



Briefing Note on the CBD ABS Negotiations

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SUMMARY OF THE INTERREGIONAL NEGOTIATING GROUP ON ACCESS AND BENEFIT-SHARING: 18-21 SEPTEMBER 2010

The Interregional negotiating group (ING) established to negotiate a draft international protocol on access and benefit-sharing (ABS) to implement the third objective of the Convention on Biological Diversity (CBD) met from 18-21 September 2010 in Montreal, Canada. The ING was established during the ninth session of the Ad hoc Open-ended Working Group on Access and Benefit-Sharing, held 22-28 March 2010 in Santiago de Cali, Colombia. The ING comprises 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 Conference of the Parties (COP) Presidencies. The spokespersons and representatives can change freely, and discussions are open to the attendance of all Working Group participants. The ING is co-chaired by the ABS Working Group Co-Chairs Timothy Hodges (Canada) and Fernando Casas (Colombia). The ING reconvened during the resumed session of ABS 9, from 10-16 July 2010 in Montreal, Canada, during which it proved to be an efficient negotiation setting. The revised draft protocol, contained in the Annex to the ABS 9 report (UNEP/CBD/COP10/10/5/Add.4) served as basis for further negotiations (the Montreal Annex).

The results of the September meeting (UNEP/CBD/WG-ABS/9/ING/1) will be transmitted to the ABS Working Group, which will reconvene briefly in Nagoya, Japan on 16 October 2010, immediately prior to the tenth session of the Conference of the Parties (COP 10) to the Convention on Biological Diversity, which is expected to finalize and adopt the protocol.

This meeting achieved some progress towards an improved common understanding on key elements of the international ABS regime, most notably on the concept of utilization of genetic resources and its relation to derivatives. Some progress was also achieved on provisions on benefit-sharing and access. Nevertheless, the key issues are still outstanding and most delegates expressed deep concern about the prospect for concluding the negotiation of an ABS protocol during COP 10. While the atmosphere during the meeting was generally constructive, delegates were unable to build on the momentum

gained during the resumed session of the ABS Working Group in July, which many had seen as the beginning of the final stretch of the negotiations.

OPENING SESSION

On Saturday morning, 18 September, Co-Chair Hodges opened the meeting, reminding participants of their mandate to finalize the text of the ABS protocol in time for adoption at COP 10, and noting that the short resumption of ABS 9 immediately prior to COP 10 will not provide an opportunity for further negotiation. He also underscored the need for COP 10 to focus on the negotiations of a COP decision accompanying the protocol, as well as determining interim arrangements towards ratification, the place of the ABS protocol in the context of the strategic plan, and relevant financial considerations. Co-Chair Casas proposed to negotiate outstanding issues in the following order: institutional clauses; the concept of “utilization of genetic resources” in the context of benefit-sharing and access; traditional knowledge (TK); compliance; scope and relationships with other instruments, in conjunction with questions related to non-commercial research and emergency situations; all remaining articles of the protocol including definitions; and the preamble.

CBD Executive Secretary Ahmed Djoghlaif underscored the intention to obtain high-level commitment for the implementation of the three CBD objectives, the ABS protocol and the strategic plan at the UN General Assembly high-level event on biodiversity to be held on 22 September 2010. He also reported that following a retreat among biodiversity-related conventions, the proposed strategic plan for the CBD will be presented as a strategic plan for all biodiversity-related conventions, and that Monique Barbut, Chief Executive Officer and Chairperson of the Global Environment Facility, committed to present COP 10 with concrete proposals to support an accelerated ratification process for the ABS protocol.

NEGOTIATION OF THE ABS PROTOCOL

Delegates considered outstanding issues on several parts of the draft ABS protocol in the ING setting as well as in small groups. Institutional provisions were discussed in the ING on Saturday morning, 18 September. The provision on fair and equitable benefit-sharing was addressed on Saturday night and Sunday morning, followed by the provisions on access. On Monday, the ING considered compliance and related measures,

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while provisions relating to TK were discussed in a small group. On Monday night, the ING was suspended to allow for discussions in two parallel small groups on the definition of utilization and scope and relationships with other instruments. The small group on utilization reconvened on Tuesday morning as well as another small group to address access for non-commercial research and emergencies.

The remainder of this report summarizes the discussions on substantive items in the order in which the relevant articles appear in the draft ABS protocol.

USE OF TERMS (ARTICLE 2): Utilization of genetic resources: The definition of utilization of genetic resources was discussed in the context of fair and equitable benefit-sharing on Saturday and in a small group on Monday night and Tuesday morning. The issue proved to be very contentious and tensions resurfaced also during the discussions on access and throughout the meeting. The initial discussion in the context of article 4 was based on the common understanding on the term “utilization of genetic resources” reached during the resumed session of ABS 9 contained in a footnote to article 4. The common understanding states that “utilization of genetic resources includes/means the conduct of research and development, on the genetic and biochemical makeup/composition of genetic material/biological resources, including through the application of biotechnology as defined under CBD Article 2, as well as subsequent applications and commercialization.” The understanding reflects different positions on the inclusion of derivatives under the scope of the protocol. At the resumed session of ABS 9, delegates had agreed to use this language as preliminary text to explore a common understanding on what constitutes “utilization of genetic resources/derivatives” as they appear in the draft protocol. Delegates also recognized that the potential use and placement of this language will depend on its context within the draft protocol.

