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GROUP OF TECHNICAL AND LEGAL EXPERTS ON COMPLIANCE IN THE CONTEXT OF THE INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING
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COMPILATION OF SUBMISSIONS BY PARTIES, GOVERNMENTS, INTERNATIONAL ORGANIZATIONS, INDIGENOUS AND LOCAL COMMUNITIES AND RELEVANT STAKEHOLDERS ON COMPLIANCE IN THE CONTEXT OF THE INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING

Note by the Executive Secretary

Addendum

SUBMISSION FROM THE GOVERNMENT OF JAPAN

1. The Secretariat is circulating herewith, as an addendum to the original compilation of submissions on compliance in the context of the international regime on access and benefit-sharing (UNEP/CBD/ABS/GTLE/2/2), a submission from the Government of Japan.

2. The contribution has been reproduced in the form and the language in which it was received by the Secretariat.

* UNEP/CBD/ABS/GTLE/2/1.

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JAPAN'S PRELIMINARY VIEWS ON THE ISSUE OF "COMPLIANCE"

1. General comment

Compliance with contract between private parties is surely ensured through normal application of judicial procedure so far as both parties remain within the territory of one country. It is true in the case of the agreed contract between users and providers of genetic resources. If the government adopts its own legislation on access and benefit sharing of genetic resources, certain form of contract can even be made mandatory on the use of genetic resources within the territory. Given this understanding, it is clear that the issue to be discussed is how we ensure compliance when users go outside of the provider country of the genetic resources.

If the contract clearly stipulates dispute settlement mechanism, including, in particular, the country of jurisdiction and the applicable law for the non-compliance case, the compliance with the contract can be ensured in either country's judicial procedure, even in the case the user has already left the country of provider. If the contract does not include such clause on jurisdiction or applicable law, there could be conflict of views on which court is to be used for the case. The general practice is that the case is filed to the court of the defendant's residence, though, in this case, the plaintiff has to bear the burden of participating in foreign judicial procedure using foreign language. On the other hand, if the case is filed to the court of plaintiff's country, concern arises that defendant's appearance is not ensured and that the ruling cannot surely be enforced. These are, however, common challenges always faced in the case related to international transactions and various approaches have been made so far to address these difficulties. These include mutual recognition and enforcement of civil and commercial judgment given by foreign country's court. The application of these available mechanisms can contribute to lessening, to large extent, the above mentioned difficulty when the court of plaintiff's country is used.

The above described facts, which will be further elaborated below, indicate that mechanisms already exist to enhance compliance with private contracts even in the situation where users of genetic resources have left country of providers. It is our views that, if the available mechanisms are not sufficient in solving concerns, the expert group should identify where problems exist and, if necessary, provide solutions.

On the assumption that the compliance can be enhanced even for the users outside of the providers' country through available mechanisms, Japan considers that the discussion on this issue should be focused on how we should tackle the difficulties arising when no contract is concluded on the use of genetic resources or when the provision is absent or insufficient in the contract regarding how to cope with the subsequent disputes. It is recommended that discussion by experts should examine what types of measures are effective in avoiding these difficulties to arise and in ensuring appropriate contracts that are mutually agreed. Various approaches should be explored including those measures that give good incentives for developing appropriate contracts.

2. Comments on the TOR of Group of Technical and Legal Experts on Compliance

We would like to provide our views with regard to each point in the terms of reference contained in annex II A of the COP decision IX/12.

(a) What kind of measures are available, or could be developed, in public and private international law to:

(i)Facilitate, with particular consideration to fairness and equity, and taking into account cost and effectiveness:

a) Access to justice, including alternative dispute resolution;

b) Access to courts by foreign plaintiffs;

In Japan, access is given to foreign plaintiff, and legal system allows foreign plaintiff to file a suite to Japanese court. The government and other public organization could provide various kinds of legal assistance to foreign plaintiff such as interpreters.

