

Convention on Biological Diversity (CBD):

# **Exploring the Creation of a Mediation Mechanism**

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## Executive Summary

(1) The **Convention on Biological Diversity (CBD)** has three overall goals: the conservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of benefits derived from genetic resources. Most of the CBD provisions are worded rather generally. They are to be made operational through international and national legislation, voluntary guidelines, or contractual agreements.

(2) The debate on **access to genetic resources and benefit sharing** is largely characterised by uncertainty and by the unequal relationship between the economically rich and scientifically advanced North and the economically poor, but bio-rich South. Fruitful dialogue is hampered by widely divergent “business” cultures among the stakeholders involved. A traditional, more community-oriented, knowledge-sharing culture encounters a modern, individually-oriented system concerned with protecting intellectual property.

(3) The present unsatisfactory situation may lead to imperfect **outcomes** for all stakeholders involved. As a committed party to the CBD, Switzerland has been looking for concrete steps to achieve ‘win-win’ situations. With that objective, Switzerland presented *Draft Guidelines on Access and Benefit Sharing Regarding the Utilisation of Genetic Resources* to COP 5 in Nairobi (15 - 26 May 2000).

(4) Further, the creation of a **Mediation Mechanism** is suggested. This is meant to facilitate negotiations between concrete stakeholders in the field of access to genetic resources and benefit sharing, which have been left open to mutual agreements. The exploration of a Mediation Mechanism is, therefore, another contribution and complementary step to an effective CBD.

(5) The basic **challenge** of the Mediation Mechanism is to assist stakeholders in building bridges, between the rules and aspirations of local communities and their governments, and those of research institutions as well as profit-oriented companies, in a fair and equitable way.

(6) The **objectives** of the Mediation Mechanism are to promote fair and equitable solutions, in each particular case, to access to genetic resources and benefit sharing and, generally, to contribute to development and technology transfer. A successful mediation will mobilise additional resources for development, including resources from the private sector. More specifically, the Mediation Mechanism will:

- mediate the negotiations among stakeholders on access to genetic resources and benefit sharing, and level the playing field among them;
- ensure that the views of all the stakeholders are represented equally;
- strive for an equitable and balanced solution by ensuring a fair negotiating process.

(7) **Core Service:** The Mediating Mechanism will provide a comprehensive, independent, and neutral mediation service between the parties to the negotiation, aimed at ensuring that the views and interests of all the stakeholders are represented and that solutions that meet the needs of all parties involved are found.

(8) **Complementary Services** could be offered on the basis of experience and knowledge gained from mediation practice: (1) In training, awareness raising and capacity building; (2) For information exchange and dissemination; (3) By establishing a World Bio-prospecting Report.

(9) **Institutional set-up:** The Mediation Mechanism should be chaired by a highly respected president. A Governing Board should be created with participation of committed stakeholders – governments, indigenous and local communities, industry, farmers, NGOs, research institutions, universities. An eminent Chief Executive Officer with her/his staff should be in charge of the day-to-day management. The Mediation Mechanism could be strengthened by the creation of an Advisory Council of experts and stakeholders.

(10) **Structure:** To be effective and efficient, the Mediation Mechanism requires a slim and decentralised structure. In addition to a head office, the Mediation Mechanism should work through a decentralised network, which would take account of cultural, social and economic differences. For this purpose, collaboration with institutions with similar aims, in all the continents, is envisaged.

(11) **Legal form:** The Mediation Mechanism should be established as a private, not-for-profit entity. The creation of a foundation is recommended.

(12) **Phased approach:** The creation of the Mediation Mechanism is an innovative undertaking. Experience shows that, in such circumstances, it is best to start with a phased approach, offering built-in opportunities to review and adjust the project. A three-phase approach is proposed, encompassing a start-up phase of 18 months, a pilot phase of five years and a subsequent, open-ended phase to establish the Mechanism, based on an endowment fund as the long-term vision.

(13) **Revenue creation:** Services of the Mediation Mechanism have to be paid for. Among the stakeholders, there are considerable differences in economic strength. Therefore, a principle of cost-sharing should be applied in transactions involving clients who cannot cover full costs.

(14) **Financial requirements:** The financial requirements in the start-up and pilot phases which are not covered by own revenues should be secured from donor governments and international foundations. The financial requirements of an endowment fund will have to be assessed after the evaluation of the pilot phase.

(15) **Outlook:** The CBD's Conference of the Parties in The Hague (COP VI, 7 – 26 April 2002) will discuss documents referring to a mediation approach. The deliberations of the contracting parties and of other stakeholders will be of importance for the future of a Mediation Mechanism. Given a sceptic reaction of industry and more positive reactions by experts involved in the implementation of the CBD and also by other stakeholders involved in access and benefit sharing negotiations its future is open. Anyhow, the Mediation Mechanism concept will be kept as an option which may come up in a later stage again when more experience in the frame of the CBD requirements have been gained.

## **1. Introduction**

### **1.1 Background**

'**Biological diversity**' stands for the richness of life on earth: for the variability among living organisms, including the genetic diversity within, and between, species, and the diversity of ecosystems<sup>1</sup>. Biological diversity is closely interrelated with the diversity in human cultures and ways of life. The Earth's biological resources are vital to humanity's economic and social development. Biological diversity is a global asset of tremendous value to present and future generations.

Some 40 percent<sup>2</sup> of the **world's economy** is based on biological products and processes, in the form of food, fuel, medicine, shelter, and transportation. In particular, people living in poverty rely on biological products for 85 or even 90 percent of their livelihood needs. A crude estimate<sup>3</sup> of the combined annual global markets for products derived from genetic resources lies between US\$ 500 bn and US\$ 800 bn.

The importance of biodiversity in cultural, social and economic terms cannot, therefore, be overestimated. The **threat** to, and even the extinction of, species and ecosystems caused by human activities has never been so great as it is today. Biodiversity is being lost faster now than at any time since the dinosaurs became extinct some 65 million years ago. Estimates indicate that current extinction rates for some species are 50 to 100 times higher than the natural level and could even rise to as much as 10,000 times.<sup>4</sup> A primary cause of biodiversity loss, world-wide, is habitat alteration as a result of human use. This irreversible process is associated with a growing loss of traditional knowledge.

