REPORT TO ASIA INDIGENOUS PEOPLES PACT (AIPP)

On the Convention on Biological Diversity’s
Third Meeting of the Ad Hoc Open-Ended
Working Group on Access and Benefit-Sharing (“ABS–3”)

14-18 February 2005 -- Bangkok, Thailand

INTERNATIONAL REGIME ON ACCESS AND BENEFIT SHARING:
NATURE, SCOPE AND ELEMENTS

Opening Day of the ABS-3. Photo: Earth Negotiations Bulletin (ENB)

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1 All photos by ENB are available on the web at www.iisd.ca/biodiv/abs-wg3/

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I. General Comments

Indigenous Preparatory Meeting: On 12-13 February 2005, at the Siam City Hotel, the International Indigenous Forum on Biodiversity (IIFB) held a meeting to prepare Indigenous representatives for participation in the Third Meeting of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing (“ABS-3”) held 14-18 February 2005 in Bangkok, Thailand at the United Nations Conference Center. Fred Fortier (Secwepemc Canadian Aboriginal) and Lucy Mulenkei (Massai from Kenya) were elected chairs of the IIFB. During this meeting, participants split into two working groups based on the official CBD agenda of the ABS-3 Sub-Working Groups 1 & 2. Joji Carino (Igorot of Philippines) and Merle Alexander (Tsimsian of Canadian) were nominated as co-chairs of the IIFB Working Group 1. Early in the week, Le’a Malia Kanehe (Kanaka Maoli of Hawai’i) was asked by the members of Working Group 1 to serve as a third co-chair.

The International Alliance of Indigenous and Tribal Peoples of the Tropical Forests organized and coordinated the work of the IIFB throughout the week, including serving as the Secretariat for the caucus. The Alliance and its staff, in particular, information officer Helen Leake, should be congratulated for her excellent coordination and support throughout the meetings.

Scope of Report: This report will only cover the IIFB Working Group 1 and IIFB participation during Sub-Working Group 1 (“SubWG1”) of ABS-3 on Item 4 of the official agenda regarding the Nature, Scope and Elements of an International Regime on Access and Benefit Sharing (“IR-ABS”). Potential objectives of the regime were also discussed and are reviewed within this report.

Background Information on the International Regime on ABS: At the Seventh Conference of the Parties (“COP VII”), the Parties engaged in extensive discussions about the mandate and the terms of reference of the ABS Working Group and decided that the Working Group would "elaborate and negotiate an international regime on access to genetic resources and benefit sharing with the aim of adopting an instrument/instruments to effectively implement the provisions of Article 15 and Article 8(j)." ABS-3 was the first of two meetings scheduled to carry out that work before COP VIII in Brazil.

II. IIFB Working Group 1 Preparatory Meetings

The primary work of Working Group 1 focused on a critique of the CBD Executive Secretariat’s report on the section on relevant existing human rights agreements as contained in the document UNEP/CBD/WG-ABS/3/2. In particular, the human rights attorneys in the group (Mililani Trask – Kanaka Maoli of Hawai’i and Mathias Ahren – Saami of Sweden) identified glaring inaccuracies in the Executive Secretariat’s interpretation of human rights law within paragraphs 53 through 58. Mililani Trask also explained the evolution of permanent sovereignty over natural resources as contained in the Final Report of the Human Rights Special Rapporteur Erica-Irene Daes (E/CN.4/Sub.2/2004/30 (13 July 2004). Human rights positions based on the right of self-determination and permanent sovereignty over natural resources formed the basis of the IIFB’s general opening statement to the plenary, the opening statement to the Sub-Working Group 1, interventions through Sub-Working Group 1 and the closing statement to the plenary, all of which are detailed below in Section III-V. Human rights analysis was also strongly
articulated during the IIFB press conference. A brief, preliminary human rights analysis prepared by Working Group 1 is attached to this report as Annex I.

III. ABS-3 Plenary Opening Statement of the IIFB regarding Human Rights

Because Indigenous peoples remain deeply concerned about the proposed international regime on access and benefit sharing, the IIFB’s opening statement to the plenary of ABS-3, focused on the necessity of any proposed regime to be consistent with human rights law. Key excerpts are included below:

“Indigenous peoples are rights holders with inherent, proprietary, and inalienable rights to our Indigenous knowledge and biological resources. Genetic resources and traditional knowledge are inextricably linked. We have consistently stated that we are not participating in these discussions to facilitate access to our traditional knowledge nor the genetic resources in our territories. Rather, we participate to ensure our rights are recognized and respected by the Parties in the development of the proposed regime. Further, the proposed international regime must be consistent with international human rights law and standards.

