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A Swiss perspective addressing ABS
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CBD)

Swiss Federal Office for Environment
(FOEN)

Expert meeting in Tokyo addressing ABS
challenges, Tokyo, 8 – 9 February 2007



Content

- The main Bones of contention
- Back to the basis (or the “basic”) toward a possible agreement
- Issues / questions and options for an Intern. regime
- The use / integration of existing international instruments
- Possible specific and “transversal” measure and options for an International regime
- Brief remarks on possible ways to make progress in the process of negotiation



I The main Bones of contention

- On the nature : « the intern. regime could be composed of one or more instruments....legally and /or non binding »
- On the objectives : on the framework concept weather the regime should *facilitate* or *regulate* the access
- On the scope : what types of genetic resources ? (how to define it , should it include derivatives?)
- The relationship with other agreements and processes (FAO, WTO/IPR, WIPO)
- On how to adress / define traditional knowledege



(I Contention issues)

On a general mechanism to ensure the fundamental requirements of the CBD which are the Prior informed Consent (PIC) and the Mutally agreed terms (MAT)

- issue of the disclosure of origine
- Internationally recognized certificate of origine/source/legal provenance



(I contention issues)

Concerning the condition /distribution of the fair and equitable benefit sharing (BS) :

Should it be included/stipulated in the international regime ?

Therefore

- Should it be included in the MAT ?
- Should benefits arrangements serve (also) the conservation of biodiversity ?



(I Contention issues)

Should we have a Compliance and enforcement Mechanism ?

- Should it be linked with patent application ?
- Should it include misappropriation and if yes how to define it ?



(I) The Polarized options / Points of divergence could be summarized by two core generic issues :

While several countries act as « providers and users »

- **« Providers » countries push for a legally binding regime that emphasize misappropriation and misuse of GR**
- **Countries regarded as « users » with some others suggested a regime consisting of a serie of « instruments »**



II Back to the Principles and obligations agreed relating to ABS

Article 15:

- **Sovereign rights of States over their natural resources**
- Parties to **facilitate access** to genetic resources
- **Access subject to prior informed consent** and granted on **mutually agreed terms**
- Parties to **take measures to share benefits from the utilization of genetic resources, on mutually agreed terms**
- Each Party endeavours to develop and carry out scientific research on genetic resources with full participation of the provider country



II Articles 16 and 19:

- priority access to technologies by Parties providing genetic resources
- +
- sharing of the results and benefits arising from biotechnologies based upon genetic resources provided by these Parties



II Back to the Terms of reference (TOR) for the International Regime (IR)

Establishment of an open ended AHTEG group with the following mandate to negotiate an IR

With

- A Process based of the analysis of existing instruments , the experience , a gap analysis
- Nature : the IR could be composed of 1 or more instruments legally binding and / or non bindings



(III. issues for considerations)

- **Is there a need for additional international tools to support national implementation ?**

What are the existing Intern. instruments ?

