of pathogens in a separate provision on the relationship with other instruments.

CANADA proposed excluding human genetic resources. The AFRICAN GROUP preferred reviewing Decision COP II/11 (Access to Genetic Resources) which reaffirms that human genetic resources are not included within the CBD framework, rather than addressing the issue in the protocol. AUSTRALIA, opposed by the AFRICAN GROUP, drew attention to human pathogens as a possible exclusion. NEW ZEALAND suggested addressing human genetic resources and pathogens under a different article, and NORWAY suggested that human resources be addressed in a COP decision.

Co-Chair Casas proposed referring to genetic resources within the scope of the Convention rather than drafting a list of inclusions and exclusions. NORWAY and NEW ZEALAND suggested that genetic resources in areas beyond national jurisdiction are covered by CBD Article 4 (Jurisdictional Scope), whereas the LIKE-MINDED ASIA-PACIFIC argued they are addressed by Article 22.2 (implementation consistent with the UN Convention on the Law of the Sea). JAPAN proposed to deal with exclusions in other articles. CANADA explained that exclusions are needed for legal certainty, they are not meant to limit the protocol.

NEW ZEALAND proposed as streamlined text that the protocol apply to genetic resources and associated TK within the scope of the CBD, that were acquired after the protocol's entry into force, and to the benefits arising from the utilization of such resources and knowledge. After some discussion, the proposal was not retained. Negotiations will continue on Sunday.

### **IN THE CORRIDORS**

Aware that this is the "make or break" meeting of the ABS Working Group – the very last chance to negotiate an ABS instrument for adoption at COP 10 – delegates finally engaged in textual negotiations of the draft protocol. The cheers that erupted when the group agreed on the very first article, however, turned out to be more due to the last goal scored at the World Cup small final, than to finding consensus on language by drawing from CBD Article 1. Still, this first step towards building consensus marked a change in the atmosphere of the negotiations, since this very same compromise had been previously proposed but not accepted. Many delegates generally drew reassurance that overcoming some of the many outstanding issues is possible, thanks to a renewed collaborative attitude nurtured by clearer rules of engagement. Others pointed to the stumbling blocks still lying ahead, such as checkpoints, temporal scope and relationship with other agreements, noting that, just as in football, a one-zero lead does not mean that one has won the game.

As delegates headed towards the evening reception, the halls were abuzz with speculations about Sunday's World Cup final. Most delegates seemed to bet on Spain, in line with the prediction of Paul the Octopus, a cephalopod with an amazing record of predicting the outcomes of World Cup games. Paul's gift of foresight clearly has commercial potential, which led some to wonder if this could change positions on the inclusion of marine biodiversity in areas beyond national jurisdiction into the protocol's scope.

## RESUMED ABS 9 HIGHLIGHTS: SUNDAY, 11 JULY 2010

Delegates met in the inter-regional negotiating group throughout the day and into the evening. They addressed provisions of the draft protocol contained in the Cali Annex (UNEP/CBD/WG-ABS/9/3, Annex I) on the protocol's relationship with other instruments, and fair and equitable benefit-sharing. Small groups met on the relationship with other instruments, and derivatives.

### INTER-REGIONAL NEGOTIATING GROUP RELATIONSHIP WITH OTHER INSTRUMENTS

**(NEW ARTICLE):** Co-Chair Casas offered new text, based on CBD Article 22.1 (Relationship with other International Conventions), as well as requiring that the protocol and other relevant international instruments are implemented in a mutually supportive manner. The CEE supported the Co-Chairs' proposal.

NEW ZEALAND noted that lack of reference to Article 22.2 (implementation consistent with the law of the sea) could raise questions with regard to areas beyond national jurisdiction. GRULAC and the PHILIPPINES opposed insertion of such a reference, noting that it would create problems for countries that are not parties to the UN Convention on the Law of the Sea.

JAPAN, supported by the EU and CANADA, underlined the lack of clarity of the expression "in a mutually supportive manner" and proposed that the protocol does not apply whenever the provisions of a specialized international ABS regime apply, provided that the other regime is in force among the parties concerned and does not run counter to the CBD objectives. The LIKE-MINDED ASIA PACIFIC stressed the need to preserve the protocol's integrity. In line with this, the LMMC suggested stating that nothing in this protocol will prevent the development of other international agreements, provided that they are supportive of, and do not run counter to, the objectives of the Convention and the protocol. Supporting the LMMC, CANADA suggested referring to international agreements "relating to ABS." The LIKE-MINDED ASIA PACIFIC noted that agreements not related to ABS could also have an impact on the protocol, citing Article 16.5 (intellectual property rights' influence on CBD implementation). SWITZERLAND proposed that the provisions of the protocol shall not prejudice the development of other more specialized ABS instruments.

The AFRICAN GROUP suggested that the protocol is the comprehensive international ABS instrument, noting the need to ensure that parties act in good faith to ensure mutual supportiveness, without subordinating the protocol to other

international instruments. The EU agreed that the protocol should be the default instrument on ABS, and suggested amending the Japanese proposal to that effect. NORWAY suggested clarifying that the article does not subordinate the protocol to other instruments. INDIA said the provision should cover: rights and obligations under existing treaties; implementation of the protocol; and development of other agreements without reference to any specific agreement.

AUSTRALIA suggested retaining and streamlining proposals made. An informal group was then established to draft compromise language. In the evening, MALAYSIA reported that the informal group had reached agreement on most of the text and was working on a remaining paragraph.

**BENEFIT-SHARING (ARTICLE 4): Paragraph 1:** The PHILIPPINES proposed that benefits arise from "every" utilization of genetic resources and associated traditional knowledge (TK). CANADA, opposed by the AFRICAN GROUP and the LIKE-MINDED ASIA-PACIFIC, proposed removing reference to TK, in order to address sharing of benefits from TK utilization in a separate provision.

GRULAC requested reference to derivatives along with genetic resources, and to the country of origin rather than the provider country. JAPAN expressed concern that the term "country of origin" does not cover all situations where benefit-sharing would have to occur. GRULAC recognized the need to address intermediaries, but requested explicit reference to the country of origin. CANADA expressed preference for reference to the "country providing" genetic resources, while the EU requested a focused discussion on the country of origin as a cross-cutting issue. The LIKE-MINDED ASIA-PACIFIC suggested drawing from CBD Article 15.3 (specification of provider countries). INDIA proposed adding elsewhere in the protocol a definition of provider country based on CBD Article 15.3.

JAPAN and CANADA requested adding reference to mutually agreed terms (MAT). The EU proposed reference to benefit-sharing "in accordance with the protocol," while CANADA noted that this should be kept separate from reference to MAT. The AFRICAN GROUP opposed reference to MAT, pointing to cases of resources acquired without prior informed consent and MAT, and from *ex situ* collections. Noting the need for balance in the text, he proposed that when a genetic resource or associated TK is utilized without MAT, the country of origin or the indigenous and local communities (ILCs) involved shall be entitled to 100% of the benefits generated, including any intellectual property, plus punitive damages.

The AFRICAN GROUP, supported by the INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY (IIFB), expressed preference for ILCs “providing,” rather than “holding,” genetic resources and associated TK. NEW ZEALAND preferred deleting reference to ILCs, to avoid singling out one type of non-party beneficiaries, and suggested addressing the issue in a related paragraph addressing sharing of benefits with ILCs. The IIFB requested retaining the reference in this paragraph.

**Paragraph 2:** Negotiations on the second paragraph as in the Cali Annex focused on sharing benefits from utilization of derivatives. GRULAC, with the LIKE-MINDED ASIA PACIFIC and the LMMC, suggested deleting specifications of derivatives in the text, referring instead to “any” utilization of genetic resources including derivatives. GRULAC, the LIKE-MINDED ASIA PACIFIC, the LMMC and NORWAY also suggested deleting the proposed list of typical uses of genetic resources. CANADA and JAPAN supported efforts to shorten the paragraph, but highlighted outstanding concerns on derivatives. JAPAN requested to qualify derivatives “in accordance with MAT.” The AFRICAN GROUP opposed leaving the term unspecified, for reasons of legal certainty and flexibility to cover advances in technology. The EU agreed, noting they cannot accept the term unless specified. While agreeing that it was important to reach a common understanding of derivatives, GRULAC said it is impossible to develop an exhaustive list and proposed to instead stipulate general criteria. He reminded delegates that countries can decide what to cover under the monitoring system, and that derivatives are already referred to in the CBD.

SWITZERLAND pointed to two main options: to name different derivatives, including biochemical compounds; or to instead clarify what is meant by utilization of genetic resources. AUSTRALIA suggested specifying utilization of genetic resources, by inserting “for purposes of research and development on their biochemical make-up.” GRULAC proposed to refer to naturally occurring biochemical compounds instead of derivatives. The AFRICAN GROUP prioritized clarifying utilization of genetic resources. INDIA stressed that derivatives are at the heart of the protocol, and that even if it is difficult to define or describe them, a solution has to be found to address them. Co-Chair Casas proposed to set up an informal group to discuss how to best address derivatives.

Co-Chair Casas then invited delegates to comment on an EU proposal to refer to parties’ “appropriate measures in accordance with the protocol,” rather than “legislative, administrative or policy measures.” PERU stressed the need for measures with legal effects. CANADA opposed reference to “in accordance with the protocol,” stressing that the protocol does not instruct as to which measures should be taken by parties. Co-Chair Casas proposed to leave the issue for later discussion.

Delegates then discussed whether the paragraph should require parties to take measures “with the aim of ensuring,” or “to ensure” benefit-sharing. The EU and CANADA supported the first option for consistency with CBD language, whereas the LIKE-MINDED ASIA PACIFIC preferred the second, arguing that stronger language is necessary, in accordance with COP decisions. The AFRICAN GROUP and GRULAC preferred a third option, requiring parties to take measures “with the aim of sharing benefits.”

**Paragraph 3:** JAPAN and the EU suggested negotiating the paragraph addressing sharing of benefits from genetic resources and associated TK on MAT, in conjunction with the first paragraph. CANADA raised concerns about references to CBD Articles 16 (Access to and Transfer of Technology) and 19 (Handling of Biotechnology and Distribution of Benefits), noting that these refer to benefit-sharing among states, not with

communities, and suggesting a separate paragraph on sharing benefits from the utilization of TK with ILCs. The AFRICAN GROUP suggested addressing Canada’s concern by inserting “as appropriate” in the original paragraph.

**Paragraph 4:** Delegates addressed an EU proposal that parties’ measures on sharing benefits from TK utilization with ILCs be “in accordance with the protocol.” The AFRICAN GROUP questioned the usefulness of the reference and the EU noted the need to clarify CBD Article 15.7 (benefit-sharing). NEW ZEALAND stressed that, while the provision should not create additional obligations for parties, it should provide for legal certainty and clarify Article 15.7.

**RULES OF ENGAGEMENT:** Following a lengthy absence from the negotiating table, the IIFB expressed its deep concern about the lack of their full and effective participation and requested opening the negotiation to ILC representatives. The AFRICAN GROUP stressed the need for indigenous participation, noting that ABS concerns them directly, and expressed concern about pursuing discussions without their voice. A CIVIL SOCIETY representative highlighted misunderstanding about the rules of engagement and requested that the ILCs and stakeholders meet with the Co-Chairs.

GRULAC, NEW ZEALAND and the EU said the process would benefit from ILCs’ ideas, and expressed hope that the Co-Chairs’ consultation would provide a solution. NORWAY highlighted the valuable input received from the Article 8(j) Working Group. Co-Chair Hodges noted that the ILCs and other stakeholders were expected to provide guidance, but only parties could propose and accept text. The AFRICAN GROUP drew attention to past practice allowing ILCs to propose text if supported by a party. The meeting was then suspended to allow for the Co-Chairs’ informal consultation with the IIFB and stakeholders.

Following the consultations, Co-Chair Hodges stressed the important role of ILCs in the process and proposed to revert to the previous practice of allowing them to table text as long as it is endorsed by at least one party. The meeting was suspended to allow the informal group on derivatives to meet.

### IN THE CORRIDORS

Sunday saw the invention of a new negotiating tool – imaginary brackets – the use of which was allowed to identify parts of the text that require further work, with the hope that “they disappear as fast as they appear.” While constructive morning discussions on the relationship with other instruments led participants to speculate that consensus on this key issue was within reach, the impasse on references to mutually agreed terms with regard to benefit-sharing led others to worry: “I hope we are not only making imaginary progress.”

As expected, football analogies abounded in the late afternoon, when delegates refocused on negotiations after having watched the World Cup final. A celebrating Spanish delegate appealed to the Working Group to take a team approach towards winning the negotiations. As discussions on derivatives went into overtime however, others drew a less optimistic parallel, noting that, like the Spanish team, negotiators play a great defense and have excellent attack strategies, but don’t score that often.

Concerns relating to their lack of participation had indigenous representatives leaving their seats at the negotiating table for most of the afternoon and evening. Although a brief evening meeting with the Co-Chairs remedied the situation, some indigenous participants stressed their deeper concern about the lack of a rights-based approach in the text, while many wondered when negotiators would tackle the recommendations by the UN Permanent Forum on Indigenous Issues, which could provide guidance in that regard.

## RESUMED ABS 9 HIGHLIGHTS: MONDAY, 12 JULY 2010

Delegates met in the inter-regional negotiating group throughout the day and into the night to address provisions of the draft protocol contained in the Cali Annex (UNEP/CBD/WG-ABS/9/3, Annex I). Informal groups met on the relationship with other instruments, and derivatives.

### INTER-REGIONAL NEGOTIATING GROUP

**OUTSTANDING ISSUES:** MALAYSIA reported on informals on the relationship with other instruments, noting the need for further consultations. CANADA reported on informals on derivatives, noting emerging consensus on focusing on benefit-sharing and what constitutes utilization of genetic resources, rather than defining derivatives.

The LIKE-MINDED ASIA PACIFIC suggested a new article on benefit-sharing in the absence of mutually agreed terms (MAT). The REPUBLIC OF KOREA proposed adding a provision making CBD Article 27 (Settlement of Disputes) applicable to the protocol *mutatis mutandis*.

### ACCESS TO GENETIC RESOURCES (ARTICLE 5):

**Paragraph 1:** The EU clarified that prior informed consent (PIC) needs to be articulated in national legislation, proposing that in the exercise of sovereign rights over natural resources and subject to national legislation, access shall be subject to PIC of the party providing resources unless otherwise determined by that party in accordance with CBD Article 15 (Access to Genetic Resources). The AFRICAN GROUP proposed adding reference also to CBD Article 9(d) (regulation of collection of biological resources for *ex situ* conservation purposes).

GRULAC, supported by the AFRICAN GROUP and the LMMC, requested insertion of “derivatives” and reference to the country of origin rather than the provider country. The AFRICAN GROUP requested reference to associated TK in the heading of the article, as well as in the text. CANADA preferred keeping all references to TK in a separate provision. The IIFB underscored that draft articles 5 and 5 bis address separate issues, as well as the difference between “genetic resources and associated TK” and “TK associated with genetic resources.”

**Paragraph 2:** The REPUBLIC OF KOREA suggested parties’ necessary measures should be communicated through the ABS clearing house. CANADA proposed that the requirement apply only for parties requiring PIC. The AFRICAN GROUP proposed that a party’s decision to waive its sovereign right to require PIC be posted on the ABS clearing house, to highlight this as an exception.