On Saturday, delegates discussed whether to place the language of the common understanding on utilization into protocol article 2. Canada cautioned that the common understanding may not have the same meaning each and every time it is used in the protocol. On the wording of the common understanding, the Latin American and Caribbean Group (GRULAC), the European Union (EU) and Switzerland proposed starting the definition with “utilization means.” The African Group preferred “includes/means” to allow broader interpretation. India preferred “include” to allow dynamic interpretation in light of scientific developments.

Australia proposed reference to “genetic and biochemical properties,” rather than “makeup/composition.” The African Group preferred “genetic, chemical and biochemical makeup/composition,” Canada “makeup of genetic material,” and the EU “composition.”

Opposed by the EU, the African Group proposed adding reference to utilization through “selection and breeding” and “other chemical techniques as to be described in an annex to the protocol;” and the Philippines suggested adding that utilization should also take into account the development of emerging and future technologies involving genetic resources. The Like-Minded Asia-Pacific cautioned against referring to specific technologies, stressing the broad character of the definition of biotechnology under the CBD. He also noted that derivatives

may be relevant in the context of other situations independent of the concept of utilization, such as naturally occurring biochemical compounds.

After informal consultations, the African Group and the Philippines withdrew their proposals, noting their understanding that the integrity of the understanding on utilization would be maintained. Raising concerns about inclusion of subsequent applications and commercialization, the EU called for a clear understanding on how the definition of utilization would be negotiated. Canada, Australia and Japan also stressed the need to revisit the definition. Acknowledging the need to renegotiate some aspects, the Like-Minded Asia-Pacific reiterated their change in position was conditional on maintaining the general thrust of the understanding reached. Delegates then agreed to move the formulation contained in a footnote of article 4 into article 2, with the understanding that the phrase was to be used as a preliminary definition or description of utilization in order to allow for the negotiation of other parts of the ABS protocol.

On Sunday, during the negotiations on access, the EU raised concerns about using the common understanding, indicating that they needed to consult with Brussels. New Zealand and Australia initially raised similar concerns, but were in a position to confirm that they had a mandate to continue negotiating on the basis of the common understanding.

On Monday afternoon, during the deliberations on compliance, Canada noted major concerns in using the common understanding on utilization in the context of compliance and requested bracketing all references to utilization throughout the draft protocol. She underlined that Canada was nevertheless prepared to continue negotiating. Co-Chair Hodges suggested that delegates could either suspend the negotiations, accept bracketing of all references to the common understanding and continue negotiating the provisions on compliance, or return to negotiating the definition of utilization in order to resolve the concerns of Canada and others. GRULAC, the African Group, the Like-Minded Megadiverse Countries (LMMC) and the Like-Minded Asia-Pacific expressed their disappointment about the departure from the agreement to negotiate the protocol based on the common understanding on utilization, but supported continuing negotiating the provisions on compliance.

The African Group suggested an exchange of views about what is meant by the term derivatives and what types of derivatives would be covered by the common understanding on utilization, in order to defuse concerns and open the way to continue negotiations. After informal discussions between the Co-Chairs and regional group leaders, delegates decided to continue negotiating on compliance and addressing utilization in a small group, which convened on Monday late into the night and on Tuesday morning.

In the small group, delegates explored the problems arising when applying the common understanding to different parts of the protocol. The EU pointed to the problem of defining derivatives in a coherent manner and explained that the common understanding would lead to heavy burdens with regard to compliance and lead to a reopening of previously agreed provisions. GRULAC said the understanding created problems both with regard to access and compliance and pointed to the need to cover naturally occurring metabolites, rather than derivatives, since these are at the basis of the majority of benefits arising from the utilization of genetic resources. Japan

inquired whether metabolites would be covered by the phrase “subsequent application and commercialization” in the common understanding. Canada suggested developing a self-standing definition of derivatives.

The group then developed separate definitions of utilization for the different sections of the protocol relating to access, benefit-sharing and compliance, as basis for further discussion and to improve understanding of the concerns arising out of the application of the common understanding across the protocol. The group produced a non-paper containing four options for the definition of utilization as it relates to access, benefit-sharing and compliance.

On Tuesday, the small-group discussions focused on: a definition of derivative (as a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources even if they do not contain functional units of heredity); a definition of utilization, and reference to the CBD definition of biotechnology.

One participant requested adding reference to biological resources to the definition of utilization, opposed by two other representatives who cautioned against stretching the concept of access to genetic resources under the CBD, and that the definition of utilization could not be agreed upon at this point. Delegates eventually agreed to a formulation of utilization for negotiation at a later stage as meaning “to conduct research and development of genetic and biochemical composition of genetic material/biological resources/genetic resources, including through the application of biotechnology as defined in CBD Article 2” (Use of Terms). Delegates also came to the understanding that the definition of utilization would be connected to: article 4 (benefit-sharing) in conjunction with reference to “subsequent applications and commercialization” and MAT; article 5 in relation to the expression “access to genetic resources for their utilization;” and article 12.1, with reference to the expression “utilized.”