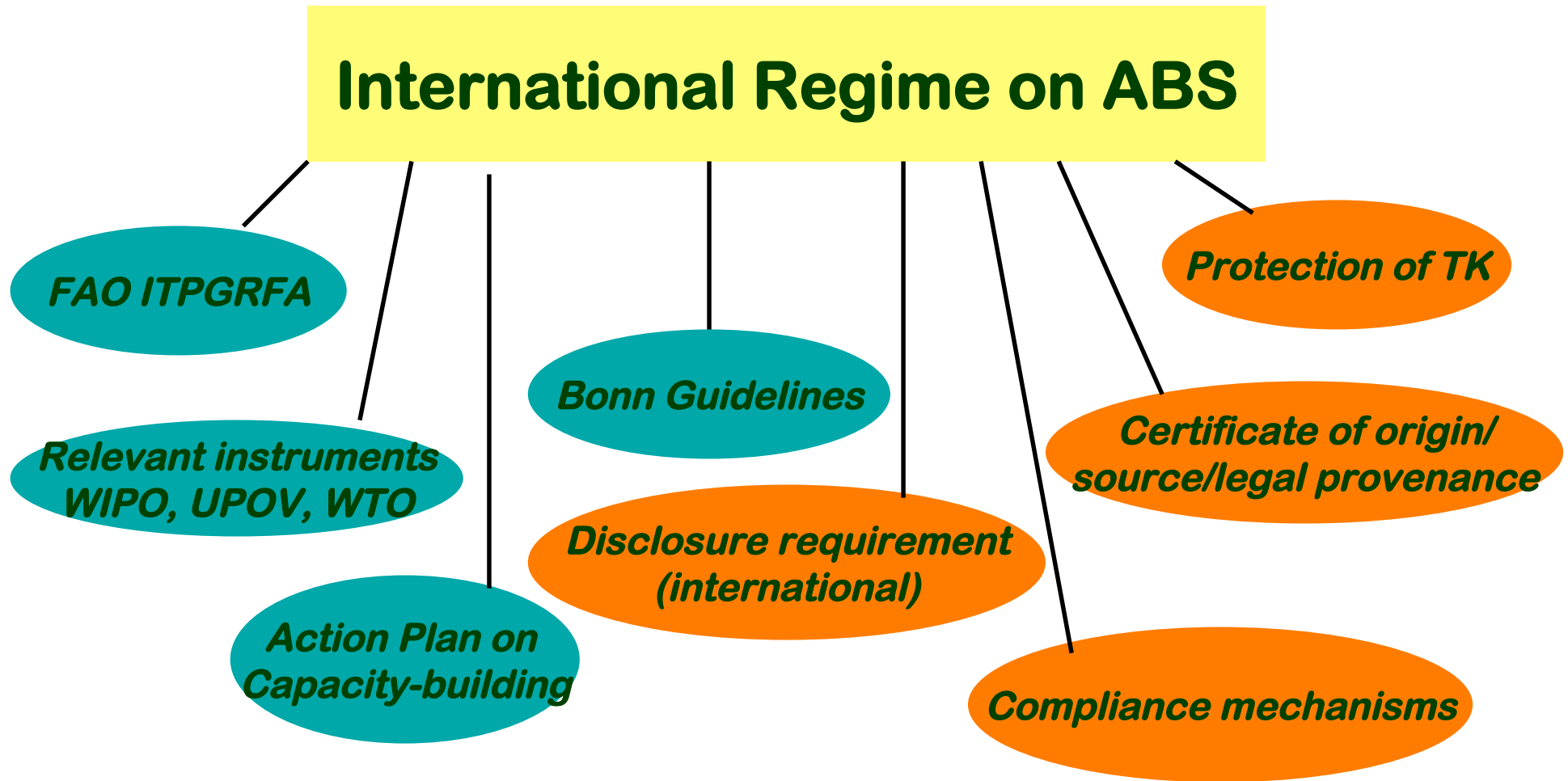
For which resources ?

Which kind of possible complementary mechanism could be developed ?

- *Certificate of origine/source /legal provenance (COLP)?*
- *Disclosure of the source of the GR (source of obtention or source of origine ?*



III. What are the existing and new possible instruments?





IV The main relevant existing international instruments

- The Bonn guidelines
- The International treaty on plant and genetic Resources for Food and Agriculture (ITPGR)
- The World Intellectual Property Organisation System (WIPO) with Patent Treaty Cooperation (PCT)



IV BONN GUIDELINES

Voluntary guidelines to assist Governments and stakeholders when:

- Establishing legislative, administrative or policy measures on access and benefit-sharing
- Negotiating contractual arrangements for access and benefit-sharing

IV BONN GUIDELINES

- I. General Provisions**
- II. Roles and responsibilities in ABS**
- III. Participation of stakeholders**
- IV. Steps in the access and benefit-sharing process**
- V. Other provisions**

IV BONN GUIDELINES

Scope

- all genetic resources and TK
- exclusion of human genetic resources

Relationship with relevant international regimes

- coherent and mutually supportive
- without prejudice to the ABS provisions of the ITPGRFA



IV BONN GUIDELINES

STEPS IN THE ABS PROCESS

- **Overall strategy**
- **Prior Informed Consent**
 - Basic principles of PIC
 - Elements of PIC
- **Mutually Agreed Terms**
 - Basic requirements for MAT
 - Indicative list of MAT
 - Benefit-sharing



IV Bonn Guidelines : MUTUALLY AGREED TERMS and BENEFIT SHARING

BENEFIT-SHARING

- **Types of benefits**
 - Monetary and non-monetary benefits (Appendix II)
- **Timing of benefits**
 - Near-term, medium-term, long-term (up-front payments, milestone payments, royalties)
- **Distribution of benefits**
 - Fair and equitable
- **Mechanisms for benefit-sharing**
 - Flexible, vary on case by case basis
 - Cooperation in scientific research and technology development, trust funds, joint ventures



IV Bonn Guidelines :ROLES AND RESPONSIBILITIES OF USERS AND PROVIDERS

- Contracting Parties providing the genetic resource
- Providers
- Users
- Contracting Parties with users of genetic resources under their jurisdiction