CANADA, opposed by the LMMC, the AFRICAN GROUP, the LIKE-MINDED ASIA PACIFIC and NORWAY, proposed a new paragraph stating that parties’ measures provide for equal treatment between similar domestic and foreign applicants and between foreign applicants from different parties. NORWAY and INDIA stressed non-discrimination is a trade-related matter. The AFRICAN GROUP suggested instead that parties should avoid application of discriminatory rules in processing access applications, except where such rules aim at advancing local non-commercial biodiversity and ecosystem research and education.

CANADA, opposed by the AFRICAN GROUP, suggested that parties require the establishment of MAT at the time of access. JAPAN proposed that parties establish clear criteria to assess applications for PIC and notify the decision to the applicant in a reasonable time period. SWITZERLAND recommended that parties provide for appropriate administrative or judicial appeals procedures; and ensure that the costs for obtaining decisions on PIC do not exceed the actual costs of processing them.

GRULAC opposed reference to the approval and involvement of indigenous and local communities (ILCs) as an alternative to their PIC. NEW ZEALAND presented text developed jointly with Australia and Canada, stating that, where applicable national law recognizes that ILCs have the right to provide access to genetic resources, parties should set out processes for obtaining their PIC or for approval and involvement, and/or for negotiating MAT.

**Paragraph 3:** Following a request by the EU, the paragraph on making decisions to grant PIC available to the ABS clearing house was retained pending negotiations on the ABS clearing house and information-sharing (article 11).

**Paragraph 4:** On informing the ABS clearing house about which genetic resources will or will not be subject to PIC, the EU proposed that a party determines which of its genetic resources will be subject to PIC. The AFRICAN GROUP proposed to revert to the original wording, or to restate that, unless a party waives its sovereign right to require PIC, such requirement is imposed.

Following discussion, delegates agreed to ask the Secretariat to produce a new version of the article displaying options for further negotiation.

### ACCESS TO ASSOCIATED TK (ARTICLE 5 BIS):

The REPUBLIC OF KOREA requested reference to PIC “in accordance with parties’ national legislation.” NORWAY proposed references to ensuring compliance, addressing non-compliance, and cooperation in cases of violation. Recalling difficult discussions in Cali, delegates agreed to revisit Norway’s proposal after discussing compliance.

**CONSIDERATIONS RELEVANT TO RESEARCH AND EMERGENCY SITUATIONS (ARTICLE 6):** A PUBLIC RESEARCH representative called for simplified access procedures, while fully respecting ABS and national sovereignty. The CEE requested reference to CBD Article 12 (Research and Training). JAPAN requested reference to simplified access measures. GRULAC opposed reference to “facilitating” non-commercial research. SWITZERLAND suggested a separate article on non-commercial research, and stating that ABS should not affect biological resources that are trade commodities.

The EU suggested additional text on: access to pathogens under the scope of other organizations or conventions; the importance of genetic resources for food and agriculture, food security and climate change adaptation; and sectoral approaches. In response, the AFRICAN GROUP requested stating that there shall be no special considerations without fair and equitable benefit-sharing and compliance and, with the LMMC and the LIKE-MINDED ASIA PACIFIC, cautioned against bringing back issues that have been previously rejected and introducing issues linked to the relationship with other instruments.

**CONTRIBUTION TO CONSERVATION AND SUSTAINABLE USE (ARTICLE 7):** Delegates accepted the formulation as in the Cali Annex.

**TRANSBOUNDARY COOPERATION (ARTICLE 8):** On two options in the Cali Annex, SWITZERLAND and CANADA expressed preference for option 1, including separate paragraphs on transboundary cooperation on genetic resources and on TK respectively; while INDIA, the PHILIPPINES and the AFRICAN GROUP preferred option 2, addressing both issues in the same paragraph. Eventually, the AFRICAN GROUP proposed, and delegates agreed on, accepting option 1, adding reference to the involvement of ILCs in the paragraph on transboundary cooperation on genetic resources.

AUSTRALIA, supported by the EU and SWITZERLAND, proposed that parties “endeavor to cooperate,” rather than “cooperate.” INDIA recommended reference to “more than one party” rather than “neighboring parties.”

CANADA proposed new text on cooperation through competent international organizations or regional organizations, in particular Small Island Developing States (SIDS). The PHILIPPINES, on behalf of SIDS, warned that SIDS issues should not be used to delay substantive discussions. CANADA withdrew the proposal.

**ARTICLE 9 (TK): Paragraph 1:** CANADA suggested limiting to implementation of article 9, rather than of the entire protocol, the provision on giving due consideration to customary laws. The LIKE-MINDED ASIA PACIFIC opposed, noting that the provision is cross-cutting. The IIFB, endorsed by MALAYSIA, requested to specify that “meaningful” consideration should be given “in good faith.”

**Paragraph 2:** CANADA requested that parties shall establish mechanisms to inform TK users about their ABS obligations “as appropriate.” The REPUBLIC OF KOREA proposed reference to the procedures for access, in addition to obligations and, following a proposal by GRULAC, agreed to additional reference to measures as made available through the ABS clearing house. The LIKE-MINDED IN SPIRIT GROUP OF WOMEN, endorsed by NEW ZEALAND, suggested explicit mention of women with regard to the effective participation of ILCs.

**Paragraph 3:** Delegates discussed whether parties shall “support” “endeavor to support” or “encourage,” as appropriate, the development of ABS-related instruments by ILCs.

**Paragraph 4:** CANADA, opposed by the AFRICAN GROUP and GRULAC, proposed to delete reference to the exchange of genetic resources and TK among ILCs. NORWAY suggested specifying that customary use and exchange are compatible with conservation and sustainable use requirements.

**Paragraph 5:** On encouraging users of publicly available TK to enter into benefit-sharing arrangements with knowledge holders, GRULAC, supported by CANADA, but opposed by NORWAY, suggested deleting the provision due to its weak wording. INDIA proposed to use “require” rather than “encourage.” NEW ZEALAND suggested specifying the rightful holders of TK within ILCs. CANADA proposed that parties, where appropriate, encourage the users of publicly available TK to take reasonable measures to enter into benefit-sharing arrangements with TK holders.

**NATIONAL FOCAL POINTS AND COMPETENT NATIONAL AUTHORITIES (ARTICLE 10): Paragraph 1:** CANADA proposed that national focal points inform applicants wishing to access TK on procedures for obtaining PIC or approval and involvement of ILCs and establishing MAT including benefit-sharing. GRULAC opposed reference to “approval and involvement” of ILCs. The LIKE-MINDED ASIA PACIFIC suggested requiring national focal points to make available information through the ABS clearing house, rather than inform applicants. An INDUSTRY representative stressed the need for an obligation for national focal points to inform users. In the evening, CANADA proposed, and delegates agreed on, requiring national focal points to “make information available” to applicants.

**Paragraph 2:** Following a proposal by New Zealand, delegates agreed to make competent national authorities responsible for granting access or, as appropriate, issuing written evidence that access requirements have been met.

**OTHER ARTICLES:** Late into the evening, delegates heard reports from the informal groups and addressed the ABS clearing house (article 11). They then initiated negotiations on compliance (article 12) and monitoring, tracking and reporting (article 13). On compliance, many proposed new and alternative text, with a number of delegates expressing concern about repeating previous exercises rather than working on compromise text. Negotiations continued late into the night.

### INFORMAL GROUP ON DERIVATIVES

Delegates considered draft text describing utilization of genetic resources as including research and development, subsequent applications and commercialization on the biological makeup of genetic material or biological resources, including through biotechnology. Discussion focused on the difference between genetic material and biological resources, the meaning of subsequent applications and commercialization, and how the description would affect provisions on ABS. The group decided to seek feedback from regional groups first and to then decide what further definitions or descriptions of terms are needed.

### IN THE CORRIDORS

On Monday, the near clash over non-commercial research and emergency situations evoked memories of earlier crises caused by inflexible positions between regional groups. Some hoped that the tension was due to confusion, while others explained it as fear that linkages with discussions on the relationship with other instruments could unravel the precious progress achieved on that issue. Yet another delegate opined that some regions still see a red flag when terms such as sectoral approaches are mentioned. Overall, though, steady – albeit not fast – progress within small groups was interpreted as a sign that all sides are still ready to tackle the difficult issues constructively.

A bumpy late night start on compliance resulting in a free-for-all tabling and bracketing of text showed that positions on this core issue of the protocol are still far apart. As one delegate said, “a small group will not be enough to bridge this divide; it will take a monumental effort.”

## RESUMED ABS 9 HIGHLIGHTS: TUESDAY, 13 JULY 2010

In the morning, delegates met in the inter-regional negotiating group to continue work on the draft protocol contained in the Cali Annex (UNEP/CBD/WG-ABS/9/3, Annex I), and in three informal groups to discuss compliance, derivatives and the relationship with other instruments. An afternoon plenary reviewed progress. In the evening, the inter-regional group worked on the basis of the revised text tabled in plenary, and addressed the relationship with other instruments, scope and final clauses.

### INTER-REGIONAL NEGOTIATING GROUP

#### MODEL CONTRACTUAL CLAUSES AND CODES OF CONDUCT AND BEST PRACTICE STANDARDS (ARTICLES 15 AND 16):

Delegates discussed two articles from the Cali Annex with similar structure. On both articles, CANADA requested reference to development “in collaboration with regional and international organizations.” The EU requested to “consider” the use of voluntary sectoral model clauses, codes of conduct and best practice standards, rather than “take stock” of them. The PHILIPPINES asked to suspend discussion on the articles pending negotiations on compliance, or address their subject matter under the article on capacity building.

**AWARENESS RAISING (ARTICLE 17):** CANADA suggested adding indigenous and local communities’ (ILCs) protocols and guidelines as items for awareness raising; and SWITZERLAND education and training of users and providers of genetic resources, and involvement of stakeholders in the further elaboration and implementation of the protocol. GRULAC and the AFRICAN GROUP considered reference to “elaboration” inappropriate after the protocol’s adoption. The IIFB, supported by several parties, requested specific reference to ILCs, along with stakeholders.

**CAPACITY (ARTICLE 18):** The EU supported using the term “capacity development,” while GRULAC and the AFRICAN GROUP preferred “capacity building” but agreed to use the two terms in conjunction. SWITZERLAND asked to add other relevant stakeholders, including the private sector. CANADA proposed to amend the paragraph on capacity building for ILCs to extend it to stakeholders. GRULAC requested specifying that the priorities should be identified by ILCs, with the IIFB, supported by AUSTRALIA, asking to specifically reference women.

CANADA proposed that capacity “may, *inter alia*,” rather than “shall” cover a list of key areas. The IIFB, endorsed by the AFRICAN GROUP, asked to extend the special measures for ILCs to relate to access to genetic resources and associated traditional knowledge (TK). The PHILIPPINES proposed to

revise the paragraph on information on capacity building to include information on model contractual clauses which should be provided to the ABS clearing house.

### TECHNOLOGY TRANSFER AND COOPERATION

**(ARTICLE 18 BIS):** The AFRICAN GROUP requested inserting “*inter alia*” to broaden the reference to developed country measures. The CEE called for specific reference to SIDS and parties with economies in transition, in addition to developing and the least developed countries. SWITZERLAND recommended that parties’ cooperation be subject to mutual agreement and specifying that creating a sound technological base is to ensure biodiversity conservation and sustainable use. The LIKE-MINDED ASIA PACIFIC added that the technological base should also ensure the development of technologies utilizing genetic resources and their derivatives and associated TK. The EU suggested cross-references to the CBD and protocol objectives. CANADA requested that parties “should” rather than “shall” collaborate in research.

**NON-PARTIES (ARTICLE 18 TER):** CANADA requested bracketing reference to a specific ABS clearing house. GRULAC proposed that non-parties submit information on activities and transactions regarding ABS relating to genetic resources and associated TK; and that ABS-related activities and transactions be consistent with the protocol and the Convention.

### FINANCIAL MECHANISM AND RESOURCES

**(ARTICLE 19):** GRULAC and the AFRICAN GROUP requested referring to “adequate, predictable and timely flow of new and additional financial resources.” The CEE requested reference to parties with economies in transition. The IIFB, supported by the PHILIPPINES, proposed reference to the specific needs of ILCs, including women. The EU suggested referencing CBD Article 21 (Financial Mechanism).

**REPORTS ON INFORMALS:** CANADA reported on informal discussions on compliance, noting cooperative spirit, increased mutual understanding and readiness to start textual negotiations. MALAYSIA reported on discussions on the relationship with other international instruments, noting the group worked on five paragraphs and reached agreement on two of them. CANADA reported on discussions on derivatives, noting that the group’s proposed description of “utilization of genetic resources” is not negotiated text, and should be presented to delegates for their consideration in conjunction with references throughout the draft protocol.

### PLENARY

Co-Chairs Hodges and Casas introduced the revised draft protocol, prepared following the first reading of the substantive articles in the Cali Annex. Regional group representatives welcomed progress to date and recommended returning to the inter-regional group as quickly as possible.

GRULAC called on delegates to work on compromise proposals so that by COP 10 few issues are left outstanding. Lamenting that similar progress had not been made during the first part of ABS 9, the LMMC asked delegates to keep working towards a good outcome for adoption in Nagoya. The CEE called for effective work, noting the need to also develop a draft COP decision. The REPUBLIC OF KOREA requested an opportunity to consider key issues, such as access, benefit-sharing and compliance, in conjunction rather than in isolation. Pointing to the many concessions it had made in the negotiations, the AFRICAN GROUP expressed concern about lack of compromise on the part of other regions and warned that the protocol's integrity had to be maintained. JAPAN commended the constructive attitude, and called on delegates to explain their concerns with regard to difficult issues. CBD Executive Secretary Ahmed Djoghlaif congratulated delegates on progress made and thanked the Co-Chairs for their commitment to the process.

### **INTER-REGIONAL NEGOTIATING GROUP**

**RELATIONSHIP WITH OTHER INSTRUMENTS (NEW ARTICLE 3 BIS):** MALAYSIA presented the new text arising from informal consultations as a package, noting acceptance of paragraphs 3 and 5 stating that the protocol does not: prevent parties from developing and implementing other specialized ABS agreements, provided they are supportive of the objectives of the protocol and the CBD; and apply for parties to a specialized ABS instrument in respect of specific genetic resources covered by, and for the purpose of, the specialized instrument.

**Paragraphs 1-2:** MALAYSIA reported on: new text stating that the protocol is not intended to be subordinated to other international instruments, which some delegates wished placed in the preamble; and disagreement over reflecting the text of CBD Article 22.2 (rights and obligations under the law of the sea). AUSTRALIA argued that lack of language reflecting CBD Article 22.2 may create the impression that Article 22 does not apply in its entirety to the protocol. The EU noted the possibility to resolve this issue in the protocol's final clauses, with GRULAC specifically pointing to article 23 on the relationship with the CBD. NORWAY stressed the importance of new text on the protocol not being subordinated to other international instruments, and proposed moving the text to the preamble to overcome differences.

**Paragraph 4:** Delegates discussed an EU proposal stating that mutually supportive implementation is without prejudice to ongoing work or practices under relevant international organizations and conventions. The EU explained the reference would ensure that the protocol does not hinder existing practices, such as agreements among botanical gardens. The AFRICAN GROUP said the reference would create exceptions and proposed stating instead that parties act in good faith to ensure mutual supportiveness. GRULAC suggested that the protocol be implemented "bearing in mind," rather than "without prejudice to" other processes, which the EU agreed to consider as an alternative.