Reporting to the ING, small group Chair Sem Shikongo (Namibia) noted a persistent political divide as to whether to require prior informed consent (PIC) for the genetic material that is contained in biological resources when it is accessed. The African Group underscored the political divide as to whether the protocol should include biochemical compounds that do not contain functional units of heredity. Delegates then discussed whether to include, in brackets, the definitions of utilization and derivatives in article 2, or rather insert a footnote clarifying that the two definitions had not been negotiated. Canada expressed strong preference for inserting a footnote, emphasizing that the proposal from the small-group discussion represents a conceptual approach that is hoped will find favor in capitals but was not even partially negotiated. The EU also stressed that some issues of general concern related to the definition of utilization still needed to be addressed.

Outcome: The article on use of terms now contains a new sub-paragraph, bracketed in its entirety, stating that: “utilization of genetic resources means to conduct research and development on the genetic and biochemical composition of genetic material/biological resources/genetic resources, including through the application of biotechnology as defined in CBD Article 2; and “derivative” means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if they do not contain functional

units of heredity. The sub-paragraph then cites the definition of biotechnology contained in CBD Article 2, namely: any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use. A footnote indicates that the article has not been negotiated.

SCOPE (ARTICLE 3): A small group, chaired by François Pythoud (Switzerland), convened on Monday evening to discuss articles 3 and 3 *bis* on scope and relationships with other instruments. Delegates discussed whether to encourage users of genetic resources to take measures to share benefits for genetic resources acquired before the entry into force of the protocol in situations where no access and benefit-sharing agreements have been established in accordance with the Convention. Delegates also made numerous, partly contradictory, additions to the text reflecting different views with regard to temporal scope and relationships with existing agreements.

In reporting to the ING, Pythoud proposed to delete any reference to temporal scope in the article on scope and rather develop a new article on genetic resources and associated TK acquired before the entry into force of the protocol. On proposed exclusions from the scope, he noted that continued divergences may be better solved in article 6 (considerations relevant to research and emergency situations) rather than in article 3.

Outcome: The article on scope contains numerous brackets around most of the substantive provisions on scope. The chapeau states that the protocol shall apply to genetic resources within the CBD’s scope and the benefits arising from the utilization of such resources as well as to TK associated with genetic resources within the CBD’s scope and the benefits arising from the utilization of such knowledge. In both phrases, references to CBD Article 15 (ABS), resources acquired after the protocol’s entry into force for a party providing such resources, and derivatives, remain bracketed.

The article further lists elements to be excluded from and included under the scope, which are bracketed in their entirety and contain numerous additional brackets. The list of exclusions comprises: human genetic resources; genetic resources beyond national jurisdiction; genetic resources contained in Annex 1 of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture; commodities in trade; genetic resources acquired prior to the protocol’s entry into force; human pathogens; and genetic resources in the Antarctic Treaty Area. The list of inclusions comprises: benefits arising from continuing and new uses of genetic resources and associated TK acquired before the CBD’s entry into force; genetic resources from the Antarctic Treaty Area; and genetic resources from marine areas beyond national jurisdiction.

Additional paragraphs in brackets address: application of the protocol to benefits, uses and continuing uses of genetic resources and derivatives arising from the date of the protocol’s entry into force; encouraging benefit-sharing with regard to uses of genetic resources and associated TK acquired before entry into force of the protocol in situations where no ABS agreements have been established in accordance with the CBD; and application of the protocol to TK associated to genetic resources acquired prior to the protocol’s entry into force and after such date.

RELATIONSHIP WITH OTHER INSTRUMENTS

(ARTICLE 3 BIS): In small-group discussions on Monday evening, delegates debated whether the article is not intended to create a hierarchy between the protocol and other international instruments, or subordinate the protocol to other international instruments. In reporting to the ING, Pythoud proposed that this be addressed as a package with relevant preambular paragraphs.

Outcome: This article incurred only minor changes compared to its formulation in the Montreal Annex.

FAIR AND EQUITABLE BENEFIT-SHARING

(ARTICLE 4): Benefit-sharing was discussed in the ING on Saturday and on Sunday.

Benefit-sharing obligation: Delegates discussed at length whether to include reference to a general benefit-sharing obligation and whether such a principle should refer to “every” utilization of genetic resources, and include references to mutually agreed terms (MAT) and supplier countries being countries of origin of genetic resources. After discussion, delegates eventually agreed to include reference to MAT. The Philippines and Indonesia expressed preference for “every” utilization, opposed by the EU and Canada, with the EU noting that some countries do not require PIC or benefit-sharing. The Like-Minded Asia-Pacific clarified that not requiring PIC does not imply waiving rights to benefit-sharing. GRULAC agreed to delete “every,” provided the definition of utilization be maintained and, with India, said the same held true for their agreement to delete reference to derivatives.

