
Regional Consultations for African Countries on ABS
Open Sessions Report
4-6th March 2010, Windhoek, Namibia

I. INTRODUCTION

1. "The Access and Benefit-sharing Regional Consultation for African Countries" took place from the 4-6th March 2010 in Windhoek, Namibia and was funded by the Government of Denmark and organised by the ABS Capacity Development Initiative for Africa in close collaboration and consultation with the CBD Secretariat, UNEP and the Co-Chairs of the WG-ABS.

2. The Regional Consultation was organised in response to decision IX/12 on Access and Benefit-sharing, paragraph 17, where the Conference of the Parties (COP) emphasized the importance of consultations to advance the negotiations of the International Regime on Access and Benefit-sharing and requested the Co-Chairs of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing (WG-ABS) to be instrumental in organizing and facilitating such consultations during the intersessional period. The decision also encouraged Parties and stakeholders to carry out bilateral, regional and interregional meetings and consultations and called upon donors and relevant organisations to provide financial resources necessary for such meetings and consultations. In addition, in paragraph 22 of the same decision, the COP invited the United Nations Environment Programme (UNEP), governments and other international organizations to support regional and interregional Consultations in close collaboration with the Secretariat.

3. In accordance with the above, and further to notification 2009-010 of 24 August 2009 announcing the tentative calendar of the Regional Consultations, the Regional Consultation for African countries provided an opportunity for the negotiators from the region to consult and exchange views on the components of the International Regime during the intersessional period with a view to finalizing the negotiations of the International Regime at the ninth meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing.

4. The following countries sent government-nominated officers or experts to the workshop: Arab Republic of Egypt, Burkina Faso, Democratic Republic of Egypt, Democratic Republic of the Congo, Eritrea, Federal Democratic Republic of Ethiopia, Federal Republic of Nigeria, Gabonese Republic, Kingdom of Morocco, Republic of Benin, Republic of Botswana, Republic of Burundi, Republic of Cameroon, Republic of Chad, Republic of Côte d'Ivoire, Republic of Djibouti, Republic of Equatorial Guinea, Republic of Ghana, Republic of Guinea, Republic of Kenya, Republic of Liberia, Republic of Madagascar, Republic of Malawi, Republic of Mali, Republic of Mauritius, Republic of Namibia, Republic of Rwanda, Republic of Senegal, Republic of South Africa, Republic of the Gambia, Republic of the Sudan, Republic of Uganda, Republic of Zimbabwe, Union of the Comoros.

II. PROCEEDINGS OF THE REGIONAL CONSULTATION

ITEM 1. OPENING OF THE MEETING AND ORGANIZATIONAL MATTERS

5. Mr. Teofilus Nghitila, the Director of Environmental Affairs in Namibia, opened the meeting and welcomed the participants to Windhoek at 9am on Thursday, 4th March 2010.

6. Opening statements were made by Dr. Andreas Drews, Manager of the ABS Capacity Development Initiative for Africa; Mr. Worku Damena Yifru, Programme Officer of the Secretariat of the Convention of Biological Diversity on behalf of the Executive Secretary of the Convention on Biological Diversity; Honorable Netumbo Nandi-Ndaitwah, Namibian Minister of Environment and Tourism speaking on behalf of the Namibian government.

7. Dr. Andreas Drews, speaking on behalf of the ABS Capacity Development Initiative for Africa, welcomed the participants to the consultations on ABS that were to take place over the next three days. He thanked the Danish Government for its generous funding and the Namibian Ministry of Environment for hosting the meeting. He informed the meeting that the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH has been implementing the ABS Capacity Development Initiative for Africa since 2006 and he described this consultation as being a key part of the preparatory process of the African group. Dr. Drews noted that this was the last of a series of similar regional consultations which have been taking place all over the world since December 2009. Dr. Drews finally remarked that this consultation was expected to contribute considerably to the African position and negotiation strategy but he reminded the meeting that compromises will be necessary in order to get an effective protocol on ABS.