The **Convention on Biological Diversity (CBD)** has been finalised in response to these widely acknowledged concerns. In force from December 29, 1993, the CBD has been ratified by 182 countries. The CBD has three overall goals:<sup>5</sup>

- the conservation of biological diversity;
- the sustainable use of its components; and
- the fair and equitable sharing of benefits derived from genetic resources.

The CBD is a framework convention. Most of the CBD provisions are worded rather generally. They are to be made operational through international and national legislation and bilateral arrangements between the parties concerned. Article. 3 of the CBD reaffirms the sovereign right of states to exploit their own resources, in furtherance of their own environmental policies, and their obligation to ensure that activities within their national jurisdiction do not cause damage to the environment of other states. To implement the CBD, a majority of countries have started to enact legislation on biodiversity; though only a small number have legislation in place.

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<sup>1</sup> CBD Art. 2

<sup>2</sup> Crucible Group 2000, 1

<sup>3</sup> ten Kate/Laird 1999, 2

<sup>4</sup> ten Kate/Laird 1999, 3

<sup>5</sup> CBD Art. 1

The debate on **access to genetic resources and benefit sharing** is largely characterised by the unequal relationship between the economically rich and scientifically advanced North and the economically poor, but bio-rich, South. Fruitful dialogue is hampered by widely divergent ‘business cultures’ among the stakeholders involved: a clash of the modern, individually-oriented, intellectual property protection systems and the traditional, more community-oriented, knowledge-sharing systems.

In practice, **contractual agreements** between stakeholders define access to genetic resources and benefit sharing. The absence of regulatory frameworks creates uncertainty and inconsistency in negotiations. In the Food and Agriculture Organisation (FAO), a commission on Genetic Resources for Food and Agriculture renegotiated FAO’s *International Undertaking on Plant Genetic Resources* to bring it into harmony with the CBD. On 3 November 2001, the “International Convention on Plant Genetic Resources for Food and Agriculture” was adopted. Its ratification is pending. It does not cover pharmaceuticals and other fields beyond food and agriculture.

The present unsatisfactory situation may lead to **imperfect outcomes** for all stakeholders. It may result in undesired consequences, such as blocking capacity building, because domestic research, as well as cooperation with foreign organisations is slowed down. In such circumstances, stakeholders are unsure of their ground and the outcome may be less than satisfactory for all concerned – governments, communities, industry, science.

**The Fifth Conference of the Parties (COP 5)** in Nairobi (15 - 26 May 2000) was of crucial significance for the future of the CBD. It was the first opportunity for countries to sign the biosafety protocol. Access and benefit sharing were on the agenda. As the first COP in the new millennium, and the first ever on the African continent, it was an opportunity to reassert the strength of the Convention; to design long-term perspectives and to discuss new initiatives. In the framework of the Global Biodiversity Forum, a first draft proposal to create a Mediation Mechanism on access and benefit sharing was presented.

Relevant **developments since COP V** are a meeting of the Panel of Experts, and a meeting of the ad hoc open-ended Working Group on Access and Benefit-Sharing. The resulting Draft Elements for an Action Plan for Capacity-Building for Access to Genetic Resources and Benefit-Sharing include elements of significance for a Mediation Mechanism and refer to mediation and facilitation of Art. 48 of the Bonn Guidelines<sup>6</sup> on access and benefit-sharing.

## **1.2 Switzerland and the CBD**

Switzerland is a **committed party to the Convention on Biological Diversity**. For many years, Switzerland has been actively involved in the discussion on access to genetic resources and benefit sharing:

- A **survey**<sup>7</sup> had been conducted in Switzerland among the private sector and the research community to examine the needs of the stakeholders. The results of this

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<sup>6</sup> See [www.biodiv.org](http://www.biodiv.org)

<sup>7</sup> Doc. UNEP/CBD/COP/4/Inf. 16

survey were communicated to the Conference of the Parties in Bratislava (COP 4).

- **Draft Guidelines<sup>8</sup> on Access and Benefit Sharing Regarding the Utilisation of Genetic Resources** were drawn up and presented to the Expert Panel in San José, Costa Rica, 4-8 October 1999. Switzerland presented the Draft Guidelines on access and benefit sharing to COP 5 in Nairobi.
- A **study<sup>9</sup>** on ways and means of introducing a certification system for bioprospecting activities had been commissioned. The study was circulated during the first meeting of the ad hoc open-ended Working Group on ABS and will be presented during the COP VI in The Hague.

The **Mediation Mechanism**, suggested by this report, is meant specifically to facilitate negotiations between stakeholders in fields that have been left open to mutual agreements. The exploration of a Mediation Mechanism is, therefore, another contribution and a complementary step to an effective CBD.

### 1.3 Methodology

The exploration of a Mediation Mechanism did not demand a scientific and statistical study, but implied a more **pragmatic, goal-oriented methodology**. The team used three major instruments to collect information and to draw up this report:

- **Desk review** of relevant studies and documents to identify lessons learnt about existing agreements, strategies and programs;
- **Interviews** with selected experts and stakeholders (multilateral organisations, governments, communities, private sector, NGOs, academia);
- **Field visits** in key countries such as Brazil, Bolivia, Peru, Kenya, Ethiopia, India, Russia, Canada, USA.

In exploring the feasibility of a Mediation Mechanism, an **earlier proposal** came to light. Some years back, the creation of a 'facilitator', to strengthen the equitable and sustainable use of biodiversity, had been suggested<sup>10</sup>. While there are obvious similarities to this exploration, there are also important differences, particularly in relation to the much broader functions of the earlier proposal. Interestingly, the mandate on behalf of the Swiss Government did not refer to this earlier proposal and it seemed the idea was 're-invented'. This fact may be interpreted as a positive signal that the time has come to make a serious effort to implement the idea of a mediator.

## 2. Past Experiences and Rationale

### 2.1 Lessons learnt on access and benefit sharing

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<sup>8</sup> UNEP/CBD/COP/5/8, 37

<sup>9</sup> Grundlagen der Wirtschaftspolitik, Nr. 2, Glowka (2001), Towards a Certification System for Bioprospecting Activities, Study commissioned by the State Secretariat for Economic Affairs (seco).

