Working Group II Report
International Indigenous Forum on Biodiversity (IIFB)

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

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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. Scope of the Report: This report covers the progress of the work in Sub-Working Group II which deliberated on items 5: use of terms, 6: other approaches to complement the Bonn Guidelines, 7: measures to support compliance with prior informed consent (PIC) and mutually agreed terms (MAT); and 8: Strategic Plan: Further Evaluation of Progress/indicators for ABS.

II. The IIFB Preparatory Meeting

In 12-13 February 2005, during the preparatory meeting, indigenous representatives participating in the ABS-WG meeting gathered to discuss on the agenda to be tabled in the meeting.

A group was formed to focus on the Sub-WG II and was composed of 17 participants who further broke up into 2 groups; one taking items 6 & 7 and the other group discussed on items 4 & 8. Bryan MacDonalds was tasked as the Team Leader while James Lamouche and Robynne Quiggin as Co-chairs.

The smaller groups reviewed the documents of the agenda items of the ABS3 meeting and came out with gaps and points for intervention. The results served as inputs for drafting the IIFB statement to the Opening Plenary of the ABS3-Working Group, including the subsequent interventions to be done in the Sub-Working Group deliberations.

III. General Comments:

During the opening plenary of the Working Group II, the IIFB presented its opening statement specifically providing the framework of engagement, “to ensure that rights of indigenous peoples are protected in the development of the International Regime as well the other related instruments”.

The statement read by James Lamouche:

Thank you Distinguished Co-Chairs, I am speaking on behalf of the International Indigenous Forum on Biodiversity. We would like to thank you for the opportunity to speak and we look forward to constructively engaging in these important issues.

Indigenous peoples stand firmly upon our rights of self-determination. Our rights of self-determination are fundamental to the freedom to carry out our responsibilities in accordance with our cultural values and customary laws. The

3 James Lamouche (Canada), Robynne Quiggin (Australia), Fred Fortier (Canada), Bryan MacDonald (Canada), Cresencio Hernandez (Canada), Lourdes Amos (Kankana-ey, Igorot, Philippines), Haini Tainsong (Dusun, Malaysia), Shwe Myo Thant (Kareni, Burma), Haman Hajar (Africa), Adam Kuleit Ole Mwarabu (Africa), Collete Mikala (Rwanda), Maurice Malanes (Kankana-ey, Igorot, Philippines), Stanley Lui (Australia), Jennifer Corpuz (Kankana-ey, Igorot, Philippines), Aroha Mead (Aoteroa), Lea Talbot (Australia), Cheryll Kitchener (Australia)
decisions in the CBD process should respect the fundamental premise that Indigenous peoples are rights holders with proprietary, inherent, and inalienable rights to our Indigenous knowledge and biological resources. The rights of Indigenous peoples, as the owners of their territories must be respected by the mechanisms and instruments that are developed by the CBD process.

IV. Deliberations and Interventions:

A RELUCTANT DEBATE AMONG THE PARTIES. Working Group 2 deliberated on items 5, 6, 7 and 8 Co-chaired by Birthe Ivars (Norway) and Orlando Rey Santos (Cuba). In the course of the deliberations, the presence of an enormous reluctance from the Parties in deciding further from the COP7 text was evident as shown by the 15-30 minute coffee breaks, 2-3 times more than scheduled. The Parties were then reminded by the Co-chairs and the Secretariat that the mandate of the Working Group is to elaborate the decisions of the Parties in COP7.

Further discussions proceeded with caution knowing for the fact that the deliberations in Working Group 1 on International Regime on Access and Benefit-Sharing to Genetic Resources: Its Scope, Nature and Elements, is far from realization. This was evident in the final draft recommendations in relation to Item 7 (UNEP/CBD/WG-ABS/3/L.4) which noted that the recommendation is without prejudice to the outcome of the negotiations on an international regime…

Surprisingly, the United States, a non-Party to the convention managed to put text recommendations to the decisions of the Working Group that have been accepted by the Parties. By using the words “our” and “we” in the beginning of their statements seemingly makes them a Party without clear accountability and obligations.

The industry on the other hand, played an active role whereby the International Chamber of Commerce (ICC) organized a side event discussing issues on Certificate of Origin/Source/Legal Provenance.

Item 5: Use of Terms

Upon introduction of the document (UNEP/CBD/WG-ABS/3/4), majority of the Parties stated that the discussion was premature; pending the outcome of deliberations on the international regime, and the establishment of an expert group was opposed. For the purposes of future work on this specific agenda item however, various proposals were set out by the Parties. On the definitions, Brazil and Gambia were concerned that CBD-agreed upon definitions may substitute those that are already defined at the national level while others state unwillingness to take in terms from other agreements. The body agreed then for the Secretariat to continue compilation of existing national definitions.

