

Chair,  
Cabinet External Relations and Defence Committee

## **GENETIC RESOURCES: NEGOTIATIONS ON AN INTERNATIONAL REGIME ON "ACCESS AND BENEFIT-SHARING"**

### **Proposal**

To seek Cabinet approval of the approach to be taken by the New Zealand delegation in: (i) negotiations under the Convention on Biological Diversity on an "international regime" (set of international rules) on access to genetic resources, and the fair and equitable sharing of the benefits arising from the utilisation of genetic resources; and (ii) the 6<sup>th</sup> Ad Hoc Working Group on Article 8(j) and Related Provisions of the Convention.

### **Executive Summary**

2 Parties to the Convention on Biological Diversity (CBD) are currently negotiating an "international regime" on access to genetic resources, and the fair and equitable sharing of the benefits arising from the utilisation of genetic resources i.e. a set of international rules on "bioprospecting". The negotiations are due to be completed by the 10<sup>th</sup> Conference of the Parties to the CBD to be held in Japan in October 2010.

3 The negotiations are complex and contentious with significant differences between the main negotiating groups on key issues (including the objectives and scope of the international regime) which have yet to be resolved.

4 New Zealand, as both a user and provider of genetic resources, seeks an effective and workable regime that balances the interests of users and providers, and accommodates differences in national circumstances.

5 The New Zealand economy, particularly the agricultural, horticultural and forestry sectors, depends on continued access to, and use of, foreign genetic resources (eg grasses, livestock, apples, kiwifruit, grapes, pinus radiata, biocontrol agents).

6 Particular challenges for New Zealand in the negotiations include: the absence of an overarching domestic bioprospecting policy framework to guide the New Zealand negotiating position, and uncertainty regarding the timing and outcome of the Waitangi Tribunal's report on the Wai 262 "flora, fauna and cultural intellectual property" claim, which may have implications for the approach to genetic resources in New Zealand.

7 Key issues on the agenda of the next round of negotiations in November 2009 are traditional knowledge (TK) associated with genetic resources, and the “nature” of the international regime i.e. whether parts or all of it will be legally binding.

8 It is proposed that the following objectives and principles should guide the New Zealand delegation in the negotiations. Objectives/principles (i) to (viii) were approved by Ministers before the last round of negotiations in April this year (submission of 11 March 2009 to the Ministers of Foreign Affairs, Maori Affairs, Energy and Resources and Conservation refers):

- (i) harnessing New Zealand’s potential as a provider of genetic resources;
- (ii) protecting New Zealand’s interests as a user of foreign genetic resources;
- (iii) maintaining the Crown’s ability to meet its obligations under the Treaty of Waitangi;
- (iv) maintaining flexibility for the Government to respond in due course to the report of the Waitangi Tribunal in the Wai 262 “flora and fauna” claim;
- (v) ensuring that genetic resources in Antarctica are regulated by the Antarctic Treaty System and not by the Convention on Biodiversity;
- (vi) maintaining an internationally competitive research environment;
- (vii) a practical and effective regime;
- (viii) environmental sustainability in line with the objectives of the Convention on Biological Diversity;
- (ix) appropriate recognition of the relationship between “access and benefit-sharing” activities and matauranga Maori or traditional knowledge associated with genetic resources;
- (x) “access and benefit-sharing” arrangements should be based on terms that are mutually agreed between the parties concerned i.e. those seeking access to genetic resources and the recognised access provider/s; and
- (xi) the consents/approvals required for “access and benefit-sharing” in relation to traditional knowledge associated with genetic resources should be covered in the terms that are mutually agreed between the parties concerned.

9 A fundamental principle underlying New Zealand’s position is that any new international regime should not unduly limit the Government’s options vis-à-vis the development of domestic policy.

10 Officials propose that New Zealand be prepared to join a consensus in favour of a binding legal regime if that is the general mood of the negotiations, but should not advocate for such a result, and should emphasise that any legally binding elements should be workable and make legal sense.

11 Officials will revert to Ministers and Cabinet for further guidance as required as the negotiations proceed.

12 The 6<sup>th</sup> Ad Hoc Working Group on Article 8(j) and Related Provisions of the CBD will take place from 2-6 November 2009 immediately prior to the next round of “access and benefit-sharing” negotiations. Article 8(j) deals with the knowledge, innovation and practices of indigenous and local communities relevant to the conservation and sustainable use of biodiversity. It is proposed that New Zealand’s objectives in this Working Group be to:

- (i) highlight practical examples of how Maori have been able to protect and develop traditional knowledge;
- (ii) support voluntary and practical outcomes, including with respect to elements of sui generis systems (i.e. specifically designed) for the protection of traditional knowledge; and
- (iii) keep discussion focussed on the Working Group’s mandate and priorities, particularly in relation to its ongoing work on an ethical code of conduct.

