



# Earth Negotiations Bulletin

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## HIGHLIGHTS FROM THE EXPERTS' PANEL ON ACCESS AND BENEFIT-SHARING WEDNESDAY, 6 OCTOBER 1999

Experts met in a brief Plenary to hear progress reports from the working groups on access and benefit-sharing (ABS) for scientific and commercial purposes, and review of legislation, administration and policy measures, regulatory procedures and incentive measures. The working groups, as well as an open-ended sub-group on IPR, convened throughout the day and into the evening.

*Editor's Note: While participating experts are appointed by governments, they speak in their own capacities. For the purpose of brevity, experts' remarks are attributed by country in the following report.*

### PLENARY

Panel Co-Chair Medaglia (Costa Rica) called upon the working group Chairs to deliver progress reports. A.H. Zakri (Malaysia) reported that the working group on ABS held discussions on MAT and benefit-sharing that resulted in draft conclusions on lessons learned, information needs and capacity-building needs.

Lev Kalakoutskii (Russian Federation) presented the outcomes of the group on the review of legislative, administrative and policy measures, regulatory procedures and incentive measures. He reported that the group discussed key elements of PIC by considering the meanings of "prior," "informed" and "consent," and highlighted draft recommendations, which include the need for Parties to address ABS measures in their national strategies, establish national focal points and adopt interim measures such as voluntary guidelines. Other points emphasized included: reporting PIC procedures in national reports; trade-offs between PIC and interest in access on the part of users; the role of intermediaries; and capacity building.

Following these presentations, delegates debated whether to create sub-groups on IPR and indigenous rights as proposed by some. BRAZIL, ARGENTINA, ETHIOPIA and BOLIVIA opposed.

### WORKING GROUPS

**ACCESS AND BENEFIT-SHARING FOR SCIENTIFIC AND COMMERCIAL PURPOSES:** This group discussed lessons learned from benefit-sharing and the disclosure of country of origin. It also reviewed and amended summaries of the previous day's discussions on MAT and benefit-sharing.

**Benefit-sharing:** Experts noted the need to involve private pharmaceutical companies in benefit-sharing and to identify all involved sectors. They also, *inter alia*: highlighted knowledge gained from bioprospecting activities; emphasized the need for benefit-sharing in cases where traditional and local knowledge is used; underscored the importance of non-monetary benefit-sharing, such as public health research, food security, technology transfer and seed provision; noted the need for a mechanism to monitor benefit-sharing; called for identification of types of benefits and stakeholders involved; and questioned whether products must be marketed before benefit-sharing can occur. One expert underscored that benefit-sharing should be determined at the national level.

One expert noted the need to combine monetary and non-monetary benefit-sharing and to determine mechanisms to finance research related to bioprospecting. Another noted that, due to their collaboration with various sectors, intermediaries can initiate flexible benefit-sharing mechanisms. One participant emphasized the importance of up-front payments when genetic materials are accessed to ensure providers will not be overlooked when benefits accrue later in complex and non-transparent collaborations. While some experts emphasized the value of bilateral and personal collaboration, others underscored the need for a multilateral framework for benefit-sharing. Participants highlighted the importance of non-monetary benefits and identified trust funds, milestone payments, designated national authorities and monitoring institutions as important elements of ABS arrangements. One expert suggested establishing a roster of bioprospecting institutions and companies to meet providers' information needs. Another drew attention to problems associated with cross-border genetic resources.

The group later reviewed a draft report on benefit-sharing which encompasses three main issues: types of benefits and beneficiaries in ABS agreements, negotiating benefit-sharing provisions in access agreements, and monitoring the implementation of benefit-sharing agreements. The discussion focused on the importance of non-monetary benefits which could be directed towards the relevant actors involved in the conservation and sustainable use of biodiversity; the need for ABS arrangements to take into account the complexity of collaborations; and the importance of distributing responsibility between Parties to the CBD and the private sector.

**Disclosure of Country of Origin:** Experts considered mechanisms to promote disclosure, including certificates of origin, user country import regulations, national focal point records, research

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publications, MAT contracts that maintain control of materials, and disclosure on a voluntary basis. They also discussed difficulties in determining whether the country of origin should be the source of species or supplier of the sample. It was noted that country of origin relates to the origin of the sample, rather than the origin of the species. One expert recalled that the CBD defines country of origin as the country which possesses the genetic resource *in situ*. Another proposed instead determining the "provider of source." Some experts noted difficulties with the meaning of "*in situ*" and agreed that determining the source country would be easier. It was also stressed that Parties to the CBD are sovereign States and that guidelines for benefit-sharing are the most that can be provided. Experts underscored the need to consider the relationship between IPR and traditional knowledge systems.