GRULAC, India and the Like-Minded Asia-Pacific insisted on stating that provider countries are countries of origin or countries that have acquired the resource in accordance with the Convention, with GRULAC suggesting reference to CBD Article 15.3 (genetic resources provided by contracting parties). The EU explained that this language defines genetic resources, not provider countries, and raised concerns that users cannot be expected to verify whether genetic resources have been acquired in accordance with the Convention. The Republic of Korea suggested defining the term “providing party” under use of terms. The African Group underscored the need to provide not only for benefit-sharing for genetic resources from the country of origin, but also when the country of origin is not known, when multiple countries provide resources, or when resources are accessed in areas beyond national jurisdiction. GRULAC emphasized that no *ex situ* centres and intermediaries should accrue benefits from utilization.

Co-Chair Casas then suggested addressing access before trying to resolve the principle of benefit-sharing. The Like-Minded Asia-Pacific opposed, urging to clarify who benefits will be shared with, before addressing access, in particular with regard to intermediaries, such as *ex situ* collections in user countries. Norway and Switzerland suggested addressing Article 2 (use of terms) first, and to base discussions on benefit-sharing on CBD Article 15.7 (sharing benefits of research and development) with regard to the definition of provider country. After an informal meeting between the Co-Chairs and regional group speakers, Co-Chair Hodges suggested that the Co-Chairs draft compromise text on the general principle on benefit-sharing and a list of key cross-cutting issues that need to be resolved before moving on to other issues.

On Sunday afternoon, Co-Chair Hodges presented text stating that “in accordance with CBD Article 15.3 and 15.7, benefits arising from the utilization of genetic resources shall be shared in a fair and equitable way with the party providing such resources that is the country of origin of such resources or a party that has acquired the genetic resources in accordance with the Convention. Such sharing shall be upon MAT.” He asked delegates to accept this text as tentatively agreed. As key cross-cutting issues he proposed: status of *ex-situ* collections, bilateral and multilateral approaches to benefit-sharing, and temporal and geographical scope, noting delegates should discuss these issues with the entirety of the protocol in mind, and be prepared to come back to them when addressing other issues. Central and Eastern Europe (CEE) supported the Co-Chairs’ proposal. The EU and the Like-Minded Asia-Pacific asked to clarify the meaning of “tentative” agreement, stressing the need to renegotiate the language after discussing other issues. Indigenous and Local Communities (ILCs) urged to address benefit-sharing with ILCs.

Noting lack of progress towards firm agreement on benefit-sharing, the LMMC, GRULAC and the African Group stated that at COP 10 they would not support a decision on the new CBD strategic plan or the financial strategy if the ABS protocol is not adopted. The EU and Canada acknowledged the linkages between ABS, financing and the strategic plan, but insisted on the opportunity to further reflect on the text on benefit-sharing. Delegates then decided to retain the Co-Chairs’ proposal, including a footnote stating that the text is tentatively agreed.

The African Group proposed an additional paragraph on ensuring that benefits arising from the utilization of genetic resources and associated TK that is held by ILCs is shared in a fair and equitable way with these communities based on MAT. Delegates agreed to revisit this article after discussing TK.

Legislative, administrative and policy measures: Delegates debated whether parties shall take measures “to ensure benefit-sharing;” “with the aim to ensure benefit-sharing,” or “with the aim to share benefits.” The Like-Minded Asia-Pacific favored “to ensure,” opposed by the EU and Canada, noting this language would be legally inappropriate. After lengthy discussion, delegates agreed to language stating that in order to implement Article 4.1, parties shall take such measures “with the aim of ensuring” benefit-sharing.

Types of benefits: Canada and Japan requested deleting reference to CBD Articles 8(j) (TK), 16 (Technology Transfer) and 19 (Handling of Biotechnology and Distribution of Benefits), with Canada noting that these do not directly address benefit-sharing and MAT. The Like-Minded Asia-Pacific stressed that Articles 16 and 19 address technology transfer and participation in research based on MAT and requested stating that benefits “shall,” rather than “may,” include monetary and non-monetary benefits. The EU explained that these types of benefits are included in the protocol annex as well as in protocol article 18 *bis* (technology transfer and cooperation). GRULAC insisted on reference to Article 8(j). The African Group and Norway suggested simplified language stating that “benefits may include monetary and non-monetary benefits, including but not limited to those listed in Annex 1.” While all delegates agreed to this language, the Like-Minded Asia-Pacific insisted on addressing reference to CBD Articles 16 and 19 in a separate paragraph.

Outcome: Article 4 states that benefits arising from the utilization of genetic resources shall be shared in a fair and equitable way with the party providing such resources that is the country or origin or a party that has acquired the genetic resources in accordance with the CBD, that such sharing shall be on MAT, and that parties shall take legislative, administrative or policy measures as appropriate to this end.

A new paragraph, bracketed in its entirety, requires parties to take administrative, legislative or policy measures, as appropriate, to ensure that benefits arising from the utilization of genetic resources and associated TK that are held by ILCs are shared in a fair and equitable way with these communities based on MAT.

