

## Access and Benefit Sharing (ABS)

### Sixth meeting of the Ad Hoc Open-ended Working Group on Access and Benefit Sharing (WGABS 6)

Geneva, Switzerland, 21-25 January, 2008

#### Introduction

The World Conservation Union – IUCN, welcomes international, regional and national policy and legal processes to implement the access to genetic resources and benefit sharing (ABS) provisions of the Convention on Biological Diversity (CBD) as well as the efforts being made by many institutions throughout the world in finding mechanisms to ensure that ABS principles are realized and implemented more effectively in practice. IUCN commends as well the efforts made by Parties to develop and implement ABS policies and legal instruments at different levels. Nevertheless, it is clear that more progress is needed to effectively achieve the third objective of the Convention. The Ad Hoc Open-ended Working Group on Access and Benefit Sharing (WG-ABS) faces an important challenge in keeping the momentum created at COPVIII and making the necessary progress to complete its work at the earliest possible time before COPX.

#### The International Regime on Access to Genetic Resources and Benefit Sharing

The development of an operational and effective International Regime on ABS requires careful appraisal of existing policy and legal advances in ABS, both nationally and internationally, and identification of areas which may require internationally agreed action by countries to support the full achievement of the benefit sharing objective of the CBD.

Analysis of existing mechanisms should include national and regional ABS legislation and measures, as well as the role played by international binding and non binding instruments such as the FAO International Treaty on Plant Genetic Resources for Food and Agriculture and the Bonn Guidelines.

In this regard, IUCN welcomes the documents prepared by the Executive Secretary for the fifth and sixth meetings of the *Ad Hoc Open Ended Working Group on Access and Benefit Sharing* and recognizes them as very useful sources of information, including areas which may require international concerted actions to support ABS efforts.

IUCN also acknowledges the work undertaken over the past few years by the *Ad Hoc Open Ended Working Group on Access and Benefit Sharing*, the work of the *Ad Hoc Open Ended Working group on Article 8(j)* and the different panels of experts which have addressed specific areas and issues regarding ABS and produced useful recommendations to move forward the negotiation process.

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IUCN commends Parties for their efforts during COP VIII to advance in the negotiation of an operational International Regime and their willingness to engage in constructive dialogue on concrete options shown at WG-ABS5.

Furthermore, IUCN specifically commends the two Co-Chairs of the Working Group for their efforts to make progress in the critical exercise of making the transition between a 'range of views' and articulating 'concrete options' for the different items of the agenda of WG-ABS5 and WG-ABS6.

## General Recommendations

### IUCN recommends that the Working Group:

- Based on the gap analysis undertaken by the CBD Executive Secretary (UNEP/CBD/WG-ABS/5/3), further defines and specifies the areas and issues which require international action and measures (as opposed to national actions) which should be prioritised for their inclusion in an International ABS Regime;
- Considers potential areas or issues which may benefit from internationally agreed obligations, for instance: compliance and enforcement; requirements for disclosure of origin and legal provenance of genetic resources and related traditional knowledge in intellectual property regimes; and monitoring and tracking flows of genetic resources and related traditional knowledge. Such analysis could contribute to identifying possible binding or non binding provisions for the International Regime;
- Identifies synergies between key areas and elements of the International Regime with other international agreements such as the FAO International Treaty as well as processes currently under way in WTO, WIPO and its Intergovernmental Committee on Genetic Resources and Intellectual Property, Traditional Knowledge and Folklore (IGC);
- Ensures that gender is fully integrated in the International Regime as well as ensures that women are represented in the discussions and debates related to the International Regime;

- Ensures compliance of ABS regimes with human rights frameworks, international and national commitments on gender equality and equity, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- Further elaborates, taking into account national experiences, the definition of key concepts such as "genetic resources" and clarify the exact meaning of "access" and "utilisation" of genetic resources, possibly differentiating between different types of uses; and
- Calls on Parties to take all the necessary steps and make efforts to develop, implement and put into practice their national and regional ABS regimes.

Further views are provided on the following more specific aspects of the agenda for this sixth meeting of the Working Group.

## Compliance

### Measures to support compliance with prior informed consent (PIC) and mutually agreed terms (MAT)

Monitoring and tracking the flows of resources (and related information and traditional knowledge) and verifying whether ABS conditions are being met by users once resources have crossed frontiers, is a complex but important aspect of the International Regime. Active and positive support is required from users of resources and countries in whose jurisdictions research is being undertaken.

Further analysis of the existing disparity in the levels of progress of national ABS regimes should allow for the development of an International Regime that provides for a common understanding of the basic conditions for effective access and benefit sharing including PIC and MAT.