8. Mr. Worku Damena Yifru, speaking on behalf of the Executive Secretary of the Convention on Biological Diversity, also welcomed the participants. He thanked the Government of Denmark for its financial support and the Government of Namibia for hosting the meeting. He described Namibia as an ideal host, given its active participation in the negotiating process, as well as its experience with hoodia and marula cases which have become worldwide references on ABS. He described this consultation process as being only the beginning. Africa's biodiversity is largely unexplored and it has the potential to become a foundation for sustainable development and poverty alleviation on the continent. He encouraged the participants to explore the issues at stake, establish the African position and identify areas for compromise, reminding the meeting that the upcoming WG-ABS 9 in Cali would be the last one before COP 10 in Nagoya.

9. Hon. Netumbo Nandi-Ndaitwah, Namibian Minister of Environment and Tourism, extended a warm welcome to the participants to beautiful Namibia. She reminded the participants that they are first and foremost working for Africa, and that the issue of biodiversity is more important to Africa than any other region. She stated that there was a difficult task ahead and limited time available. Therefore it was important

that the time was used wisely by the African group to plan and prepare. It was suggested that the participants should identify a bottom line, from which it could be seen where compromise was necessary and where not. Alliance and bridge building was recommended with those who are near the African position, while innovative “out of the box” thinking and mutual compromise was recommended where there was division. She urged the participants to give birth to a landmark process that will put the regime on course to its logical conclusion.

ITEM 2. ADOPTION OF THE AGENDA

10. Mr. Sem T. Shikongo the African ABS Intersessional Coordinator and Chief Negotiator took over the chairmanship of the meeting. There were no objections to the agenda and proceedings were carried out flexibly but in overall accordance with the agenda (see annex 1). The agenda contained two open sessions which included selected thematic inputs and a consultation session with the ABS Co-Chairs. This report deals with these open sessions. The open sessions generated much discussion and debate among the participants which formed the basis of the closed sessions of the meeting.

ITEM 3. THE INTERNATIONAL REGIME ON ACCESS AND BENEFIT SHARING

SESSION 1: SELECTED THEMATIC INPUTS

11. Dr. Regine Anderson, representing the Fridtjof Nansen Institute (FNI) Norway, presented a comprehensive working paper to the participants which focussed on the interlinkages of the IR-ABS with other international instruments. She highlighted what these instruments were, their implications for the ABS regime as well as presenting the possible usefulness of a sectoral approach to ABS. The international instruments referred to included the International Treaty on Plant Genetic Resources for Food and Agriculture (The Plant Treaty) with its Multilateral System of Access and Benefit-sharing (MLS), the FAO Commission on Genetic Resources for Food and Agriculture (CGFRA), the UN Convention on the Law of the Sea (UNCLOS), the Antarctic Treaty, international regimes pertaining to pathogens, international regimes pertaining to traditional knowledge, international regimes on payment for ecosystem services; and international regimes on intellectual property rights.

12. The Plant Treaty and its MLS component as well as the CGFRA were discussed in most detail during the presentation. The CGFRA oversees the management of all genetic resources for food and agriculture, including plants, animals, forests, aquatic, micro-organisms and invertebrates. However there are no legally binding obligations with the exception of the Plant Treaty and its associated MLS which represent an established and legally binding ABS system. Therefore it can be kept outside the IR-ABS. The MLS system is quite different from ABS in the CBD. It involves a common pool of genetic resources in the public domain (IPR cannot be claimed on the resource in the form it is received) with standardised ABS agreements and a fixed benefit-sharing system to custodians rather than providers of genetic resources. Non-monetary benefit-

sharing is also covered by the system. A Standard Material Transfer Agreement (SMTA) is applied for all transfers of genetic material, with compliance monitored by a third party beneficiary. A dispute settlement procedure is also in place. Challenges relate to the scope of material that could be excluded from the IR-ABS. In addition the CGFRA invites the WG-ABS to take into account the distinctive features of the different genetic resources for food and agriculture and proposes that a sectoral approach be considered.