13 Engagement with stakeholders and Maori is planned which will feed into the New Zealand delegation’s preparations for the 6<sup>th</sup> Ad Hoc Working Group on Article 8(j) and Related Provisions, “access and benefit-sharing” negotiations and 10<sup>th</sup> Conference of the Parties to the CBD.

## **Background**

14 Parties to the Convention on Biological Diversity (CBD) are currently negotiating an “international regime” on access to genetic resources, and the fair and equitable sharing of the benefits arising from the utilisation of genetic resources i.e. a set of international rules on “bioprospecting”<sup>1</sup>. Within CBD circles, this is referred to as “access and benefit-sharing” or ABS. Adoption of an international ABS regime would give effect to the third objective<sup>2</sup> of the CBD. The negotiations are due to be completed by the 10<sup>th</sup> Conference of the Parties (the CBD’s decision-making body) to be held in Japan in October 2010.

15 “Genetic resources” are defined within the CBD as genetic material of actual or potential value, with “genetic material” being any material of plant, animal, microbial or other origin containing “functional units of heredity” i.e. elements, such as genes or chromosomes, that perform a function and may be passed from one generation to the next through replication or reproduction. (Note that the term “genetic resources” should not be confused with

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<sup>1</sup> The collection of genetic resources or biological material from flora and fauna, and the analysis of their material properties or molecular, biochemical or genetic content for the purposes of developing a product. “Bioprospecting” covers both commercial and non-commercial activities. The term “biodiscovery” is sometimes used instead of “bioprospecting”.

<sup>2</sup> The three objectives of the CBD as set out in Article 1 are: (i) the conservation of biological diversity (ii) the sustainable use of its components and (iii) the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources.

"genetically modified organisms" or GMOs which are a subset of genetic resources).

## Comment

### The negotiating dynamic

16 The negotiations are complex and contentious. Broadly speaking, it would appear that developed countries, wealthy but biodiversity-poor, want an international regime that facilitates **access** to genetic resources for their biotech industries and provides legal certainty regarding such access. Developing countries, less wealthy but biodiversity-rich, want an all-encompassing and legally-binding regime that guarantees them a fair share of the **benefits** derived from the utilisation of their genetic resources, including the development of products derived from them. In reality, all countries are both users and providers (or potential providers) of genetic resources.

17 New Zealand seeks an effective and workable regime that balances the interests of both users and providers, and accommodates differences in national circumstances, which put us more to the middle. Generally, we work closely with Canada, Australia and Japan in these negotiations.

### Current state-of-play

18 The last round of negotiations in April 2009 addressed the **objectives** and **scope** of the international regime, **compliance** issues, and the rules on **access** and **benefit-sharing**. The April negotiations were acrimonious and highlighted significant differences between the main negotiating groups (EU, Likeminded Megadiverse Countries<sup>3</sup> led by Brazil and African Group) on key issues, including the objectives and scope of the international regime, which have yet to be resolved. Two further rounds of negotiations are scheduled: 9-15 November 2009 in Montreal and 18-24 March 2010 in Colombia.

19 The November negotiations will address **traditional knowledge associated with genetic resources**, the “**nature**” of the international regime (ie whether parts or all of it will be legally-binding), and **capacity-building**. Negotiations will also continue on **compliance** issues, and the rules on **access** and **benefit-sharing**. The final round of negotiations in March 2010 will aim to arrive at consensus on a consolidated text in time for adoption by the 10<sup>th</sup> Conference of the Parties in October 2010.

### Challenges for New Zealand

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<sup>3</sup> Group of biodiversity-rich developing countries. The US is not a Party to the CBD but follows developments closely as an observer.

20 New Zealand has a relatively large number of endemic (unique) species, and anecdotal evidence suggests there is significant domestic and international interest in accessing New Zealand's genetic resources (e.g. native plants and micro-organisms) and, in some cases, the mātāuranga Māori or traditional knowledge associated with them, for pharmaceutical and other purposes. New Zealand is therefore interested in an international regime that supports our ability to **harness the benefits of being a provider of genetic resources**.