This analysis should help define minimum standards for access to be agreed and recognized internationally in the context of an International Regime without undermining the sovereign rights of States over their genetic resources, as well as relevant rights and interests of indigenous and local communities,

and without deteriorating the existing national and international property rights provisions.

At the same time, the International Regime should strengthen national PIC provisions through the establishment of minimum requirements on the user-side to ensure compliance with PIC including with respect to indigenous and local communities' knowledge, innovations and practices related to genetic resources.

The elaboration of standardized Material Transfer Agreements, including model clauses on dispute resolution and choice of law, can play an important role to support compliance and increase legal certainty. Such MTA model clauses could be tailored to sector-specific needs.

The definition and development of sanctions at the national level in order to prevent misuse and misappropriation of genetic resources should be stipulated in an International Regime's provisions concerning PIC and MAT.

An internationally agreed definition of misappropriation might be useful in this context, supporting compliance. In particular such a definition could serve as a point of reference for user-side legislation prohibiting the use of misappropriated genetic resources and related traditional knowledge (TK).

In light of the above, **IUCN recommends that the Working Group:**

- As part of the Provisional Agenda Item 3.1. pays special attention to the need for Parties acting as users of genetic resources to: recognize and validate prior informed consent (PIC), both at the national and local levels with regard to access to and use of resources and TK as appropriate; mutually agreed terms (MAT) including access contracts or other instruments; and ABS conditions imposed by Parties acting as providers of genetic resources;
- Identifies specific legal and institutional elements that could potentially be included in binding provisions of an International Regime, in the area of compliance and enforcement, as a means to support achievement of CBD and national ABS objectives;
- Considers the standardization of Material Transfer Agreements and/or

the elaboration of model clauses as an element to support compliance and enhance legal certainty on the user and the provider side; and

- Considers working on an international definition of misappropriation of genetic resources as a potential reference point for a prohibition of such misappropriation, and of the use of misappropriated genetic resources, at the national level.

### **Internationally Recognized Certificate of Origin/Source/Legal Provenance**

IUCN welcomes the progress made in the elaboration of an internationally recognized certificate of origin/source/legal provenance including the work undertaken by the Group of Technical Experts on an Internationally Recognized Certificate of Origin/Source/Legal Provenance.

Following the suggestion by the Group, the certificate should be considered part of a broader ABS regime and could be very useful in addressing the limitations of national legal systems in guaranteeing benefit sharing once the genetic resources have left the provider country.

The certificate could enable a coherent linkage and positive synergy between the needs and interests of countries providing genetic resources (and related TK) and those of countries using the resources and TK.

In sum, the certificate under an International Regime would have to: a) form an integral part of the regime; b) be internationally recognized; c) complement national access frameworks, including PIC and MAT; d) be simple and e) be cost-effective.

**To contribute proactively in the design and development of the certificate, IUCN recommends that the Working Group:**

- Gives due consideration to the Report of the Meeting of the Group of Technical Experts on an Internationally Recognized Certificate of Origin/Source/Legal Provenance, identifies areas that need further elaboration and recommends that COPIX renew the mandate of the Group to address such issues and continue the process of development and refinement of the certificate by

convening further meetings of the Group of Technical Experts in time for WG-ABS7; and

- Recommends to COP IX to agree on a “model” certificate and establish a pilot/test phase to implement this model certificate and to verify its operability and effectiveness on real cases. This will also serve to test the feasibility and potential costs of a certificate scheme.

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

Provisions dealing with compliance and enforcement cover, depending on the country, monitoring, reporting, sanctions and penalties, enforcement, access to justice and dispute resolution. The process of negotiation of an International Regime so far has evidenced the need to further discuss which basic monitoring, enforcement and dispute settlement measures would be part of the Regime, support national implementation of ABS provisions, complement private international law and existing dispute settlement mechanisms.

It has been suggested that contract law (i.e. applicable to access contracts) may offer solutions and options for non compliance and enforcement of contract terms in foreign jurisdiction. However, access to justice (foreign courts, administrative tribunals or dispute settlement mechanisms) is difficult, costly and even uncertain, in the context of Public and Private International Law, choice of law principles and the legal foundations for and recognition of claims. These difficulties are furthermore heightened especially between countries with different legal systems and traditions.

In addition to the above-mentioned measures to support compliance, measures to improve access to justice across different jurisdictions as well as mechanisms for information exchange and administrative and judicial cooperation in the context of ABS-related cases and disputes, seem necessary.

With respect to international (inter-state) dispute settlement, the possibilities foreseen in Art. 27 of the Convention may prove insufficient, and an additional mechanism or process, specific to disputes related to the International ABS Regime, may be needed. However, discussions may only be meaningful

at a more advanced stage of the elaboration and negotiation of the Regime.