13. With regard to UNCLOS, the main issue is the freedom to explore and exploit genetic resources in the areas beyond the jurisdiction of the coastal states, i.e. on the high seas and on the deep seabed beyond the continental shelf. From the ABS point of view it is important that these resources are included in the IR-ABS. Under the Antarctic Treaty, rights to genetic resources are not regulated, and the lack of clarity with regard to territorial status makes PIC and MAT difficult. It could create loopholes for the IR-ABS if these genetic resources are kept outside its scope.

13 bis. Another area of concern is pathogens. There are high potential values in terms of their use in producing medicine and vaccines. Thus there are strong arguments to include pathogens in the regime, although there are also suggestions that only certain uses of pathogens should be included. It is important to spell out exactly what this means. In addition, the issue of intellectual property rights and the way this is addressed in the IR-ABS is crucial to prospects for benefit-sharing.

14. Overall conclusions were that there are good arguments for a broad and inclusive IR-ABS, however the fear was expressed that this might lead to a watered-down document. Other options could include some general provisions for all resources including user country measures, and chapters for all relevant sub categories; general provisions for all resources with annexes and sub-categories to be negotiated under the CBD; or general provisions as above but with negotiations left to other competent international fora.

15. The comprehensive nature of the document was very well received by the participants. Many comments and points for clarity emerged in the discussion. Concern was raised about the benefit-sharing approach of the MLS in terms of rewarding custodians as opposed to providers, who typically own resources under their sovereignty. Custodianship is problematic and varies from country to country. For plant genetic resources, custodians may not only be farmers, but also gene banks, agricultural research centres etc. In terms of wild resources, the knowledge may be in traditional communities but varieties may for example be within nurseries or privately owned land research institutions. It was also clarified that all national genebanks must include their collections in the MLS. The Nordic countries have made their gene banks available but progress in other countries has been slow. It was also suggested that it would be dangerous to leave loopholes in the IR-ABS and to leave these for other fora to negotiate, as these would then be beyond the influence of the IR-ABS. It was reiterated that pathogens are very important for benefit-sharing and their importance for high value medicines and vaccines was noted. Concerns were raised that the MLS was opening up resources for privatisation with particular concerns relating to slight improvements which exclude the original

supplier and the looseness of the term “in the form received” and its connotations for intellectual property rights. Interest was also expressed in the dispute settlement procedure employed by the Plant Treaty.

16. Ms. Susanna Chung, of the Permanent Mission of South Africa in Geneva, and Mr. Olivier Rukundo, of the Centre for International Sustainable Development Law (CISDL), then presented the status of WIPO/IGC negotiations on intellectual property rights for genetic resources and traditional knowledge. The IGC was established in 2001 to work on the issues of intellectual property rights that arise with regard to access to genetic resources and benefit sharing, protection of traditional knowledge and protection of folklore. Two documents on the protection of traditional expressions of folklore and traditional knowledge were produced by the IGC in 2006 but were not well received in Northern countries. This led to a stalemate in the progress of the IGC. However the African position continued to move work forward and proposed a new mandate for the IGC to work on a legally binding international instrument to ensure the protection of genetic resources, TK and traditional cultural expressions. It was reported that this mandate to submit a text by 2011 was granted by the WIPO General Assembly. WIPO is currently waiting on the outcome of CBD to see how it can fill in some of the gaps that the CBD cannot cover with regard to genetic resources. However it is the view of developing countries that work could begin with folklore as this was already quite far advanced. Disclosure requirements are being considered by both WIPO and the IR-ABS. WIPO has been requested by the CBD to undertake a feasibility study as to how disclosure requirements can be given effect. The patent cooperation treaty also has no provision for disclosure requirements, therefore an amendment would be required. A similar amendment would also be necessary to the TRIPs agreement. It was recommended that it would be good for the IR-ABS to enforce as much as possible but what is best is to ensure *how* this can be enforced, while also being aware of what is happening in other fora.

17. Several questions and points were raised after the presentation. In response to whether WIPO has a definition for genetic resources, it was reported that a workshop would be held in April for the African group, and that ABS experts were invited to join and provide a definition. There is no concrete text for genetic resources within the IGC. Much has been done on folklore but the plan is to use what is being discussed by ABS as a basis with regard to genetic resources. It was reiterated that WIPO does not want to pre-jump the IR-ABS in terms of disclosure requirements. Its position is that the IR-ABS should push for the amendment of the patent system through disclosure. Due care must be given to ensure that these areas are enforceable through WIPO.

