

2. It was in recognition of this international concern that the UNEP Governing Council, in its decisions 14/26 and 15/34, stressed the need for concerted international action to conserve bio-diversity by *inter alia* formulation of a comprehensive international legal instrument, possibly in the form of a Framework Convention. The Governing Council, accordingly, established an *Ad hoc* Group of Experts on Biological Diversity which held its first session in Geneva in November 1988. The second session of the *Ad hoc* Group was convened in Geneva in February 1990 to advise further on the content of a new international legal instrument, with particular emphasis on its socio-economic context. The Group requested the Executive Director to begin a number of studies as a means of responding to specific issues in the process of developing the new legal instrument. These studies covered : bio-diversity global conservation needs and costs; current multilateral, bilateral and national financial support for biological diversity conservation; an analysis of possible financial mechanisms; the relationship between intellectual property rights and access to genetic resources; and biotechnology issues. The results of these studies were presented to the *Ad hoc* Group at its third session which was held in Geneva in July 1990. At that session, the *Ad hoc* Group advised further on, *inter alia*, the content of elements for a global framework legal instrument on biological diversity. The Group agreed that in dealing with the issues of costs, financial mechanisms and technology transfer, the broad estimates of costs involved should be accepted. However, the Group maintained that the complex issues involved in biotechnology transfer required further expert examination before the set of elements covering the issues could be agreed. Accordingly, an expert meeting of the open-ended Sub-Working Group on Biotechnology, which was held in Nairobi in November 1990, discussed issues relevant to biotechnology transfer, mainly the scope of biotechnologies to be included in the proposed Convention and ways and means for their transfer to developing countries.

3. The outcome of the three sessions of the Expert Group and the Sub-Group on Biotechnology showed that there was an urgent need for an international legal instrument for the conservation of biological diversity encompassing it at three levels : intra-species, inter-species and ecosystems, including both *in situ* and *ex situ* conservation. It was clarified that certain issues might need to be considered in separate protocols and that, if possible, these protocols should be negotiated concurrently with the Framework Convention. It was agreed that the proposed Convention should contain firm funding commitments. Biotechnology transfer was recognised as an important element in the planned instrument, with a potential to contribute to improved conservation and sustainable utilization of genetic diversity. The experts also agreed that the access to genetic resources should be based on mutual agreement and full respect for the permanent sovereignty of States over their natural resources and that an innovative mechanism that facilitates access to resources and new technologies should be included in the legal instrument.

4. Subsequently, the UNEP Governing Council by its decisions 15/34 and SS.II.5 appointed an *Ad hoc* Working Group of Legal and Technical

Experts with a mandate to negotiate an international legal instrument for the conservation of biological diversity. At its first session held in Nairobi from 19 to 23 November 1990, the Group focussed on the elements for possible inclusion in a global Framework Convention on Biological Diversity. On the basis of its consideration of these elements the session requested the UNEP Secretariat to prepare a Draft Convention on Biological Diversity (UNEP/Bio. Div./WG. 2/2/2) which was presented to the second session of the *Ad hoc* Working Group held in Nairobi from 25 February to 6 March 1991. The second session discussed parts of the Draft Convention and identified a number of issues for further clarification with the help of notes to be prepared by the UNEP Secretariat. It made recommendations to the Secretariat on the revision of the Draft Convention. The Session also requested the Executive Director to convene a meeting of a regionally balanced group of lawyers (Lawyers' Meeting) to review the Draft Convention as revised by the Secretariat. The session also made important decisions on procedural and organizational matters; adopted its rules of procedure; elected its officers; established two sub-working group assigning each group with specific parts of the Draft Convention.

5. The UNEP Governing Council, at its sixteenth session, by decision 16/42 renamed the *Ad hoc* Working Group of Legal and Technical Experts on Biological Diversity as the *Inter-governmental Negotiating Committee (INC)* for a Convention on Biological Diversity clarifying that the change of name did not mean a new negotiating body nor affect the continuity of the process of elaborating the Convention. The INC consists of Working Group I and Working Group II. Working Group I has been assigned almost two-thirds part of the Draft Convention. Working Group II has been allotted specific draft articles which can be said to constitute the heart of the Convention. The successful elaboration of the Convention depends upon agreement being reached on the issues being tackled by Working Group II. These include access to genetic resources; access to and transfer of technology including bio-technology and funds and funding mechanisms. The impact of these provisions is likely to permeate the entire fabric of the Convention.