The CBD and its member states under Article 103 of the UN Charter read in conjunction with Article 1(3) are obliged to respect human rights. We note that COPVII decided to have this Working Group take into account their international human rights obligations in the elaboration of the proposed international regime on access to genetic resources and benefit sharing, in particular the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights.

...
In particular, we note the right of self-determination and the corresponding right of permanent sovereignty over natural resources is the fundamental premise upon which Indigenous peoples have asserted our proprietary, inherent, and inalienable rights over our traditional knowledge and natural resources, including genetic resources.

We would like to reiterate the IIFB intervention made at COPVII that states must affirm and implement their obligations under relevant international human rights law. State sovereignty does not amount to absolute political or legal freedom. Sovereignty of states is limited by the Charter of the United Nations and by other principles of international law, such as human rights treaties. States must recognize that trade agreements, such as the TRIPs agreement and WIPO treaties, must be interpreted and applied consistently with human rights obligations.

We encourage the Parties to affirm that their existing human rights obligations are clearly reflected in the nature, scope, and elements of any proposed international regime. We further encourage that the Executive Secretary seek the expert advice within the UN human rights system to more thoroughly evaluate the linkages between human rights law and ABS. The CBD should remain mindful of and act consistently with existing and evolving human rights standards regarding Indigenous peoples.”

IV. ABS-3 Sub-Working Group 1 – IIFB Interventions

Mr. Sem Taukondjo Shikongo from Namibia and Mr. Geoff Burton from Australia co-chaired Sub-WG 1, which was tasked with making recommendations regarding the nature, scope, and elements of the proposed IR-ABS as contained in COP Decision VII/19 D. During the week, the co-chairs also incorporated comments on the potential objectives of an IR and additional elements and options to be considered. By far, Mr. Shikongo was far more receptive to interventions by the IIFB. Therefore, when Mr. Shikongo was actually chairing the meeting (i.e., accepting interventions, etc.), the IIFB was able to make interventions, however, when Mr. Burton was chairing the meeting, our requests to speak were rarely acknowledged. When this occurred it was incumbent upon the IIFB participants to lobby friendly states to make interventions to support our positions. In reality, however, no states were willing to support our stand for self-determination.
Key excerpts from interventions made on behalf of the IIFB on these topics are included below:

**A. Opening Statement to Sub-WG 1**

During our opening statement to Sub-WG 1, the IIFB made general statements and recommendations on topics including human rights law as it relates to ABS, the right of free prior informed consent when Indigenous knowledge or genetic resources originating from Indigenous lands and territories are accessed or used, mechanisms for the protection of cultural heritage, the work of the Working Group on Article 8(j) on sui generis protections of traditional knowledge and its mandate to collaborate on the IR, and the rights and participation of Indigenous women in ABS processes.

**Human Rights and ABS:**

“…[W]e do not support the interpretation of the relationship between human rights instruments and access and benefit sharing found in paragraphs 53 through 58 of document 3/2…[H]uman rights, and specifically the human rights of Indigenous Peoples, are central to a just and equitable international regime in ABS. COP VII recognized the relevance of human rights by including human rights instruments as sources for this work. The CBD should promote collaboration between the UN Permanent Forum on Indigenous Issues and the UN human rights bodies and mechanisms. In this light, we call on the ABS Working Group to consider the following recommendation:

**Recommendation:**

The CBD consult with the UN Permanent Forum on Indigenous Issues UN human rights bodies, mechanisms and Special Rapporteurs, regarding the relationship between human rights instruments, emerging standards, such as the UN Draft Declaration on the Right of Indigenous Peoples, and access and benefit sharing with a particular emphasis on Indigenous Peoples rights.

We note the right of self-determination and the corresponding right of permanent sovereignty over natural resources is the fundamental upon which Indigenous Peoples have asserted our proprietary, inherent and inalienable rights over our traditional knowledge and natural resources, including genetic resources.”

**UN Permanent Forum on Indigenous Issues (UNPFII) and Models of free prior informed consent:**

“We call attention to the recent the International Workshop On Methodologies Regarding Free Prior And Informed Consent And Indigenous Peoples that occurred on January 17–19, 2005 under the auspices of the UNPFII and the positive contribution made by the SCBD as a participant in that Workshop. The Report arising from the Workshop recognizes the substantive role that the UNPFII can perform in co-ordinating work in the development of models on free and prior informed consent. We consider that the ABS Working Group and the CBD as a whole can be informed by the results of this Workshop.
Recommendation. We recommend that:

The Parties and SCBD consider the conclusions and recommendations from the Report of the Methodologies Regarding Free Prior and Informed Consent and Indigenous Peoples in their ongoing work under access and benefit–sharing.”