<sup>10</sup> Krattiger/Lesser 1995

The Convention on Biological Diversity (CBD) refers to access to genetic resources on 'mutually agreed terms' and to the 'fair and equitable' sharing of benefits arising from the use of genetic resources. However, state parties are left to determine the precise and appropriate legislation governing access and benefit sharing in their particular countries.

Ten years on, many states are still in the process of enacting legislation to govern access and benefit sharing. Most of the benefit sharing arrangements that have been concluded have taken place in a legislative vacuum. Nevertheless, such arrangements can themselves provide valuable information and guidance for legislators about the kind of legislation needed to guide stakeholders in their negotiations. The main lessons from these existing arrangements are outlined below:

### ***Lesson 1: A regulatory framework is needed***

One of the most important elements needed to make access and benefit sharing effective is the development and implementation of legislation or guidelines dealing with ownership, roles and responsibilities, access and benefit sharing issues. This will ensure proper management and promote the conservation and sustainable utilisation of genetic resources. A well-known example is the Costa Rican law on Access to Genetic Resources and Benefit Sharing. There are other examples, however, (e.g. Peru) where access has been regulated in a restrictive way, with the effect that access is almost impossible and no benefits for sharing arise.

The Tropical Botanical Garden and Research Institute (TBGRI), in south-west India, seemed to have a model benefit sharing arrangement with the Kani tribe, with prior informed consent and equitable sharing of monetary benefits (50% of the licence fees for commercialisation and royalties go to the Kanis through a trust fund).<sup>11</sup> However, the lack of law and policy governing this type of arrangement resulted in confusion over roles and responsibilities, precise beneficiaries, lack of co-ordination among government departments, and inadequate dialogue.

### ***Lesson 2: Benefit sharing arrangements may contribute to the development of policy and legislation***

The example of the Natural Products Development and Conservation (NPDC) project in Fiji demonstrates that such arrangements can stimulate intense discussion on regulation of access at the governmental level. This collaborative project brings together the University of the South Pacific, the South Pacific Committee for Human Ecology and Environment (SPACHEE), the Strathclyde Institute of Drug Research (SIDR), and local communities in Verata, Fiji.<sup>12</sup> The NPDC project has generated positive legal developments in Fiji, leading to the development of draft legislation on

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<sup>11</sup> See R.V. Anuradha (1998), Sharing with the Kanis: A Case Study from Kerala, India,

<sup>12</sup> See W.G. Aalbersberg, I. Korovolavula, J.E. Parks and D Russell, The Role of a Fijian Community in a Bioprospecting Project (case study submitted to the Secretariat of the Convention on Biological Diversity)



access to genetic resources, and is contributing to sustainable marine resource management.<sup>13</sup>

***Lesson 3: Disclosure and prior informed consent are mandatory requirements for bioprospecting***

Evidence from the existing access and benefit sharing arrangements shows that the principle of disclosure and informed consent, by the local community and the government, is a requirement for the collection of genetic resources and the agreements that govern them.

***Lesson 4: There are relatively successful examples of traditional knowledge promotion, benefit sharing and capacity building projects***

There are a number of positive examples of access and benefit sharing. In 1992, three agencies of the US government – the National Institute of Health, the National Science Foundation and the US Agency for International Development – launched the International Co-operative Biodiversity Group (ICBG) initiative as an integrated conservation and development programme. The stated aims of the programme are to stimulate bio-prospecting, to provide models for the sustainable use of biodiversity and to assess the feasibility of bio-prospecting as a means to:

improve human health;

conserve biodiversity;

promote sustainable economic activity of communities, primarily in less-developed countries<sup>14</sup>.

Although the early ICBG projects were started before the CBD came into force, they embodied the basic CBD principles. The principles governing the parties' contractual arrangements required that:

- full disclosure was made and informed consent obtained;
- both short and long-term benefits were shared with appropriate source country communities and organisations;
- local laws and customs were followed; and
- where possible, credit be given to local indigenous or other intellectual contributors.

Subsequent projects have followed these principles; thus, the ICBG projects have achieved relative success in promoting the development of traditional knowledge, novel benefit sharing processes, and capacity building.

For instance, the Surinam ICBG project (a partnership between local tribal communities, Conservation International, a Surinam pharmaceutical company and a US pharmaceutical company) is designed to promote drug discovery, while

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<sup>13</sup> L.R. Putzel (1998) Community Based Conservation and Biodiversity Prospecting in Verata Fiji: A History and Review, National Resources and Rights Program, Rainforest Alliance.

<sup>14</sup> See J.P. Rosenthal (1998), Equitable Sharing of Biodiversity Benefits: Agreements on Genetic Resources, Fogarty International Center, National Institutes of Health, <http://www.nih.gov/fic/opportunities/oecdpub.html>

conserving both biological and ethno-botanical knowledge.<sup>15</sup> The benefit sharing arrangements compensate tribal communities, in the form of royalties, for their contribution to drug development. But the project also provides training for Surinamese people in plant collection, identification techniques, and management.

The ICBG project in Africa includes Nigerian and Camerounian institutions in partnership with US research institutions, including the Smithsonian Tropical Research Institute and the Walter Reed Army Institute of Research. The project has established an integrated programme for the discovery of biologically active plants for drug development and biodiversity conservation.<sup>16</sup> Through the ICBG project, the Bioresources Development and Conservation Programme (BDCCP), a Nigerian NGO, launched the Fund for Integrated Rural Development and Traditional Medicine (FIRD-TM). The FIRD-TM has an independent board composed of senior government officials, representatives of village councils and traditional healers' associations. It receives funds that are used to build technical skills in Nigeria; so bioresources are a viable vehicle for sustainable development and improved care.<sup>17</sup>

**Lesson 5: Information about existing access and benefit sharing arrangements needs to be shared widely among stakeholders in different countries and regions**

Despite the proliferation of bio-prospecting contracts, there is still little knowledge about such arrangements and what lessons they provide. The details of even the most famous of such agreements (the Merck/Inbio agreement) are unknown to many stakeholders in this field. Although confidentiality clauses limit the revelation of some facts, there is still some general information that would help other stakeholders in their own negotiations or in the development of policy on access and benefit sharing.