The ABS Management Tool was presented by Switzerland as a tool applicable to both users and providers. In a meeting held by those involved in the development of the tool4

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4 Meeting of the ABS Management Tool Advisory Committee, Hotel Royal Princess, Bangkok, Thailand,
during the week however, the tool was presented as being in the stage of testing to pilot projects and should not be interpreted by Parties and all concerned as absolute.

The IIFB for this agenda item agreed that it is premature for the group to engage in further discussions and negotiations and state as read in the excerpts of the statement during the deliberations of the specific item agenda:

“We believe that it is premature for this group to engage in discussions and negotiations on specific terms elaborated in item 5 until our rights are recognized and protected in the CBD process. We encourage the parties to have regard to the international instruments which elaborate Indigenous rights during their discussions. Indigenous Peoples are not participating in these discussions in order to facilitate access to our knowledge and the genetic resources in our territories including lands and waters. On the contrary, we are participating to ensure that these discussions recognize and uphold our rights.”

Looking further, one of the major debates is based on the unwillingness of some countries or Parties to recognize the unfair relations of the “developing” and “developed” States in other instruments such as the TRIPS-WTO and WIPO. The indigenous peoples on the other hand continue to remind Parties consistency to other international instruments and adherence to international obligations.

The recommendation contained in UNEP/CBD/WG-ABS/3/L.2 was adopted by the Parties as recommendation 3/2 of the final report on 18 February 2005.

In summary, the recommendation reiterates the invitation to Parties⁵, governments, relevant organizations, indigenous and local communities and relevant stakeholders to

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⁵ The invitation to the Parties made at COP7 & by the Parties
submit to the Executive Secretary, information on national definition of specific terms, and views on whether additional terms are needed. The recommendation noted that only a few Parties have submitted information and views so far.

**Item 6: Other Approaches, including an International Certificate of Origin/Source/Legal Provenance**

The document (UNEP/CBD/WG-ABS/3/5) dealt on the issues of the process, the scope of its applicability and the “stakeholders” involved. Other approaches which had been proposed in the document included regional instruments, instruments developed for the agricultural sector, codes of conduct and the corporate policies of private companies. The main focus was on the international certificate of origin/source/legal provenance. A polarized negotiation that illustrates a “north-south” divide was more evident as the discussions progressed in this agenda item.

Most of the Parties from the South are insistent of ensuring a process which recognizes the rights of the Country of Origin/Provider Country such as involvement of provider country in research and development (Turkey) and compliance to national legislation (Brazil). The Like-Minded Megadiverse Countries (LMMC) pushed for a standardized code accompanying biological resources including its derivatives. The EU, Japan, New Zealand, Canada, Mexico however were reluctant that this certificate may not fall within the Intellectual Property Rights (IPR) law and further called for the flexibility, functionality, viability, cost-effectiveness and a realistic process. Norway clarified its position on disclosure requirements in patent application process.

Again, the uncertainty in the discussions were articulated by Colombia stating the certification process should be consistent to the International Regime with the support of Malaysia by reiterating the need for a clear definition of terms.

The representative of the United Nations University/Institute of Advanced Studies (UNU/IAS) presented a rather comprehensive suggestion clarifying the possible definition of a Country of Origin, a Source and Legal Provenance, based on a study conducted by the University. The industry sector on the other hand, was invited to participate in compiling information on the design of a certificate for inclusion to further submission of Parties along with pilot projects.

Consultation with the indigenous and local communities, stakeholders and industry sectors was raised by Canada. Looking further, the deliberate effort by Canada to avoid the recognition of rights of indigenous peoples as “rights holders” and to decide over the access to their genetic resources and associated traditional knowledge, is evident by reducing the right to consent into a mere consultation.

The IIFB with utmost concern to this agenda item read in its statement as read:

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6 Terms include: access to genetic resources, benefit sharing, commercialization, derivatives, provider, user, stakeholder, ex situ collection and voluntary nature (from UNEP/CBD/WG-ABS/3/L.2)

7 Paragraph 80
“... we would like to express our reservations in relation to the proposed development of a certificate of origin. We note the unresolved issues associated with the practicality and enforceability of a certificate that authenticates the origins of genetic material that may go through many transformations and transit many borders.

These practical problems are significantly compounded when trying to apply the concept of a Certificate of Origin to “the associated traditional knowledge” of genetic resources.