“We note the significant work being done under the UN Working Group on Indigenous Populations (“WGIP”) on the Cultural Heritage of Indigenous Peoples which builds on the earlier report of the Special–Rapporteur Madame Erica Daes on Principles and Guidelines on Indigenous Cultural Heritage (E/CN.4/Sub2/2000/26). Indigenous Peoples value this work because it proposes positive measures in addition to the defensive measures which Indigenous Peoples may employ against the encroachment of intellectual property rights over our resources in the bodies of the WTO–TRIPs and WIPO.”

Outcomes of Working Group on Article 8(j):

“Distinguished Co-Chairs, as we know, the mandate and scope of this Working Group calls for collaboration of ABS WG and 8(j) WG and their respective ongoing work. We would like to highlight two specific components of the 8(j)’s work programme:

(a) Development of sui generis systems and measures for the respect and protection of Indigenous knowledge, including Indigenous customary law; and

(b) Development of elements of an ethical code of conduct to ensure respect for the cultural and intellectual heritage of Indigenous Peoples relevant for the conservation and sustainable use of biological diversity.”

Recommendation:

Given that the outcomes of the Working Group Article 8(j) are a substantive element of the proposed international regime, we recommend that the Fourth meeting of the Ad–Hoc Open–Ended Inter–Sessional Working Group on Article 8(j) and related provisions occur prior to the Fourth meeting of the Ad–Hoc Open–Ended Working Group on Access and Benefit–Sharing.

Rights and Participation of Indigenous Women in ABS Processes

“…[I]n all its discussions on the nature, scope and elements on the international regime, the Working Group must ensure the recognition and the protection of the rights of Indigenous women as holders and protectors of traditional knowledge and resources.”
Stella Tamang (left) (Tamang peoples of Nepal), member of the Indigenous Women’s Biodiversity Network (IWBN), delivered the IIFB opening statement to Sub-WG1 as IWBN Co-Chair Florina Lopez (right) looks on. Photo: ENB

B. General Report and Specific Interventions of IIFB on International Regime on ABS regarding Nature, Scope, Potential Objectives and Elements

The Parties, both developing and developed, have consistently pushed for the international regime to be subject to national legislation, especially where it addresses Indigenous peoples’ rights. Nevertheless, Indigenous peoples have consistently stated our concern of having our rights subject to domestic law. This issue featured prominently within the Sub-WG 1 discussions, therefore, the IIFB found it necessary to state that:

“National sovereignty over natural, biological, and genetic resources under the CBD does not amount to absolute political or legal freedom. As Article 3 of the CBD rightly affirms: Sovereignty of states is limited by the Charter of the United Nations and by other principles of international law. Human rights treaties limit state sovereignty. State Parties to the CBD are obliged to achieve consistency between international human rights law and any legislation on access and benefit sharing; both in terms of a proposed regime’s international elements and in national legislation.”

Nature

The Parties spent a significant amount of time discussing whether or not the proposed international regime should be legally or non-legally binding. In general, the polarized positions were represented by the developing countries (in particular India on behalf of the Like-Minded Mega Diverse, and Ethiopia on behalf the African Group) on one hand who want a legally-binding regime, and the developed countries (particularly Canada and the European Union) on the other hand who, currently, do not want a legally binding regime and are calling for more gap analysis. The IIFB did not take a position.

In the end, the Parties did not stray from the COP VII Decision text or add any new language. Therefore, the final document reads: “The international regime could be composed of one or
more instruments within a set of principles, norms, rules and decision-making procedures legally binding and/or non-binding.”

**Scope**

Similar to the discussion under “nature” of the regime, the Parties did not agree to any new language beyond the COP VII decision regarding scope of the regime. Therefore, the regime would cover:

(i) *Access to genetic resources and promotion and safeguarding of fair and equitable sharing of the benefits arising out of the utilization of genetic resources in accordance with relevant provisions of the Convention on Biological Diversity*

(ii) *Traditional knowledge, innovations and practices in accordance with Article 8(j).*

The Parties did, however, put forth six options for further negotiation and consideration at ABS-4 representing the various regional and lobbying block positions (see UNEP/CBD/WG-ABS/3/SWG.1/L.1). Further analysis is required regarding the options tabled as they relate to Indigenous peoples, Indigenous knowledge and our rights to land.