IV Bonn Guidelines : ROLES AND RESPONSIBILITIES OF USERS AND PROVIDERS

Contracting Parties providing the genetic resource:

- Ensure compliance with Article 15
- Ensure that commercial or other use does not prevent traditional use of genetic resources
- Fulfil their roles in clear, objective and transparent manner
- Ensure stakeholders take into account environmental consequences of the access activities
- Mechanisms to ensure that their decisions are made available to relevant I&LC
- Measures to enhance I&LC negotiating capacity



IV Bonn Guidelines :ROLES AND RESPONSIBILITIES OF USERS AND PROVIDERS

Providers should:

- Only supply genetic resources or traditional knowledge when entitled to do so
- Avoid imposition of arbitrary restrictions on access to genetic resources



IV Bonn Guidelines : ROLES AND RESPONSIBILITIES OF USERS AND PROVIDERS

Users should:

- Seek Prior Informed Consent
- Respect customs, traditions, values and customary practices of I&LC
- Only use genetic resources for purposes consistent with terms and conditions under which they were acquired
- Maintain all relevant data
- When supplying to third Parties, honour terms and conditions
- Ensure fair and equitable sharing of benefits



IV Bonn Guidelines : ROLES AND RESPONSIBILITIES OF USERS AND PROVIDERS

Contracting Parties with users under jurisdiction:

- Info to potential users on their obligations
- Encourage the disclosure of country or origin of GR or TK in IPR applications
- Prevent use of GR without PIC
- Cooperation to address alleged infringements
- Voluntary certification systems
- Discouraging unfair trade practices
- Other measures



IV BONN GUIDELINES

- Recognised by Parties as a **useful first step**
- Implementation kept **under review**
- The need for their **further refinement** is to be considered on the basis of relevant work



IV The International Treaty on Plant Genetic Resources for Food and Agriculture

The status of the Treaty

- Negotiated by 164 member FAO Commission on Genetic Resources for Food and Agriculture
- Adopted by the FAO Conference by consensus in November 2001
- Entered into force on **29 June 2004**
- At present (nov 06), 105 States and EC are Parties
- **Standard Material Transfer Agreement to operate (2006)**



IV The International Treaty on Plant Genetic Resources for Food and Agriculture

Main Achievements of the Treaty (1)

- The Multilateral System of Access and Benefit Sharing
 - List of 64 crops chosen (Annex 1) on basis of importance for food security and interdependence
 - PGRFA under management and control of Contracting Parties and in the public domain
 - Contracting Parties to invite other holders of PGRFA to place in Multilateral System



IV The International Treaty on Plant Genetic Resources for Food and Agriculture

Main Achievements of the Treaty (2)

- A Multilateral System of Access and Benefit Sharing with low costs
- Multilateral agreement on rules regarding facilitated access
- Multilateral agreement on rules regarding benefitsharing with **Standard Material Transfer Agreement** (MTA, 2006)



IV The International Treaty on Plant Genetic Resources for Food and Agriculture

Standard Material Transfer Agreement (MTA) and BS

- **First concrete global tool to implement benefit sharing**
- **Mandatory monetary Benefit Sharing** : If a product incorporates material from the Multilateral System is commercialized in such and is not “available without restriction to others for further research and breeding” a mandatory payment will be made :
1,1 % the gross income of the gross sales of seeds
- **Voluntary monetary Benefit Sharing for research and breeding** If the material available without restriction to others, payment is voluntary
 - These moneys will be used in the context of the Treaty’s Funding Strategy



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V. “ Possible Transversal measures” :

Issue of the Certificate of origine/source/legal provenance

1. Rationale, objectives and need

- To ensure traceability of genetic resources an increase transparency
- To ensure compliance with CBD ABS provisions and access requirements
- To provide legal certainty and predictability for users
- Large variety of users of genetic resources (GR) to be borne in mind



V. Issue of the Certificate of origin/source/legal provenance

Distinction between the options for a certificate system

- **Certificate of origin**

Country of origin of genetic resources possesses genetic resources *in situ* (Art. 2 of CBD),
??issued by CAN of country of origin ??
Difficult to implement

- **Certificate of legal provenance**

Evidence that the resource accessed in conformity with the access requirements of the providers country in accordance with art 15

Rem. :could only be issued by countries which establish legal requirements

- **Certificate of source**

Country of origin or countries that have acquired genetic resources in accordance with CBD (Art. 15.3)

*Issued by CNA of country of origin or source country, **more feasible***

Important issue : Certificate system and traditional knowledge

The issue of whether or not a certificate system should cover traditional knowledge associated with GR has not yet been closely examined



(v.) Potential characteristics and features

Nature:

Voluntary or ***mandatory***

Scope

Will the certificate apply to a genetic resource acquired after the CBD came into force but before the new system is implemented?