**SCOPE (NEW ARTICLE 3):** Co-Chair Casas proposed to delete the paragraph containing exemptions, but AUSTRALIA opposed. Casas then proposed to work on the basis of compromise text on temporal scope proposed by Norway, which encourages benefit-sharing arrangements for new and continuous utilization of genetic resources acquired before the entry into force of the Protocol. The AFRICAN GROUP and GRULAC preferred to distinguish continuous from new uses. Regarding situations where the owner providing access is not clear, the AFRICAN GROUP proposed establishment of an international trust fund to be used for conservation and sustainable use purposes.

Pointing out that some of these issues require political direction and could be addressed at COP 10, JAPAN said some exclusions might not be required once compromise is reached on other issues, such as the relationship with other instruments.

Insisting on a broad scope, the AFRICAN GROUP indicated they could agree to exemptions for commodities as long as they are not put to other uses and for genetic resources contained in Annex I of the ITPGR as long as they are used in accordance with that Treaty. GRULAC proposed referring to "commodities in trade used solely for final consumption." The EU requested retaining a self-standing paragraph exempting areas beyond national jurisdiction and the Antarctic Treaty Area.

The AFRICAN GROUP recommended that the protocol apply to: benefits arising from continuing uses; benefits arising from new uses; genetic resources from the Antarctic Treaty Area; and marine genetic resources from areas beyond national jurisdiction. The AFRICAN GROUP stressed that the discussion on scope is of political nature, and proposed focusing on compliance instead.

**FINAL CLAUSES:** Delegates continued discussions on institutional arrangements and final clauses (articles 20-31 of the Cali Annex) late into the evening.

### **INFORMAL GROUP ON COMPLIANCE**

Delegates discussed the rationale behind the textual proposals made on compliance (article 12) on Monday evening, debating whether to: focus on "utilization" of genetic resources or "misappropriation"; establish a clear obligation for governments to assist provider countries in ensuring compliance with national ABS laws and/or with MAT; address misappropriation of TK in contravention of national legislation and community procedures; use criminal law to determine the consequences of violations; cover only the most serious violations or all types; address compliance with PIC in article 12 or elsewhere in the protocol; clarify that benefit-sharing applies even in cases of infringement or lack of MAT; and include measures to prevent misappropriation. Some delegations requested to deal with all compliance-related articles of the protocol as a package and to work on the basis of the text in the Cali Annex.

### **INFORMAL GROUP ON DERIVATIVES**

Delegates discussed a definition of "utilization of genetic resources," as the conduct of research and development on the genetic and biochemical makeup or composition of genetic material or biological resources, including through the application of biotechnology as defined in CBD Article 2 (Use of Terms), as well as subsequent application and commercialization. Discussion focused on ensuring flexibility to accommodate future scientific developments while being legally precise.

### **IN THE CORRIDORS**

Midway through this final round of negotiations before COP 10 and with a revised draft protocol in their hands, delegates expressed mixed sentiments in assessing progress achieved so far. Some congratulated the "magnificent" progress achieved in relatively short time. Others opined that the negotiating text has turned into a "Monstreal Annex," pointing to over-bracketing and similarities with the unworkable outcome of ABS 8. As the group returned into negotiating mode in the inter-regional group, the pessimists were heard noting that "to adopt the protocol in October, we should have been at this point a year ago." Those standing in the middle, however, experienced "Montreal Annex déjà-vu" only with respect to the article on scope. The optimists noted that there is still time to find creative solutions, pointing to the fact that brackets and alternative options in other controversial provisions seem to constructively focus attention on specific areas of disagreement.

## RESUMED ABS 9 HIGHLIGHTS: WEDNESDAY, 14 JULY 2010

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

### INTER-REGIONAL NEGOTIATING GROUP

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

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

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

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

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

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

This issue of the *Earth Negotiations Bulletin* © <enb@iisd.org> is written and edited by Stefan Jungcort, Ph.D., Elisa Morgera, Ph.D., Nicole Schabus, and Elsa Tsioumani. The Digital Editor is Francis Dejon. The Editor is Pamela S. Chasek, Ph.D. <pam@iisd.org>. The Director of IISD Reporting Services is Langston James "Kimo" Goree VI <kimo@iisd.org>. The Sustaining Donors of the *Bulletin* are the United Kingdom (through the Department for International Development – DFID), the Government of the United States of America (through the Department of State Bureau of Oceans and International Environmental and Scientific Affairs), the Government of Canada (through CIDA), the Danish Ministry of Foreign Affairs, the German Federal Ministry for Economic Cooperation and Development (BMZ), the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), the Netherlands Ministry of Foreign Affairs, the European Commission (DG-ENV), and the Italian Ministry for the Environment, Land and Sea. General Support for the *Bulletin* during 2010 is provided by the Norwegian Ministry of Foreign Affairs, the Government of Australia, the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management, the Ministry of Environment of Sweden, the New Zealand Ministry of Foreign Affairs and Trade, SWAN International, Swiss Federal Office for the Environment (FOEN), the Finnish Ministry for Foreign Affairs, the Japanese Ministry of Environment (through the Institute for Global Environmental Strategies - IGES), the Japanese Ministry of Economy, Trade and Industry (through the Global Industrial and Social Progress Research Institute - GISPRI), the Government of Iceland, the United Nations Environment Programme (UNEP), and the World Bank. Specific funding for coverage of this meeting has been provided by the Norwegian Ministry of Foreign Affairs and the Japanese Ministry of the Environment. Funding for translation of the *Bulletin* into French has been provided by the Government of France, the Belgium Walloon Region, the Province of Québec, and the International Organization of the Francophone (OIF and IEPF). Funding for translation of the *Bulletin* into Spanish has been provided by the Spanish Ministry of the Environment and Rural and Marine Affairs. The opinions expressed in the *Bulletin* are those of the authors and do not necessarily reflect the views of IISD or other donors. Excerpts from the *Bulletin* may be used in non-commercial publications with appropriate academic citation. For information on the *Bulletin*, including requests to provide reporting services, contact the Director of IISD Reporting Services at <kimo@iisd.org>, +1-646-536-7556 or 300 East 56th St., 11A, New York, New York 10022, USA. The ENB Team at the CBD Resumed ABS 9 can be contacted by e-mail at <elsa@iisd.org>

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

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

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

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

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

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

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

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

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

### **IN THE CORRIDORS**

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

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

## RESUMED ABS 9 HIGHLIGHTS: THURSDAY, 15 JULY 2010

Delegates met in the inter-regional negotiating group throughout the day and into the night, to address provisions on benefit-sharing and access, among others, on the basis of the revised draft tabled on Tuesday, and the preamble on the basis of the Cali Annex. Informal groups met on compliance with mutually agreed terms (article 14) and on the concept of utilization of genetic resources in the context of benefit-sharing (article 4.2). A closed meeting of regional representatives was held in the afternoon.

### INTER-REGIONAL NEGOTIATING GROUP

#### BENEFIT-SHARING (ARTICLE 4): Paragraph 1:

The EU proposed adding to a bracketed reference to benefit-sharing from derivatives “where mutually agreed between the provider and the user.” The LIKE-MINDED ASIA PACIFIC and GRULAC opposed qualifying benefit-sharing from derivatives. GRULAC argued that benefit-sharing is a self-standing obligation and proposed inserting a footnote on the definition of utilization. SWITZERLAND proposed to simplify the language by stating that benefits shall be shared with the party providing the genetic resources. The AFRICAN GROUP, supported by the PHILIPPINES, stressed that there is a benefit-sharing obligation for every use. CANADA proposed to move parts of the paragraph to the preamble or to reformulate it as an obligation.

**Paragraph 2:** GRULAC requested insertion of the proposed definition of utilization of genetic resources. The EU recommended tackling utilization in an informal setting with regard to all relevant provisions of the protocol. The LIKE-MINDED ASIA PACIFIC emphasized that the concept of utilization is central to developing countries’ efforts to receive benefits.

Co-Chair Casas proposed that an informal group produce text on utilization of genetic resources in the context of article 4.2. The EU requested that the group focus on all relevant articles of the protocol, while the LMMC, the LIKE-MINDED ASIA PACIFIC and GRULAC preferred prioritizing discussion of article 4.2. Delegates eventually agreed to the latter approach.

**PREAMBLE:** The EU and CANADA proposed wording to ensure that reference is made to all COP decisions mandating the ABS Working Group to elaborate and negotiate an international regime on ABS, with the IIFB also referring to the role of the Article 8(j) Working Group in the process.

Several new preambular paragraphs were proposed. The AFRICAN GROUP proposed stating that fair and equitable benefit-sharing is the primary incentive available for sustainable use and conservation of biodiversity. The IIFB proposed noting the significance of the UN Declaration on the Rights of Indigenous Peoples, which was supported by the EU adding “in relation to this protocol.” The LMMC suggested reaffirming the sovereign rights of states over their natural resources.

The EU asked to acknowledge the fundamental role of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) and the FAO Commission on Genetic Resources for Food and Agriculture (CGRFA). SWITZERLAND proposed recalling the ITPGR Multilateral System as a legally binding international ABS instrument developed in harmony with the CBD.

CANADA suggested affirming that nothing in the protocol shall be interpreted as affecting the granting or the exercise of intellectual property rights (IPRs). The LMMC proposed recognizing that IPRs play an important role in benefit-sharing, and need to be supportive of, and not run counter to, the three CBD objectives.

CANADA requested acknowledging ongoing related work in various forums including the ITPGR, the CGRFA, the UN Working Group on marine biodiversity in areas beyond national jurisdiction, and the World Health Organization’s Working Group on pandemic influenza preparedness. AUSTRALIA proposed language on the importance of ensuring access to human pathogens for public health preparedness and response purposes. The AFRICAN GROUP proposed acknowledging the ongoing work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization, noting that the protocol is the comprehensive instrument on ABS. Pending agreement on the relationship with other instruments, NORWAY proposed: recognizing that this protocol and other relevant international agreements should be mutually supportive; emphasizing that this protocol shall not be interpreted as implying a change in the rights and obligations of a party under any existing international agreement; and understanding that the above is not intended to subordinate this protocol to other international agreements.

The AFRICAN GROUP suggested noting the interrelationship between genetic resources and TK and the inseparable nature of these resources for ILCs. The LMMC proposed underlining

the importance of TK and its development for biodiversity conservation and sustainable use. INDIA highlighted that TK may be owned by ILCs and countries, as applicable. The LIKE-MINDED IN SPIRIT GROUP OF WOMEN proposed recognizing the vital role of women in ABS.

**PROCEDURAL ISSUES:** Following a closed meeting of regional representatives, proposed by Canada, delegates heard reports on the informal groups. SWITZERLAND reported on utilization of genetic resources in the context of benefit-sharing, noting general agreement that reference to utilization would cover most of the benefit-sharing scenarios. He recommended further discussion of cases of non-compliance and TK associated with genetic resources in the inter-regional group. INDIA reported back that the informal negotiations on compliance with MAT (article 14) had reached agreement on all paragraphs, with the last being subject to confirmation by one group. The AFRICAN GROUP pointed out that they had conceded some previously held positions, but made acceptance of the article contingent on the outcome in the related article on an international ABS ombudsperson (Article 14 bis).

Co-Chair Casas proposed for the inter-regional group to get to the core of the negotiation, by addressing: the link between utilization of genetic resources and benefit-sharing; temporal scope; access; and disclosure and certificates with regard to compliance. The LIKE-MINDED ASIA PACIFIC and the AFRICAN GROUP expressed hope that exchange on these issues will help bridge differences on key issues and also resolve others. The EU further identified as key issues: the relationship with other international instruments; the entire provision on scope; and TK. The AFRICAN GROUP argued that all those issues are part of a package. The EU and the LIKE-MINDED ASIA PACIFIC prioritized a second reading of the articles on access and on research and emergency situations.

**ACCESS (ARTICLE 5): Paragraph 1:** Delegates agreed to refer to sovereign rights over “natural resources.” The EU requested retention of bracketed references to relevant CBD provisions; and GRULAC to references to “subject to national legislation.”

**Paragraph 2:** Delegates discussed, without reaching agreement, whether parties shall take measures when they “require” PIC, which was supported by CANADA and the EU, or “unless they waive” their right to PIC, which was supported by the AFRICAN GROUP. The EU noted the need to enact rules at domestic level to receive benefits and to activate the compliance-related obligation under the protocol.

With regard to a list of criteria for parties’ measures on access, delegates discussed language on non-discrimination in access applications, and establishing MAT at the time of access, without reaching agreement. Delegates accepted language proposed by Switzerland on providing the information on how to apply for PIC; and by Japan and Canada on providing for a clear and transparent written decision by a competent national authority in a reasonable period of time. Clauses on simplified procedures for non-commercial research and criteria or processes for communities’ PIC remain outstanding pending consultations.

SWITZERLAND asked to retain a clause that the cost for obtaining PIC decisions does not exceed the actual cost of processing the application. The LMMC, instead, proposed to include it in the clause on timely decisions, noting that they should also be cost-effective. GRULAC asked to bracket the entire paragraph on measures to be taken by parties requiring

PIC. Following a lengthy discussion and informal consultations, GRULAC agreed to remove the brackets. Negotiations continued into the night.

#### **INFORMAL GROUP ON COMPLIANCE WITH MAT (ARTICLE 14)**

On requiring parties to take measures, as appropriate, to address cases of alleged non-compliance, delegates discussed whether to delete reference to “cases of alleged non-compliance,” which was initially opposed by most developing country groups. Cautioning that measures in relation to MAT should not interfere with domestic contract law procedures, developed countries suggested referring to “measures regarding non-compliance with MAT,” which was agreed. On enforcement of foreign judgements, delegates agreed that parties “promote the utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards.” The group also agreed to a reference to cooperation between parties, after clarifying that it refers to assisting parties making claims, rather than to compliance with MAT. The group agreed to merge references to facilitating access to justice and providing support to those seeking redress. Delegates also decided that the COP/MOP review the article’s effectiveness in accordance with article 26 (assessment and review).

#### **IN THE CORRIDORS**

As the clock was ticking away, delegates started speculating about the next steps. While most acknowledged that unprecedented progress has been made at the resumed session, they were also well aware of the limited room left for reaching compromise at this meeting. As one put it, “we are solving many issues, but we are not getting anywhere closer on the cross-cutting ones.” Others reported that several countries had exhausted their negotiating instructions, thus making further progress nearly impossible. With major issues thus still outstanding (such as scope, derivatives, traditional knowledge and measures to support compliance), several felt that the text is clearly not ripe for adoption by the COP, in particular if the final touches are expected to be put by a ministerial segment.

Notwithstanding the lingering question as to how COP 10 will live up to the pressure to deliver on the negotiation of the ABS protocol, the mood continued to be constructive. Many considered the message inside the fortune cookie awarded to the African Group for an outstanding performance in accommodating the concerns of others – “Great things are about to happen to you!” – as the positive oracle needed for the last push in the negotiations.

**ENB SUMMARY AND ANALYSIS:** The *Earth Negotiations Bulletin* summary and analysis of the resumed ABS 9 will be available on Monday, 19 July 2010 online at: <http://www.iisd.ca/biodiv/rabs9/>

## SUMMARY OF THE RESUMED NINTH MEETING OF THE WORKING GROUP ON ACCESS AND BENEFIT-SHARING OF THE CONVENTION ON BIOLOGICAL DIVERSITY: 10-16 JULY 2010

The resumed ninth 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 10-16 July 2010, in Montreal, Canada. It was preceded by informal, regional and interregional consultations, held from 8-9 July 2010. More than 400 participants attended the meeting, representing governments, UN agencies, intergovernmental and non-governmental organizations, indigenous and local community groups (ILCs), public sector research, academia and business.