**Potential Objectives**

During the discussion on potential objectives of the IR, the IIFB’s primary concern was to achieve a textual recommendation that would ensure that the IR be consistent with human rights law, including recognition of Indigenous peoples right of self-determination. Initially, the IIFB was very pleased that specific text that we offered to the co-chairs regarding human rights were included in the first Co-Chair’s text on February 15th. Specifically, the following primary objectives were included:

- “Achieve consistency between human rights law and ABS laws”
- “Ensure recognition of indigenous peoples’ right to self-determination”

Unfortunately, the February 16th Co-Chair’s text deleted both of those objectives, and only minimally proposed, “to provide effective protection for the traditional knowledge of indigenous and local communities associated with genetic resources and derivatives, subject to national legislation of the countries where these communities are located.” It also proposed to “ensure compliance with prior informed consent of countries of origin and of indigenous and local communities.”

When the Co-Chairs set a “Friends of the Chair” group to address the polarized positions on the scope and potential objectives of the regime, the IIFB requested to be included. Although the Co-Chairs did agree to have one IIFB representative attend the meeting, some miscommunication about the time and location of the meeting occurred and the IIFB was not included in the meeting. Accordingly, when the Sub-WG1 reconvened, the IIFB intervened to say that we were very disappointed to see that without any discussion on the floor the day before proposing to delete reference to human rights, the text, nevertheless, emerged without any commitment to consistency with the states’ human rights obligations.
Le’a Kanehe requesting the Co-Chairs of Sub-Working Group 1 to include the IIFB in the Friends of the Chair group on scope and potential objectives of the international regime on ABS. Photo: ENB.

There is not a state party to the CBD that is not also obliged by the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). This is why the COP VII/19 included these instruments in its decision. We submitted that the Co-Chair’s text should be amended to reflect the following objective:

To protect the rights of indigenous peoples and local communities to their genetic resources and associated traditional knowledge consistent with international human rights obligations.

Unfortunately, this text was also rejected.

We further stated that,

A specific objective to recognize the rights of Indigenous peoples will reflect a commitment by Parties to ensure that all subsequent aspects of any proposed international regime will recognize and protect our interests. Without this, it is not possible that Indigenous peoples can support any access and benefit-sharing regime as it has evolved to this point. As long as the framework of a regime is subject to national legislation, while pretending to ignore international obligations, Indigenous peoples’ inherent human right of self-determination will not be appropriately protected. History clearly shows us that states’ interests directly conflict with Indigenous peoples rights. History is repeating itself again today in this elaboration and negotiation of the proposed international regime.”

In the end, the Working Group was unable to agree on any firm objectives, but instead the major blocks (European Union (EU), Like-Minded Mega Diverse, African Group, Canada, among others) proposed six different options, each with varying objectives. These will be further discussed at their next meeting, ABS-4. Although all of this text is optional and in flux, it is important to note that there are several potential objectives that relate to Indigenous peoples as
contained in UNEP/CBD/WG-ABS/SWG.1/L.1. Further analysis will be required to determine response to the various options.

Friends of the Chair group meeting, including Switzerland, India on behalf of Like-Minded Mega Diverse countries, Ethiopia on behalf of the African Group, Tanzania, and The Netherlands on behalf of the European Union, to discuss the scope and potential objectives of the international regime. Photo: ENB.

**Elements**

The Co-Chairs made a significant effort to cluster elements for consideration contained in the COP VII Decision by subject matter/topic. Therefore, the following sub-headings by subject matter emerged:

- Access
- Ensuring benefit-sharing
- Promoting benefit-sharing
- *Recognition and protection of rights of indigenous and local communities*
- Derivatives
- Promotion and enforcement mechanisms of the international regime and compliance with PIC and MAT
- Functioning of the international regime
- Poverty eradication; and
- Relevant elements of existing instruments and processes

It is important to note that the original Co-Chair’s Text heading relating to Indigenous peoples read “Protection of traditional knowledge.” In our initial general comments on the elements, we highlighted our concern with the clustering of elements under this heading. Furthermore, we asserted that the appropriate subject of the protection of human rights are peoples, therefore protection of traditional knowledge is just one aspect of Indigenous peoples rights. Accordingly, the IIFB explained that this clustering of elements speak to a set of rights that include, but are not limited to the recognition and protection of our rights to traditional knowledge. For example,
customary law is not narrowly confined to traditional knowledge. Furthermore, our right to free prior informed consent pertains to not only traditional knowledge, but also to the genetic resources within our territories. Therefore, we suggested that the appropriate cluster heading should read, “Recognition and protection of rights of Indigenous peoples and local communities,” which was eventually adopted, except that the typical CBD text of “indigenous and local communities” was used, as reflected in the list of headings above.