Will biological materials, such as chemical extracts and essential oils, be freely useable without a certificate?

Will the system cover genetic resources and knowledge/information derived?

*Some argue that certificate could only be attached to physical property
Others argue that it should apply to GR and information or knowledge derived from these resources*



(V. Transversal measures)

Information contained in the certificate

- Particulars of provider and user
- Details of GR / (and or TK)
- Details of approved use of GR and restrictions on use
- Period of the agreement
- Conditions of transfer of rights to third parties
- Details of issuing authorities
- Taxonomic identification
- Issuing date
- Information for the identification of the material



(V. Transversal measures)

Form

- Paper, code, virtual online system?
- Internationally recognised format – not necessarily standardized
- Simple, homogeneous, practical
- Security measures for the verification of its authenticity
- Easily verifiable
- Entail low administrative costs



(V. Transversal measures)

The Ideal Certificate

An Internationally recognised format applicable to all kind of Genetic Resources is needed

But : not necessarily standardized in order to allow enough flexibility **to be applicable for :**

- **the various category of Genetic resources and**
- **to the specific needs OF DIFFERENT users and providers**



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(V. Transversal measures)

Possible Synergies with IPR

Proposals by Switzerland on Declaration of Source within the frame of the PCT at WIPO to address the question / request to link the access with IPR and patent application ?



Switzerland proposes ...

... to explicitly enable States to require disclosure of source of genetic resources and related traditional knowledge in patent applications

→ Amendment of WIPO's Patent Cooperation Treaty (PCT)



Switzerland proposes ...

... that requirement can be fulfilled already in international phase



Switzerland proposes ...

... to include declaration of source in international publication of patent application



Switzerland proposes also ...

... to establish on-line list of government agencies competent to receive information on declaration of source (“notification”)



The Concept of the Source

A multitude of entities may be involved in access and benefit sharing

→ Broad concept of „*source*“ of genetic resources and traditional knowledge



Advantages of Optional National Introduction

1. Faster international progress
 - ✍️ Gain experience without prejudice to further international efforts
 - ✓✍️ Build with existing national provisions
 - ✓✍️ No additional obligations/ burden for developing countries



V Options to develop an IR

A framework /Umbrella covering a set of existing legally binding (FAO Treaty)and non binding instruments such (Bonn Guid.) for all GR

and

some specific measures to operate the PIC such as :

- *Certificate of origine/source/legal provenance; Decl. of origine (for patent)*
- *Capacity building*
- *Financial mecanism(s) (eg Global crop diversity Trust established within the frame of the Intern. Treaty on Plant Genetic Resources)*



V. OUTLINE OF CURRENT EFFORTS and PRIORITIES FOR an ABS REGIME FOR SWITZERLAND

Priorities

- **Integration of the International Treaty on PGR in the regime**
- **To work toward the effective implementation of the Bonn Guideline as an integrated part of the regime**
- **To work toward an effective system enabling the PIC implementation : a certificate of source with a flexible format to meet the various needs of the different kind of GR**
- **to include explicitly in the PCT /WIPO system the declaration of source in international publication of patent application as optional**
- **Participative approach addressing the various sector of providers user needs**



(V.) Parties have to cooperate at national and international level with the Professional Organizations and stake holders to define adequate sectorial measures (such as the elaboration of a certificate of source/legal provenance/origin)

Party and Professional Organizations

Botanical Gardens
and ex situ collections

Public Research

Industry

Breeders

NGOs ?

Information

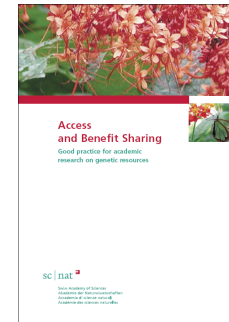
Sectorial
Measures

IPEN, International
Plant Exchange
Network



V. The implementation in Switzerland

- Working group on ABS
- To identify sectorial measures
 - **Swiss Academy of natural Sciences:**
 - **Botanical gardens:** participation in the International network(IPEN)
 - **Industry**
- Développement of tools to implement the Bonn Guidelines, in particular private enterprises :
 - Management tool