6. The Bureau of the INC is as follows :

Chairman	H.E. Mr. V. Sanchez (Chile)
Vice-Chairmen	Mr. V. Koester (Denmark) Mr. J. Muliro (Kenya) Mr. G. Zavarzin (USSR)
Rapporteur	Mr. J. Hussain (Pakistan)

Working Group I

Chairman	Mr. J. Muliro (Kenya)
Vice-Chairman	Mr. Pavel Suian (Romania)
Rapporteur	Mr. Nordahl Roaldsy (Norway)

Working Group II

Chairman	Mr. V. Koester (Denmark)
Vice-Chairman	Mr. A. Vaish (India)
Rapporteur	Mr. S. Samba (The Gambia)

7. The first session of the INC was held in Madrid from 24 June to 3 July 1991; second session in Nairobi from 23 September to 2 October 1991; third session in Geneva from 25 November to 4 December 1991; and the fourth in Nairobi from 6 to 15 February 1992 which has produced the Fifth Revised Draft Convention on Biological Diversity contained in Document No. UNEP/BIO.Div/N7-INC.5/2. This text will be taken up for final consideration at the fifth session of the INC scheduled to be held in Nairobi from 11 to 19 May 1992 just before the UNCED to be held in Rio in June 1992.

An Overview of the Fifth Revised Draft Convention on Biological Diversity

8. The conservation of biological diversity and the problems relating to climate change are among the most important environmental issues facing the world at the present juncture. The destruction of habitats is causing thousands of species to become extinct every year and the consequent loss of biological diversity is a main factor in what might become an irreversible climate change. Biological diversity, therefore, needs to be conserved so that mankind can derive maximum sustainable benefit from world genetic resources.

9. The international community has already enacted instruments to protect biological diversity, but they have proved to be inadequate. It is, therefore, essential to supplement such action by a global Convention which would enable the present generation to discharge its responsibility to future ones through preserving their heritage.

10. The Draft Convention on Biological Diversity, presently under negotiation, is intended to evolve a broad legal framework pooling together a wide range of actions at national and international levels for conservation and sound use of biological diversity that have hitherto been taken on a piecemeal basis. The Draft Convention originally consisted of 41 articles, but during the course of the ongoing inter-governmental negotiations, a number of articles, paragraphs and subparagraphs have been deleted, moved or rearranged. Consequently, the draft provisions have been renumbered to read sequentially. The Fifth Revised Draft Convention consists of a Preamble, 43 Articles and an Annex. Part I of the Annex lays down the procedure for arbitration of disputes which may arise between the Contracting Parties over the interpretation and application of the Convention. Part II of the Annex sets out the procedure for settling such disputes through conciliation.

11. The Preamble is intended to provide the *raison d'être* for laying down a comprehensive legal regime for the conservation of bio-diversity at

national and international levels. Although the text remains unchanged, it may have to be altered in the light of the proposal submitted by the Group of 77 and China contained in Annex II to the text of the Fifth Revised Draft Convention.

12. Article 1 is addressed to setting forth the objectives of the proposed Convention. The main objective of the Convention is to conserve biological diversity for the present and future generations. The text remains in square brackets as the objectives of fair and equitable sharing of the benefits of research in biotechnology, provision of adequate, new and additional funding by the developed countries and the conditions for the transfer of technology related to bio-diversity conservation remain to be negotiated.

13. Article 2 enumerates the definitions of terms used in the Convention. This is essential to impart clarity and unambiguity to the Convention regime. However, the present text is based on definitions prepared by a Sub-Working Group of Working Group II, although they have not yet been considered by the Working Group II itself. Moreover, the Sub-Working Group of Working Group I has also prepared a set of definitions which are appended to the text of the Fifth Revised Draft Convention. Since these are yet to be considered by Working Groups I and II, Article 2 stays in square brackets.

14. Article 3 on Fundamental Principles is a crucial article since it is closely related to Articles 4 to 22 which frame obligations for the Contracting Parties. The extent of these obligations would depend upon the content of the basic principles incorporated in Article 3. The basic principles ought to be recognised in this article are that obligations should include *in-situ* and *ex-situ* conservation, intergenerational equity and responsibility, arrangements for the transfer of the technologies including biotechnology and the establishment of financial mechanisms. Since the precise content of these principles is yet to be worked out, Article 3 remains in square brackets.

15. Article 4 frames the general obligations of the Contracting Parties at national and international levels. It stays in square brackets because of alternative texts. Article 5 obligates the Contracting Parties to develop their national strategies, plans and programmes for conservation and sustainable use of their biological diversity. Article 6 requires the Contracting Parties to identify and monitor components of biological diversity important for conservation within their sovereign jurisdiction. Article 7 obligates the Contracting Parties to conserve their biological resources through *in-situ* conservation. Article 8 requires the Contracting Parties to adopt measures for the *ex-situ* conservation of components of biological diversity identified pursuant to Article 6, for the purpose of complementing *in-situ* measures. Article 9 makes compliance by developing Contracting Parties of the obligations contained in Articles 5, 7 and 8 conditional upon the provision of technical and financial assistance. Its text is still to be negotiated.