It is important to remember that these headings may eventually be dropped in any final text and even if retained, they do not have any operative power or binding mandate for the regime or the Parties to actually recognize or protect the rights of Indigenous peoples.

IIFB also lobbied to have all the elements relating to Indigenous peoples clustered together, a move that was supported by the EU. Therefore, element (x) from the COP VII decision on “measures to ensure compliance with prior informed consent of indigenous and local communities holding traditional knowledge associated with genetic resources, in accordance with Article 8(j).” Because this language is only applicable to PIC for traditional knowledge and is subject to national legislation, which is the limitation of Article 8(j), we asserted that this text should be changed to read:

Measures to ensure compliance with prior informed consent of indigenous and local communities regarding access to, and use of, their genetic resources and associated traditional knowledge in accordance with international human rights obligations.

This language broadens PIC to access to genetic resources within our territories and balances domestic law with international human rights obligations of the countries. Unfortunately, the Parties did not change any of the elements as set forth by the COP, therefore, this language was not considered, but should be asserted in future meetings when the Parties decide to open up the text.
Potential additional elements

The Co-Chair’s took recommendations for potential additional elements and options identified that were not already addressed in the COP VII list of elements to be considered. Essentially, any Party was able to put forward suggestions for consideration at ABS-4, resulting in twenty new potential additional elements. Of those twenty, the IIFB and Indigenous Women’s Biodiversity Network (IWBN) were successful in putting forth two new elements:

- *Measures to ensure recognition and protection of the rights of indigenous women as holders and protectors of traditional knowledge and genetic resources*
- *Measures to protect the rights of indigenous peoples to the genetic resources originating in indigenous lands and territories.*

It will be very important for Indigenous peoples to comment on the necessity of these two measures to remain as elements of any international regime on ABS.

In addition, Parties recommended at least five other potential additional elements that particularly relate to Indigenous peoples, which include:

- Measures to prevent misappropriation of genetic resources, their derivatives and products as well as traditional knowledge;
- Measures to ensure access to information in regulating access on access and benefit-sharing of genetic resources and associated traditional knowledge;
- Nationally recognised certificate of origin/source/legal provenance of genetic resources and their derivatives and associated traditional knowledge as well as rules of customary law;
- Measures to prevent the unauthorised access and use of genetic resources and traditional knowledge; and
- Measures to ensure disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge as a precondition for the registration and commercialization of new products based on genetic resources and/or associated traditional knowledge.

Further analysis of these potential elements is required.

V. Closing Statement to Plenary

The work of the IIFB in Sub-WG 1 to assert our human right of self-determination and corresponding right of permanent sovereignty over natural resources featured prominently in the IIFB’s overall closing statement made to the plenary of the Working Group. Key excerpts are included below.
IIFB Co-Chair Fred Fortier (Aboriginal of Canada) presented the caucus’ closing statement to the plenary of ABS-3 calling for consistency with human rights law and increased participation for Indigenous peoples within all processes. Photo: ENB.

“The International Indigenous Forum on Biodiversity (IIFB) is deeply concerned that the direction of the proposed international regime on access and benefit sharing will lead to gross violations of Indigenous Peoples rights to our lands, resources, and traditional knowledge.

For this reason, we have consistently stated that we are not participating in these discussions to facilitate access to our traditional knowledge nor the genetic resources in our territories.

The current form of the nature, scope, potential objectives and elements of an international regime on access and benefit sharing has ignored core proposals of the IIFB. We have stated that a primary objective of any proposed international regime must achieve consistency between human rights law and ABS laws. We were very disappointed to see that without any discussion on the floor proposing to delete reference to human rights, the text emerged without any firm commitment by Parties to meet human rights obligations.

We would like to acknowledge the efforts of a few Parties to provide optional text that does recognize the need to protect the rights of Indigenous Peoples to our own traditional knowledge consistent with international human rights obligations.³ Nevertheless, we still persist in demanding recognition for our

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³ It should be noted that Mr. Tewolde Berhan Gebre Egziabher on behalf of Ethiopia and the spokesperson for the African Group, as well as the European Union did submit some IIFB text within their options tabled under the potential objectives and elements.
rights to control access to, and the use of the genetic resources originating from our lands and territories in accordance with the basic human right of peoples, including Indigenous peoples, to self-determination as contained in Article 1 of both the international covenants on Civil and Political Rights and Economic, Social and Cultural Rights.”