The article further states that, to implement paragraph 1, parties shall take legislative, administrative or policy measures, as appropriate; and that benefits may include monetary and non-monetary benefits, including, but not limited to those listed in the annex of the protocol. Two footnotes indicate that this language is tentatively agreed; and that the following issues are outstanding: status of *ex situ* collections, bilateral/multilateral approach to benefit-sharing, temporal and geographical scope, and absence of MAT.

A paragraph that is bracketed in its entirety addresses the sharing of benefits arising out of the utilization of traditional knowledge associated to genetic resources.

ACCESS TO GENETIC RESOURCES (ARTICLE 5):
Access subject to PIC: The EU wished to remove brackets around reference to “subject to national legislation,” and the African Group proposed specifying instead “subject to domestic access and benefit-sharing regulatory requirements.” Parties decided to retain both options in brackets.

GRULAC, supported by Switzerland, the CEE and the Like-Minded Asia-Pacific, proposed referring to access to genetic resources “for utilization,” with the African Group suggesting explicit reference to the definition of utilization in protocol article 2. Canada remarked that the CBD does not pose such a condition, and the Like-Minded Asia-Pacific proposed inserting instead “including for utilization.”

The Like-Minded Asia-Pacific proposed referring to the “party providing such resources or a party that has acquired the genetic resources in accordance with the CBD,” while Canada favored “party providing such resources.” Following a concession from the African Group, delegates decided to delete bracketed reference to CBD Articles 9(d) (regulation of *ex situ* conservation) and 14 (Impact Assessment and Minimizing Adverse Impacts).

Japan proposed referring to access to genetic resources “for environmentally sound uses,” and the African Group proposed a new paragraph stating that “all applications for access shall be channeled through the competent national authority of the party where the applicant is domiciled and shall be accompanied by full environmental impact assessment (EIA) conducted by an independent third party, certifying that access requested is for environmentally sound uses as defined by the providing country.”

Access to genetic resources held by ILCs: Participants to the small group on TK debated options on ensuring the PIC or approval and involvement of ILCs when their genetic resources are accessed that would accommodate different scenarios with regard to domestic legislation and the relationship between

international and national law in different countries. While most countries accepted reference to PIC, some insisted on referring to the approval and involvement of ILCs instead, and delegates eventually agreed on language combining both options. Contentious debates ensued regarding references to national and international law. While ILC representatives, supported by some parties, strongly opposed any reference that would imply subordination of indigenous rights to national law, many countries insisted on keeping some reference to national law or domestic legislation.

Similar debates took place with regard to language specifying that ILCs “own” genetic resources, or “have the right to grant access” to them. Delegates tentatively agreed to language stating that the PIC or approval and involvement of ILCs is required where applicable law, national legislation or international law recognizes that ILCs own or otherwise have the right to grant access to genetic resources, while leaving references to “law,” “domestic legislation” and “international law” in brackets.

On measures to be taken by countries to ensure the PIC of ILCs or their approval and involvement, delegates decided to develop distinct options that would appropriately accommodate different situations with regard to domestic legislation and the relationship between international and domestic law.

Legislative, administrative and policy measures: Parties discussed whether the list of measures related to access is mandatory or a best endeavor. The EU requested mandatory language, offering to withdraw a proposal in article 12.2 (measures to address non-compliance) to link compliance with measures related to access. This was agreed upon by the African Group, with the Like-Minded Asia-Pacific recommending similar wording for access and benefit-sharing measures. GRULAC noted the need to also ensure that the list of compliance measures becomes mandatory.

Delegates then debated whether such measures should be taken by “parties requiring PIC,” or “unless a party determines that access to genetic resources shall not be subject to PIC.” The EU and Canada preferred the first option, noting that parties have a sovereign right not to require PIC, and that the norm should be that parties requiring PIC should take the measures listed in the article. GRULAC and the Like-Minded Asia-Pacific said the norm is that parties require PIC and suggested language to the effect that parties shall take measures, unless they make use of the exemption not to require PIC.

The African Group suggested that all parties post their decision with regard to PIC on the ABS clearing house, noting the importance of posting their decision not to require PIC for implementation. After lengthy discussion, delegates agreed to retain simplified versions of the two options for further discussion.

Delegates then agreed to a provision on legal certainty, clarity and transparency of national ABS requirements.

The African Group, the Like-Minded Asia-Pacific and the LMMC strongly opposed a provision requiring equal treatment in applications for access to genetic resources between similar domestic and foreign applicants and between similar foreign applicants from different parties, noting that this provision would hinder development of domestic capacities to utilize genetic resources. The African Group added that the requirement would undermine national sovereignty in developing ABS legislation. Recalling similar contentions during the negotiation of the

Bonn Guidelines, Norway suggested providing for a transparent framework on access. The EU suggested reference to fair and non-arbitrary rules.

Stressing the importance to ensure equal treatment for balance with requirements on benefit-sharing and user measures, Canada explained that this provision would apply only to applicants with comparable capacities and thus not disadvantage domestic applicants. He expressed willingness to consider the EU proposal. Delegates decided to leave the reference in brackets. The group also decided to defer references to facilitated procedures for access for non-commercial research and a requirement to provide for the issuance of a permit or internationally recognized certificate of origin.