**REVIEW OF LEGISLATION, ADMINISTRATION AND POLICY MEASURES, REGULATORY PROCEDURES AND INCENTIVE MEASURES:** This group focused on international measures to support PIC, access legislation, IPR and incentive measures. The group also developed draft text on access legislation for the final report of the Panel.

**International Measures to Support PIC:** Experts considered various multilateral mechanisms to support PIC, including: the disclosure of country of origin in IPR applications; monitoring IPR applications; certification schemes; knowledge registries; clearinghouse information; and conflict resolution and arbitration processes. Experts also stressed the need to develop capacity-building measures and voluntary guidelines, including for *ex situ* collections.

**Access Legislation:** Experts considered aspects of access legislation grouped in the following categories: simple, clear legislation; scope; uses (scientific and commercial); regional collaboration; MAT and flexibility; capacity building (legal and commercial); focal points for PIC; and information accessibility. One expert said the public sector should be considered under uses, and another added ownership of genetic resources under scope. Others stressed the importance of awareness-raising and improved participation at the national level.

On the issue of scope, experts discussed the definition of genetic resources and its implications for access legislation, as well as the possible implications of CBD definitions. Others observed that access legislation should consider, *inter alia*: technology aspects; local and national perspectives; geographic scope; and the relevance of *ex situ* collections. It was agreed that access legislation should only cover genetic resources, but that benefit-sharing should also cover their derivatives.

There was general agreement that flexibility in access legislation would facilitate implementation of all CBD objectives. Some experts supported establishing minimum international standards for MAT and leaving the rest to national legislation and the negotiation of individual contracts.

Most experts noted difficulties in determining appropriate international standards for access legislation and MAT. One suggested a list of indicators of benefit-sharing, which would not be a shopping list of benefits but would identify desirable terms for MAT. Another noted that, given the requirement for flexibility, indicators were a good alternative to minimum standards, since these would assist contracting parties rather than being regulatory and prescriptive. It was noted that the concept of flexibility might encounter opposition at the COP, where political forces, particularly from developing countries, may prefer prescriptiveness, necessitating a careful description of the potential benefits. The importance of distinguishing between different types and uses of genetic resources in access legislation was also stressed.

One expert emphasized the need to address incentives for sustainable use of genetic resources to balance the concept of flexibility. The importance of capacity building at the national level was reiterated. One expert suggested that ecotourism also be considered a matter of genetic resource use. Most agreed that this was an important issue, but that it was already being addressed by SBSTTA.

**Incentives:** In discussion on incentive measures to encourage fair and equal contractual partnerships, there was general agreement that incentives should be derived from national policy and targeted to specific objectives, such as conservation and sustainable use. It was also agreed that incentives must be identified for both providers and users at the national level as well as at the multilateral level.

**Intellectual Property Rights:** An open-ended sub-group met to discuss the issue of IPR. Experts discussed IPR in relation to PIC, traditional knowledge, contractual agreements and scope with regard to genetic resources. They also considered potential benefits and conditions of IPR with respect to PIC; how IPR facilitates the PIC; tools for transparency; the need for monitoring of patent applications; and incentives for the private sector to seek PIC. Recognizing that traditional knowledge represents innovation and creativity that should be protected, experts emphasized the need to define and further document traditional knowledge; and protect *sui generis* systems. It was also noted that IPR are not sufficient for protecting traditional knowledge.

Experts emphasized: contractual agreements as a means to determine conditions under which IPR are granted; the need for licensing arrangements for genetic resources and traditional knowledge; and IPR as a means of capturing benefits in contractual agreements. They also highlighted how a contract on ABS can guide a user applying for IPR and discussed ongoing processes in other fora, such as WIPO. On issues related to scope, experts distinguished between patenting versus genetic resources and IPR versus traditional knowledge and farmers' privileges. They noted other issues requiring attention, *inter alia*: distinguishing between national patrimony and cultural patrimony; ensuring that IPR does not impede traditional uses; using licensing arrangements; implementing mechanisms for distribution of benefits; applying current IPR regimes to protect traditional knowledge; and maintaining consistency with other international agreements.

### IN THE CORRIDORS

Despite initial opposition, a working group was established to consider IPR. Some opposing experts felt that IPR issues should only be addressed by the WTO and TRIPs agreement, while others feared opening a "can of worms." Those in favor of the group hoped that holding a discussion among experts with varying backgrounds and views would provide a unique opportunity to forward the debate and to bring the impact of IPR on biodiversity conservation to the attention of the WTO.

### THINGS TO LOOK FOR

**WORKING GROUP:** The working group on the review of legislation, administration and policy measures, regulatory procedures and incentive measures will convene at 9:00 am to review its IPR sub-group's draft text.

**PLENARY:** Plenary will convene at 10:00 am to review the findings of Wednesday's working group deliberations.