SESSION 2: CONSULTATION WITH THE ABS CO-CHAIRS

18. This session began with greetings from Dr. Ahmed Djoghlaif, the Executive Secretary of the Convention on Biodiversity. He assured the conference of the high level commitment of Japan to make the upcoming COP 10 a great success. He reminded the meeting that the success of COP 10 cannot be achieved without success at WG-ABS 9 in

Cali, Colombia. He offered words of encouragement to the working group and reaffirmed the support of the secretariat to the working group.

19. The Co-Chairs Mr. Hodges and Mr. Casas provided the participants with an update of the IR-ABS process. The key features of the strategic approach to the international regime negotiations were first outlined. These explained the thrust of the overall process with the generation of an improved understanding of issues and the positions of others; improved trust; the generation of political momentum; the need for a lock in process, all quoted as important factors in leading to the finalization of the IR-ABS. It was reported that the Regional Consultations had exceeded expectations with regard to all of these issues. The experiences of each of the different regional consultations were briefly summarised by Mr. Casas and reports of these were made available to the participants.

20. The Road Map to Nagoya was also elaborated on by the Co-chairs. Of particular interest to the delegates were the outcomes of the recent Friends of the Co-Chairs (FoCC) meeting and the role of the upcoming Co-Chairs Informal Inter-regional Consultation (CIIC). Mr Hodges reported on the FoCC meeting which took place from 26-29 January 2010 in Montreal. The participants at the meeting were chosen by the secretariat and included 19 representatives from the parties as well as representatives from ILCs, non-commercial users, NGOs and industry. He informed the delegates that the meeting did not discuss the text but that discussions were more informal and based on a series of questions aimed at improving the understanding of one another's position through frank and open discussions. There is to be no written report of the FoCC but it was reported that the understanding of key issues had been greatly enhanced by the meeting. The key outcomes of the meeting will be communicated to the CIIC which will take place from the 16-18 March 2010 in Cali and consist of 8 representatives from each region and other stakeholders. These will be closed consultations. It is envisaged that the improved understanding of key issues at the FoCC will be built upon and that the regional representatives will report back to the WGs to bring them up to full speed. It is believed that this work on issues can then serve as a useful basis for negotiations on the text.

21. Mr. Hodges then alluded briefly to the key substantive issues that were confronting the working group. These were also discussed in detail after the presentation with the WG participants. The key points from this discussion are outlined below:

- **Nature of the Regime:** It was asserted that there must be a balance in terms of flexibility and obligations for both users and providers. All parties are to be users and providers, therefore reciprocity and interdependence is the key. The scope of the regime has already been dealt with under the Bonn guidelines.
- **Access and Benefit-sharing Compliance (ABC):** It was noted that there is a need to link up compliance with traditional knowledge and capacity development. Some structural analysis may be needed to move forward. It has emerged as a major concern that some countries have no intention to establish national ABS related legislation.

- **Commercial versus Non-commercial Use:** The difficulty in drawing a line between these two uses was noted. Non-commercial use often becomes commercial, and perhaps this should be addressed through clear user obligations.
- **Facilitated Access:** ABC will be much better understood if obligations for users and providers are identified. A lack of clarity from the EU side with regard to international access standards has been noted and precise clarification is awaited.
- **Derivatives:** This issue was reported as being quite well solved in terms of benefit-sharing, but sovereign rights over derivatives is recognised as being a difficult issue. It was recommended that it may be better to describe an issue rather than trying to precisely define it as this would save time on difficult discussions.
- **Certificates:** There are a number of different issues with regard to certificates. General agreement was reported in terms of tracking; the nature and content of certificates was still to be decided; disagreement was noted in terms of the provisions for disclosure requirements; guidance was expected from the working group on a dispute resolution mechanism; with regard to remedies it was noted that existing instruments are in place but there are no user obligations; arbitrary awards across jurisdictions are necessary; general agreement was noted with regard to customary law but wording is in need of negotiation.
- **Capacity Development:** This issue is recognised as a key aspect of the regime, in terms of the capacity of providers to become users and for developing countries to add value to their resources.
- **Traditional Knowledge:** This was also recognised as a key ingredient, and it was noted that the role of the state was different in different countries. ICs and TK needs to be part of compliance issue.
- **Regional Funding:** Mechanisms need to be explored for increasing the capacity of governance structures with regard to ABS.