The first part of the ninth meeting was held from 22-28 March 2010, in Cali, Colombia, and was suspended, with delegates agreeing that the draft protocol text tabled by the Co-Chairs and revised during the session (Cali Annex) was not negotiated. On the basis of the Cali Annex, delegates in Montreal conducted two readings of the text to isolate and resolve outstanding issues and reach consensus on language, with the aim to finalize the protocol text in time for its possible adoption at the tenth meeting of the Conference of the Parties (COP 10), to be held from 18-29 October 2010, in Nagoya, Japan.

Delegates made a number of important steps towards meeting their mandate, including approving a substantive outcome in the form of a draft ABS protocol, which is no longer a Co-Chairs' text but rather a text negotiated by parties. At the same time, delegates showed their commitment to finalizing the protocol by working intensely and in good spirit through day and night sessions. They made progress in reaching agreement on the language of less controversial provisions, as well as certain difficult issues, including the relationship with other instruments and compliance with domestic ABS requirements. They also identified the key issues that require further compromises, including scope and the issue of pathogens, derivatives and the

concept of utilization of genetic resources, and mechanisms to support compliance. Several sets of brackets remain and, as a result, the Working Group decided to hold another meeting before COP 10, possibly in September 2010.

## A BRIEF HISTORY OF THE CBD AND ABS

The CBD, negotiated under the auspices of the UN Environment Programme (UNEP), was opened for signature on 5 June 1992, and entered into force on 29 December 1993. There are currently 193 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.

CBD Article 15 addresses access to genetic resources, including facilitating access, prior informed consent (PIC), mutually agreed terms (MAT) and benefit-sharing. Related articles refer 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 established a regionally-balanced expert panel on ABS. The expert panel held two meetings (October 1999, San José, Costa Rica; and March 2001, Montreal, Canada) and developed a set of

### IN THIS ISSUE

A Brief History of the CBD and ABS . . . . .	1
Resumed ABS 9 Report . . . . .	3
ABS Protocol . . . . .	3
Closing Plenary . . . . .	13
A Brief Analysis of Resumed ABS 9 . . . . .	14
Upcoming Meetings . . . . .	16
Glossary . . . . .	16

This issue of the *Earth Negotiations Bulletin* © <enb@iisd.org> is written and edited by Stefan Jungcort, Ph.D., Elisa Morgera, Ph.D., Nicole Schabus, and Elsa Tsoumani. The Digital Editor is Francis Dejon. The Editor is Pamela S. Chasek, Ph.D. <pam@iisd.org>. The Director of IISD Reporting Services is Langston James "Kimo" Goree VI <kimo@iisd.org>. The Sustaining Donors of the *Bulletin* are the United Kingdom (through the Department for International Development – DFID), the Government of the United States of America (through the Department of State Bureau of Oceans and International Environmental and Scientific Affairs), the Government of Canada (through CIDA), the Danish Ministry of Foreign Affairs, the German Federal Ministry for Economic Cooperation and Development (BMZ), the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), the Netherlands Ministry of Foreign Affairs, the European Commission (DG-ENV), and the Italian Ministry for the Environment, Land and Sea. General Support for the *Bulletin* during 2010 is provided by the Norwegian Ministry of Foreign Affairs, the Government of Australia, the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management, the Ministry of Environment of Sweden, the New Zealand Ministry of Foreign Affairs and Trade, SWAN International, Swiss Federal Office for the Environment (FOEN), the Finnish Ministry for Foreign Affairs, the Japanese Ministry of Environment (through the Institute for Global Environmental Strategies - IGES), the Japanese Ministry of Economy, Trade and Industry (through the Global Industrial and Social Progress Research Institute - GISPRI), the Government of Iceland, the United Nations Environment Programme (UNEP), and the World Bank. Specific funding for coverage of this meeting has been provided by the Norwegian Ministry of Foreign Affairs and the Japanese Ministry of the Environment. Funding for translation of the *Bulletin* into French has been provided by the Government of France, the Belgium Walloon Region, the Province of Québec, and the International Organization of the Francophone (OIF and IEPF). Funding for translation of the *Bulletin* into Spanish has been provided by the Spanish Ministry of the Environment and Rural and Marine Affairs. The opinions expressed in the *Bulletin* are those of the authors and do not necessarily reflect the views of IISD or other donors. Excerpts from the *Bulletin* may be used in non-commercial publications with appropriate academic citation. For information on the *Bulletin*, including requests to provide reporting services, contact the Director of IISD Reporting Services at <kimo@iisd.org>, +1-646-536-7556 or 300 East 56th St., 11A, New York, New York 10022, USA.

recommendations, including on PIC, MAT, approaches for stakeholder involvement and options to address ABS within the CBD framework. COP 5 (May 2000, Nairobi, Kenya) established the Working Group on ABS to develop guidelines and other approaches on: PIC and MAT; participation of stakeholders; benefit-sharing mechanisms; and the preservation of traditional knowledge.

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

**COP 6:** At its sixth meeting (April 2002, The Hague, the Netherlands), the COP adopted the Bonn Guidelines on ABS and 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 of the World Trade Organization.

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

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

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

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

**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. The COP also requested the Working Group on Article 8(j) to contribute to the mandate of the ABS Working Group on issues relevant to traditional knowledge.

**ABS 5 and 6:** At its fifth and sixth meetings (October 2007, Montreal, Canada, and January 2008, Geneva, Switzerland), the ABS Working Group focused on the main components of the international regime on ABS, including fair and equitable sharing of benefits, access to genetic resources, compliance, traditional knowledge and genetic resources, and capacity building. In Geneva, the Working Group produced 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, and instructed the ABS Working Group to finalize the international regime and to submit an instrument/instruments for consideration and adoption by COP 10. The three expert groups (concepts, terms, working definitions and sectoral approaches; compliance; and traditional knowledge associated with genetic resources) each met once between December 2008 and June 2009.

**ABS 7:** At its seventh meeting (April 2009, Paris, France), the Working Group focused on operational text on the objective, scope, compliance, fair and equitable benefit-sharing, and access. Despite procedural obstacles, mostly related to the structure of the negotiating document, the Working Group consolidated submissions on compliance, benefit-sharing and access.

**ARTICLE 8(J) WG 6:** At its sixth meeting (November 2009, Montreal, Canada), the Working Group on Article 8(j) expressed detailed views on the international regime on ABS, for transmission to ABS 8.

**ABS 8:** At its eighth meeting (November 2009, Montreal, Canada), the Working Group addressed operative text on all components of the regime, and discussed its legal nature. The meeting adopted the Montreal Annex, consisting of a single, consolidated draft of the international regime, and a second annex on proposals for operational texts left in abeyance for consideration at ABS 9. The Working Group also established an intersessional process leading up to ABS 9, including: a Friends of the Co-Chairs group; a Co-Chairs’ Inter-regional Informal Consultation; and a series of regional consultations.

**ABS 9 (FIRST PART):** At the first part of its ninth meeting (March 2010, Cali, Colombia), the Working Group conducted negotiations on the basis of a draft protocol, tabled as a Co-Chairs’ text and developed upon a request made during the Co-Chairs’ Informal Inter-regional Consultation held prior to the meeting. Following three days of contact group discussions, which achieved progress on a number of issues, including benefit-sharing from derivatives and an internationally recognized certificate of compliance, an inter-regional group was established. Due to procedural wrangling, the inter-regional group did not enter into text-based negotiations. The Working Group eventually agreed to: suspend the meeting and convene a resumed session in July 2010; and forward the draft protocol text as revised during the meeting to the resumed session, with the understanding that the draft was not negotiated, is without prejudice to the rights of parties to make further amendments and additions to the text, and should be read together with the ABS 9 report reflecting parties’ views expressed at the meeting. After the meeting, the draft protocol was circulated to parties, in accordance with Article 28 of the Convention (Adoption of Protocols).

## RESUMED ABS 9 REPORT

On Saturday, 10 July 2010, Working Group Co-Chair Timothy Hodges (Canada) welcomed delegates and thanked: Japan for funding the resumed ABS 9 session; Canada, Spain and Switzerland for funding developing country participation; and Norway for funding coverage of the meeting by the *Earth Negotiations Bulletin*, underlining its importance for the transparency of the process. In a video message, UN Goodwill Ambassador for Biodiversity Edward Norton reminded delegates that all need to accept special responsibility to act now to prevent irreversible biodiversity loss. Working Group Co-Chair Fernando Casas (Colombia) said he expects high-level commitment from delegates to reach a definitive agreement. Noting previous successes in CBD negotiations held in Montreal, Hodges called for negotiations in good faith in the spirit of compromise, and stressed that postponing difficult issues to be resolved by the Conference of the Parties (COP) is not an option.

COP 10 Ambassador Kiyoshi Araki (Japan) called on delegates to engage in text-based negotiations and tackle difficult issues, so that any outstanding issues can be addressed through involvement of ministers at COP 10. Brazil, for the Like-Minded Megadiverse Countries (LMMC), stressed the need to maintain the integrity of the draft protocol contained in the Cali Annex. He said that balance needs to be achieved in the negotiation of every article, stressing the importance of including derivatives and appropriate treatment of traditional knowledge (TK). Malawi, for the African Group, and Mexico, for the Latin American and Caribbean Group (GRULAC), reiterated the need for a legally binding ABS protocol. The African Group called for clear rules of engagement for the negotiations.

Serbia, for Central and Eastern Europe (CEE), prioritized: a legally binding instrument focusing on the utilization of genetic resources and derivatives, compliance, capacity building, and benefit-sharing, taking into account conservation and sustainable use; and harmony with other processes in other international fora. Saudi Arabia emphasized technology transfer.

New Zealand, for the Like-Minded in Spirit Group of Women, underscored the need to reflect a gender perspective in the text of international regime and to ensure women's full and effective participation at all levels of policy-making and implementation of the CBD objectives. Malaysia, on behalf of the Like-Minded Asia-Pacific Group of Developing Countries, emphasized compliance as the reason for existence and value added of an ABS protocol. The EU called for balance of rights and obligations under the instrument, as well as vis-à-vis other international instruments.

**ORGANIZATIONAL MATTERS:** Co-Chair Hodges explained that meeting officers remain as elected in Cali, with the COP Bureau serving as the meeting Bureau and Somaly Chan (Cambodia) as the meeting rapporteur. The Working Group then adopted the agenda (UNEP/CBD/WG-ABS/9/1/Rev.1).

Regarding the organization of work, Hodges proposed that negotiations continue on the basis of the Cali Annex (UNEP/CBD/WG-ABS/9/3, Annex I). He suggested reconvening the inter-regional negotiating group formed in Cali to work in a roundtable format and comprise: five representatives for each UN region; two representatives each for indigenous and local

communities, civil society, industry and public research; and the representatives of the current and upcoming COP Presidencies. He explained that spokespersons and representatives can change freely, and discussions will be open to the attendance of all Working Group participants. The Working Group approved reconvening the inter-regional group, to be co-chaired by the Working Group Co-Chairs.

Co-Chair Casas then presented the rules of engagement, according to which: parties are expected to start negotiating the draft protocol article by article; and an article will be considered agreed if there are no objections, bearing in mind that nothing is agreed until everything is agreed. Calling on parties to "exercise maximum restraint" and propose text that will also accommodate the views of others, he suggested using brackets if there is no compromise, for further consideration at a later stage. The rules of engagement were revisited on Sunday, 11 July, when the International Indigenous Forum on Biodiversity (IIFB) expressed its deep concern about the lack of their full and effective participation and requested opening the negotiations to ILC representatives. Following consultations among the Co-Chairs, the IIFB and stakeholders, Co-Chair Hodges proposed to revert to the practice used in prior Working Group meetings and allow ILCs to table text as long as it is endorsed by at least one party.

Plenary met to open and close the meeting, and on Tuesday, 13 July, to review progress. The inter-regional group met throughout the meeting, from Saturday to Friday, 10-16 July. Delegates held a first reading of the protocol provisions on the basis of the Cali Annex, and a second reading on the basis of a revised draft circulated on Tuesday, 13 July. Whenever time allowed only for a first reading of the provision in question, all new proposals remained in brackets. Informal groups met on: the relationship with other instruments; derivatives; the concept of utilization of genetic resources in the context of benefit-sharing (article 4.2); compliance (article 12); compliance with MAT (article 14); scope; and institutional and final clauses. Closed meetings of regional representatives were held on Thursday and Friday, 15-16 July 2010, to address linkages among the protocol provisions and identify the key issues requiring compromise solutions. The closing plenary adopted the draft ABS protocol (UNEP/CBD/WG-ABS/9/L.2/Rev.1) with remaining brackets as a whole, without discussion.

This report reviews discussions and summarizes the outcome under each protocol provision, except for article 2 (use of terms) that was not addressed at this meeting, focusing on remaining outstanding items.

### ABS PROTOCOL

**PREAMBLE:** Delegates held one reading of the preamble on Thursday, 15 July. The EU and Canada proposed wording to ensure that reference is made to all COP decisions mandating the ABS Working Group to elaborate and negotiate an international regime on ABS, with the IIFB also referring to the role of the Article 8(j) Working Group in the process.

Several new preambular paragraphs were proposed. The African Group proposed stating that fair and equitable benefit-sharing is the primary incentive available for sustainable use and conservation of biodiversity. The IIFB proposed noting the

significance of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which was supported by the EU, adding “in relation to this protocol.” The LMMC suggested reaffirming the sovereign rights of states over their natural resources.

The EU asked to acknowledge the fundamental role of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) and the FAO Commission on Genetic Resources for Food and Agriculture (CGRFA). Switzerland proposed recalling the ITPGR Multilateral System as a legally binding international ABS instrument developed in harmony with the CBD.

Canada suggested affirming that nothing in the protocol shall be interpreted as affecting the granting or the exercise of intellectual property rights (IPRs). The LMMC proposed recognizing that IPRs play an important role in benefit-sharing, and need to be supportive of, and not run counter to, the three CBD objectives.

Canada requested acknowledging ongoing related work in various forums, including the ITPGR, the CGRFA, the UN Working Group on marine biodiversity in areas beyond national jurisdiction, and the World Health Organization’s Working Group on pandemic influenza preparedness. Australia proposed language on the importance of ensuring access to human pathogens for public health preparedness and response purposes. The African Group proposed acknowledging the ongoing work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization (WIPO IGC), noting that the protocol is the comprehensive instrument on ABS. Pending agreement on the relationship with other instruments, Norway proposed: recognizing that this protocol and other relevant international agreements should be mutually supportive; emphasizing that this protocol shall not be interpreted as implying a change in the rights and obligations of a party under any existing international agreement; and understanding that the above is not intended to subordinate this protocol to other international agreements.

The African Group suggested noting the interrelationship between genetic resources and TK and the inseparable nature of these resources for ILCs. The LMMC proposed underlining the importance of TK and its development for biodiversity conservation and sustainable use. India highlighted that TK may be owned by ILCs and countries, as applicable. The Like-Minded in Spirit Group of Women proposed recognizing the vital role of women in ABS.

**Outcome:** The preamble includes language on:

- the important contribution to sustainable development made by technology transfer and cooperation to build research and innovation capacities for adding value to genetic resources;
- the importance of genetic resources to food security, public health, biodiversity conservation and the mitigation of and adaptation to climate change;
- the potential role of ABS to contribute to the conservation and sustainable use of biodiversity, poverty eradication and environmental sustainability; and
- the importance of providing legal certainty.