16. Article 10 requires the Contracting Parties to integrate conservation of their biological resources into their national decision-making and to

encourage cooperation between governmental authorities and private sectors. Article 11 on Incentive Measures obligates the Contracting Parties to provide effective social and economic measures to encourage conservation and sustainable use of biological diversity. Its text is also still to be negotiated. Article 12 enjoins the Contracting Parties to establish research and training programmes for the identification, conservation, management and sustainable use and development of bio-diversity and its components. Article 13 requires the Contracting Parties to promote general awareness about the importance of and the measures required for the conservation of bio-diversity. Article 14 obligates the Contracting Parties to monitor environmental impact assessment of their proposed projects or programmes that are likely to have significant adverse effects on biological diversity, whether within or outside the limits of their national jurisdiction and to avoid or minimize such adverse effects. Paragraphs (d) to (g) of this article dealing with the question of liability and compensation for damage to biological diversity are yet to be negotiated.

17. Article 15 requires the Contracting Parties to submit to the Conference of the Parties, the apex body to administer the Convention, inventories of species found in their jurisdictions which are threatened with extinction on a global level. Inclusion of an area on the List of Biogeographic Areas of Particular Importance shall require the consent of the concerned State. This article stays in square brackets because of alternative provisions. Yet another proposal is to delete the whole of this article alongwith Article 25 on Procedure for Global Lists.

18. Article 16 to 22 constitute the backbone of this Convention. Article 16 regulates access to genetic resources which has hitherto been relatively free. Although it requires Contracting Parties to create conditions to facilitate access to genetic resources by other Contracting Parties and not to impose restrictions that run counter to the objectives of the Convention, such access shall be granted on mutually agreed terms and subject to the prior consent of the Contracting Parties providing such resources. It also obligates Contracting Parties to carry out scientific research based on genetic resources provided by other Contracting Parties with their full participation, and where possible, in those countries. It also requires Contracting Parties to share the results of such scientific research and the benefits arising from the utilization of genetic resources with the Contracting Parties providing those resources. This article has evolved a great deal and has now reached near agreement with the outstanding divergence being limited to whether the benefits should be shared with the countries of origin or with the countries providing genetic materials.

19. Article 17 amalgamates in a single text the previous two Articles on Access to Technology and Transfer of Technology. It obligates each Contracting Party to undertake to provide and/or facilitate access for and transfer to other Contracting Parties relevant technologies including biotechnology. Such access and transfer has to be effected under (fair and reasonable) (fair and most favourable) (preferential and concessional) conditions. However,

for developing countries providing genetic resources, the access to and transfer of technology should be on mutually agreed terms (notwithstanding patents and other intellectual property rights). It also obligates the Contracting Parties to encourage their private sectors to facilitate access, joint development and transfer of technology for the benefit of both governmental institutions and the private sectors of developing countries. It also requires co-operation of the Contracting Parties to ensure that patents and other intellectual property rights do not run counter to the objectives of the Convention. The areas of disagreement have substantially been reduced on this article with the outstanding differences being limited to countries of origin and countries providing genetic resources and the question of patents and other intellectual property rights.

20. Article 18 on Exchange of Information which is closely connected with both Articles 16 and 17, enjoins the Contracting Parties to facilitate continuing exchange of information and specialized knowledge and to establish the necessary modalities therefor. The only point which remains to be settled in regard to this provision is whether such information should be limited to that which is publicly available.

21. Article 19 on Technical and Scientific Co-operation obligates the Contracting Parties to promote such co-operation in the context of conservation of bio-diversity. In particular, it enjoins the developed Contracting Parties to promote such co-operation with the developing Contracting Parties and to provide financial resources for this purpose. It also mandates the Conference of the Parties, at its first meeting, to consider establishment of a clearing-house mechanism to promote and facilitate such co-operation.

22. Article 20 is addressed to Handling of Biotechnology and Distribution of its Benefits. It requires the Contracting Parties to take appropriate measures to involve the participation of other Contracting Parties, especially the developing countries, in biotechnological research activities, which provide the genetic resources for such research. It also obligates the Contracting Parties to provide access on mutually agreed terms to the developing countries to the results and benefits arising from biotechnologies based on genetic resources provided by them. It also obligates the Contracting Parties to ensure that any natural or legal person under their jurisdiction who intends to introduce in another Contracting State genetically modified organisms which may have an adverse impact on the biological diversity or environment in that country, to obtain the agreement/consent of that Contracting State and to make available to the latter information about the safety regulations. This provision also seems to be largely agreed

23. Articles 21 and 22 are the key provisions on financial resources and funding mechanisms. Paragraph (1) of Article 21 requires each Contracting Party to provide financial support for the conservation of biological diversity in accordance with its national plans, priorities and programmes. Paragraph (2) has two alternatives. The first alternative requires the developed countries to commit themselves to provide adequate, new, and additional financial

resources to enable developing countries to achieve the objectives of the Convention. Alternative 2 requires the developed countries' commitment to provide financial resources to meet the agreed incremental costs to developing countries for fulfilling their obligations under the Convention or for achieving the objectives of the Convention. Paragraph (3) clarifies that compliance by the developing countries of the obligations stipulated by the Convention would depend upon the availability of the financial resources to be provided by the developed countries.