**Lesson 6: Effective protection is required for traditional knowledge**

The tension between private and public rights – in particular the issue of ownership of genetic resources – may be a factor in the hesitancy of governments over the enactment of legislation on access and benefit sharing. Moreover, doubt has been expressed over the application of patents (and the entire notion of intellectual property rights) to knowledge held by indigenous communities. Viable alternatives, such as the development of *sui generis* systems of protection, may take some time to work out. However, the lack of appropriate legislation has not halted the progress of bio-prospecting arrangements; individual bio-prospecting arrangements are developing ways to recognise indigenous peoples' rights over their traditional knowledge.

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<sup>15</sup> See M. Guerin-McManus, L. Famolare, I. Bowles, S. Malone, R. Mittmeier and A. Rosenfeld, *Bioprospecting in Practice: A Case Study of the Suriname ICBG Project and benefit Sharing under the Convention on Biological Diversity*, <http://www.biodiversity.org/chm/techno/gen-res.html/cases#cases>

<sup>16</sup> See M. Iwu and Sarah A. Laird, *The International Cooperative Biodiversity Group Drug Development and Biodiversity Conservation in Africa: Case Study of a Benefit Sharing Plan*, <http://www.biodiversity.org/chm/techno/gen-res.html/cases#cases>

<sup>17</sup> K. Nnadozie (1999), *Profile – Fund for Integrated Rural Development and Traditional Medicine (FIRD-TM), BDCCP - Nigeria*.

For instance, in the ICBG Peru programme, the contractual arrangements set up a triangle of relationships, involving two Universities and the Aguaruna peoples in Peru, and Washington University and Monsanto-Searle pharmaceutical company in the US. A Biological Collecting Agreement governs the relationship between Washington University and the Aguaruna peoples (through an umbrella organisation, CONAP), on collaboration, sample collection and benefit sharing. And, a know-how licence has been agreed between the Aguaruna and Monsanto-Searle for Searle's use of the traditional knowledge and specific benefits arising from that use.<sup>18</sup>

***Lesson 7: Considering present IPR legislation and practice, there is no adequate alternative to patenting in the public sector***

One of the objectives of the CBD is to provide and/or facilitate access to and transfer of technology that are relevant to the conservation and sustainable use of biological diversity among Contracting Parties (Article 16). With the private sector becoming more active in the field of breeding, but mainly in pharmaceutical research with genetic resources, more and more Intellectual Property Rights (IPRs) were sought for the products, be they new plant varieties (UPOV) or patents on other products. The effects of the new "International Convention on Plant Genetic Resources for Food and Agriculture" on intellectual property rights remains to be seen. In the past, the public sector hardly ever sought protection of its research products. When public actors started to seek partnerships with the private sector to create synergies between the different actors, it became more and more necessary to allow for IPRs on the results, especially when private actors were providing new technologies that were already protected by patents.

This orientation towards partnerships and technology transfer has now changed the attitude of more and more public actors. To allow for technology transfer, IPRs must be granted on the research products. However licences can be provided to partners in developing countries at no – or a nominal – cost, but not to actors competing with the provider of a protected technology in the same market.

***Lesson 8: Non-monetary benefits are just as valuable as monetary benefits***

Experience from the existing bio-prospecting contracts appears to suggest that information, training, equipment and technology transfer, given in connection with the implementation of the project, are just as, if not more, important than monetary benefits in the form of guarantees of future royalties. Experience shows that monetary benefits are shared for rather short periods, while non-monetary benefits prove to be shared for longer terms.

## ***2.2 Lessons learnt with mediation services***

### ***2.2.1 Preconditions for mediation***

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<sup>18</sup> Rosenthal (1998)

Mediation is a method of conflict resolution that can be applied to conflicts in almost any private or public field; for example, to conflicts regarding business, administration or political matters. In every individual case, however, certain preconditions for mediation must be met to ensure that a given conflict is suitable for mediation procedures.

Such preconditions or positive indicators for mediation procedures are:

- willingness of the parties to find solutions that take account of the interests of all parties;
- willingness of the parties to co-operate in the mediation process;
- autonomy and self determination of the parties;
- confidence and positive engagement of the parties in the mediation process;
- ability of the parties to articulate their own interests;
- numerous conflict points;
- acceptance of confidentiality among the parties.

Negative indicators for mediation procedures are:

- conflict concerns law issues only;
- conflict concerns questions that involve the whole society;
- conflict concerns basic values and philosophy of life.

The large majority of partners interviewed were very interested in the mediation approach and were willing to co-operate. There is an urgent need for practical and concrete approaches and a broad acceptance of mediation procedures, in order to help the parties involved find an appropriate solution in a given case, always within the framework of international and national principles and law. But the suitability of mediation in the context of access to genetic resources and benefit sharing is not obvious. There are questions, in particular, about cultural differences between the parties involved and potential imbalance of power.

### 2.2.2 The Australian experience

Experience in Australia, with a constellation of parties that is typical in the context of access to genetic resources and benefit sharing, shows that mediation is possible and suitable also in this field. In the Australian examples, conflicts between the government of Australia, uranium mining companies and aboriginal tribes have been successfully solved by mediation. The Australian experience teaches us that mediation in such a context has to start well in advance of the negotiation of the particular problem - access to genetic resources and benefit sharing.

Mediation in an inter-cultural and multi-party context has to start with a broad preparatory phase. All preconditions and elements of the mediation procedure have to be conducted in a way that itself suggests mediation. That means that – as the Australian example shows – the location of mediation sessions, the manner of negotiating and especially the preparation of negotiations, negotiation rules, etc have to be worked out through preparatory talks with every party involved. The mediation team has to be composed of persons with rich life experience in all the cultures involved. Not only language translation, but cultural translation is needed.

The conflicts between the Australian government, the uranium companies and the aboriginal tribes have been mediated at sacred places on the territory of the aborigines. The mediation sessions were preceded by introduction procedures and rituals of the aborigines. In such a pre-mediated and adapted setting the aborigines proved to be powerful negotiators.