Bracketed language addresses: the sovereign rights of states over their natural resources; public awareness of the economic value of ecosystems and biodiversity; the significance of UNDRIP; the interdependence of all countries with regard to genetic resources for food and agriculture and the role of the ITPGR and the CGRFA; the World Health Organization’s International Health Regulations and the importance of ensuring access to human pathogens for public health preparedness and response purposes; the role of IPRs; ongoing work in other international forums; the Multilateral System of the ITPGR; the role of women and the need for their full participation; the interrelationship between genetic resources and TK and the inseparability of these resources for ILCs; rights of ILCs to genetic resources and associated TK; and the relationship between the protocol and other international agreements.

**OBJECTIVE (ARTICLE 1):** The inter-regional group held one reading of the objective on Saturday, 10 July. GRULAC, the CEE and the LMMC supported the original text on ensuring fair and equitable benefit-sharing from the utilization of genetic resources, with the Philippines requesting to add derivatives. The EU and the Republic of Korea proposed adding reference to facilitation of access to genetic resources. The African Group, supported by GRULAC, proposed instead to use the wording of the third objective in CBD Article 1 (Objectives). Canada proposed to add reference to contributing to the first and second CBD objectives. Delegates eventually agreed on the objective of the protocol, without any brackets.

**Outcome:** Article 1 states that the objective of the protocol is the fair and equitable sharing of benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and sustainable use of its components.

**USE OF TERMS (ARTICLE 2):** This article was not addressed during the meeting and is not included in the outcome document.

**SCOPE (ARTICLE 3):** The inter-regional group held a first reading of the provision on scope on Saturday, 10 July, and a second reading on Tuesday, 13 July. Main issues addressed included temporal scope and exclusions from the protocol’s scope.

The EU, Japan and New Zealand proposed that the protocol apply to genetic resources acquired after the protocol’s entry into force. The African Group said users have a moral obligation to share benefits from new and continued uses, adding that coverage of uses after the protocol’s entry into force does not suggest retroactivity. Norway suggested that parties “encourage” users to share benefits from such resources. The Like-Minded Asia-Pacific and Peru reminded delegates that there has been a benefit-sharing obligation since the CBD’s entry into force.

Canada proposed excluding from the protocol’s scope: genetic resources beyond national jurisdiction; genetic resources falling under Annex I of the ITPGR for CBD parties that are also ITPGR parties; genetic resources when “utilized solely as a commodity”; and TK associated with genetic resources

acquired prior to the protocol's entry into force. The African Group cautioned against undermining the comprehensiveness of the regime and violating CBD Article 3 on states' responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of areas beyond national jurisdiction; and recommended extending the scope to pre-CBD accessions to ensure coverage of *ex situ* collections. The EU suggested exclusion of genetic resources beyond the limits of national jurisdiction or those located in the Antarctic Treaty Area; and addressing the relationship with the ITPGR and the issue of pathogens in a separate provision on the relationship with other instruments.

Canada proposed excluding human genetic resources. The African Group preferred reviewing Decision COP II/11 (Access to Genetic Resources), which reaffirms that human genetic resources are not included within the CBD framework, rather than addressing the issue in the protocol. Australia, opposed by the African Group, drew attention to human pathogens as a possible exclusion.

Co-Chair Casas proposed referring to genetic resources within the scope of the Convention rather than drafting a list of inclusions and exclusions. New Zealand proposed streamlined text that the protocol applies to genetic resources and associated TK within the scope of the CBD acquired after the protocol's entry into force, and to the benefits arising from the utilization of such resources and knowledge. After some discussion, the proposal was not retained.

During the second reading, delegates considered Norway's proposal to encourage benefit-sharing arrangements for new and continuous utilization of genetic resources acquired before the entry into force of the protocol. The African Group proposed: establishing a trust fund to be used for conservation and sustainable use purposes, for situations when the owner providing access cannot be clearly identified; and supported by GRULAC, distinguishing continuous from new uses. Insisting on a broad scope, the African Group also indicated they could agree to exemptions for commodities as long as they are not put to other uses, and for genetic resources contained in Annex I of the ITPGR as long as they are used in accordance with that Treaty. He further recommended that the protocol apply to: benefits arising from continuing uses; benefits arising from new uses; genetic resources from the Antarctic Treaty Area; and marine genetic resources from areas beyond national jurisdiction.

**Outcome:** Article 3 remains heavily bracketed. It states that the protocol shall apply to genetic resources within the scope of the Convention and to the benefits arising from "any" or "the" utilization of such resources and to associated TK and the benefits arising from its utilization. Bracketed references address: acquisition after the protocol's entry into force; and derivatives.

A bracketed list of exclusions from scope addresses: human genetic resources; genetic resources beyond national jurisdiction; Annex I of the ITPGR; genetic resources utilized solely as commodities; genetic resources and TK acquired prior to the protocol's entry into force; human pathogens; and genetic resources in the Antarctic Treaty Area.

An alternative bracketed clause states that the protocol applies to: benefits arising from continuing uses of genetic resources and TK acquired before the entry into force of the Convention; benefits arising from new uses of genetic resources and TK acquired before the entry into force of the Convention; genetic resources from the Antarctic Treaty Area; and genetic resources from marine areas beyond national jurisdiction.

#### RELATIONSHIP WITH OTHER INSTRUMENTS

**(ARTICLE 3 BIS):** The inter-regional group first addressed the issue of the relationship with other instruments on Sunday, 11 July, on the basis of new text proposed by Co-Chair Casas. Following consultations in an informal group, the inter-regional group held a second reading on Tuesday, 13 July.

The text proposed by Co-Chair Casas was based on CBD Article 22.1 (relationship with other international conventions), further requiring that the protocol and other relevant international instruments are implemented in a mutually supportive manner. The CEE supported the proposal. Delegates discussed whether to include reference to Article 22.2 (implementation consistent with the law of the sea). New Zealand and Australia supported such a reference, noting that lack of it could raise questions with regard to areas beyond national jurisdiction. GRULAC and the Philippines opposed, arguing that it would create problems for countries that are not parties to the UN Convention on the Law of the Sea.

Japan, supported by the EU and Canada, underlined that expression "in a mutually supportive manner" is not clear, and proposed that the protocol does not apply whenever the provisions of a specialized international ABS regime apply, provided that the other regime is in force among the parties concerned and does not run counter to the CBD objectives. The LMMC suggested stating instead that nothing in this protocol will prevent the development of other international agreements, provided that they are supportive of, and do not run counter to, the objectives of the Convention and the protocol. Supporting the LMMC proposal, Canada suggested referring to international agreements "relating to ABS." The Like-Minded Asia Pacific Group noted that agreements not related to ABS could also have an impact on the protocol, citing Article 16.5 (intellectual property rights' influence on CBD implementation). Switzerland proposed that the provisions of the protocol shall not prejudice the development of other more specialized ABS instruments.

The African Group suggested that the protocol is the comprehensive international ABS instrument. The EU agreed that the protocol should be the default instrument on ABS. Norway suggested clarifying that the article does not subordinate the protocol to other instruments. India said the provision should cover: rights and obligations under existing treaties; implementation of the protocol; and development of other agreements without reference to any specific agreement.

The inter-regional group's second reading was held on the basis of text developed in the informal group, including agreed language that the protocol does not: prevent parties from developing and implementing other specialized ABS agreements, provided they are supportive of the objectives of the protocol and the CBD; and apply for parties to a specialized ABS instrument in respect of specific genetic resources covered by, and for the

purpose of, the specialized instrument. Disagreement persisted on text stating that the protocol is not intended to be subordinated to other international instruments, which some delegates wished placed in the preamble to overcome differences; and reflecting the text of CBD Article 22.2. Delegates also discussed an EU proposal stating that mutually supportive implementation is without prejudice to ongoing work or practices under relevant international organizations and conventions. The African Group proposed stating instead that parties act in good faith to ensure mutual supportiveness.

**Outcome:** Article 3 bis states that nothing in this protocol shall prevent the parties from developing and implementing other relevant international agreements, including other specialized ABS agreements, provided they are supportive of and do not run counter to the objectives of the Convention and the protocol; the protocol and other relevant international instruments shall be implemented in a mutually supportive manner; and where a specialized international ABS instrument applies that is consistent with and does not run counter to the CBD and protocol objectives, the protocol does not apply for the parties to the specialized instrument in respect of the specific genetic resource covered and for the purpose of the specialized agreement.

Bracketed language states that the protocol's provisions shall not affect the rights and obligations deriving from existing international agreements, except where their exercise would cause a serious damage or threat to biodiversity, and this paragraph is not intended to subordinate the protocol to other international instruments.

#### FAIR AND EQUITABLE BENEFIT-SHARING

**(ARTICLE 4):** Delegates discussed the article in the inter-regional negotiating group on Sunday, 11 July, and held a second reading on Thursday and Friday, 15-16 July. Informal groups also met to discuss derivatives and the concept of utilization of genetic resources in the context of benefit-sharing.

**Derivatives and utilization of genetic resources:** GRULAC requested reference to derivatives along with genetic resources in regard to benefit-sharing and, together with the LMMC and the Like-Minded Asia Pacific Group, contemplated language to refer instead to "any utilization of genetic resources," which would include derivatives. GRULAC, the Like-Minded Asia Pacific Group, the LMMC and Norway suggested deleting the reference to the proposed list of typical uses of genetic resources contained in annex II of the Cali Annex. The African Group and the EU opposed leaving the term "derivatives" unspecified for reasons of legal certainty. GRULAC replied that it is impossible to develop an exhaustive list and proposed to instead stipulate general criteria. Switzerland pointed to two main options: to name different derivatives, including biochemical compounds; or to clarify what is meant by utilization of genetic resources. Australia suggested specifying utilization of genetic resources, by inserting "for purposes of research and development on their biochemical make-up." GRULAC proposed to refer to naturally occurring biochemical compounds instead of derivatives. Eventually delegates reached a general understanding that

reference to utilization of genetic resources would cover most of the benefit-sharing scenarios and not require a definition of derivatives, but did not reach agreement on final wording.

Following regional representatives' closed-door consultations, during the closing plenary Chair Casas proposed placing in a footnote under paragraphs 1 and 2 of the article, the proposed common understanding of "utilization of genetic resources" accompanied by the explanation that: this language is the outcome of discussions by a small group set up by the inter-regional group to explore a common understanding on what constitutes utilization of genetic resources/derivatives, as they appear in the draft protocol; the small group also recognized that its potential use and placement will depend on its context within the protocol; and the language will provide an input to negotiations.

**Paragraph 1:** Regarding benefit-sharing with the party providing the genetic resource, GRULAC asked to refer to the country of origin instead. Japan and Canada expressed concern that this term does not cover all situations where benefit-sharing would have to occur. The EU requested a focused discussion on the country of origin as a cross-cutting issue. The Like-Minded Asia-Pacific Group suggested drawing from CBD Article 15.3 (specification of provider countries).

Canada, opposed by the African Group and the Like-Minded Asia-Pacific Group, proposed removing reference to TK, and to address sharing of benefits from TK utilization in a separate provision. New Zealand, opposed by the IIFB, preferred deleting reference to ILCs, to avoid singling out one type of non-party beneficiaries, and suggested addressing the issue in a related paragraph addressing sharing of benefits with ILCs.

The EU proposed adding to a bracketed reference to benefit-sharing from derivatives "where mutually agreed between the provider and the user." The Like-Minded Asia Pacific Group and GRULAC opposed qualifying benefit-sharing from derivatives. Switzerland proposed stating that benefits shall be shared with the party providing the genetic resources. The African Group, supported by the Philippines, stressed that there is a benefit-sharing obligation for every use. Japan and Canada requested adding reference to benefit-sharing in accordance with MAT. The African Group opposed, pointing to the need to also cover the cases of resources acquired without PIC and MAT. Noting that some proposals would weaken the benefit-sharing obligation, he proposed adding a paragraph stating that when a genetic resource is utilized without MAT, the country of origin or ILC shall be entitled to 100% of the benefits generated, including IPRs, plus punitive damages.

On Friday, 16 July, the Philippines reiterated an earlier request for insertion of new language on benefit-sharing in special conditions, stating that the protocol shall ensure that the rights of the parties and ILCs to benefit-sharing are not prejudiced, even when there is no ABS legislation or measure yet in place; or in situations when access has occurred without PIC or MAT. The EU opposed the insertion, even if in brackets, expressing concern at the implications of this addition for other articles. Co-Chair Hodges proposed reflecting the Philippines' proposal in the meeting report.

**Paragraph 2:** Regarding national measures, the EU proposed to refer to parties' "appropriate measures in accordance with the protocol," rather than "legislative, administrative or policy measures." Canada opposed reference to "in accordance with the protocol," stressing that the protocol does not instruct as to which measures should be taken by parties. Delegates further discussed whether the paragraph should require parties to take measures "with the aim of ensuring," preferred by the EU and Canada, or "to ensure" benefit-sharing, as requested by the Like-Minded Asia Pacific Group. The African Group and GRULAC preferred a third option, requiring parties to take measures "with the aim of sharing benefits."

**Paragraph 3:** Regarding sharing benefits based on MAT, Canada raised concerns about references to CBD Articles 16 (Access to and Transfer of Technology) and 19 (Handling of Biotechnology and Distribution of Benefits), noting that these refer to benefit-sharing among states, not with communities, and, opposed by the African Group, suggested a separate paragraph on benefit-sharing with ILCs for TK utilization.

**Outcome:** The article on fair and equitable benefit-sharing consists of five heavily bracketed paragraphs. References to associated TK and derivatives are bracketed throughout, along with alternative references to naturally occurring biological compounds and utilization of genetic resources.

The first paragraph focuses on recipients of benefit-sharing, namely parties providing the genetic resource or, alternatively, countries of origin and ILCs holding such resources. All these references remain bracketed. It provides that benefits shall be shared in a fair and equitable way, with the specification "according to MAT" remaining in brackets. The provision that when a genetic resource is utilized without MAT, the country of origin or ILC shall be entitled to 100% of the benefits generated, including IPRs, plus punitive damages, remains bracketed.

The second paragraph focuses on measures to be taken by parties, as appropriate. The specification "for the purposes of research and development on their biochemical makeup" and the references to the list of typical uses of genetic resources in Annex II, and other proposed descriptions remain bracketed, as does a reference to review of such lists by the COP/MOP.

The third paragraph states that the benefits arising from "the" or "any" utilization of genetic resources shall be shared on MAT, including as provided in CBD Articles 8(j), 15, 16 and 19, the latter being in brackets along with the addition "as appropriate."

The fourth paragraph focuses on benefit-sharing from utilization of TK associated with genetic resources with ILCs holding such knowledge, with references to "in accordance with this protocol" and "taking into account the provisions of article 9" remaining bracketed.

The fifth paragraph is bracketed in its entirety and states that benefits from the utilization of TK shall be shared on MAT.

**ACCESS TO GENETIC RESOURCES (ARTICLE 5):** Delegates held a first reading of the article on Monday, 12 July, and a second on Thursday, 15 July. The African Group requested reference to associated TK in the heading of the article, as well as in the text. Canada, opposed by the IIFB, preferred keeping all references to TK in a separate article.

Regarding the first paragraph on parties' sovereign rights to require or not require PIC according to CBD Article 15 (Access to Genetic Resources), the EU requested to insert "subject to national legislation" to reflect their understanding that PIC needs to be articulated in national legislation. Delegates agreed to refer to sovereign rights over "natural resources."

Regarding the paragraph on access criteria, Canada proposed that the requirement apply only for parties requiring PIC. The African Group proposed that a party's decision to waive its sovereign right to require PIC be posted on the ABS clearing house to highlight this as an exception. Delegates discussed, without reaching agreement, whether parties shall take measures when they "require" PIC, which was supported by Canada and the EU, or "unless they waive" their right to PIC, which was supported by the African Group. The EU noted the need to enact rules at the domestic level to receive benefits and to activate the compliance-related obligation under the protocol.