24. Article 22 contemplates the establishment of financial mechanisms to provide financial support to the developing Contracting Parties to enable them to realize the objectives set by the Convention. This has two alternative texts. Alternative I envisages the establishment of a Biological Development Fund and requires the developed Contracting Parties to contribute thereto on a mandatory basis according to a formula which is as yet to be worked out. The agency to administer this Fund or the manner in which it will be administered are as yet to be negotiated. The criteria and guidelines for access and utilization of the Fund are to be established by the Conference of the Parties at its first meeting. It also enjoins the Contracting Parties to consider strengthening existing financial institutions to provide financial assistance for conservation of biological diversity. Alternative I reflects the proposal of the developing countries.

25. Alternative II, which seems to reflect the position taken by the developed countries, contemplates the establishment of a fund or financial mechanism to provide resources to the developing Contracting Parties to enable them to meet the agreed incremental costs of complying with the provisions of the Convention. Contributions to this fund or financial mechanism have to be made by all the Contracting Parties which would be assessed according to a formula yet to be worked out. The proposed fund or financial mechanism will be administered by the existing Global Environmental Facility or a Multilateral Fund for Biological Diversity. The other provisions are identical to those in Alternative I.

26. It is worth noticing that Alternative II is subject to a number of conditionalities. Firstly, it envisages contributions being made to the proposed Fund by all Contracting Parties basing the assessment of all States on their GNP and transfer to biodiverse States on the basis of need. Secondly, it restricts financial assistance to the developing Contracting Parties to enable them to meet the agreed incremental costs which they would incur in complying with the provisions of the Convention. Thirdly, the developed countries propose that the Fund should be managed on the pattern of the World Bank which would ensure that they have a dominant role as major donor countries. These conditionalities point to the strategy of the developed countries to make the Third World countries to agree to an overall aid package through IMF-World Bank rather than a separate environment-related assistance fund, including the transfer of technology. Since this is being resisted by the developing countries, there is as yet no agreement on the content of Article 22. It should be noted that disagreement on the role of

GEF managed by the World Bank permeates the negotiations on Climate Change as well.

27. Article 23 deals with the question of relationship of this Convention with other existing international conventions in the field of conservation of biological diversity. It stays in square brackets presumably because it does not address the question of the relationship of this Convention with future agreements.

28. Articles 24 to 35 deal with the institutional measures for the Convention itself. These contemplate the establishment of a Conference of the Parties as the apex body to administer the Convention with the help of a Scientific and Technical Committee and a Secretariat.

29. Article 24 establishes the Conference of the Parties as an apex body to keep under continuing review the implementation of the Convention. Article 25 lays down the procedure for compiling and publicising the Global Lists of Biogeographic Areas of particular importance for the conservation of biological diversity. With the proposed deletion of Article 15 on Global Lists, this Article is most likely to be deleted. Article 26 establishes a Secretariat to service the Conference of the Parties. The text of this article is almost settled except for sub-paragraphs 1(b) and (c). These stay in square brackets because the role and character of the Scientific and Technical Committee is as yet to be agreed upon while Articles 15 and 25 on Global Lists are likely to be deleted. Article 27 envisages the establishment of a Scientific and Technical Committee. Its text is not yet settled as the role and character of this institution is yet to be agreed on. Article 28 requires the Contracting Parties to submit reports to the Conference of the Parties on the actions taken by them for the implementation of the Convention. The text of this article is almost settled. Article 29 makes the expenses incurred in respect of technical and scientific co-operation amongst the Contracting Parties in pursuance of Article 19 a charge on the proposed Biological Development Fund.

30. Article 30 lays down the dispute settlement mechanisms in relation to the Convention. The text has alternative provisions, but is most likely to be settled at the forthcoming session of the INC. Article 31 relates to the adoption of Protocols; Article 32 is addressed to the amendment of the Convention and Protocols; Article 33 deals with adoption and amendment of Annexes; Article 34 with the Right to Vote; and Article 35 with the relationship between the Convention and its Protocols. The texts of these provisions appear to be settled.

31. Articles 36 to 43 are in the nature of Final Provisions dealing with signature; ratification, acceptance or approval; accession; entry into force; reservations; withdrawals; depository; and authentic texts. There appears to be no controversy in relation to the texts of these articles.