21 The New Zealand economy, in particular the agricultural, horticultural and forestry sectors, is dependent on continued access to, and use of, foreign genetic resources, both to initiate and to refine the production of a wide variety of products (e.g. grasses, livestock, apples, kiwifruit, grapes, *pinus radiata* and biocontrol agents). Some taonga species are based on foreign genetic resources (e.g. kumara). Another key objective is therefore to **protect New Zealand's interests as a major user of foreign genetic resources**. It is also important to ensure that undue costs and restrictions are not imposed on research and innovation based on genetic resources given their importance to New Zealand's economic prosperity.

22 A particular challenge for New Zealand is the **absence of an overarching domestic bioprospecting policy framework** to guide the New Zealand negotiating position. While work is underway to develop such a framework (led by the Ministry of Economic Development), finalisation of this work awaits the Crown's response to the Waitangi Tribunal's report on the **Wai 262** "flora, fauna and cultural intellectual property" claim<sup>4</sup> which may have implications for the approach to genetic resources in New Zealand. The timing of the Wai 262 report remains uncertain, but it is possible that the international ABS negotiations, which touch on issues central to the Wai 262 claim<sup>5</sup>, will be completed ahead of the release of the Wai 262 report.

23 Given the need for consistency domestically with what New Zealand agrees to internationally, the New Zealand delegation will be seeking to **ensure that the international ABS regime is sufficiently flexible** so as not to constrain unduly the Government's domestic policy options.

#### "Mutually agreed terms"

24 Article 15 of the CBD stipulates that access to genetic resources, where granted, and the sharing of benefits arising from the utilisation of genetic resources, should be based on "**mutually agreed terms**". The New Zealand negotiating position is based on the expectation that the international ABS regime (and our eventual domestic regime) will be based on the same principle i.e. terms

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<sup>4</sup> The claim, initiated in 1991, includes a contention that the Treaty of Waitangi guarantees kaitiakitanga and rangatiratanga rights to iwi over indigenous biological resources and traditional knowledge/mātāuranga Māori.

<sup>5</sup> These issues include: mātāuranga Māori (traditional knowledge), Māori intellectual property rights, environmental, resource and conservation management including concerns about bioprospecting, access to indigenous flora and fauna, biotechnological developments including genetic material, ownership claims to resources and species, and iwi-Māori participation in decision-making on these matters.

that are mutually agreed between the parties concerned - those seeking access to genetic resources and the recognised access provider/s.

25 The term “recognised access provider/s” denotes that the question of who the access provider/s should be is, in our view, best left to individual countries to determine in accordance with their national circumstances. Depending on the outcome of the Wai 262 inquiry, there could be an expansion in the range of recognised access providers in New Zealand. These currently include the Department of Conservation (when dealing with biological and genetic resources on the DOC estate or indigenous wildlife), Land Information New Zealand, local territorial authorities and private land owners (individuals and groups including iwi and hapu).

#### Traditional knowledge associated with genetic resources

26 A challenging issue on the agenda of the November negotiations is how to address within the international ABS regime traditional knowledge (TK) associated with genetic resources. Given the relevance of this issue for Maori, it is a priority for New Zealand that the international regime gives appropriate recognition to the relationship between “access and benefit-sharing” and matauranga Maori<sup>6</sup> or TK associated with genetic resources.

27 A number of Parties to the CBD have indicated that they support the principle that the “prior informed consent” (PIC) or approval of indigenous and local communities must be obtained when accessing TK associated with genetic resources. It is unclear what PIC or approval with respect to TK associated with genetic resources would mean in practical terms in New Zealand due to uncertainty regarding control over, and rights relating to, genetic resources which have TK associated with them. Related issues requiring domestic clarification include: what is the government’s role (if any) regarding TK, from whom and at what level should PIC be obtained when seeking access to TK associated with genetic resources (iwi, hapu or individual holders of the TK), what happens if the TK is held by more than one iwi, when is the TK deemed to have been “used”, and who should verify or certify that the PIC had been appropriately obtained.

28 On the understanding that “mutually agreed terms” will be the basis for any ABS arrangements under the international regime, officials expect the issue of TK associated with genetic resources, including the obtaining of any consents or approvals required, to be covered in the terms that are negotiated between the party seeking access to a genetic resource and the recognised access provider when access to TK associated with genetic resources is also sought.