VI. Recommendations for Future Work

The Working Group is expected to meet again before COP VIII in 2006 (exact dates to be announced) and is mandated to work “with the collaboration of the Ad-Hoc Open-ended Working Group on Article 8(j) and related provisions.” Both Working Groups are currently planned to occur back-to-back in Spain in March 2006 (exact dates to be announced). The IIFB recommended that, “[g]iven that the outcomes of the Working Group Article 8(j) are a substantive element of the proposed international regime, . . . the Fourth meeting of the Ad–Hoc Open–Ended Inter–Sessional Working Group on Article 8(j) and related provisions [should] occur prior to the Fourth meeting of the Ad–Hoc Open–Ended Working Group on Access and Benefit–Sharing.” It will be essential that a broad-based Indigenous caucus participate in association with the IIFB at both 8(j)-4 and ABS-4, taking into account regional representation, gender balance, and individuals and organizations experienced in both ABS, protection of Indigenous knowledge, and human rights processes.

On the final day of ABS-3, Australian Torres Strait Islander, Stanley Lui, and Australian Aboriginals, Robynne Quiggin, Leah Talbot, and Cheryl Kitchener, pose with fellow-aboriginal John Scott, who serves as the CBD Secretariat for Article 8(j) and related provisions. Photo: ENB

In the interim, Indigenous peoples have the opportunity to submit comments and proposals to the Executive Secretary on the nature, scope, potential objectives, and elements of the proposed regime (see para. 3 of UNEP/CBD/WG-ABS/3/SWG.1/L.1). Although the IIFB lobbied to have our proposals included in the final document, the Parties decided that they wanted such options to be limited only to Parties (see para. 2 of UNEP/CBD/WG-ABS/3/SWG.1/L.1). Therefore,
most of the recommendations for specific text that the IIFB suggested will need to be made during the submission process consistent with para. 3 of the recommendations (and of course lobbied for again at ABS-4). The specific timeline was not set for this submission process, however, in any case, it will be “no later than three months prior to the next meeting of the Working Group (December 2005).”

The matrix, prepared by the Co-Chairs of the Sub-WG 1, contained in UNEP/CBD/WG-ABS/3/SWG.1/L.1, Annex II: Analysis of gaps, was designed to assist Parties and others to comment on the elements in relation to provisions of existing international instruments within and outside the CBD, relevant provisions of existing regional and national instrument, and relevant processes, gaps identified and how those gaps should be addressed (see para. 5 of UNEP/CBD/WG-ABS/3/SWG.1/L.1). Indigenous peoples may want to utilize this matrix.

VII. Recommendations for Future Work

Working Group on Article 8(j) and Related Provisions

The WG on ABS is expected to meet again before COP VIII in 2006 (exact dates to be announced) and is mandated to work “with the collaboration of the Ad-Hoc Open-ended Working Group on Article 8(j) and related provisions.” The IIFB recommended that, “[g]iven that the outcomes of the Working Group Article 8(j) are a substantive element of the proposed international regime, . . . the Fourth meeting of the Ad–Hoc Open–Ended Inter–Sessional Working Group on Article 8(j) and related provisions [should] occur prior to the Fourth meeting of the Ad–Hoc Open–Ended Working Group on Access and Benefit–Sharing.” That recommendation appears to have been followed and the meetings are tentatively planned to occur back-to-back in Spain, with the WG8(j) occurring from 13-17 of March 2006 and the WGABS occurring from 20-24 March 2006 (see www.biodiv.org/meetings). It will be essential that a broad-based Indigenous caucus participate in association with the IIFB at both 8(j)-4 and ABS-4, taking into account regional representation, gender balance, and individuals and organizations experienced in both ABS, protection of Indigenous knowledge, and human rights processes.

In the interim, Indigenous peoples have the opportunity to submit comments and proposals to the Executive Secretary on the nature, scope, potential objectives, and elements of the proposed regime (see para. 3 of UNEP/CBD/WG-ABS/3/SWG.1/L.1). Although the IIFB lobbied to have our proposals included in the final document, the Parties decided that they wanted such options to be limited only to Parties (see para. 2 of UNEP/CBD/WG-ABS/3/SWG.1/L.1). Therefore, most of the recommendations for specific text that the IIFB suggested will need to be made during the submission process consistent with para. 3 of the recommendations (and of course lobbied for again at ABS-4). The specific timeline was not set for this submission process, however, in any case, it will be “no later than three months prior to the next meeting of the Working Group.”

The matrix, prepared by the Co-Chairs of the Sub-WG 1, contained in UNEP/CBD/WG-ABS/3/SWG.1/L.1, Annex II: Analysis of gaps, was designed to assist Parties and others to comment on the elements in relation to provisions of existing international instruments within and outside the CBD, relevant provisions of existing regional and national instrument, and
relevant processes, gaps identified and how those gaps should be addressed (see para. 5 of UNEP/CBD/WG-ABS/3/SWG.1/L.1). Indigenous peoples may want to utilize this matrix.