22. With regard to the shape of the IR-ABS, Mr. Hodges outlined a number of guiding principles including transparency, adaptability, fairness, flexibility, predictability, efficiency, simplicity and reciprocity. Mr. Hodges clarified that he envisaged a much shorter and more focussed document. A document that is credible for circulation to all parties by the Secretariat must be submitted before April 18, 2010. As it stands the text is not credible, but Mr. Hodges believes that it can be made credible by shortening it and removing some of the many brackets. This result must be achieved in the Cali meeting.

23. It was noted in the discussions that three issues remained outstanding from WG-ABS 8: the preamble, closing articles and the possibility of definitions to remove brackets. The African group feels that definitions could help solve issues of text relating to biological resources, derivatives and tracking. The Co-Chairs expressed the view that definitions do not always help, maybe some key ones, but that there was an important need to be flexible. The need for the IR to be flexible enough to accommodate ever-changing biological developments was also touched upon as being necessary but challenging. The building in of a review to the regime that would evolve over time was mooted as a possible way forward.

ITEM 4: CLOSURE OF THE MEETING

24. The Chair extended his thanks to both of the Co-Chairs for providing such a thorough overview. The presentation and subsequent discussion provided the African group with much food for thought. In light of the key substantive issues raised by the Co-Chairs, the meeting proceeded as a closed session to further refine the African position and to identify areas for political and technical compromise. (See Annex II for the main points/features of the African position)

Annex II. MAIN POINTS/FEATURES IN THE AFRICAN POSITION

- **Nature:** A single comprehensive legally binding regime.
- **Objective:** To ensure the fair and equitable sharing of benefits arising from the utilization of biological resources (BR) and/or genetic resources (GR) and Associated TK in accordance with Articles 8j, 15, 16, 19.2 of the CBD.
- The **scope** should cover all biological resources (BR) and/or genetic resources (GR) and their derivatives and products as well as associated knowledge, innovations, and traditional practices subject to national legislation.
- **Ex Situ:** The scope of the IR-ABS shall include continued and new uses of pre-CBD accessions of BRs/GRs and associated TK.
- Maintaining the rights of indigenous and local communities (ILC) to exchange material and knowledge among themselves according to customary practice.

- **Access** is subject to national legislations, and is linked to mandatory Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT).
- Minimum standards for **benefit sharing** to be specified in the international regime.
- **Technology transfer** must include participation of provider countries in the development of technology for use and exploitation of accessed materials in the user countries as well as in final product development.
- **Disclosure:** The IR ABS must make provision for mandatory disclosure requirements (access, PIC, MAT, benefit-sharing arrangements, etc.) and the implementation thereof in all aspects (particularly with respect to Intellectual Property Rights (IPR)).
- Internationally Recognized **Certificate** Issued by Competent National Authority of the provider country to accompany accessed materials at clearly defined checkpoints for tracking and monitoring purposes.
- **Capacity Building/Development** is a priority for African countries and requires the necessary financial and technical support for the implementation of the IR-ABS. African countries must identify their own needs and priorities.
- **Compliance:** The IR ABS should ensure strong compliance provisions at the local, national, regional and international levels, including with the IR itself. The IR-ABS should ensure user countries develop laws, policies and administrative measures to ensure compliance with the ABS laws or requirements of provider countries.
- The IR-ABS must make provisions for **transboundary BRs/GRs** and associated TK through, inter alia, bilateral, sub-regional or regional ABS arrangements or agreements.
- **Traditional Knowledge (TK):** Access to TK shall be in accordance with the customary laws, community protocols and community level procedures of Indigenous and Local Communities (ILCs) subject to national law.

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