On rules and procedures for requiring and establishing MAT, delegates discussed whether to include reference to MAT establishment “at the time of access.” Canada and the EU preferred to retain the reference, while others raised concerns that this would limit flexibility in negotiating MAT. On the list of terms, the EU and Canada insisted that the terms “may” *inter alia* include, whereas the African Group and the Like-Minded Asia-Pacific and the Philippines requested more prescriptive language. Delegates decided to defer the issue. On providing for appeals procedures, the Like-Minded Asia-Pacific said these can only apply to existing contracts but not to the decision to grant access, as the latter would undermine national sovereignty.

Outcome: Article 5 states that access to genetic resources, with reference to “including for their utilization” and “as defined in article 2 of the protocol” in brackets, shall be subject to PIC of the party that provides such resources that is the country of origin or a party that has acquired the genetic resources in accordance with the Convention, or the country of origin, with all these options in brackets. Brackets also surround “subject to national legislation” and “subject to domestic ABS regulatory requirements.”

A new paragraph, bracketed in its entirety, indicates that all applications for access shall be channelled through the competent national authority of the party where the applicant is domiciled and be accompanied by full EIA, conducted by an independent third party, certifying that the access requested is for an environmentally sound use as defined by the provider country.

The article further requires that parties take legislative, administrative or policy measures in relation to access, unless the party determines not to require PIC, or unless a party waives its sovereign right through a national decision posted on the ABS clearing-house, with both options in brackets. Three bracketed options then require parties to: provide for equal treatment in applications for access between similar domestic and foreign applicants and between similar foreign applicants of different parties; avoid application of discriminatory rules in processing access permits except where such rules aim at advancing local, non-commercial biodiversity and ecosystem research and education; and provide for fair and non-arbitrary rules and procedures on accessing genetic resources.

ACCESS TO TK ASSOCIATED WITH GENETIC RESOURCES (ARTICLE 5 BIS): This article was discussed by the small group on TK on Monday. On references to national law, the Small Island Developing States called for specific reference to the UN Declaration on the Rights of Indigenous Peoples whenever national law is mentioned, or to state “in accordance with national law, and, whenever appropriate,

with international legislation.” ILCs reiterated that language subjecting international indigenous rights to national legislation was unacceptable, suggesting to refer to applicable law only. The African Group insisted on “in accordance with national law.”

RESEARCH AND EMERGENCY SITUATIONS

(ARTICLE 6): This article was discussed in a small group on Tuesday morning. On non-commercial research, the group discussed whether to refer to “simplified measures” or “facilitated procedures” on access to genetic resources for the purpose of research relevant for biodiversity conservation and sustainable use. On change of intent, several developing-country regions requested inserting language on change of intent of research to cover downstream commercialization. Delegates eventually agreed to add the words “taking into account the need to address a change of intent for such research.” The group then discussed a proposal that the first session of the COP/MOP should adopt guidance to implement the article. Several groups raised concerns since there was not sufficient clarity on the meaning of the article and some parts had not yet been agreed to. Delegates agreed to move the request to the COP/MOP to a footnote for further consideration at a later stage.

On access to pathogens in emergency situations, delegates restated earlier positions without making any progress. The Like-Minded Asia Pacific, the African Group and GRULAC wished to delete the paragraph. The EU reiterated that they would insist on addressing this issue under the protocol. Japan and Australia said that the issue should be specifically addressed so as to ensure that there is no delay in access to pathogens in emergency situations. The African Group provided an extensive list of questions that would have to be addressed before discussing the issue any further.

Outcome: The chapeau of the article now contains a bracketed reference stating that parties that regulate access to genetic resources and their derivatives shall implement the subsequent provisions on the basis of their sovereign rights. The subsequent sub-paragraph states that parties shall create conditions to promote and encourage research that contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, including through simplified measures on access for non-commercial research purposes, taking into account the need to address a change of intent for such research. The second sub-paragraph on access to pathogens in emergency situations was not changed and remains entirely bracketed.

COMPLIANCE (ARTICLE 12): Implementation of PIC and MAT: Delegates discussed, without reaching agreement, whether to eliminate reference to derivatives and how to reflect their understanding of utilization in the context of compliance. The EU, Canada and Switzerland cautioned against re-opening language agreed upon at the previous session, while the Like-Minded Asia-Pacific proposed including reference to “utilization of genetic resources,” and India “access to genetic resources for utilization.”

Delegates then discussed, without reaching agreement, whether to refer to the requirements of the “country of origin” or “other party,” with Canada supporting deleting, and India retaining, country of origin. The EU cautioned that reference to the country of origin would place a heavy burden on user

countries to check whether sovereignty claims of provider countries are well-founded. The Like-Minded Asia-Pacific supported reference to “other party in accordance with article 5.”

The EU requested retaining explicit reference to “legislative, administrative or policy measures” to provide that access is in accordance with PIC and MAT, for consistency with article 5, and delegates decided to insert such clarification in the first paragraph.