With regard to a list of criteria for parties' measures on access, delegates discussed language on non-discrimination in access applications, and establishing MAT at the time of access, without reaching agreement. Delegates accepted language proposed by Switzerland on providing the information on how to apply for PIC; and by Japan and Canada on providing for a clear and transparent written decision by a competent national authority in a reasonable period of time. Clauses on simplified procedures for non-commercial research and criteria or processes for communities' PIC remain outstanding.

Regarding specific access criteria, Canada, opposed by the LMMC, the African Group, the Like-Minded Asia Pacific Group and Norway, proposed a new paragraph stating that parties' measures provide for equal treatment between similar domestic and foreign applicants and between foreign applicants from different parties. Norway and India stressed non-discrimination is a trade-related matter. The African Group suggested instead that parties should avoid application of discriminatory rules in processing access applications, except where such rules aim at advancing local non-commercial biodiversity and ecosystem research and education.

GRULAC asked to delete reference to the approval and involvement of ILCs as an alternative to their PIC. New Zealand presented text developed jointly with Australia and Canada, stating that, where applicable national law recognizes that ILCs have the right to provide access to genetic resources, parties should set out processes for obtaining their PIC or for approval and involvement, and/or for negotiating MAT.

Canada, opposed by the African Group, suggested that parties require the establishment of MAT at the time of access. Japan proposed that parties establish clear criteria to assess applications for PIC and notify the decision to the applicant in a reasonable time period. Switzerland recommended that parties provide for appropriate administrative or judicial appeals procedures; and ensure that the costs for obtaining decisions on PIC do not exceed the actual costs of processing them. The LMMC proposed to include the latter in the clause on timely decisions, noting that they should also be cost-effective.

On informing the ABS clearing house about which genetic resources will or will not be subject to PIC, the EU proposed that a party determines which of its genetic resources will be subject to PIC. The African Group proposed to restate that, unless a party waives its sovereign right to require PIC, such a requirement is imposed.

**Outcome:** The article on access to genetic resources consists of four paragraphs containing numerous brackets, including around all references to derivatives, associated TK and country of origin/provider country.

The first paragraph stipulates that in the exercise of its sovereign rights over natural resources, access to genetic resources shall be subject to PIC of the party providing such resources/country of origin, unless otherwise determined by that party.

The second paragraph sets out necessary legislative, administrative or policy measures for either: parties requiring PIC; or “unless a party waives its sovereign right through a national decision posted on the ABS clearing house.” The criteria for measures include references without brackets to:

- information on how to apply for PIC;
- clear and transparent written decisions by the competent national authority;
- procedures for obtaining PIC, approval or involvement of ILCs for access to genetic resources, where applicable and subject to national legislation; and
- establishment of clear rules and procedures for requiring and establishing MAT.

Criteria that remain bracketed include: legal certainty, clarity and transparency of national ABS requirements; equal treatment in applications for access between foreign and domestic applicants and similar foreign applicants; simplified access procedures for non-commercial use in research in accordance with national law; provision for issuance of a permit or internationally recognized certificate as evidence of the decision to grant PIC; and administrative and judicial appeal procedures.

The third paragraph stipulates that parties shall make decisions to grant PIC available at the ABS clearing house.

The fourth paragraph is heavily bracketed and addresses how, in accordance with CBD Article 15(1), each party shall determine which of its genetic resources will be subject to PIC and shall inform the ABS clearing house accordingly.

**ACCESS TO TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES (ARTICLE 5 BIS):** Delegates held a first reading of the article on Monday, 12 July, and a second on Thursday, 15 July. The Republic of Korea requested reference to PIC “in accordance with national legislation.” Norway proposed references to ensuring compliance, addressing non-compliance, and cooperation in cases of violation.

**Outcome:** The article stipulates that parties shall take measures, as appropriate, with the aim of ensuring that TK associated with genetic resources that is held by ILCs is accessed in accordance with MAT and with the PIC or approval and involvement of ILCs, with the reference making it subject to national legislation remaining in brackets. Paragraphs remaining in brackets refer to: parties taking measures to ensure that

TK within their jurisdiction has been accessed and utilized in accordance to paragraph 1; parties’ measures addressing situations of non-compliance; and cooperation in cases of alleged violations.

**RESEARCH AND EMERGENCY SITUATIONS (ARTICLE 6):** Delegates held a first reading of the article on Monday, 12 July, and a second on Thursday, 15 July. A public research representative called for simplified access procedures, while fully respecting ABS and national sovereignty. The CEE requested reference to CBD Article 12 (Research and Training). Japan proposed reference to simplified access measures. GRULAC opposed reference to “facilitating” non-commercial research. Switzerland suggested a separate article on non-commercial research, stating that ABS should not affect biological resources that are trade commodities. The EU suggested additional text on: access to pathogens under the scope of other organizations or conventions; the importance of genetic resources for food and agriculture, food security and climate change adaptation; and sectoral approaches. In response, the African Group requested stating that there shall be no special considerations without fair and equitable benefit-sharing and compliance.

**Outcome:** The article’s title includes bracketed references to considerations relevant to “non-commercial” and emergency situations. It provides that parties shall create conditions to promote and encourage biodiversity research, with references to simplified measures on access for non-commercial research and to facilitating non-commercial research in brackets. Bracketed language refers to emergency situations, including threats to public health, food security or biological diversity, according to national legislation, and requires parties to provide for immediate access to pathogens of genetic resources falling also under the scope of other international instruments. Other bracketed paragraphs call for consideration of the importance of genetic resources for food and agriculture; sectoral approaches in the implementation and further development of the protocol; parties providing no special consideration for any sector or any use of genetic resources without adequate provision for benefit-sharing and compliance; and noting that domestic ABS laws will not affect biological resources that are traded and used as commodities.

**CONTRIBUTION TO CONSERVATION AND SUSTAINABLE USE (ARTICLE 7):** On Monday, 12 July, delegates addressed and accepted the formulation as in the Cali Annex.

**Outcome:** The article states that parties shall encourage users and providers to direct benefits arising from the utilization of genetic resources towards the conservation and sustainable use of biodiversity in support of the CBD objectives.

**TRANSBOUNDARY COOPERATION (ARTICLE 8):** Delegates held a first reading of the text on Monday, 12 July. On two options in the Cali Annex, Switzerland and Canada expressed preference for the option including separate paragraphs on transboundary cooperation on genetic resources and on TK, respectively; while India, the Philippines and the African Group preferred the option addressing both issues in the same paragraph. Eventually, the African Group proposed, and

delegates agreed on, accepting the first option, adding reference to the involvement of ILCs in the paragraph on transboundary cooperation on genetic resources. Australia, supported by the EU and Switzerland, proposed that parties “endeavor to cooperate,” rather than “cooperate.” India recommended reference to “more than one party” rather than “neighboring parties.”

**Outcome:** The article contains clean text on instances where the same genetic resources are found *in situ* within the territory of more than one party, those parties shall endeavor to cooperate, as appropriate, with the involvement of ILCs with a view to implementing the protocol. The same provision is made for transboundary traditional knowledge.

**TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES (ARTICLE 9):** Delegates discussed the article on Monday, 12 July, and in a late-night session on Thursday, 15 July. Regarding the provision on giving due consideration to customary laws, Canada, opposed by the LMMC, suggested limiting it to implementation of article 9, rather than of the entire protocol.

Regarding the provision that parties shall establish mechanisms to inform TK users about their ABS obligations, the Republic of Korea proposed reference to procedures for access, in addition to obligations and, following a proposal by GRULAC, agreed to additional reference to measures available through the ABS clearing house.

Canada, opposed by the African Group and GRULAC, proposed deleting a provision on exchange of genetic resources and TK among ILCs. Norway suggested specifying that customary use and exchange are compatible with conservation and sustainable use requirements.

GRULAC, opposed by Norway, suggested deleting the provision on encouraging users of publicly available TK to enter into benefit-sharing arrangements with knowledge holders, due to its weak wording. India proposed to use “require” rather than “encourage” as the operative word. New Zealand suggested that benefit-sharing arrangements should be with the rightful holders of TK within their indigenous and local communities. Canada proposed that parties, where appropriate, encourage the users of publicly available TK to take reasonable measures to enter into benefit-sharing arrangements with TK holders. Australia proposed to specify that it addresses publicly available TK “obtained by the users from a source different than the ILCs.”

**Outcome:** The article contains five paragraphs with numerous brackets. The first stipulates that parties shall take into account community-level procedures, indigenous and customary laws, and community protocols of ILCs in implementing their obligations under the protocol or the article, with all those specifics remaining in brackets. It further sets out that parties, with the effective participation of ILCs, shall establish mechanisms to inform potential TK users about their ABS obligations, including a bracketed reference on measures as made available through the ABS clearing house. Furthermore, parties shall endeavor to support, as appropriate, ILCs in development of: community protocols; minimum requirements for MAT; and model contractual clauses. Finally, parties shall not restrict customary use or exchange of genetic resources and associated TK among ILCs in accordance with CBD objectives.

The provision on publicly available TK remains bracketed and stipulates that parties encourage or require users of publicly available TK, which has been obtained by that user from a source other than an ILC, to take all reasonable measures to enter into fair and equitable benefit-sharing arrangements with the rightful holders of such knowledge within ILCs.

**NATIONAL FOCAL POINTS AND COMPETENT NATIONAL AUTHORITIES (ARTICLE 10):** Delegates negotiated this article on Monday, 12 July. Canada proposed that national focal points inform applicants wishing to access TK on procedures for obtaining PIC or approval and involvement of ILCs and establishing MAT, including benefit-sharing. GRULAC opposed reference to “approval and involvement” of ILCs. Eventually, delegates agreed on requiring national focal points to “make information available” to applicants, and to make competent national authorities responsible for granting access or, as appropriate, issuing written evidence that access requirements have been met.

**Outcome:** According to this article, the national focal points on ABS shall make available for applicants seeking access to genetic resources, information on procedures for obtaining PIC and establishing MAT, including benefit-sharing; for applicants seeking access to TK, information on procedures for obtaining PIC of ILCs and establishing MAT, including benefit-sharing; and information on competent national authorities, relevant ILCs and relevant stakeholders. Furthermore, competent national authorities are responsible for granting access or, as appropriate, issuing written evidence that access requirements have been met.

**ABS CLEARING HOUSE AND INFORMATION-SHARING (ARTICLE 11):** Delegates negotiated this article on Monday evening, mostly discussing which information should be included in the clearing house.

**Outcome:** The article requires parties to make available to the clearing house information required by the protocol, with bracketed references to information required pursuant to COP/MOP decisions and “without prejudice to the protection of confidential information.” Bracketed references on information to be included in the clearing house concern, *inter alia*: bilateral, regional and multilateral agreements; decisions on PIC; details of MAT; ILCs’ laws, protocol and procedures; and relevant competent authorities of ILCs.

**COMPLIANCE WITH ABS LEGISLATION (ARTICLE 12):** The first reading was undertaken in an evening session on Monday; following informal consultations on Tuesday, the second reading was carried out from Wednesday onwards.

**Paragraph 1:** Debate centered on whether governments are obligated to assist in ensuring compliance with national ABS laws of other countries, and whether to relate this obligation to the “utilization” of genetic resources or to “misappropriation.” Other issues included whether to assist in ensuring compliance with MAT; address misappropriation of TK; mention the country of origin or use other expressions such as provider country; and refer to international law in addition to national ABS law.

Canada and the EU supported reference to misappropriation, arguing that this provides more clarity for domestic implementation; GRULAC preferred any infringement of the protocol and the CBD, arguing that reference to misappropriation

limits measures to criminal sanctions; and the African Group and the Like-Minded Asia Pacific preferred utilization of genetic resources without PIC and MAT, to avoid a debate on the definition of misappropriation. The Republic of Korea proposed separating the concept of utilization from compliance with PIC and MAT, by proposing that: genetic resources should be utilized in accordance with PIC and MAT; and parties shall take appropriate measures to ensure that PIC has been obtained and that MAT have been established in accordance with national legislation. Norway stressed the importance of the role of the state in ensuring compliance with MAT, and the Philippines noted the need to ensure compliance with PIC and MAT according to national legislation. Japan preferred not to address compliance with MAT under this article, noting that compliance with the protocol requires only that MAT have been established. Delegates eventually agreed to an obligation for parties to take measures to provide that genetic resources utilized within their jurisdiction have been accessed in accordance with PIC, and that MAT have been established.

The African Group proposed reference to associated TK, which remained in brackets. Delegates also discussed, without reaching agreement, whether to refer to the country of origin, supported by GRULAC and the CEE; the party providing the genetic resources, supported by the EU; and the country in which the resources have been accessed, supported by Canada.

The African Group and Like-Minded Asia Pacific Group further requested reference to compliance with international legislation on ABS, to address the case of countries with no national ABS legislation, stressing that absence of national ABS legislation does not imply free access. The EU argued that absence of national legislation indicates that a party has not decided how to exercise its sovereign rights in accordance with the CBD and that the provisions of the CBD and the protocol do not apply directly to individuals, proposing the establishment of an international procedure for countries that have not been able to regulate access domestically. Norway, supported by the African Group and GRULAC, suggested referring to domestic ABS frameworks, to make the provision more inclusive. Delegates eventually agreed to refer to “domestic ABS regulatory requirements.”

**Paragraph 2:** Discussion centered on the type of measures to address situations of non-compliance, with delegates debating whether these should be only administrative or legal, or, as suggested by New Zealand, also policy ones, without reaching agreement. Then delegates discussed, without reaching agreement, an EU proposal creating a link with article 5 (access), by allowing parties to refrain from taking measures to address non-compliance if domestic ABS frameworks of another party providing misappropriated genetic resources was not in conformity with the list of criteria for parties’ measures on access spelled out in article 5.2. GRULAC, the LMMC and the African Group requested withdrawal of the proposal, noting that in cases of misappropriation, a court or administrative authority would only need to check whether PIC and MAT have been obtained. The EU highlighted the need to make provider countries’ obligations on users enforceable in user countries.

**Paragraph 3:** On cooperation in cases of alleged violations, delegates discussed, without reaching agreement, whether cooperation should concern cases of alleged violations of national legislation, or, as supported by the African Group and GRULAC, of international ABS legislation. Delegates then discussed, without reaching agreement, whether to qualify an obligation for parties to cooperate in cases of alleged violations by adding “as appropriate,” which was supported by the Republic of Korea. The EU stressed the need for a clear obligation with regard to cases of alleged violation of national ABS law.

**Outcome:** The title of the article on compliance with ABS legislation contains bracketed reference to international ABS law. Parties are required to take appropriate, effective and proportionate measures to provide that genetic resources utilized within their jurisdictions have been accessed in accordance with PIC and that MAT have been established, as required by the domestic ABS regulatory requirements of another party, or alternatively, the country of origin. References to derivatives and associated TK in this paragraph remain in brackets. Parties are further required to take appropriate, effective and proportionate administrative or legal measures, or in alternative legislative, administrative or policy measures, to address situations of non-compliance. Text allowing parties to refrain from taking such measures if the domestic ABS framework of another country was not in conformity with article 5.2 (criteria for parties’ measures on access) at the time of misappropriation remains bracketed in its entirety. Parties are required to cooperate in cases of alleged violations of ABS legislation, with references to “national law” and “Convention and protocol” remaining in brackets.