The Australian experience teaches us that questions of imbalance of power must not be pre-judged from a Western lifestyle perspective. All parties have to take a step out of their normal cultural context and meet on new ground. This poses a challenge for all parties involved. No less challenging is the task of the mediating team to be careful to ensure that:

- all parties participate on a voluntary basis;
- all parties are fully informed about the issues and all the facts relevant for decision-making;
- -the setting for the mediation allows all parties to look after their interests in an autonomous way.

### **2.3 Rationale for a Mediation Mechanism**

From the experiences to date on bio-prospecting agreements, there would appear to be a need for a Mediation Mechanism, within a mutually agreed framework and range, in order to:

- **provide consistency** in approaches to negotiations on access and benefit sharing. During the exploration, many experts commented on the uncertainty surrounding bio-prospecting negotiations and experiences.
- **ensure access** by all stakeholders to information pertaining to access and benefit sharing issues. In particular, the Mediation Mechanism could disseminate information about various examples of benefit sharing arrangements to interested stakeholders all over the world.
- **level the playing field** among stakeholders and ensure a balanced outcome.

A large majority of partners interviewed affirmed an urgent need for practical guidance, rules, exchange of experience and information in the field of access to genetic resources and benefit sharing. Several government representatives mentioned that companies sought access almost daily but there was a lot of uncertainty about how to deal with such requests. Most countries have not yet enacted specific national laws for access and benefit sharing, and no specific authorities are competent to deal with these issues. Not only is the interest of companies in natural resources growing, but also the expectations of countries for a fair share of profits is expanding. In this context, most partners felt that mediation could be a promising approach and could meet the needs in this field.

## **3. Objectives, Services and Guiding Principles**

### **3.1 Introduction**

The idea of a Mediation Mechanism is ***firmly embedded in the spirit of the CBD*** and will work according to CBD principles and objectives. Though instrumental in its implementation, the Mediation Mechanism has not necessarily to become institutionally part of the CBD structure. It is an innovative and flexible instrument to strengthen the CBD and does not divert attention from more important substantive issues, such as the conditions and modalities of access and benefit sharing. In particular, a Mediation Mechanism can be instrumental in the implementation of Article 15 (7) CBD.

At the ***multilateral level***, recognising ‘the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions<sup>19</sup>, the CBD supports the process followed by the FAO Commission on Plant Genetic resources which led to the renegotiation of the International Undertaking on Plant Genetic Resources and its adaptation to the CBD. On 3 November 2001, the “International Convention on Plant Genetic Resources for Food and Agriculture” was adopted. Its ratification is pending. It does not cover pharmaceuticals and other fields beyond food and agriculture.

At the ***national level***, the results of a mediation process have to be compared with the particular country’s legal requirements and the agreements arrived at have to be checked against the respective regulatory framework. There need not, therefore, be a conflict with national sovereignty. According to the CBD, states will address the access to genetic resources on three levels :

- States shall facilitate access to genetic resources for environmentally sound use;
- The access shall be subject to prior informed consent and based on mutually agreed terms;
- The agreed terms have to provide for the sharing of benefits derived from genetic resources with the country of origin and/or other stakeholders.

The “***Draft Guidelines on Access and Benefit Sharing Regarding the Utilisation of Genetic Resources***”<sup>20</sup> proposed by Switzerland, as well as the suggested Mediation Mechanism, are based on the CBD provisions and contribute to its implementation. The Mediation Mechanism assists parties involved in a given case where rules – voluntary or binding, national or multilateral – are of a general nature and leave room for mutual agreements. The Mediation Mechanism does not, therefore, in any way compete with, or interfere in, national or multilateral rules of access to genetic resources and benefit sharing.

The Mediation Mechanism would become active ***on request only***. There may be countries with their own mediation facilities, or with legislation regulating access and benefit sharing extensively and in a way that is considered ‘fair’ by all stakeholders. In such circumstances, the Mediation Mechanism will not be invoked, as it is activated entirely on a voluntary basis. There are, however, no existing global and credible dispute settlement mechanisms offering mediation services.

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<sup>19</sup> UNEP/CBD/COP/2/15

<sup>20</sup> UNEP/CBD/COP/5/8, 37; UNEP/CBD/WG-ABS/1/INF/5

### 3.2 Objectives

The **overall objective** of the Mediation Mechanism is to promote fair and equitable solutions, in each particular case, to access to genetic resources and benefit sharing and to contribute generally to development and technology transfer. A successful mediation mobilises additional resources for development, including resources from the private sector.

The **specific objectives** of the Mediation Mechanism are threefold:

- To mediate the negotiations among stakeholders on access to genetic resources and benefit sharing, and to level the playing field among them;
- To ensure that the views of all the stakeholders are represented equally;
- To strive for an equitable and balanced solution by ensuring a fair negotiating process.

Beyond the single negotiating case, the Mediation Mechanism provides a forum where the stakeholders meet, debate and possibly develop a common understanding and approaches. As such, the Mediation Mechanism will strengthen the CBD implementation.

### 3.3 Scope

A pre-condition of its operational legitimacy is the participation of all interested parties on a voluntary basis. Therefore, the services of the Mediation Mechanism should be available for a broad range of transactions:

- Commercial or public interest transactions concerning genetic resources;
- Material transfer agreements, as well as knowledge/information transfer agreements, including traditional knowledge;
- Multilateral, bilateral as well as intra-national cases of access and benefit sharing.

### 3.4 Services

**Core Service Mediation:** The Mediation Mechanism will provide a comprehensive, independent and neutral mediation service between the parties to the negotiation. It will aim to ensure that the views and interests of all the stakeholders are represented and that solutions, which meet the needs of all parties involved, are found. In such a way, the Mediation Mechanism can contribute to the implementation of the recommendation, made by the Panel of Experts on Access and Benefit-Sharing,<sup>21</sup> for contractual agreements based on mutually agreed terms. The Draft Bonn Guidelines contain in § 48 a reference to support of a mediator or facilitator should stakeholders wish to seek support when negotiating mutually agreed terms.