Measures to address non-compliance: The EU confirmed withdrawal of their proposal that parties may refrain from taking compliance measures, if the domestic access and benefit-sharing framework of another party providing the misappropriated genetic resources at the time of misappropriation was not in conformity with article 5.2.

Cooperation: Delegates debated whether cooperation should be ensured in cases of violation of national legislation, or of the protocol and the CBD. The African Group expressed willingness to eliminate references to international law, and rather insert, supported by the EU and Canada, “domestic access and benefit-sharing regulatory requirements,” explaining that this proposal would allow countries that do not have national ABS legislation to count on other parties’ cooperation in ensuring compliance with administrative acts on ABS. GRULAC, expressing concern about potentially excluding laws, recommended adding reference to both domestic “legislation” and “regulatory requirements.” Delegates eventually agreed on reference to “domestic legislation or regulatory requirements referred to in paragraph 12.1” throughout the article, including in its title.

GRULAC proposed clarifying that the obligation to cooperate with regard to compliance is triggered by “the request of the country alleging violation of domestic ABS regulatory requirements,” which was opposed by the African Group, the Like-Minded Asia-Pacific and the EU stressing the reciprocal nature of the cooperation obligation. GRULAC then proposed instead to refer to an obligation of cooperation “without undue delay,” and delegates eventually agreed to insert “as far as possible and as appropriate.”

Outcome: Article 12 is titled “Compliance with domestic legislation or regulatory requirements on ABS,” and requires parties to take appropriate, effective and proportionate legislative, administrative or policy measures to provide genetic resources utilized within their jurisdiction have been accessed in accordance with PIC and that MAT have been established, as required by the domestic ABS legislation or regulatory requirement of the “other party” or “country of origin,” with these two options in brackets. References to derivatives and associated TK also remain in brackets.

Article 12 further requires parties to take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted under article 12.1; and, as far as possible and appropriate, cooperate in cases of alleged violation of domestic ABS legislation or regulatory requirements referred to in article 12.1.

MONITORING (ARTICLE 13): Measures for monitoring, tracking and reporting: Delegates first discussed whether monitoring should concern: “compliance according to article 12.1,” which was supported by Canada, the Like-Minded Asia-Pacific and the African Group; “compliance with PIC and MAT,” supported by India, the EU, Switzerland, and Australia; “compliance with the protocol,” as suggested by Norway; and

“compliance with domestic ABS legislation and regulatory requirements,” proposed by GRULAC. New Zealand proposed requiring parties to take measures, as appropriate, to monitor utilization of genetic resources to support the requirement to obtain PIC and MAT. GRULAC, supported by Indonesia, requested to make the list of measures on monitoring mandatory, while New Zealand preferred the list to be optional.

Checkpoints: On a list of information to be provided at checkpoints, Australia expressed preference for “information requirements” and “mandatory checkpoints,” but opposed including the list of information to be disclosed. The Like-Minded Asia-Pacific suggested reference to “disclosing information” including information identified in the list. The African Group favored mandatory disclosure requirements and “mandatory compliance checkpoints,” while the Like-Minded Asia-Pacific proposed qualifying checkpoints as “effective.”

Outcome: Aside several minor changes in the article’s chapeau, the text of the article remains unchanged, with most of the substantive provisions still in brackets.

INSTITUTIONAL PROVISIONS

The EU suggested a general reference to relevant CBD language rather than referencing individual articles or repeating CBD language, but delegates agreed to the proposal by the Like-Minded Asia-Pacific to restate such language in the protocol.

COP SERVING AS THE COP/MOP OF THE ABS

PROTOCOL (ARTICLE 20): Delegates discussed whether the CBD Conference of the Parties serving as Meeting of the Parties to the ABS Protocol (COP/MOP) should convene “in conjunction” and/or “in parallel” with the COP. The EU called for ensuring a close relationship between the COP/MOP and the COP, with Co-Chair Hodges noting that such a connection is also ensured through the CBD strategic plan. The African Group raised concerns about difficulties for developing country delegates to attend parallel meetings. After informal discussions, delegates agreed to retain two options: the COP/MOP to be held “together” or “in conjunction” with the COP.

Outcome: The article states that: the COP shall serve as the COP/MOP of the ABS protocol; CBD parties that are not protocol parties may participate as observers, but that decisions by the COP/MOP shall be taken by protocol parties only; and COP bureau members that are from non-parties shall be substituted by a member elected by and from protocol parties.

SUBSIDIARY BODIES (ARTICLE 21): On using existing bodies under the COP for ABS-related issues, the EU called for a practical arrangement that would allow using existing bodies to the extent possible but, with others, noted the need to ensure that only parties to the ABS protocol can take decisions relating to ABS issues.

The Philippines called for establishing a subsidiary body for implementation in the protocol text, whereas others felt this should be decided by the COP/MOP. Delegates agreed in principle on establishing such a body and considered whether this was covered under article 25 (procedures and mechanisms to promote compliance). After informal consultations, delegates agreed that the COP/MOP would decide on the establishment of a subsidiary body on implementation during its first meeting, as provided for under article 25.

