



**Convention on  
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AD HOC OPEN-ENDED WORKING GROUP  
ON ACCESS AND BENEFIT-SHARING  
Sixth meeting  
Geneva, 21-25 January 2008  
Item 3 of the provisional agenda\*

**CO-CHAIRS' REFLECTIONS ON PROGRESS MADE BY THE WORKING GROUP ON  
ACCESS AND BENEFIT-SHARING AT ITS FIFTH MEETING**

***Potential areas of convergence, options, possible tools and concepts for clarification***

***Note by the Executive Secretary***

1. The Executive Secretary is pleased to circulate herewith, for the information of participants in the sixth meeting of the Ad Hoc Working Group on Access and Benefit-sharing, the Co-Chairs' reflections on progress made by the Working Group at its fifth meeting, held in Montreal from 8 to 12 October 2007.
2. As noted in the Co-Chairs' letter of 8 November 2007, which was sent to all national focal points by notification SCBD/SEL/VN/GD/60723 (2007-143) of 12 November 2007\*\*, the reflections focus on potential areas of convergence, options, possible tools and concepts for clarification arising from interventions made by Governments, indigenous and local communities and stakeholders at the fifth meeting of the Working Group. The various items collected in these reflections do not follow a specific order of priority. Areas of potential divergence are not incorporated in the attached reflections, as they were not included in the original draft shared at the fifth meeting of the Working Group, due to time constraints.
3. The Co-Chairs' reflections were drafted with the aim of assisting the Working Group in the critical exercise of making the transition between the "range of views" (as contained in the annex to decision VIII/4 A of the Conference of the Parties to the Convention, as well as in the identified inputs in paragraph 2 of the same decision) and articulating "concrete options" for the different items of the agenda of fifth and sixth meetings of the Working Group, in the context of the elaboration and negotiation of the international regime.
4. The reflections are being circulated in the form and language in which they were submitted to the Secretariat by the Co-Chairs.

\* UNEP/CBD/WG-ABS/6/1.

\*\* <http://www.cbd.int/doc/notifications/2007/ntf-2007-143-abs-en.pdf>.

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In order to minimize the environmental impacts of the Secretariat's processes, and to contribute to the Secretary-General's initiative for a C-Neutral UN, this document is printed in limited numbers. Delegates are kindly requested to bring their copies to meetings and not to request additional copies.

**CO-CHAIRS' REFLECTIONS ON PROGRESS MADE BY THE WORKING GROUP ON  
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***Potential areas of convergence, options, possible tools and concepts for clarification***

**Potential Areas of Convergence**

- The International Regime on ABS is to assist with the implementation of the third objective of the Convention
- The International Regime on ABS is to contribute to the implementation of the other two objectives of the Convention
- The International Regime is to support national implementation of the ABS provisions of the Convention
- The International Regime is to complement national ABS measures
- International Regime should respect/recognise/accommodate national circumstances, priorities and diversity among Parties
- Access and benefit-sharing are interlinked – two sides of a coin
  
- International Regime is to set out minimum requirements for benefit-sharing and/or access
- Importance of measures to support compliance with prior informed consent (PIC) and mutually agreed terms (MAT) when genetic resources leave the provider country and their linkages to access
- Benefit-sharing includes monetary and non-monetary benefits
- Linkage between genetic resources and traditional knowledge need to be addressed
- Internationally recognized certificate could be part of the international regime
- Report of the Group of Technical Experts on an Internationally Recognized Certificate considered as useful basis for further work
- Capacity building and training needs to be an integral element of the International Regime
- Capacity-building to support implementation of the regime

**Benefit-sharing**

Potential areas of convergence

- International Regime should complement national legislation

- International Regime should support national implementation
- Benefits linked to conservation and sustainable use of biological diversity.

#### Options and possible tools

- Sectoral approaches for standardizing choices in material transfer agreements (MTAs)
- Model contracts/clauses
- Best practices on benefit-sharing
- Benefit-sharing includes non-monetary benefits, such as participation in research and development and technology transfer, and monetary benefits
- Minimum international conditions, standards and requirements for benefit-sharing
- Benefit-sharing should be mandatory
- Involvement/inclusion of indigenous and local communities in benefit-sharing and related negotiations
- Multilateral benefit-sharing options for cases where the origin of genetic resources is unknown through the establishment of a fund
- Capacity-building
- Mechanisms to monitor and enforce compliance with benefit-sharing agreements