**MONITORING (ARTICLE 13):** The first reading of this article was undertaken in an evening session on Monday, 12 July. Following informal consultations on Tuesday, 13 July, the second reading based on the revised protocol text was carried out from Wednesday onwards.

Delegates discussed, without reaching agreement, whether to monitor only, or also track and report on the utilization of genetic resources, with the African Group preferring reference to all of these terms, while Canada opposed reference to tracking and, with the EU, noted lack of clarity regarding reporting. Delegates also discussed the purposes of these measures, with: the EU proposing “to create transparency”; GRULAC “to support compliance measures under the protocol”; Japan, supported by the Like-Minded Asia Pacific Group and Canada, “to support compliance measures under article 12.1”; and the African Group “to support compliance with PIC and MAT.” Delegates could not agree on whether to add reference to derivatives and associated TK in the chapeau, or on several items in the list of measures to support compliance, including on checkpoints, particularly intellectual property examination or patent and plant variety offices, and ILCs that may grant access to TK associated with genetic resources. Delegates also did not reach agreement on the minimum information to be contained in the internationally recognized certificate of compliance.

**Outcome:** The article title refers to monitoring and reporting the utilization of genetic resources, with bracketed references to tracking and associated TK. Parties are required to take

measures, as appropriate, to monitor, with bracketed references to tracking and reporting, utilization of genetic resources, with bracketed references to derivatives and associated TK, to support compliance, with the various bracketed references on purposes.

The article also includes a list of measures to monitor utilization of genetic resources, which contains bracketed references to mandatory disclosure or information requirements; intellectual property examination or patent and plant variety offices as checkpoints; and ILCs that may grant access to TK as checkpoints.

The whole paragraph on internationally recognized certificate of compliance is bracketed, with mandatory language on the minimum information and qualification as to “when it is not confidential” also bracketed. Minimum information items listed in brackets include: details of relevant ILC holders of TK; geographic location of access activity; link to MAT or confirmation that they were entered into; and confirmation that PIC was obtained, among others.

A paragraph providing for the COP/MOP to decide on the minimum content or consider additional modalities of the internationally recognized certificate of compliance is also bracketed in its entirety.

#### **NON-COMPLIANCE WITH MANDATORY DISCLOSURE REQUIREMENTS (ARTICLE 13 BIS):**

Delegates could not reach agreement on this new article, which was introduced during late-night negotiations on Monday, 12 July.

**Outcome:** According to the article, bracketed in its entirety, if a user fails or refuses to disclose pertinent information on the country of origin or source in cases where the claim is directly based on genetic resources and associated TK, the user should be given the possibility to remedy the omission within a specific time fixed under the relevant law; and the application shall not be further processed if the user continues to fail to make any declaration.

**COMPLIANCE WITH MAT (ARTICLE 14):** The first reading was undertaken in an evening session on Monday, 12 July; and informal consultations were held on Thursday, 15 July.

Delegates focused on an obligation for parties to take effective measures regarding non-compliance with MAT, with developed countries cautioning that measures in relation to MAT should not interfere with domestic contract law procedures. Delegates agreed to language on parties promoting the utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards; and clarified that cooperation between parties refers to assisting parties making claims, rather than to compliance with MAT. Brackets from the relevant paragraph, however, could not be removed pending confirmation from the EU. Delegates also decided that the COP/MOP should review the article’s effectiveness in accordance with article 26 (assessment and review), rather than reviewing the effectiveness of parties’ measures.

**Outcome:** In the article, parties are required to encourage providers and users of genetic resources to include provisions in MAT to cover dispute resolution; and ensure that an opportunity to seek recourse is available under their legal systems, consistent with applicable jurisdictional requirements, in cases of disputes

arising from MAT. Bracketed text requires parties to take effective measures, as appropriate, regarding non-compliance with MAT, including promoting utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards; and within further brackets, facilitating access to justice, including assistance to those seeking legal redress and facilitating cooperation between parties. Other bracketed text states that the effectiveness of article 14 shall be reviewed by the COP/MOP in accordance with article 26 of the protocol.

**INTERNATIONAL ABS OMBUDSPERSON (ARTICLE 14 BIS):** Delegates could not agree on this new article, which was introduced during late-night negotiations on Wednesday, 14 July.

**Outcome:** According to the article, bracketed in its entirety, an office of an ABS ombudsperson shall be established by the COP/MOP no later than two years after the entry into force of the protocol, to support developing countries and ILCs to identify breaches of rights and provide technical and legal support in ensuring effective redress of such breaches.

**MODEL CONTRACTUAL CLAUSES (ARTICLE 15):** Delegates discussed this article on Tuesday, 13 July. Canada requested reference to development “in collaboration with regional and international organizations.” The Philippines asked to suspend discussion pending negotiations on compliance, or address the subject matter under the article on capacity building. On Friday morning, during a second reading, delegates agreed to include the specification “cross-sectoral” alongside sectoral model contractual clauses, and to delete the term “menus” of model contractual clauses. They further agreed that the COP/MOP “take stock of” such clauses.

**Outcome:** The article requires parties to encourage, as appropriate, the development, update and use of sectoral and cross-sectoral model contractual clauses for MAT, with bracketed references to “voluntary” clauses, collaboration with international and regional organizations, and their development by or in consultation with users and providers. The COP/MOP is mandated to periodically take stock of the use of these clauses.

**CODES OF CONDUCT (ARTICLE 16):** Delegates discussed this article on Tuesday, 13 July. Canada, opposed by the African Group, requested reference to development “in collaboration with regional and international organizations.” On Friday morning, delegates agreed on a suggestion by South Africa to consistently refer to “voluntary codes of conduct, guidelines, best practices and/or standards.” Switzerland supported a reference that the COP/MOP consider the adoption of specific codes of conduct, guidelines, best practices and/or standards.

**Outcome:** The article requires parties to encourage, as appropriate, the development, update and use of voluntary codes of conduct, guidelines and best practices and/or standards in relation to ABS, with bracketed references to collaboration with international and regional organizations and their development by or in consultation with users and providers. The article further requires the COP/MOP to periodically take stock of the use of voluntary codes of conduct, guidelines and best practices and/

or standards and consider adoption of specific codes of conduct, guidelines and best practices, with bracketed reference to collaboration with international and regional organizations.

**AWARENESS RAISING (ARTICLE 17):** Delegates discussed this article on Tuesday, 13 July, and on the basis of the revised text of the protocol on Friday, 16 July. Canada suggested that parties' measures on awareness-raising address ILCs' protocols and guidelines. Switzerland proposed to include measures on education and training of users and providers of genetic resources, and involvement of stakeholders in the further implementation of the protocol. The IIFB, supported by several parties, requested specific reference to ILCs, along with stakeholders. On Friday morning, delegates agreed to refer to "indigenous and local communities and relevant stakeholders" throughout the paragraph.

**Outcome:** According to the article, parties are mandated to take measures to raise awareness of the importance of genetic resources, with bracketed references also to derivatives and associated TK, and related ABS issues, through measures including, *inter alia*: meetings and help desks for ILCs and relevant stakeholders; promotion of voluntary codes of conduct, guidelines and best practices and/or standards in consultation with ILCs and relevant stakeholders; and involvement of ILCs and relevant stakeholders in the further implementation of the protocol.

**CAPACITY (ARTICLE 18):** Delegates discussed this article on Tuesday, 13 July, and on the basis of the revised text on Friday, 16 July. The EU supported using the term "capacity development," while GRULAC and the African Group preferred "capacity building" but agreed to use the two terms in conjunction. Canada proposed that capacity "may, *inter alia*," rather than "shall," cover a list of key areas. Switzerland asked to add other relevant stakeholders, including the private sector. Canada proposed to amend the paragraph on capacity building for ILCs to extend it to all stakeholders. GRULAC requested specifying that the priorities should be identified by ILCs and, with the IIFB, supported by Australia, requested specific reference to women. The IIFB, endorsed by the African Group, asked to extend the special measures for ILCs to relate to access to genetic resources and associated TK.

On Friday morning, delegates agreed to: refer to capacity building and development, rather than capacity building only; insert reference to ILCs "and all relevant stakeholders"; place "emphasis on participation by" women from ILCs; and that capacity building should address, among other things, the development of countries' endogenous research capacity to add value to their own genetic resources.

**Outcome:** According to this article, parties are required to cooperate in capacity building, capacity development and strengthening of human resources and institutional capacities to effectively implement the protocol in developing country parties, through institutions and organizations and, in brackets, other relevant stakeholders, including the private sector. As the basis for appropriate measures in relation to the implementation of this protocol, parties should identify their national capacity needs and priorities through national capacities self-assessments, and

support the capacity needs and priorities of ILCs and relevant stakeholders as identified by them, and emphasize the needs and priorities of women.

The article indicates among the areas to be addressed by capacity building and capacity development, *inter alia*, the capacity of countries to develop their endogenous research capabilities to add value to their own genetic resources. Among the measures to build, develop and strengthen capacity, the article includes special measures to increase the capacity of ILCs with emphasis on enhancing the capacity of women within ILCs in relation to access to TK associated with genetic resources or, alternatively, genetic resources and associated TK.

**TECHNOLOGY TRANSFER AND COOPERATION (ARTICLE 18 BIS):** Delegates discussed this article on Tuesday, 13 July, and on the basis of the revised text on Friday, 16 July. Canada requested that parties "should," rather than "shall," collaborate in research. Switzerland recommended that parties' cooperation be subject to mutual agreement and specifying that creating a sound technological base is necessary to ensure biodiversity conservation and sustainable use. The Like-Minded Asia Pacific Group added that the technological base should also ensure the development of technologies utilizing genetic resources and their derivatives and associated TK.

On Friday morning, delegates agreed to state that parties "shall" collaborate and cooperate in technical and scientific research and development programmes, including biotechnological research activities, as a means to achieve the objective of the protocol. They also agreed on aiming to enable the development and strengthening of a sound and viable technological and scientific base for the attainment of the objectives of the Convention and the protocol.

**Outcome:** The article requires parties to collaborate and cooperate in technical and scientific research and development programmes, including biotechnological research activities, as a means to achieve the objective of the protocol. According to bracketed text, collaboration and cooperation shall or should include measures by developed countries that provide incentives to companies and institutions within their jurisdictions to promote and encourage access to technology in developing countries. Collaborative activities shall or should take place in the countries providing or the country of origin of genetic resources.

**NON-PARTIES (ARTICLE 18 TER):** Delegates discussed this article on Tuesday, 13 July. GRULAC proposed that non-parties submit information on activities and transactions regarding ABS relating to genetic resources and derivatives; and that ABS-related activities and transactions be consistent with the protocol and the Convention, which were bracketed.

**Outcome:** The article mandates parties to encourage non-parties to adhere to the protocol and contribute appropriate information to the clearing house, with bracketed text referring to activities and transactions regarding ABS relating to genetic resources and derivatives within their jurisdiction. The second paragraph is bracketed in its entirety: it requires that these activities and transactions be consistent with the protocol and the CBD.

**FINANCIAL MECHANISM AND RESOURCES**

**(ARTICLE 19):** Delegates discussed this article on Tuesday, 13 July. On the financial mechanism, the EU suggested referencing CBD Article 21 (Financial Mechanism). On capacity building, GRULAC and the African Group requested referring to “adequate, predictable and timely flow of new and additional financial resources”; the CEE added reference to parties with economies in transition; and the IIFB, supported by the Philippines, added the specific needs of ILCs, including women. These insertions remained in brackets.

**Outcome:** The article provides for the designation of the CBD financial mechanism, with reference to CBD Article 21 in brackets, as the financial mechanism for the protocol. On capacity building, the COP/MOP is mandated to take into account, in providing guidance with respect to the financial mechanism, the need for financial resources, with reference to adequate, predictable and timely flow of new and additional resources in brackets, by developing country parties, with bracketed reference to parties with economies in transition and the specific needs and requirements of ILCs, including women within these communities. Reference to adequate, predictable and timely flow of new and additional resources is also bracketed in the following paragraph on efforts to identify and implement capacity-building requirements for the protocol’s implementation.

**OTHER PROVISIONS (ARTICLES 20-31):** Delegates discussed institutional arrangements and final clauses on Tuesday night, 13 July, and in an informal group on Wednesday evening, 14 July. Discussions focused on article 20 on the protocol’s COP/MOP, with delegates discussing whether to: mandate the COP to keep under review the protocol’s implementation and make, within its mandate, the decisions necessary to promote its effective implementation; and convene the meetings of the COP/MOP in conjunction, in parallel or simultaneously with the COP. On relationship with the CBD (article 23), delegates discussed whether all the CBD provisions apply to the protocol *mutatis mutandis*, or only the CBD provisions on protocols apply to it. On assessment and review (article 26), delegates discussed whether to undertake an evaluation of the effectiveness of the protocol every five or six years, and whether this should include an assessment of its procedures. Delegates agreed that the protocol will be open for signature only by CBD parties.

**Outcome:** According to article 20 (COP/MOP), the CBD COP shall serve as the meeting of the parties to the protocol. A bracketed paragraph mandates the COP to keep under review the protocol’s implementation and make, within its mandate, the decisions necessary to promote its effective implementation. The first meeting of the COP/MOP is to be convened by the Secretariat in conjunction, simultaneously, in parallel or concurrently, with these options in brackets, with the first meeting of the COP after the date of entry into force of the protocol.

Article 21 (subsidiary bodies) is entirely bracketed. Article 22 (secretariat) stipulates that the CBD Secretariat shall serve as the protocol Secretariat. Article 23 (relationship with the Convention) states that except as otherwise provided in the protocol, the provisions of the Convention, or alternatively only

those related to its protocols, shall apply to the protocol, with brackets around “*mutatis mutandis*.” Article 24 (monitoring and reporting) addresses parties’ regular reporting duties. The title of article 25 includes two bracketed options: compliance with the protocol or facilitative mechanism to promote implementation of the protocol. Article 26 (assessment and review) provides that the COP undertake every five or six years alternatively, an evaluation of the effectiveness of the protocol, with reference to “including an assessment of its procedures” in brackets. According to article 27 (signature), the protocol will be open to signature only by parties to the CBD. Article 28 (entry into force) addresses the requirements for entry into force, including a bracketed reference to 50 required ratifications. Article 29 (reservations) stipulates that there cannot be reservations to the protocol. Article 30 (withdrawal) sets out the requirements for withdrawal. Article 31 (authentic texts) establishes that all UN language versions of the protocol are equally authentic.

**CLOSING PLENARY**

On Friday afternoon, Co-Chair Hodges congratulated delegates on the “tremendous” progress achieved towards adoption of the protocol in Nagoya, stressing that the substantive outcome of the resumed session is no longer a Co-Chairs’ text, but rather a negotiating text owned by parties. Co-Chair Casas reported on the outcome of the regional representatives’ consultations on “linkages,” which prioritized discussion on pathogens, derivatives/utilization, and the relationship with other instruments. Delegates endorsed the draft protocol (UNEP/CBD/WG-ABS/9/L.2/Rev.1) as a whole to form the basis of future negotiations, as amended following the regional representatives’ consultations, to include a footnote on the proposed common understanding of utilization of genetic resources under article 4.1 and 4.2 (benefit-sharing).