Traditional knowledge by definition is local, site specific, and grounded in an intergenerational, cultural context of a particular peoples. Traditional knowledge of one people in relation to a biological resource might be quite different to the traditional knowledge of the same biological resource of another people. We wonder how a Certificate of Origin would be able to respect the customary laws and practices of Indigenous Peoples and believe that much more discussion needs to occur with the full participation of Indigenous Peoples.”

One complexity of certifying the origin of genetic materials and associated traditional knowledge is related to “lack of clear recognition or rights of indigenous peoples over their traditional knowledge and the lack of necessary mechanisms to ensure that access to traditional knowledge conforms to customary law and practices of indigenous and local communities.” As more scientific and technological treatments are applied to a material, it acquires a “new” trait or character and is totally separated from its original material. Being a new “invention”, it could be patented by the “inventor” based on the IPR law, even without the knowledge of the original source.

The complexity further gets two-fold where in case it gets patented, the recognition of ownership is taken out from a specific group of peoples, thus totally disregarding the recognition of the genetic resource and its associated traditional knowledge. As this material transfers from one border to another, a third-fold complexity arises from the fact that it is impossible to monitor what derivatives would be taken further from the genetic material.

One difficulty perceived in this whole debate is the willingness of all concerned to understand each one’s issue basically because of conflicting interests. While being directly affected by decisions being taken by the Parties, Indigenous peoples are marginalized in the debate being in the perimeters of the discourse. It is worth noting however, that the LMMC has stressed the empowerment of indigenous and local communities in PIC negotiations while Mexico says otherwise by stating that traditional knowledge should be excluded from the initial concept of a certificate.

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9 Like-Minded Megadiverse Countries: Bolivia, Brazil, China, Colombia, Costa Rica, Democratic Republic of Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, Philippines, South Africa and Venezuela.
The final document of the Working Group (UNEP/CBD/WG-ABS/3/L.3) states the usefulness of other approaches in the implementation of ABS and recognizes that the international certificate of origin/source/legal provenance could be a possible element of the international regime on ABS. The Parties, Governments, relevant international organizations, indigenous and local communities and all relevant stakeholders in particular the private sector are invited to prepare further studies, pilot projects, report and submit views to the Executive Secretary on the design of an international certificate of origin/source/legal provenance, including inter alia:

(a) Its rationale, need and objectives;
(b) The desirable characteristics/features;
(c) The practicality, feasibility and costs at national and international levels.

This will be reviewed in ABS4 and submission by Parties shall further be considered.

Item 7: Measures to Ensure Compliance with Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT)

After reviewing the document (UNEP/CBD/WG-ABS/3/5), the Parties agreed that the result of the deliberations will not prejudice the outcomes of the negotiations on an international regime.

The discourse on this agenda item focused on the various issues raised including the persistence of the lack of information on experience related to the Bonn Guidelines as elaborated by the EU and Thailand as a new Party to the Convention. The session on the specific agenda item included an intense debate on the relations of CBD to the TRIPS agreements. Earlier in the opening statement, Nehemiah Rotich, speaking on behalf of Mr Klaus Topfer, the Executive Director of the United Nations Environment Programme (UNEP), called the attention of the Parties towards the existing contradictions between the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO) and the CBD that have to be resolved, and that intellectual property rights (IPRs) applied to life forms under TRIPS run counter to the CBD objectives.10 In the further discussions however, Australia and the EU reiterates otherwise while Ethiopia, Liberia, supported by the Third World Network agree with the UNEP statement and called for further support from Parties to the disclosure requirements being proposed by the developing countries in the TRIPS. The US reminded the Parties not to duplicate existing work under the WIPO after stating that the disclosure requirements in the patent system do not guarantee benefit-sharing.

10 “Subsequent to this statement, the UNEP Executive Director clarified the organization’s position in a communication to Dr. Suwit Khunkitti, Chairman of the meeting. In a letter dated 18 February, he wrote:”” This is to advise you that the speech made by the United Nations Environment Programme (UNEP) staff member does not represent or reflect the position of the Executive Director and UNEP. This was not the speech of the Executive Director of UNEP.” Mr. Töpfer also requested that the official records of the meeting clearly state UNEP’s clarification and that it be distributed urgently to all delegates.” UNEP/CBD/WG-ABS/3/7 footnote page 3
Switzerland informed the Parties of its proposal to amend WIPO’s Patent Cooperation Treaty.