#### Concepts for clarification

- Derivatives
- Biological resources vs genetic resources

### **Access**

#### Potential areas of convergence

- Access based on PIC and MAT, including PIC of indigenous and local communities
- Access dependant on benefit-sharing and vice versa
- Access procedures to be predictable and provide legal certainty
- International Regime to address access to genetic resources and associated traditional knowledge

#### Options and possible tools

- Minimum standards/requirements for access in the International Regime
- Need to distinguish between access for scientific and for commercial use
  - Mechanisms to address change of use or intent of user
  - Facilitated access for non-commercial use
- Parties to report on submitted access applications to an international information exchange mechanism
- For ex situ collections, if country of origin is unidentifiable, provider country can grant access on behalf of community and benefits could be shared through a Fund.
- Model provisions/standardisation
- Capacity-building for the development of national ABS legislation
- Commitment to non-discrimination in providing access

#### Concepts for clarification

- Derivatives
- Differentiation between access to biological resources and access to genetic resources
- Relationship between country of origin and provider country

### **Compliance**

#### **Measures to support compliance with PIC and MAT**

#### Options and possible tools

- International mechanism needed:
  - To monitor compliance
  - To enforce compliance
- Remedies and sanctions for non-compliance
- Measures to prevent misappropriation
- International Regime to prohibit the use of misappropriated genetic resources
- Strong contractual system
- Model contracts/clauses

- Private international law can assist to address problems relating to contracts when parties to contracts are in different jurisdictions.
- Recourse to enforcement/ enforcement mechanisms
- Legally binding elements of user measures could be considered if linked to minimum requirements for access
- Awareness raising among users
- Use of modern communication tools to facilitate traceability of genetic resources and their uses
- Notifications on updated ABS legislation
- Unilateral declarations by users that genetic resources have been legally obtained
- Codes of conduct/ guidelines for users
- Public research funding agencies to oblige users to comply
- Capacity-building
- Independent technical legal advice for indigenous and local communities
- International disclosure requirements in IPR applications

#### Concepts for clarification

- Need for transparency vs confidentiality of ABS agreements
- Definition of misappropriation, traditional knowledge and derivatives
- Application of principle of shared but differentiated responsibility to remedies and sanctions.

#### **Internationally recognized certificate of origin/source/legal provenance**

#### Potential areas of convergence

- Report of the Group of Technical Experts considered as useful basis for further work
- Certificate should be part of the international regime
- Certificate to support monitoring and compliance with PIC and MAT once genetic resources have left the provider country
- Tool to prevent misappropriation
- An internationally recognised certificate should supplement ABS contracts and ABS legislation

- Certificate should be practical, feasible and cost-effective
- Certificate should not impede scientific research
- Certificate may be used as a means of complying with the disclosure requirements

#### Options

- Certificate of compliance with national law in accordance with the Convention or certificate of origin
- Certificate of compliance issued by competent national authority
- Competent national authorities to be established by Parties as users and providers of genetic resources
- Mandatory or voluntary
- The certificate to provide minimum information, as reflected in the report of the Group of Technical Experts
- Standardized internationally recognised format
- Reporting system
- Establishment of national databases and of an International Registry
- Effective checkpoints to be identified
- Checkpoints to cover commercial and/or non-commercial use, including scientific use of genetic resources
- Absence of certificate should not imply illegitimate or illegal access
- Minimum check points to be agreed at the international level
- Capacity development for operating the system
- Model certificate to be tested through a pilot programme

#### Concepts for clarification

- Whether it should apply to traditional knowledge and how, in order to support the implementation of Article 8(j)
- Whether the certificate should apply to derivatives and how
- What should be the check points?

- What genetic resources should the certificate apply to?
- Sanctions for non-compliance
- How the certificate would relate to other elements of the international regime
- Misappropriation
- Whether the certificate should provide traceability or tracking mechanism
- Relationship with other international agreements such as the, WTO, CITES, FAO ITPGRFA, including its SMTA
- Feasibility, practicality and costs of the certificate, including costs of maintaining such a system

### **Monitoring, enforcement and dispute settlement**

#### **I. In relation to ABS legislations and ABS contracts**

##### Potential areas of convergence

- Parties to ensure compliance with national ABS legislation and the CBD
- Issue closely linked to measures to support compliance PIC and MAT
- Further legal expertise needed to address this issue
- International Regime to provide expeditious, effective access to justice, at low transaction costs.
- Capacity-building necessary for monitoring, enforcement and dispute settlement
- Dispute settlement to be expeditious, effective and low cost