RECOMMENDATIONS

I. It will be essential for Indigenous peoples and IPOs to complete an in-depth analysis of the documents coming out of ABS-3 and inform both ABS-4 and 8(j)-4 of Indigenous positions on these documents. The following recommendations are not to be considered exhaustive, but are offered as key steps toward achievement of stronger Indigenous peoples participation in the future work relating to ABS and the protection of Indigenous peoples’ rights:

1. Undertake an in-depth analysis of consensus text and optional text put forth by Parties in Annex I of UNEP/CBD/WG-ABS/3/SWG.1/L.1 on the nature, scope, potential objectives, and elements of an international regime on ABS. This analysis should be based on a human rights approach, including political, social, cultural, and economic rights as they relate to access to, and use of, genetic resources and Indigenous knowledge and benefit sharing arising from such access and use. The preliminary analysis contained in Annex I of this report can serve as an initial foundation. To achieve a full analysis in this regard, it will be critical to engage Indigenous human rights law attorneys, others experienced in the human rights forums, and Indigenous people engaged in the protection of Indigenous rights. This analysis should be disseminated to Indigenous peoples and IPOs allowing for sufficient time to submit responses on the ABS-3 documents;

2. Organize workshop(s), in partnership with other IPOs and NGOs, to build the capacity of Indigenous peoples to more fully and effectively participate in the Working Group on ABS, Working Group on Article 8(j), CBD COP, and other relevant venues (i.e, WIPO), including engaging donor agencies, governments, and other relevant organizations in the support of such workshops;

3. Request the United Nations Permanent Forum on Indigenous Issues, at its Fourth Meeting in May 2005, to coordinate the human rights bodies and special rapporteurs of the UN to analyze the proposed international regime on ABS and make appropriate recommendations to the CBD;

4. Request the United Nations Permanent Forum on Indigenous Issues, at its Fourth Meeting in May 2005, to coordinate the work of all the various UN agencies and bodies engaged in work on traditional knowledge/Indigenous knowledge (i.e, WIPO, UNESCO, CBD, UNDP, WGIP etc.) with the goal of achieving consistency across the UN system in protecting the rights of Indigenous peoples related to Indigenous knowledge.

II. Cross-cutting issues with other thematic area working groups and subsidiary bodies

The CBD has several upcoming inter-sessional meetings planned that will have ABS as a cross-cutting issue, which include:
The first and second meetings of the Ad-Hoc Open-Ended Working Group on Protected Areas scheduled for 13-17 June 2005 in Montecatini, Italy (“WGPA-1”) and 28 November – 2 December in Montreal, Canada (“WGPA-2”), respectively;


The fourth meeting of the Working Group on Article 8(j) (“WG8j-4”) tentatively scheduled for 13-17 March 2006 in Spain.

(see www.biodiv.org/meetings for more info on these meetings)

Recommendations for WG8j issues have already been highlighted above, however, cross-cutting issues with protected areas and marine and coastal biodiversity in relation to ABS are addressed below.

**Protected Areas**

With regard to Protected Areas (PA), it is likely that the emphasis placed on access to genetic resources and benefit sharing by the States as was experienced in Island Biodiversity discussions at SBSTTA-10 will be repeated in WGPA. There is already indication that PA may serve as hotspot locations for access to genetic resources. These areas are already recognized for their unique and rich biodiversity, therefore making them havens for bioprospectors, as is suggested by suggested activity 2.1.6 (Establish or strengthen national policies to deal with access to genetic resources within protected areas and fair and equitable sharing of benefits arising from their utilization drawing up on the Bonn Guidelines . . . ).

It is also likely that there will be a push to engage Indigenous peoples in the use of Indigenous knowledge, innovations, and practices to further resource mapping and biological inventory, as indicated in suggested activity 3.3.3. This issue overlaps with the push to utilize gene banks in goal 1, target 4 of the Island Biodiversity PoW. The following text was suggested in this regard and should be considered and adapted to suit application within the WGPA.

Establish, with the full and effective participation of indigenous and local communities, a process and set of requirements governing prior informed consent, mutually agreed terms, and equitable sharing of benefits with respect to traditional knowledge, innovations and practices associated with genetic resources to be held in gene banks.

Indigenous participants may consider engaging the mandate within Goal 2.2 “to enhance and secure involvement of indigenous and local communities and relevant stakeholders.”