29 Note that the principle of PIC in this particular context i.e. when accessing traditional knowledge associated with a genetic resource (as opposed to accessing the genetic resource itself) does not raise the same legal and constitutional issues as the use of the term PIC in the Declaration on the Rights of

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<sup>6</sup> Matauranga Maori provides the epistemological basis and authorising context from which traditional knowledge and the use of traditional knowledge is derived.

Indigenous Peoples. In the Declaration<sup>7</sup>, the term PIC is used in relation to (among other things) lands and resources traditionally held, and to legislative and administrative measures, and could be interpreted as giving indigenous peoples a right of veto over government decision-making or granting them political rights that non-indigenous New Zealanders do not have.

### “Nature”

30 A contentious issue on the agenda of the November negotiations is the “nature” of the international ABS regime i.e. whether parts or all of it should be legally binding. New Zealand has taken a cautious position on the issue emphasising that any regime should be workable (i.e. able to be implemented) and make legal sense.

31 In general terms, the question of legal form is better considered once the content of the regime has become clearer and this has been New Zealand’s position to date. However, it is understood that the Co-chairs of the negotiations may press for a decision on “nature” in November, and there is a strong push by developing countries for a legally binding regime i.e. a Protocol to the Convention.

32 Officials consider that New Zealand should be prepared to join a consensus in favour of a binding legal regime if that is the general mood of the negotiation, but should not advocate for such a result. The New Zealand delegation would also continue to stress that in order for any element in the international regime to be legally binding, it must be workable and make legal sense.

### NZ objectives and principles

33 Before the last round of negotiations held in April this year, Ministers agreed that the following objectives and principles should guide the New Zealand delegation in the negotiations (submission of 11 March 2009 to the Ministers of Foreign Affairs, Maori Affairs, Energy and Resources and Conservation refers). A fundamental principle underlying these objectives and principles is that any new international regime should not unduly limit the Government’s options vis-à-vis the development of domestic policy:

- (i) harnessing New Zealand’s potential as a provider of genetic resources;
- (ii) protecting New Zealand’s interests as a user of foreign genetic resources;
- (iii) maintaining the Crown’s ability to meet its obligations under the Treaty of Waitangi;
- (iv) maintaining flexibility for the Government to respond in due course to the report of the Waitangi Tribunal in the Wai 262 “flora and fauna” claim;

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<sup>7</sup> The Declaration in fact refers to “free prior informed consent” (rather than “prior informed consent”).

- (v) ensuring that genetic resources in Antarctica are regulated by the Antarctic Treaty System and not by the Convention on Biodiversity;
- (vi) maintaining an internationally competitive research environment;
- (vii) a practical and effective regime;
- (viii) environmental sustainability in line with the objectives of the Convention on Biological Diversity.

34 In view of the new items on the agenda of the upcoming negotiations, and to ensure consistency with New Zealand's policy settings, officials propose three additional objectives/principles:

- (i) appropriate recognition of the relationship between ABS activities and mātāuranga Māori or traditional knowledge associated with genetic resources (paragraph 26 refers);
- (ii) "access and benefit-sharing" arrangements should be based on terms that are mutually agreed between the parties concerned i.e. those seeking access to genetic resources and the recognised access provider/s (paragraph 24 refers);
- (iii) the consents/approvals required for "access and benefit-sharing" in relation to traditional knowledge associated with genetic resources should be covered in the terms that are mutually agreed between the parties concerned (paragraph 28 refers).

35 Officials will revert to Ministers and Cabinet for further guidance as required as the negotiations proceed.

#### 6<sup>th</sup> Ad Hoc Working Group on Article 8(j) and Related Provisions

36 The 6<sup>th</sup> Ad Hoc Working Group on Article 8(j) and Related Provisions of the CBD will take place from 2-6 November 2009 immediately prior to the next round of ABS negotiations. Article 8(j)<sup>8</sup> deals with the knowledge, innovation and practices of indigenous and local communities relevant to the conservation and sustainable use of biodiversity. The Working Group's mandate in relation to traditional knowledge is broader than "access and benefit-sharing". Differing interpretations of how to deal with traditional knowledge make this a challenging and controversial forum which is followed closely by many indigenous groups including Māori.