The Philippines requested reflecting his proposal for new text on benefit-sharing in special conditions in the draft protocol, noting support from Asia Pacific small island developing states, for the protocol to ensure that the rights to benefit-sharing of countries without ABS legislation are not prejudiced. Canada expressed satisfaction with the results of the resumed session and requested reflecting in the protocol, or in the meeting report, that: the draft protocol is no longer a Co-Chairs’ text, but a text negotiated by parties; there is balance in the draft; and that nothing is agreed until everything is agreed. Peru underscored the importance of agreement reached on key issues during the resumed session, in particular on the relationship with other instruments and compliance with domestic ABS requirements (articles 3 bis and 12.1) as encouraging steps in the right direction. She also expressed concern with regard to outstanding issues related to: express reference to derivatives directly or through common understanding, and linkages with the protocol’s scope, benefit-sharing and compliance; TK; and the need for comprehensive and straightforward clause on scope. Co-Chair Hodges proposed reflecting these observations in the meeting report, which was accepted.

Noting that the Co-Chairs had been approached by a number of delegations regarding an intersessional process before COP 10, Co-Chair Hodges called for proposals from delegates.

Malaysia called for maintaining the momentum by holding another intersessional resumed meeting before COP 10. He proposed Thailand as a meeting venue, with Thailand welcoming the proposal and noting that cabinet approval would be sought in this regard. Co-Chair Hodges proposed that the resumed meeting use the format of the inter-regional negotiating group, with the Working Group resuming to approve the outcome immediately prior to COP 10. He said parties and other participants will be notified about the meeting's exact date and location as soon as possible.

Expressing moderate optimism about the progress to date, Mexico, for GRULAC, welcomed the proposal to continue work before COP 10, and requested that during a future meeting regular plenary meetings be held to allow all parties to comment. The African Group committed to participating in the proposed process, as long as other parties are also ready to compromise and move beyond "red-lines" on critical issues. Japan said they would consider a financial contribution to ensure inclusiveness. The Working Group then adopted the report of the meeting (UNEP/CBD/WG-ABS/9/L.1/Add.1) with minor corrections.

Brazil, on behalf of the LMMC, highlighted that parties had engaged in negotiations in good spirit, but needed to also make compromises to reach the COP 10 deadline. The Republic of Korea expressed appreciation for the meeting's achievements but highlighted the need for further efforts. Ukraine, for the CEE, urged for further progress, noting time is sufficient to finalize and adopt the protocol in Nagoya. Emphasizing benefit-sharing and capacity building, Malawi, for the African Group, expressed hope that with political will and commitment to the Convention outstanding issues can be resolved. The Cook Islands, for Asia and the Pacific, highlighted the need to identify the key issues to be resolved to achieve a workable outcome. Haiti, on behalf of GRULAC, stressed the need for political will to reach satisfactory compromise on issues including derivatives and compliance. The EU expressed satisfaction with progress achieved and renewed momentum, and called on delegates to come back with refined instructions allowing for compromises. Japan highlighted the good spirit of collaboration in the meeting.

CBD Executive Secretary Ahmed Djoghlaif congratulated delegates and the Co-Chairs on the meeting's achievements, acknowledging the leadership and guidance of Japan and Germany, and noting that history will recall the ABS protocol as one of the most important environmental instruments.

The IIFB highlighted indigenous peoples' fundamental role in biodiversity conservation and sustainable use, and urged protection of their collective rights to genetic resources and associated TK within any international instrument on ABS. New Zealand, on behalf of the Like-minded in Spirit Group of Women, acknowledged the support of all delegates in including a gender perspective in the ABS protocol.

Following the customary exchange of courtesies, Co-Chair Hodges acknowledged the important role played by the *Earth Negotiations Bulletin* and suspended the meeting at 6:47 pm.

## A BRIEF ANALYSIS OF RESUMED ABS 9

Touted as the ultimate chance to complete the negotiation of an international ABS regime before COP 10, the resumed session of ABS 9 was perceived as the week that would either make or break CBD's new and long-awaited protocol. After seven long days and nights of negotiation in Montreal, delegates unanimously agreed that the meeting had created the much needed momentum, but additional steps were necessary to ensure that this momentum is translated into a successful conclusion at COP 10. To bridge the distance from Montreal to Nagoya, delegates decided to reconvene the inter-regional negotiating group before COP 10. The unanimous support for this intersessional meeting and the serious commitment shown by all delegations in enduring the tour de force negotiations in Montreal may be the best indication yet for a successful conclusion in Nagoya. The lengthy list of complex and contentious cross-cutting issues still to be resolved, however, projected a shadow on progress achieved.

### THE ABC OF ABS

Against the background of the procedural debates that had bogged down the first part of ABS 9 in Cali, the resumed session started out on a positive note, with all delegates accepting, without reservation, the Cali Annex as the basis for negotiation. Delegates also quickly agreed to tackle first the core provisions of the protocol—access, benefit-sharing and compliance, or the ABC of ABS, as the Co-Chairs labeled them. There is general understanding that the protocol should at least provide guidance on the implementation of the CBD ABS-related provisions, including access subject to prior informed consent (PIC), use based on mutually agreed terms (MAT) between providers and users of genetic resources and associated traditional knowledge, and compliance with the ABS-related legislation of the provider country, including benefit-sharing obligations. On the surface, the challenge of striking a deal between user and provider countries may seem straightforward: balancing transparent and clear provisions on access with requirements for users to share the benefits, supported by provisions to ensure compliance with PIC and MAT. The ABC provisions are, however, loaded with complex, and in some respects, emerging legal issues that require imaginative solutions. They are also tightly interlinked with other provisions in the regime, some of them politically sensitive due to their links to other fora, particularly trade and intellectual property related ones. This resulting web of legal complexity and political pitfalls makes it hard to distinguish how the final deal will be struck.

### INTERLINKAGES—MANAGING LEGAL COMPLEXITY

Many of the key terms used in the draft protocol refer to concepts for which delegates still need to develop a common understanding, such as utilization of genetic resources and its relation to derivatives, pathogens, and traditional knowledge in the public domain. Often, ABS negotiators have had to break new legal ground with respect to capturing the pace of and regulating scientific and technological advances, both to bridge different domestic-law approaches and to ensure that they lead to practicable and unambiguous international legal provisions. In

contrast to previous meetings, where such Babylonian confusion proved to be a sure recipe for disaster, feeding mistrust, delegates took a more reasoned approach this time, identifying a number of “cross-cutting issues” and addressing them in constructive small group discussions.

This approach was most successful with respect to developing a common understanding on utilization of genetic resources, which can be of use in addressing the long-standing issue of derivatives. The informal group produced a comprehensive “description” of utilization in scientific terms, which attempts to capture both the use of a genetic resource as information through research and development, as well as subsequent applications and commercialization. This description captures both the uses of genetic information as well as that of naturally occurring compounds, and could be a way to reflect genetic resources and derivatives in a single definition. This could provide a solution to the tensions between developing countries that wish to ensure a broad basis of activities and uses of resources triggering benefit-sharing, and developed countries who have largely opposed inclusion of derivatives, due to the term’s conceptual uncertainties and potential conflicts with trade in commodities.

Another cross-cutting issue touching upon several protocol provisions is the role of the Convention and the protocol itself as opposed to national ABS law. The African Group argued that the CBD and the protocol can be applied at the national level, entailing a default obligation to obtain PIC in the absence of national legislation—given the diverging capacities of countries to swiftly enact domestic ABS frameworks. The EU argued instead that a party needs to enact domestic legislation in order to exercise its sovereignty to require PIC and “activate” its right to benefit-sharing. These different interpretations not only have implications for the mechanisms to be created by the protocol, but also influence the negotiating dynamics leading to frequent misunderstandings and occasional accusations of bad faith.

Negotiations on the scope of the future protocol are also tied to a number of other provisions, especially in terms of the relationship with other relevant international instruments. On this issue, the interest of provider countries for an all-inclusive protocol created frictions with the interest of users to provide room for the development of specialized regimes that take into account the needs and practices of specific user communities, such as plant breeders or microbial researchers. Substantive progress towards accommodating both concerns was achieved at this meeting, which almost led some delegates to tout victory when a general understanding was reached that the ABS regime should be recognized as the “umbrella regime” with regard to all genetic resources and that specialized regimes should take its provisions into account, without pre-empting the possibility to develop specific rules in specific fields. The outstanding question is now how to formulate this in an unambiguous way so that both existing specialized regimes, such as the ITPGR, and future regimes are covered.

## **THE TOXIC ISSUES—CIRCUMVENTING POLITICAL PITFALLS**

In addition to these interlinked issues, there are a number of “toxic” items, on which positions are entrenched in a seemingly permanent deadlock. The difficulty with these issues is that their resolution seems to require unilateral concessions by either provider or user countries, which makes it difficult to reach compromise on the specific issues, but creates a need to reciprocate on other issues in order to develop a balanced overall package.

Access to pathogens is one of these issues. It was brought up for the first time by the EU in Paris during ABS 7: developed countries insist that pathogens be excluded from the regime’s scope arguing that human health-related concerns should be addressed by the World Health Organization, pointing to the ongoing negotiations under the Pandemic Influenza Preparedness Framework for sharing influenza viruses and access to vaccines and other benefits. Developing countries see this as an attempt to exclude a highly profitable sector from the regime, arguing that emergencies could be addressed through expedited access procedures as long as benefit-sharing is secured, thus not requiring an exclusion.

Traditional knowledge seems to be another explosive issue. The EU and Canada prefer to address all matters related to traditional knowledge outside the CBD—in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization (WIPO). Developing countries, instead, wish to ensure that traditional knowledge is covered in the protocol, in order to successfully address misappropriation. They also fear that moving the issue to WIPO could weaken the CBD obligation to share benefits, because of the risk of losing sight of the distinction between traditional knowledge associated with genetic resources and other traditional knowledge. Dealing with publicly available traditional knowledge, such as knowledge about the healing properties of plants, proved to be another bone of contention, with the challenge being to devise a system that controls and monitors access to and use of such knowledge, without subjecting it to the requirements of intellectual property protection, while at the same time ensuring sharing of benefits with knowledge holders.

Another issue that has frequently poisoned the atmosphere of ABS negotiations is the question of using patent offices as checkpoints, in relation to the broader issue of monitoring and tracking the utilization of genetic resources and more specifically linked to disclosure requirements. Provider countries view disclosure requirements, certificates and checkpoints as essential components of a monitoring system, and necessary to track all forms of utilization of genetic resources and enforce PIC, MAT and benefit-sharing. User countries, on the other hand, have serious concerns about burdening patent offices or introducing any kind of additional requirements to patent-related processes, pointing to the increased costs and time required to process patent information, as well as issues regarding confidential information.

**UNLOCKING THE CORE**

Reportedly, in their closed door meeting, regional group leaders came up with a strategy to resolve the complex interlinkages and contentious issues surrounding the core of the ABS regime by prioritizing those with the highest potential for domino-effect deal-striking: the concept of utilization, pathogens and the protocol's relationship with other instruments. These three are believed to provide the key to unlock negotiations on other issues by providing the necessary clarity and common understanding between provider and user countries. They, however, also noted that some countries, who had exhausted their mandates to compromise at this meeting, will have to do some serious homework and get revised instructions in order to be in a position to accept the deal once a compromise formula has been found. Most delegates evaluated these tasks as difficult, but doable. If the re-resumed session, which has been tentatively scheduled for September, succeeds in maintaining the constructive spirit in Montreal, the fulfillment of the mandate to adopt an international ABS regime at COP 10 remains within reach.

**UPCOMING MEETINGS**

**WIPO IGC Intersessional Working Group:** The first intersessional working group of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization (WIPO) will focus on traditional cultural expressions. **dates:** 19-23 July 2010 **location:** Geneva, Switzerland **contact:** WIPO Secretariat **phone:** +41-22-338-9111 **fax:** +41-22-733-5428 **e-mail:** grtkf@wipo.int **www:** [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=20443](http://www.wipo.int/meetings/en/details.jsp?meeting_id=20443)

**International Conference on Biodiversity Conservation in Transboundary Tropical Forests:** This Conference is organized by the International Tropical Timber Organization (ITTO), in collaboration with the CBD Secretariat and IUCN, with the support of the Government of Ecuador, in the framework of the International Year of Biodiversity. Its results will be forwarded to CBD COP 10. Its objective is to review the status and ways ahead for the conservation, management and financing of biodiversity in tropical transboundary conservation areas. **dates:** 21-24 July 2010 **location:** Quito (Pichincha), Ecuador **contact:** ITTO Secretariat **phone:** +81-45-223-1110 **fax:** +81-45-223-1111 **e-mail:** rfm@itto.int **www:** [http://www.itto.int/en/workshop\\_detail/id=2245](http://www.itto.int/en/workshop_detail/id=2245)

**GRULAC ILC Capacity-Building Workshop on the CBD:** The sixth Latin American and Caribbean Indigenous and Local Community Capacity-Building Workshop on the CBD will address issues relevant to Article 8(j) and ABS. **dates:** 11-13 August 2010 **location:** Panama City, Panama **contact:** CBD Secretariat **phone:** 1-514-288-2220 **fax:** 1-514-288-6588 **e-mail:** secretariat@cbd.int **www:** <http://www.cbd.int/doc/notifications/2010/ntf-2010-140-tk-en.pdf>

**Inter-regional Group on ABS:** The inter-regional negotiating group on ABS is expected to meet to finalize the ABS protocol for possible adoption by CBD COP 10. **dates:** September 2010

[tentative] **location:** Bangkok, Thailand [tentative] **contact:** CBD Secretariat **phone:** 1-514-288-2220 **fax:** 1-514-288-6588 **e-mail:** secretariat@cbd.int **www:** <http://www.cbd.int/meetings/>

**High-Level Event on Biodiversity:** A high-level event is scheduled to mark the International Year of Biodiversity, on the eve of opening the general debate of the sixty-fifth session of the UN General Assembly. **date:** 22 September 2010 **location:** UN Headquarters, New York **contact:** CBD Secretariat **phone:** +1-514-288-2220 **fax:** +1-514-288-6588 **e-mail:** secretariat@cbd.int **www:** <http://www.cbd.int/doc/press/2010/pr-2010-04-16-unga-en.pdf>

**Biosafety Protocol COP/MOP 5:** The fifth Meeting of the Parties to the Cartagena Protocol on Biosafety is expected to adopt a supplementary protocol on liability and redress in the context of Article 27 of the Protocol. It will be preceded by a three-day meeting of the Friends of the Co-Chairs' group on liability and redress, held from 6-8 October 2010. **dates:** 11-15 October 2010 **location:** Nagoya (Aichi), Japan **contact:** CBD Secretariat **phone:** 1-514-288-2220 **fax:** 1-514-288-6588 **e-mail:** secretariat@cbd.int **www:** <http://www.cbd.int/mop5/>

**CBD COP 10:** The tenth Conference of the Parties to the Convention on Biological Diversity is expected to, *inter alia*, adopt a protocol on ABS, assess the achievement of the 2010 target to reduce significantly the rate of biodiversity loss and adopt the Convention's new strategic plan. **dates:** 18-29 October 2010 **location:** Nagoya, Japan **contact:** CBD Secretariat **phone:** +1-514-288-2220 **fax:** +1-514-288-6588 **e-mail:** secretariat@cbd.int **www:** <http://www.cbd.int/cop10/>

**GLOSSARY**

ABS	Access and Benefit-sharing
CBD	Convention on Biological Diversity
CEE	Central and Eastern Europe
COP	Conference of the Parties
COP/MOP	Conference of the Parties serving as the Meeting of the Parties
GRULAC	Latin American and the Caribbean Group
IIFB	International Indigenous Forum on Biodiversity
ILCs	Indigenous and local communities
IPRs	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
TK	Traditional knowledge
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
WIPO	World Intellectual Property Organization