Intense issues that lead to the bracketing of all its references were the disclosure of origin in IPR applications; collection, examination and dissemination of pertinent information, including with regard to WIPO and WTO; and misappropriation of genetic resources, including their derivatives, and traditional knowledge. In this regard, the Parties suggested that further studies on the occurrence, extent and cost of misappropriation of genetic resources and associated traditional knowledge, including the extent of non-compliance for those countries with relevant national legislation; and international and national measures to address illegal access and non-compliance, including penalties and compensation according to national law. This includes the international exchange of genetic resources and their derivatives; measures to address non-compliance with ABS arrangements in national jurisdiction.

The IIFB called for ensuring the PIC of indigenous and local communities to their genetic resources and traditional knowledge. Above photo L-R: Members of the IIFB with Aroha Te Pareake Mead, Paul Oldham, James Lamouche, Brian MacDonald, Lourdes Amos and Crescencio Hernandez Photo: ENB

The current and inconsistent discourse displays a wide gap in following the issues to PIC and MAT. Again, while these differences are being resolved among the Parties, the indigenous peoples, having persistently been raising the issue of recognition of their rights free, prior informed consent is left out in the whole arena. The IIFB has clearly said this in its statement as read:

“While the International Indigenous Forum on Biodiversity welcomes measures taken by governments to ensure compliance with ‘Prior Informed Consent’ and ‘Mutually Agreed Terms’ in relation to access and utilization of genetic resources and associated traditional knowledge, we note that in order for Indigenous Peoples to give their free, prior informed consent – processes, mechanisms, and structures must
be in place within Indigenous communities to be ‘informed’ and therefore to be able to give their consent or refusal.

For free, prior informed consent to be a meaningful principle, Parties will need to devote much more resources to capacity building of Indigenous communities or this will be a shallow exercise.”

Finally, the document (UNEP/CBD/WG-ABS/3/L.4) was adopted recognizing the different levels of developing measures to support compliance with PIC and MAT in different countries. Subject to the outcomes on the negotiations of an international regime, the body agreed to pursue activities as defined in VII/19 (Section E) including the implementation of the Bonn Guidelines and further analysis conduct for regional workshops (France, Canada & Switzerland); consider the introduction of disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in IPR applications and submit information on related issues to the Executive Secretary and undertake analytical work on: (a) the occurrence, nature, extent and cost of misappropriation of genetic resources, and associated traditional knowledge including, for countries with relevant legislation, the extent of non-compliance with their national legislation on PIC and MAT; (b) enforcement problems experienced under national access legislation; and (c) the effectiveness, practicality and cost of measures to ensure compliance with PIC and MAT.

The reference to misappropriation of derivatives of genetic resources however remains bracketed, for the Executive Secretary to compile and disseminate further information, through the CHM and other means. The information gathered is expected to be transmitted to relevant forums such as the FAO, UN Conference on Trade and Development, UNEP, UPOV, WIPO, and WTO; and to compile pertinent documentation circulated in these forums and make it available to the Parties in time for ABS-4.

**Item 8: Strategic Plan: Future Evaluation of Progress/Indicators for ABS**

In the discussions on indicators for ABS, the IIFB and Malaysia supported both process-oriented and outcome-oriented indicators while majority of the Parties favored process-oriented indicators.

The suggestion of Colombia to refer traditional knowledge-related indicators to the Working Group on Article 8(j) clearly indicates the view of Parties that traditional knowledge is alienable and is separate from the genetic and biological resources to which the knowledge is associated with. This prompted for the call of IIFB linking the indicators to culture-based indicators on ABS as read in the statement as follows:

“Our indulgence of the Co-Chairs the IIFB would like to speak to two issues. Firstly dealing specifically with the matter of indicators, and secondly dealing with procedural issues which we have not had an opportunity to address.”
With respect to specific indicators, the IIFB welcomes the ABS Working Group proposal to consider the work that has been done on appropriate indicators and other targets to monitor and assess progress.

We take note that both outcome and process based indicators are contemplated as options in the document. And that it maybe required that a combination of the two may be needed to take into account the different circumstances of countries. In relation to the elements of access and benefit sharing relating to models of prior informed consent/ codes of ethics/codes of conduct and customary law we would like to suggest the following:

**Outcome-orientated indicators**

a) Number of countries that have adopted models of prior informed consent developed by indigenous peoples in access and benefit-sharing arrangements

b) Number of countries that have incorporated respect for code(s) of ethics developed by indigenous peoples and local communities into national legislation and procedures on access and benefit-sharing

Number of countries that require compliance with code(s) of ethics developed by indigenous peoples by:

a) National Research Councils  
b) Public Research Organisations  
c) Private research Organisations  
d) Industry