37 As a country with extensive experience in this area, New Zealand's key interests in this Working Group are to provide a constructive voice on the issues under discussion, and to work towards outcomes that will not complicate domestic

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<sup>8</sup> Article 8(j) states that "Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".

policy options. In support of these interests, it is proposed that the objectives of the New Zealand delegation to the 6<sup>th</sup> Ad Hoc Working Group on Article 8(j) be to:

- (i) highlight practical examples of how Maori have been able to protect and develop traditional knowledge;
- (ii) support voluntary and practical outcomes, including with respect to elements of sui generis systems (i.e. specifically designed) for the protection of traditional knowledge; and
- (iii) keep discussion focussed on the Working Group's mandate and priorities, particularly in relation to its ongoing work on an ethical code of conduct.

38 The Article 8(j) Working Group also has on its agenda the international ABS negotiations and will forward its views on this to the 8<sup>th</sup> ABS Working Group.

### **Consultation**

39 The Ministry of Economic Development, Te Puni Kokiri, Ministry of Agriculture and Forestry, Ministry of Research, Science and Technology, and Department of Conservation have been consulted on this submission and agree with its recommendations. Crown Law has also been consulted. The Department of Prime Minister and Cabinet has been informed.

40 Engagement with stakeholders and Maori is planned which will feed into the New Zealand delegation's preparations for the 6<sup>th</sup> Ad Hoc Working Group on Article 8(j), remaining ABS negotiations and the 10<sup>th</sup> Conference of the Parties to the CBD.

### **Financial Implications**

41 There are no financial implications.

### **Human Rights Implications**

42 There are no inconsistencies with the Human Rights Act 1993 and New Zealand Bill of Rights Act 1990.

### **Legislative Implications**

43 There are no legislative implications.

### **Regulatory Impact and Business Compliance Cost Statement**

44 A RIS or BCCS is not required.

### **Publicity**

45 No publicity is planned, however it is proposed that this paper be publicly released once it has been approved by Cabinet.

## Recommendations

46 It is recommended that the Committee:

1. confirm that the following objectives, agreed by Ministers before the last round of negotiations in April 2009, should continue to guide the New Zealand delegation in negotiations under the Convention on Biological Diversity on an international regime on access to genetic resources, and the sharing of the benefits arising from the utilisation of genetic resources:
  - 1.1 harnessing New Zealand's potential as a provider of genetic resources;
  - 1.2 protecting New Zealand's interests as a user of foreign genetic resources;
  - 1.3 maintaining the Crown's ability to meet its obligations under the Treaty of Waitangi;
  - 1.4 maintaining flexibility for the Government to respond in due course to the report of the Waitangi Tribunal in the Wai 262 "flora and fauna" claim;
  - 1.5 ensuring that genetic resources in Antarctica are regulated by the Antarctic Treaty System and not by the Convention on Biodiversity;
  - 1.6 maintaining an internationally competitive research environment; and
  - 1.7 a workable and effective regime;
2. agree that the following additional objectives/principles should also guide the New Zealand delegation in the negotiations:
  - 2.1 appropriate recognition of the relationship between "access and benefit-sharing" activities and matauranga Maori or traditional knowledge associated with genetic resources;
  - 2.2 "access and benefit-sharing" arrangements should be based on terms that are mutually agreed between the parties concerned i.e. those seeking access to genetic resources and the recognised access provider/s;
  - 2.3 the consents/approvals required for "access and benefit-sharing" in relation to traditional knowledge associated with genetic resources should be covered in the terms that are mutually agreed between the parties concerned;
3. agree that New Zealand should be prepared to join a consensus in favour of a binding legal regime if that is the general mood of the negotiations but should not advocate for such a result, and should

- emphasise that any legally binding elements should be workable and make legal sense;
4. note that a fundamental principle underlying the above objectives is that any new international regime should not unduly limit the Government's options vis-à-vis the development of domestic policy;
  5. note that further guidance will be sought from Ministers and Cabinet as required as the negotiations proceed;
  6. note that the 6<sup>th</sup> Ad Hoc Working Group on Article 8(j) and Related Provisions of the CBD will take place from 2-6 November 2009 immediately prior to the next round of "access and benefit-sharing" negotiations;
  7. agree that New Zealand's objectives at this Working Group should be to:
    - 7.1 highlight practical examples of how Maori have been able to protect and develop traditional knowledge;
    - 7.2 support voluntary and practical outcomes, including with respect to elements of sui generis systems (i.e. specifically designed) for the protection of traditional knowledge; and
    - 7.3 keep discussion focussed on the Working Group's mandate and priorities, particularly in relation to its ongoing work on an ethical code of conduct; and
  8. agree that this paper be publicly released once it has been approved by Cabinet.

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