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<sup>21</sup> See UNEP/CBD/COP/5/8, 2 November 1999, p. 29

**Complementary Services:** Complementary, related services will be offered on the basis of experience and knowledge gained from mediation practice.

- **Training, Awareness Raising and Capacity Building:** The Mediation Mechanism will provide training to the mediators engaged in its work and will facilitate the networking of professional mediators involved in bio-prospecting. Specific training, awareness raising, and capacity building will be offered to all stakeholders, according to their needs. In such a way, the Mediation Mechanism can contribute to the implementation of the capacity building recommendations made by the Panel of Experts on Access and Benefit-Sharing, which identified four major critical capacity building needs<sup>22</sup>.
- **Information exchange and dissemination:** The Mediation Mechanism will facilitate the exchange of information between stakeholders involved in negotiation, and will provide a database of information on experience relating to access to genetic resources and benefit sharing, to which the public will have access. *Inter alia*, a newsletter in English and Spanish is required and an inquiry service should be established. In such a way, the Mediation Mechanism can contribute to the implementation of the information needs recommendations made by the Panel of Experts on Access and Benefit-Sharing<sup>23</sup>.
- **World Bio-prospecting Report** 'Information is a critical aspect of providing the necessary parity of bargaining power for stakeholders in access and benefit sharing arrangements'<sup>24</sup>. In order to narrow the gap of information on experience with access to genetic resources and benefit sharing, the Mediation Mechanism will publish, biannually, a comprehensive *World Bio-prospecting Report*. The *Report* will be an important source of information on experience and lessons learnt, as well as a forum for deepening and widening the discussion about basic questions, in the context of access to genetic resources and benefit sharing. It should give the Mediation Mechanism a high profile, enhancing respect and credibility, and might eventually become its flagship publication.

Many **additional services** have been mentioned as being needed in the context of access to genetic resources and benefit sharing. These include: advice to countries preparing their own legislation; monitoring the implementation of the access and benefit sharing agreements; facilitation of multilateral negotiations; capacity building; empowerment of communities; awareness creation at corporate level; arbitration; research; advocacy for an equitable sharing of benefits, etc. The Mediation Mechanism will have limited resources available and needs to concentrate on the above mentioned services.

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<sup>22</sup> (a) Assessment and inventory of biological resources as well as information management; (b) Contract negotiation skills; (c) Legal drafting skills for development of access and benefit-sharing measures; (d) Development of sui generis regimes for the protection of traditional knowledge associated with genetic resources. See UNEP/CBD/CPO/5/8, 2 November 1999, p. 30; see also Draft Action Plan for Capacity Building of the Working Group on Access and Benefit-Sharing with similar elements.

<sup>23</sup> See UNEP/CBD/CPO/5/8, 2 November 1999, p. 29; see also Draft Action Plan for Capacity Building of the Working Group on Access and Benefit-Sharing with similar elements.

<sup>24</sup> UNEP/CBD/CPO/5/8, 2 November 1999, p. 29



### 3.5 Principles of mediation

To ensure the success of the Mediation Mechanism it is important that the way the ***institution is built complies with the working principles of mediation***. The approach applied from the very beginning of the launch of this initiative should, therefore, be followed throughout its operational phase. This means having a neutral and impartial institution, which adopts a participatory and inclusive approach, to ensure full transparency, and which applies principles of fairness and equity .

Mediation, as such, is an ***alternative dispute or problem resolution method*** in which a neutral third party assists all the parties involved in a conflict or problem to develop solutions that are based on their own views, interests and needs. The mediator is responsible for a fair process but is not to decide on the substance, as an arbitrator would. A mediator sets a framework in which autonomy for decisions is given back to, or upheld for, all stakeholders. Mediation is a method that facilitates and encourages parties to find their own creative, innovative and appropriate solutions to specific cases, on a 'win-win' basis.

A ***mediation process*** usually passes through several, sometimes overlapping, phases:

Contact between the parties and the mediating team; definition of, and decision on, the objectives; the process, rules of work and the sharing of costs. Establishment of autonomy of the parties;

Identification of the specific problems, the contents and stages of the dispute; fact finding;

Creation of mutual understanding of the different realities and views of the parties.

Elaboration of the different interests and needs behind the positions, as well as projects with a focus on the future. Development of a common understanding of the problems to be solved;

Elaboration of options for solutions, based on the interests and needs of all the parties involved;

Evaluation of the options, consensus-building processes; recording of the solutions found, as well as the implementation procedures and control mechanisms.

In all phases, essential elements will be: a voluntary approach, autonomy of the parties, impartiality and neutrality of the mediators, full information and transparency inside the process, and confidentiality vis-à-vis outsiders. The questions of how and when to inform the public have to be dealt with and agreed on, within the mediation process.

For the specific problems of access to genetic resources and benefit sharing, which predominantly occur in an international context, mediation will require an intensive ***preparatory phase*** to carefully elaborate on:

- identifying and preparing all the parties involved,
- the question of whether mediation is suitable in the present case,
- representation requirements,
- cultural backgrounds and pre-conditions,
- language,
- relevant information and expertise,

- the infrastructure and setting for the mediation sessions.

The tools for these preparations can be interviews with all parties, but also exchange of documents, seminars etc.

The responsibility of the mediator is to create an optimum setting for the negotiations and to lead the process. The **mediator's main tasks** are to

- facilitate and assure communication among the parties;
- assure implementation of appropriate working rules and principles. These may comprise the following: mutual acceptance of all parties involved on an equal footing; specific acceptance of the equality of the views of different stakeholders involved; full transparency to the individual positions and views; putting individual interests and needs on the table; provision of all relevant information for decision making by all parties; respect for the views and interests of the other parties involved; and active assistance to find solutions which will meet individual needs of all parties;
- balance power between the parties and give equal room to all views and ideas;
- steer the process by listening actively and by asking relevant questions;
- collect and group positions, views, ideas, options and visualise them;
- record the results of consensus and check that agreement is complete and that no misunderstandings remain.

Mediation in the field of access to genetic resources and benefit sharing cannot be dealt with by a single person; it will require a **team of mediators** in order to handle the complexity of the issues and the diversity of the parties. Furthermore, a **supervision service** may have to be established to complement the work of the mediation team and to assist with follow-up and feed-back.