Number of countries that require evidence of equitable benefit-sharing with indigenous peoples and local communities in national legislation

**Process-oriented indicators**

Number of countries that have established national measures to ensure that users under their jurisdiction comply with the customary laws of indigenous peoples from whom traditional knowledge and genetic resources are sought

Number of countries that have initiated:

a) Capacity-building projects with indigenous peoples in relation to ABS  
b) Consultation exercises with indigenous peoples in the development of national ABS legislation
As has been previously mentioned, the participation of indigenous peoples in the ABS meeting was restricted to one collective intervention per agenda item. In the CBD-Working Group on Article 8(j) [Traditional Knowledge & Genetic Resources] gains have been made in increasing indigenous participation. The IIFB therefore decided to seek parity between the two processes and tabled a draft decision.

IIFB Co-Chair Fred Fortier (Shwepnek aborigine 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.

Distinguished Co-Chairs we have noted with interest the, numerous member states have expressed support for the full and effective participation of Indigenous Peoples in the dialogue that this working group has been tasked with. For that we thank them. It is the opinion of International Indigenous Forum on Biodiversity that the starting point for achieving this objective is the modification of the procedural aspects of the Ad–Hoc Open–Ended Working Group on Access and Benefit Sharing to be consistent with the procedures agreed to by the Member States for the purpose of deliberations in the Ad Hoc Inter–Sessional Open–Ended Working Group on Article 8(j) and Related Provisions.

In particular, we note progressive modifications such as:

(a) Indigenous Peoples representatives informally invited to participate with the Bureau as the Friends of the Chair

(b) Indigenous Peoples representatives informally invited to be Friends of the Chair in Working Groups, Sub–Working Groups and Drafting Groups;

(c) Access to administrative support; and
(d) Amendments to the procedure related to speaking order.

On this particular matter the IIFB have developed draft text for the consideration by the parties which we will make available to the Secretariat and parties for their consideration.”

The need to advocate for procedural matters was due to the fact that the Parties do recognize “full and effective participation of indigenous and local communities” but in practice, indigenous peoples, even if they participate in the deliberations of the Parties are not given the appropriate venue where recommendations are recognized.

This proposal was read in both Sub-Working Groups on the 2nd day of the meeting and intensive lobbying with Parties for their support became the focus of the IIFB’s activities. The proposal was also tabled at the Bureau meeting. The IIFB requested language ensuring the collaboration between the Working Groups on ABS and Article 8(j) (traditional knowledge).

On the final day in Plenary, while no country opposed the proposal, a number of key developed countries requested further time to consider the implications. Canada pretended it was hearing the proposal for the very first time and even commented that it was difficult to track the intent of the proposal because of the speed at which it was being read out. Canada’s intervention brought diplomacy to an all-time low. The delegate, Tim Hodges, lied in Plenary and did a great disservice to the integrity of the process. Switzerland attempted to correct the situation by taking the floor and reminding delegates that the proposal had been the subject of many discussions since the 2nd day of the meeting.

The result of Canada’s actions, together with the ambiguous reserved support of Australia and New Zealand meant that a decision to increase indigenous participation was not
reached at this meeting. In its closing statement to the Plenary, the IIF made the following comments:

"We are seriously disturbed that the Parties were unable to implement and operationalize the COP’s purported mandate to support the full and effective participation of Indigenous Peoples. Today could have been the first significant step forward within the Working Group on ABS. It is with great sadness that we could not take that step together today. We will look to the future and encourage Parties to proceed in good faith on our proposal. ....... IIFB Closing Statement

V. Recommendations:

1. Maximise further work of indigenous groups in partnership with other institutions (ex: Call of the Earth and the UNU/AIS) to make substantive inputs of indigenous peoples issues regarding Certificate of Origin/Source/Legal Provenance to provide clarity on the unique context of indigenous issues relative to this specific item;

2. Indigenous peoples to make further contributions on the review of the voluntary Bonn Guidelines and the PIC requirements in relation to recognition of rights of Indigenous and Local Communities (ILCs) where there is existence of voluntary implementation of the guidelines;

3. Preparation of case studies by indigenous peoples regarding existing access and benefit-sharing (ABS) agreements, its lessons, impact and challenges ahead, making further interventions to the present deliberations of the International Regime and other approaches of ABS;

4. Pursue lobbying the recognition of the ABS3 recommendations on procedural matters onto the 4th ABS-WG meeting, with the positive recommendation of the WG-8(j); and,

5. Maximise the WG-8(j) meeting to formally recommend to the 4th WG-ABS meeting significant matters related to priority issues on ABS.