##### Options and possible tools

- Non-compliance scenarios:
  - Breach of an ABS contract
  - Illegal access
- Existing mechanisms of contractual law, private international law and criminal law to provide legal mechanisms in situations of non-compliance when users and providers are in different jurisdictions.
- Guidance could be developed on how to apply existing legal mechanism to access and benefit-sharing

- International Regime to set requirements for implementation of monitoring and enforcement mechanisms both by provider and user countries.
- International collaboration among enforcement agencies and court systems of provider and user countries to address alleged infringements of national legislation and ABS agreements.
- Sectoral approaches for standardising choices in MTAs also relevant for effective monitoring and enforcement
- Improving information base as a means for effective monitoring and enforcement
- Certification vital instrument for monitoring/tracing genetic resources, and enforcement
- Checkpoints such as those established for the internationally recognized certificate critical instruments for enforcement once genetic resources have left the provider country
- Promote engagement with ABS-related intermediaries with a view to enhance compliance with ABS-related arrangements
- Cooperative mechanisms for resolving disputes to ensure that indigenous and local communities have access to courts in user countries, in particular in cases of alleged misappropriation
- Monitoring of access negotiations to ensure balance of bargaining power

#### Concepts for clarification

- Whether the IR should include an international requirement for disclosure of origin/source/legal provenance to ensure monitoring and compliance
- The need for specific ABS administrative and judicial remedies
- Whether to undertake international work on defining misappropriation
- Whether to introduce an international obligation to prohibit misappropriation, following the development of an international definition
- Role of State and non-State actors in the regime to be further examined

## **II. In relation to the implementation of the International Regime**

#### Potential area of convergence

- To be addressed once negotiation of international regime is in further advanced stage

#### Options

- Parties to develop national legislation for the implementation of the international regime, including sanctions



- Need for accessible and effective dispute settlement provisions in IR, in addition to Article 27.
- Consider establishment of an international compliance committee

### **Traditional knowledge and genetic resources**

#### Potential area of convergence

- International regime to be developed and implemented so as to support implementation of 8(j)

#### Options and possible tools

- Potential users seeking access to traditional knowledge associated with genetic resources should do so on terms equal to those for access to genetic resources, based on PIC and MAT
- International Regime to encourage Parties to consider the development and adoption of *sui generis* systems in accordance with national law
- *Sui generis* systems to be developed to be complementary to the IR
- Draft code of ethical conduct, under development by the WG-Art. 8(j), could be considered as an element for inclusion into the IR
- IR to include sharing of benefits arising out of the utilization of genetic resources and associated traditional knowledge in accordance with PIC and MAT
- Guidance to be developed for the inclusion of TK in national ABS regimes
- IR to take into account the UN Declaration on The Rights of Indigenous Peoples (UNDRIP), in particular its Article 31

#### Concepts for clarification

- Whether to integrate TK into the IR as a stand alone element or a cross-cutting element
- Whether the IR should include international IP-related norms for protection of TK, including disclosure requirements in IPR applications
- Collaboration between WG-ABS and WG on 8(j)
- Collaboration between CBD and other forums on traditional knowledge and genetic resources

#### Collaboration with the WG-Article 8(j)

- Report of the group of technical experts to be forwarded to the WG-8(j)
- Expert meeting could address:

- How the certificate could include TK
- How the draft ethical code of conduct could contribute to the IR
- Identify best practices to ensure that ABS-related research respect TK, e.g., publications and registries
- How can TK be integrated into PIC procedures, in particular in light of national PIC procedures and transboundary territories of indigenous communities
- How can TK be integrated into standardising MTAs.
- Capacity-building needs and implications stemming from the IR

### **Capacity-building**

#### Potential areas of convergence

- Capacity building and training needs to be an integral element of the IR
- Capacity-building to support implementation of the regime

#### Options and possible tools

- IR to include minimum requirements on capacity building
- ABS capacity building action plan to provide guidance
- Pertinent provisions of the IR need to include technology transfer
- Technology transfer needs to be flexible, demand-driven in accordance with national needs
- North-south and south-south transfer of technology, including capacity building, to maintain acquired technology and for technology adaptation
- Technology transfer to involve local scientists and include joint research
- Lack of awareness to be addressed in parallel with lack of capacity
- Establish financial mechanism for capacity building
- Capacity building needs to be extended to indigenous and local communities
- Areas for capacity building could include:
  - Negotiation of contracts
  - Empowering indigenous and local communities with regard to their provision of free PIC

- PIC and MAT

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