## **4. Institutional issues**

### **4.1 Basic options**

The Mediation Mechanism could either be a **governmental institution or a private non-profit mechanism**. In our inquiries, most experts clearly preferred a non-governmental body. Several experts interviewed would like to see a strong institution, which would give guidance in helping to solve the problems about access and benefit sharing and which would have enough authority to command respect from both governments and companies. The majority, however, would prefer a non-governmental institution, but with a board or steering committee composed of representatives of all stakeholders, including governments. An additional possibility for giving the institution credibility would be to engage the services of a high profile, well-respected personality. In the first instance, however, the Mediation Mechanism should gain trust and respect by doing a good job. Most experts felt that the creation of a governmental institution would take too much time and that such an institution would not be flexible enough; it would tend to be too bureaucratic, whereas first and foremost flexibility would be required.

Obviously, there is widespread concern regarding the growing role of intermediary bodies in the commercial exploration and use of genetic resources<sup>25</sup>. In contrast to stakeholders and other interested parties, a Mediation Mechanism is neither a provider nor a user of genetic resources and has no stake whatsoever in the outcome. It is recommended that the proposal aims for the creation of a private, non-profit-making body.

## 4.2 *Legal form*

The form of a **foundation** seems appropriate, meaning the creation of a fund with a well-defined and fixed scope, as is envisaged for the Mediation Mechanism. All stakeholders and future donors could contribute to this fund. The organisation of a foundation has to be set out in a public document. A board would have to be appointed, composed of eminent, independent personalities, or of representatives of all stakeholders, which would have the tasks of leading the foundation and ensuring that the fund is used for the specific, stated purposes. Such an international foundation would be – e.g. if it is based on Swiss law (Art. 80ff. ZGB) – subject to formal and financial supervision by the (Swiss) authorities.

## 4.3 *Management Principles*

The Mediation Mechanism should, from the very beginning, be established together with partners who represent all **stakeholders**. The following stakeholders have been identified: industry, governments, indigenous and local communities, farmers, NGOs, research institutions, universities. The like-minded, launching coalition (see chapter 6) may play a key role in the first phase. There should be a preparatory steering committee, ideally including governments from the South and North, as well as representatives of an indigenous peoples' organisation, of an environmental and a development NGO, of a science institute and of business.

As regards the **management** of the Mediation Mechanism, in the operational phase the following principles should be applied:

- The **structure** of the institution should be created in a way that is directly supportive of the services offered;
- All **partners** participating in the creation and operation of the Mediation Mechanism, with financial or in kind contributions, should be represented within the institutional set-up;
- A **Governing Board** with a minimum of 5 members should be created, representing those stakeholders taking an active commitment, to deal with strategic institutional questions, adoption of business plans, appointment of directors, monitoring and evaluation policy, adoption of annual accounts;
- A highly qualified **Chief Executive Officer**, with her/his secretariat, should be in charge of the day-to-day management and business;
- The institution should be chaired by a highly respected **president**, with representative tasks;

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<sup>25</sup> UNEP/CBD/COP/5/8, 33-34

- The Mediation Mechanism can be strengthened by the creation of an **Advisory Council**, meeting once a year, consisting of experts and the main stakeholders, involving people from all the continents, offering advice and providing a forum for access and benefit sharing issues.

In order to build trust in the Mediation Mechanism, **transparency** is crucial. Not only must the creation of the Mediation Mechanism be transparent and participatory, so must its future structure and work. The transparency that has been evident so far in generating the proposal for a Mediation Mechanism, as well as in determining the legal form of a Swiss foundation, provides a good precedent for a high level of transparency. The need for transparent procedures, however, has to be consciously met at each stage.

#### **4.4 Location, network, staff**

To be effective and efficient, the Mediation Mechanism requires a **slim and decentralised structure**. This basic requirement determines the proposed set-up for a network and staff.

Switzerland was generally perceived as being a neutral, independent and reliable country, and therefore a suitable option for the **location for the head office** of the Mediation Mechanism. Furthermore, Switzerland has shown leadership in the issue of access and benefit sharing, which has generally been welcomed. Many interviewees acknowledged the active role of Switzerland as a leader of the compromise group, in the biosafety protocol negotiations. The fact that Switzerland is also the home of several important multinational pharmaceutical companies did not detract from the country's generally positive image in the international debate on access and benefit sharing.

Beside a central secretariat in Switzerland, the Mediation Mechanism should consist of a **decentralised network**, which would take account of cultural, geographic, climatic and economic differences. For this purpose, collaboration with institutions with similar aims in all the continents should be envisaged. As a first step, key partners in all the continents have to be identified. Together with these key partners regional consultations can be prepared to inform about the Mediation Mechanism, to discuss the initiative in a regional context, to identify further networking partners, and to find potential mediators. Criteria for the selection of networking partners should be, *inter alia*:

- Local, national, regional expertise in issues of access to genetic resources and benefit sharing;
- High reputation of the institution and personalities across stakeholders;
- Commitment and suitability of the institution to become a networking partner.

The **staff** at the head office will have to be kept to a minimum to achieve maximum benefit from the decentralised structure. A highly motivated Chief Executive Officer will have to lead operations, assisted by task managers responsible for mediation, capacity building, information, and the *World Bio-prospecting Report*. The mediation teams, in any specific case, would have to be composed of persons from different cultural and economic backgrounds. In order to meet this need, mediation teams with members from all continents would have to be engaged and trained.

## **5. Financial Feasibility**

### **5.1 Phased approach**

The creation of the Mediation Mechanism is an innovative undertaking. Experience shows that in such circumstances it is best to start with a phased approach, offering built-in opportunities to re-examine and adjust the joint project. A **three phase approach**, encompassing a start-up phase, a pilot phase, and a final phase of an endowment fund, as the long-term vision, is proposed.

The **start-up phase** began with the exploration study and should continue at least for another 12 months, with the Mediation Mechanism taking up operations subsequently. The initial exploration will have to be followed by a detailed feasibility study, regional consultations, and preparations for the establishment of the Mechanism.