### **IUCN thus recommends that the Working Group:**

- Considers the measures mentioned above in the context of ‘Compliance’ as well in the context of monitoring, enforcement and dispute settlement;
- Pays particular attention to the need for improving existing and developing new information exchange mechanisms, for the purpose of tracking and monitoring, including tools of modern information technology, as well as the potential role that a system of an internationally recognized certificate (referred to above) can play in this context; and
- Identifies measures to improve access to justice and administrative and judicial cooperation in cases of alleged infringements of ABS requirements and agreements.

### **Traditional Knowledge (TK) and Genetic Resources**

Although efforts have been made by the Secretariat and Parties to create positive synergies between ABS and traditional knowledge discussions, particularly in the context of both the *Ad Hoc Open Ended Working Group on ABS* and the *Ad Hoc Open Ended Working Group on Article 8(j)*, there are still considerable uncertainties in the manner in which these groups can further and more effectively interact and build upon each others’ work.

IUCN has been strongly supportive of efforts to strengthen and consolidate the rights of indigenous peoples and local communities over their traditional knowledge and streamline their specific interests into ABS discussions – as well as into fora such as the WIPO Intergovernmental Committee (IGC), FAO and WTO.

IUCN also believes that preservation and maintenance of traditional knowledge, as a key element of safeguarding indigenous and local cultures, is critically important in the context of developing policy and legal mechanisms to protect indigenous peoples and local communities’ intellectual efforts.

Furthermore, IUCN supports open, transparent and inclusive policy processes where informed participation of indigenous peoples and local communities is increased.

**In this context, IUCN recommends that the Working Group:**

- Provides COP IX with clear and specific proposals (in terms of concrete, possible legal elements) as to how to best integrate traditional knowledge concerns into the International Regime with due consideration to their technical feasibility and the practicability of their inclusion and incorporation;
- Liaises more effectively with ongoing work and activities of the Ad Hoc Open Ended Working Group on Article 8(j) and incorporates their recommendations in the context of the process of development of the International Regime;
- In the context of an internationally recognized certificate of origin/source/legal provenance, explores whether such a certificate could be extended to traditional knowledge; and
- Calls on COP IX to request the Global Environment Facility (GEF) to continue supporting capacity building processes for indigenous peoples and local communities, particularly in the area of ABS and protection of traditional knowledge.

## Capacity Building

IUCN believes that capacity building and information sharing are key elements of an International ABS Regime. Capacity building efforts should be focused on those areas identified at the Action Plan on Capacity Building for Access to Genetic Resources and Benefit-Sharing (Decision VII/19F) as key areas requiring capacity building and mechanisms for implementation of ABS provisions at national, regional, subregional and international levels. Predictable funding for capacity building activities should be ensured through innovative mechanisms and the promotion of public-private partnerships, in particular to address the needs of developing countries and indigenous and local communities.

**In this respect, IUCN recommends that the Working Group:**

- Encourages the further analysis of possible incentives to private sector actors to engage in capacity building, information and knowledge sharing, and technological cooperation and technology transfer activities; and
- Identifies specific communication mechanisms to disseminate information regarding ABS and the process of negotiation of an International Regime in a user friendly way.

## Nature, Scope and Objectives

IUCN believes that an International ABS Regime should be composed of a number of elements, measures and provisions, legally binding and non-legally binding, that should allow for:

- ensuring the conservation and sustainable use of biodiversity;
- providing legal certainty for users and providers;
- ensuring the fair and equitable sharing of the benefits arising from the use of genetic resources and associated traditional knowledge, both monetary and non-monetary;
- regulating access and sustainable use of genetic resources and benefit-sharing arrangements;
- protecting and strengthening traditional knowledge (TK) systems;
- maintaining and revitalizing TK and cultural diversity;
- including and empowering indigenous peoples, local communities and women through prior informed consent (PIC) mechanisms and participation in the negotiation of national ABS frameworks and an International Regime;
- strengthening domestic biotechnology and research programmes;
- establishing links with and complementing already existing

mechanisms and processes under WIPO, FAO and WTO; and

- contributing to the Millennium Development Goals (MDGs) and especially in the areas of poverty, food security and health.

**In addition, IUCN recommends that the Working Group:**

- Analyses the different possibilities to include “derivatives”, and the implications of their inclusion, in the International Regime, either in the context of definitions and scope or in the context of benefit sharing;

- Concentrates its efforts on those elements and areas in the Annex to Decision VIII/4 on the International Regime on Access and Benefit Sharing that have the potential of being recognized by Parties as areas of convergence, recognizing that there are numerous areas of divergence that need further discussion as well; and
- Promotes further regional consultations, with the aim of bringing views together, based on the discussion of these areas of convergence, to take place between the sixth meeting of the Working Group and COPX.