Outcome: The article states that: any subsidiary body under the Convention may, upon decision by the COP/MOP, serve the protocol, in which case the COP/MOP shall specify which

functions it shall exercise; CBD parties that are not protocol parties may participate as observers; decisions relating to the protocol be taken only by parties to the protocol; and the bureau members from non-parties to the protocol of subsidiary bodies to the convention shall be substituted by members elected by and from among protocol parties, if that body addresses matters relating to the protocol.

The article further contains two entirely bracketed paragraphs addressing the establishment of a subsidiary body for implementation to assist the COP/MOP in the assessment and review of the protocol's implementation. The second paragraph specifies that this subsidiary body shall consider information communicated by parties on implementation, and assist the COP/MOP, as appropriate, in the preparation and implementation of its decisions.

SECRETARIAT (ARTICLE 22): Participants agreed to retain reference to CBD Article 24.1 applying *mutatis mutandis* to the protocol.

Outcome: The article now contains a reference without brackets to CBD Article 24.1 along with provisions stating that the CBD Secretariat shall serve as Secretariat for the ABS protocol.

RELATIONSHIP WITH THE CBD (ARTICLE 23): The EU proposed, and participants agreed, to delete reference to applying the CBD provisions "*mutatis mutandis*" to the ABS protocol. The Like-Minded Asia-Pacific recommended retaining references to the CBD articles "relating to its protocols." Canada proposed using language from the Biosafety Protocol, with the EU cautioning that such language may not necessarily be useful in the context of the ABS protocol. Following informal discussions, delegates agreed to delete the article and to retain article 22.2 (CBD Article 24.1 applying *mutatis mutandis* to the protocol.)

MONITORING AND REPORTING (ARTICLE 24): Participants agreed to retain the article as formulated in the Montreal Annex, removing all brackets.

Outcome: Article 24 requires each party to monitor the implementation of its obligations and, at intervals and in the format to be determined by the COP/MOP, report to the COP/MOP on measures taken to implement the protocol.

PROCEDURES AND MECHANISMS TO PROMOTE COMPLIANCE WITH THE PROTOCOL (ARTICLE 25): Participants agreed to retain the article as formulated in the Montreal Annex, removing all brackets. Following informal consultations, they also agreed on the title of the article being "procedures and mechanisms to promote compliance with the protocol," with the understanding that it concerns compliance by parties with the protocol.

Outcome: Article 25 requires the COP/MOP to consider and approve at its first meeting cooperative procedures and institutional mechanisms to promote compliance with the ABS protocol provisions and to address cases of non-compliance, including provisions to offer advice or assistance, where appropriate. The article also notes that these procedures will be separate from and without prejudice to dispute settlement procedures and mechanisms.

ASSESSMENT AND REVIEW (ARTICLE 26): Delegates agreed to remove reference to an "assessment of the protocol procedures" in the context of periodic assessment of the protocol's effectiveness. They then discussed the periodicity of

such assessment, to ensure consistency with the periodicity of the COP/MOP, and eventually agreed that the first review will be held four years after the entry into force of the protocol and successive reviews at intervals to be determined by the COP/MOP.

Outcome: Article 26 requires the COP/MOP to undertake an evaluation of the protocol's effectiveness four years after the entry into force of the protocol and thereafter at intervals to be determined by the COP/MOP.

ENTRY INTO FORCE (ARTICLE 28): Participants agreed to retain the article as formulated in the Montreal Annex, removing all brackets.

Outcome: Article 28 foresees that the protocol will enter into force ninety days after the date of the deposit of the 50th instrument of ratification.

CLOSING SESSION

The ING reconvened on Tuesday morning to hear the reports of the small groups on the definition of utilization, scope and relationships with other agreements and research and emergencies. Co-Chair Hodges then explained that the draft ABS protocol, as revised by the ING, would be transmitted to the resumed session of ABS 9, to be held on 16 October 2010, in order to adopt the ABS 9 report and transmit the revised draft protocol to the COP for further negotiation. He noted that progress during the meeting was hampered by two kinds of issues: political issues, which will require political decisions during COP 10, and issues of complexity, which make it difficult to come to agreement on individual elements of the protocol. He expressed concern that the time remaining would be insufficient to resolve the latter issues, pointing to the need to also negotiate a COP decision on ABS, including a work plan and interim arrangements if the protocol should be adopted.

Expressing concern about the slow progress during the meeting, GRULAC proposed reconvening the ING before COP 10 to continue negotiating the protocol. Most raised concerns about overlap and possible interference with the COP/MOP of the Biosafety Protocol, and delegates decided to continue negotiations on the weekend before and during COP 10 instead.

Co-Chair Hodges thanked the CBD Secretariat for their support and the *Earth Negotiations Bulletin* team for providing continued coverage of the ABS negotiations and gavelled the meeting to a close at 1:30 pm.

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
EIA	Environmental impact assessment
GRULAC	Latin American and the Caribbean Group
ILCs	Indigenous and local communities
ING	Inter-regional group
LMMC	Like-Minded Megadiverse Countries
MAT	Mutually agreed terms
PIC	Prior informed consent
TK	Traditional knowledge