In particular, suggested activity 2.2.2 calls for implementing plans and initiatives to effectively involve IPs at all levels of PA planning, governance and management, which should apply to planning for and regulation of ABS in PAs in island ecosystems.

**Marine & Coastal Biodiversity**
Marine & Coastal biodiversity will appear again on the SBSTTA-11 agenda as item 6.1: Marine and coastal biodiversity: identification of technical options for the conservation and sustainable use of deep seabed genetic resources beyond national jurisdiction. Decision VII/5, para 29-31 and 54-56 speak to the need to conserve and sustainably use genetic resources of the deep seabed and ocean floor and subsoil in areas beyond national jurisdiction, including in areas such as seamounts, hydrothermal vents, cold-water corals and other vulnerable ecosystem, in a manner consistent with the UN Convention on the Law of the Sea (UNCLOS). The Executive Secretary has been requested (para 54) to compile information on the methods for the identification, assessment and monitoring of these genetic resources and to compile and synthesize information on their status and trends including identification of threats to such genetic resources and the technical options for their protection, and to report those findings to SBSTTA.

Unique microorganisms that thrive in extreme environments such as the deep sea bed and hydrothermal vents, which are called “extremophiles,” are of particular interest to bioprospectors. Therefore, Indigenous participants must be aware of this particular part of ABS relevant to deep sea marine biodiversity.

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4 For example, J. Craig Venter’s massive expedition through the gene rich seas of the world has raised considerable concern. Aboard his yacht, the Sorcerer II, Venter has been collecting samples every 200 miles in the Sargasso Sea, and the waters off Mexico, Costa Rica, Panama, Ecuador (Galapagos), Chile and French Polynesia. Among other microbes, Venter is in search of photoreceptor genes that convert sunlight to energy and extremophiles from harsh environments like volcanoes and hot sulfur vents that pharmaceutical, agricultural and chemical researchers prize. Venter claims to be the discoverer of 1800 previously unknown species from seawater collected in the Sargasso Sea and 1,214,207 genes. Although Venter does not plan to seek patents himself, he is going to make the data publicly available to other researchers who may eventually seek patents for products derived from the genetic samples. ETC Group, Playing God in the Galapagos: J. Craig Venter, Master and Commander of Genomics, on Global Expedition to Collect Microbial Diversity for Engineering Life, 1, March/April 2004 (available at http://www.etcgroup.org).
Plenary Hall, United Nations Conference Center. Photo: ENB.
Annex I

IIFB’s preliminary critique and analysis of the role of existing international human rights law in relation to access to genetic resources and benefit sharing

The fundamental human right of self-determination is the basis of the UN Charter and grounds the Universal Declaration on Human Rights and both international human rights covenants. Article 1.1 of the ICCPR and the ICESCR states that:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Furthermore, under Articles 1.2 and 27 of the ICCPR, Indigenous peoples have the right to freely dispose of their natural wealth and to be secure in their means of subsistence, including territorial and cultural rights, and must be recognized and safeguarded. UN human rights forums, particularly the UN Human Rights Committee has repeatedly emphasized that these rights apply equally to Indigenous peoples.

In 1958, the UN Commission on Permanent Sovereignty Over Natural Resources was established and in 1962 the UN passed General Assembly resolution 1803 (XVII), which indicates that the principle of permanent sovereignty over natural resources is over forty years old. Permanent sovereignty over natural resources is a principal that continues to be an essential precondition to a people’s realization of its right of self-determination and its’ right to development.

The right of self-determination and the corresponding right of permanent sovereignty over natural resources is the fundamental premise upon which Indigenous peoples have asserted our proprietary, inherent, and inalienable rights over our traditional knowledge and natural resources, including genetic resources.

The document ABS/3/2 does not reflect these human rights principles. For example, paragraph 56 alleges that “to enjoy and utilize fully and freely their natural wealth and resources” would imply that governments have the right to control and manage “their” natural resources. This is a blatant misinterpretation of international law. Governments do not hold rights under human rights treaties; rather, peoples, including Indigenous peoples and individuals are the subjects of human rights. Further more, paragraph 55 declares that ICCPR recognizes sovereign rights over natural resources. This is correct, but, again, we must clarify that the subject of this right is peoples, not governments. Moreover, paragraph 53 asserts that there is “no direct linkage between human rights and ABS.” This is absolutely incorrect. Indeed, there is a clear linkage between human rights and ABS. Human rights, particularly the right of self-determination, Indigenous peoples’ rights to lands and resources, and free prior informed consent provide the limits to which any ABS regime must adhere.