For the **pilot phase**, a period of five years seems to be appropriate. This period allows for the establishment of the institution and for the service to gain first-hand relevant experience and to be evaluated.

After four years of service, an **external evaluation** of the Mediation Mechanism will be required, in order to answer the questions of whether and how the services should be continued. This evaluation may include the question of whether the Mediation Mechanism requires any adjustment following the adoption of guidelines on access and benefit sharing by the Conference of the Parties – at the earliest at COP 7 in the year 2004. This schedule leaves sufficient time – provided there is a positive result of the evaluation – to secure funding for the continuation of the Mediation Mechanism after the pilot phase.

Provided there is a positive result from the evaluation, the Mediation Mechanism should be entirely based on an **endowment fund**. Its credibility depends on its independence and impartiality. This core quality can be strengthened by a form of funding that secures a long-term financial basis beyond annual contributions. Further, an endowment fund offers high security to donors that the funds allocated are not misused for other purposes.

### **5.2 Sources of income**

As a basic principle, services of the Mediation Mechanism have to be paid for. Among the stakeholders involved, there are considerable differences in economic strength. A principle of cost sharing should, therefore, be applied in transactions involving clients who cannot cover full costs. Agreements on cost covering and sharing will be part of the first phase of each mediation procedure.

**Revenue** for the services rendered should be developed as a source of income over the years. Three major sources can be identified:

- **Fees for mediation services:** A large majority of the experts interviewed were in favour of a fee being charged for the use of the mediation services. The fee should, however, be at an appropriate level, avoiding discrimination against poor stakeholders like traditional communities, and avoiding the creation of a net burden for the economically weaker stakeholders.
- **Consultancy services:** The professional staff of the Mediating Mechanism may sell their expertise as consultants, provided such consultancies fit into the Mediation Mechanism's overall programme priorities.
- **Sale of publications:** Even if the newsletter and the *World Bio-prospecting Report* are distributed free of charge in developing countries, there will be a modest revenue out of the sale of publications.

For the start-up phase, the pilot phase and the endowment fund it is proposed that the funding required beyond own revenues is secured from donor governments and private international foundations. It has to be noticed that the Mediation Mechanism creates and contributes to public goods and, therefore, even in the long term it would be over optimistic to assume full cost coverage by revenue of services.

### ***Private sector contributions***

The question of whether and how industry should contribute financially to the Mediation Mechanism proved to be a delicate and controversial issue. As an important stakeholder with strong financial backing, the private sector should share the burden of the Mediation Mechanism. Some would have preferred funds from industry rather than governments, because of the potential inconsistency of government contributions. Others prioritised non-business funding, because they were afraid that substantial co-financing by the private sector would put the Mediation Mechanism's impartiality at risk and endanger its credibility.

The recommended policy conclusions reached on this dilemma are threefold:

- No stakeholder involved in bio-prospecting arrangements should directly sponsor the budget of the mediation service.
- The overall budget should be shared equally among governments, foundations and the private sector.
- Private sector companies, based in industrialised as well as developing countries, should be invited to participate and contribute.

### ***International Foundations***

Several private international foundations have already shown an active interest in financing biodiversity projects and programmes. Some of them may be prepared to contribute to the establishment of a Mediation Mechanism as described here. Based on the policy principles outlined here.

### ***Bilateral contributions***

Several Northern governments take a keen interest in the implementation of the CBD in general and in finding adequate solutions to access and benefit sharing in

particular and can, therefore, be approached to contribute to the establishment of a Mediation Mechanism.

### **Other sources**

- Most of the **developing country governments** may not be in the position to contribute financially to the Mediation Mechanism. To demonstrate their commitment, they could, however, offer expertise and other crucial **contributions in kind**. Such a commitment should be linked to their joining the launching coalition of like-minded countries (see chapter 6).
- An assessment needs to be made as to whether, and under what conditions, contributions by the **Global Environment Facility (GEF)** for core or complementary activities of the Mediation Mechanism can be accessed.

## **6. Outlook**

While there was general support for the Mediation Mechanism and its objectives from many stakeholders including government, NGO and community experts, a non-representative survey of the direct users (industry) of genetic resources showed a low interest in the creation of a Mediation Mechanism. According to their indications there is a very small number of cases (one or two) of access and benefit sharing arrangements a year. Furthermore the direct users fear that such a mechanism would complicate negotiations in a way which would lead to a total disinterest for the botanical material and a lack of co-operation . Such firms appear to be very sensitive to any rise in transaction costs and delays. The representatives responsible for the negotiations in companies describe their job in a very pragmatic way. They usually negotiate with a homologue partner in the genetic resources source country . This partner has to take heed of all in country requirements of the national law implementing the CBD. The partner has to guarantee in his contract with the user that all parties, which have to be involved according to the legal requirements of the country, have given their consent. Such negotiations should take no longer than three months inclusive, from the beginning of negotiations to the conclusion of an agreement. The negotiations are made usually by writing and only if necessary do the two parties meet in order to solve some remaining open points. According to those interviewed, so far this negotiation practice seems to work well in most cases . This explains why from the industry side there is a reluctance to include any new or additional element which, from their perspective, would cost time and money.

Given this scepticism about the Mediation Mechanism initiative by industry as a key player, the Swiss government represented by the State Secretariat for Economic Affairs (seco) decided to discontinue the preparation of the Mediation Mechanism project for the time being. For the moment, it may be useful to observe the developments in the implementation of the CBD so far as access and benefit sharing are concerned. Given a much more positive reaction to the Mediation Mechanism approach by the experts responsible for the implementation of the CBD and also by other stakeholders involved in access and benefit sharing negotiations, it is likely that the approach may be applied at a later stage when more experience in the framework of the CBD requirements has been gained. The Mediation Mechanism

concept will be kept as an option to solve problems and conflicts on access and benefit-sharing regarding the utilization of genetic resources.

COP VI in The Hague (7-26 April 2002) will discuss the Bonn Guidelines and the Draft Action Plan for Capacity Building on Access and Benefit-Sharing. It will be interesting to see how the contracting parties and other stakeholders will comment the mediation approach referred to in the relevant documents.



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