V. Toward an Intern. Regime

Bonn Guidelines

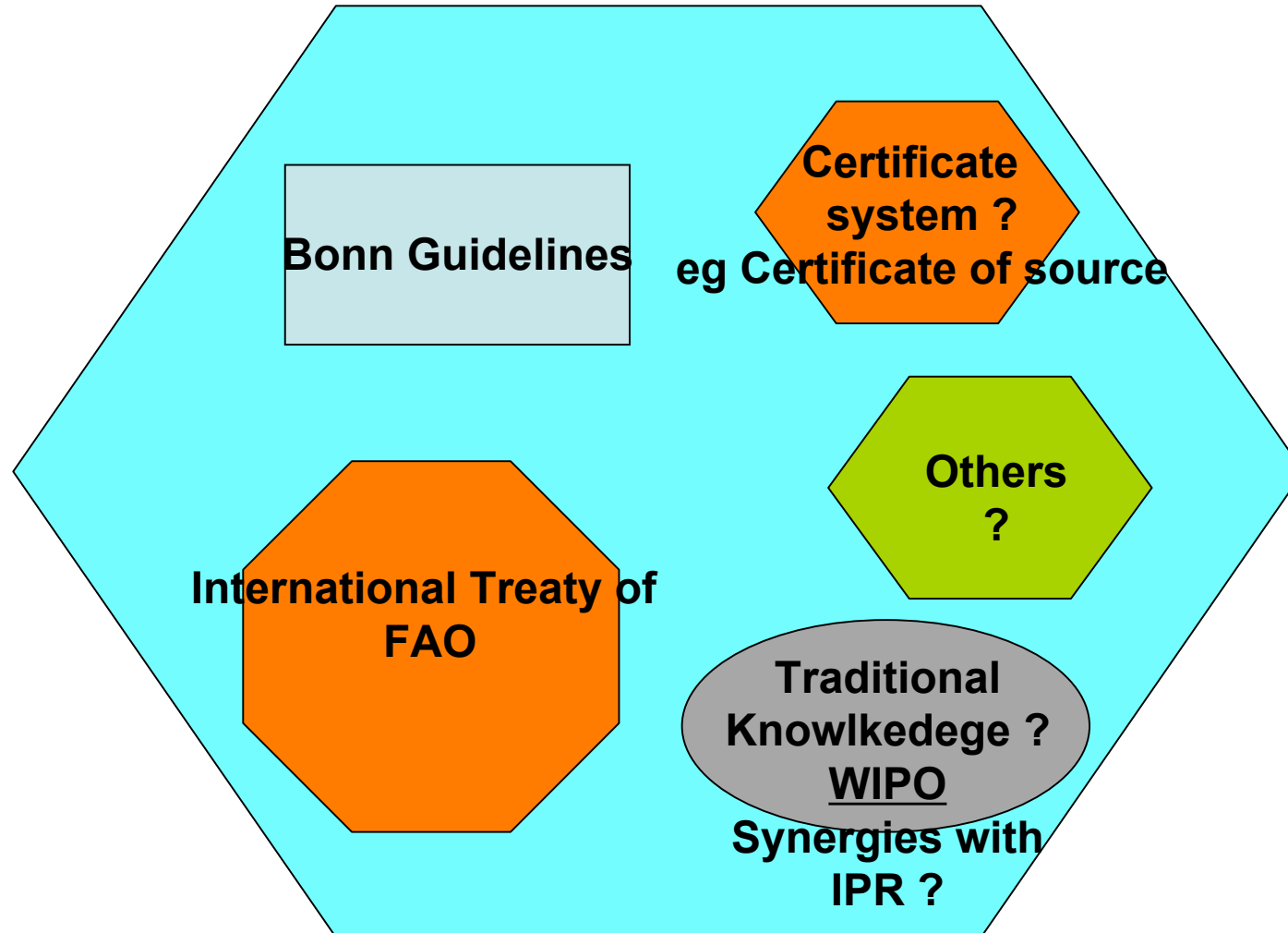
International
Regime?

International Treaty
FAO

Traditional Knowledge
WIPO ?



V. Toward an International Regime





VI. Issue and options for consideration to make progress in the process of negotiation

1. Need to recognize that presently the text is very polarized to make progress
2. Need to cluster the main issues and to (re) initiate the negotiation related with the some priority
3. Focus on in-depth negotiation on ways and means to operate the PIC (option : the development of a simple and effective Certificate system need to be elaborated)
4. To group clusters related with major issue with the attempt first to agree on some principle based on the text of the CBD and on the Bonn guidelines
5. Elaborate a calendar and conduct organized intercessional consultation
6. Explore ways and means to conduct the meeting/negotiations through some groups of interests



- ご静聴ありがとうございました
- Thank you for your attention