Additionally to lessen the burden for foreign plaintiffs, it is well recognized that efforts are being made to internationally harmonize individual countries' legal systems on private law in international forum such as, Hague Conference on Private International Law, UNCITRAL(United Nations Commission on International Trade Law), UNIDROIT (International Institute for the Unification of Private Law). These efforts may benefit those foreign plaintiffs who face some difficulties in less harmonized legal system in other countries. Even though these international harmonization cannot easily be achieved with anticipated long-term negotiations and limited number of participating countries, difficulties arising from the use of court in plaintiff's country can be alleviated to a significant extent if details of dispute settlements are agreed in contract such as MTA between users and providers of genetic resources.

Aside from judicial system, there exist alternative dispute resolution such as arbitration and conciliation as effective mechanisms to have effective resolution to disputes. ADR mechanisms are provided by institute such as the Hague Conference, PCA (Permanent Court of Arbitration), UNCITRAL, UNIDROIT. The New York Convention (the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards) provides mechanisms to recognize and enforce arbitrary award made by foreign country, and Japan is already a member of the convention.

The ADR mentioned above can be well suitable for the disputes concerning the use of genetic resources. If compared with judicial system, we can find much more advantages, having more commonality between provider's country and user's country, and causing less burden in terms of time and cost to spend. It is thus recommended that contract on the use of genetic resources should stipulate the use of ADR as a dispute settlement mechanism.

(ii) Support mutual recognition and enforcement of judgments across jurisdictions

Japan's civil and commercial laws allow our courts to recognize and enforce final judgment made by courts of foreign country if certain condition is met (Article 118 of the Law of Civil Procedure, Article 24 of the Law of Civil Enforcement). We are aware of the efforts to promote international harmonization of the recognition and enforcement of foreign judgments in civil and commercial such as the Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters.

On this harmonization of mutual recognition and enforcement, difficulties are well recognized in the similar way with the harmonization of international private law, but, again in this area, detailed pre-arrangement on MTA can facilitate many of dispute settlements in spite of difficulties facing international efforts for harmonization.

The above described fact indicates that legal mechanism concerning recognition and enforcements of foreign courts are already well established or being further facilitated. If any difficulty still remains in actual implementation, it is important that we should identify what such difficulties are and examine how they can be addressed.

(iii) Provide remedies and sanctions in civil, commercial and criminal matters; in order to ensure compliance with national access and benefit-sharing legislation and requirements, including prior informed consent and mutually agreed terms;

In the civil and commercial cases, the legal system as described above can provide remedy and sanction for the dispute concerning transborder transactions.

In any case, it can be said to the issue of remedy and sanction again that detailed advance-agreement between users and providers of genetic resources can contribute to facilitating dispute settlement without so many difficulties.

In addition to above, Japan also gave consideration to measures to be developed in future; disclosure requirement of the source/origin in patent applications and the certificate system.

Regarding the mandatory disclosure of the source/origin in patent applications, there are a lot of problems as follows, as our delegation clearly pointed out in the past negotiations;

- At the examination of patent application, the source/origin of genetic resources does not contribute to the judgement on patentability. To make the source/origin disclosure one of requirements for patentability could not be justifiable in light of objectives of patent system.
- The obligation of the source/origin disclosure in patent applications would lead to an undue burden for applicants and affect legal certainty of patents since it is difficult to define clearly the scope where the disclosure is required for patent applications. Thus, we have serious concern that the requirement would undermine the smooth operation of patent system.
- It should also be reminded that the introduction of the requirement would restrain patent applications, and would eventually result in less monetary benefits through utilization of patent system, which means the return of benefits to providers of genetic resources might be decreased as well.

As for certificate system, as examined by the past expert group, multiple options are still on the table with the different level of national discretion in providing and requesting a certificate. In any case, the system needs to be considered based on the principles of practicability, flexibility and cost-effectiveness.

In further discussing this option, the attention should be given to ITPGR (International Treaty on Plant Genetic Resources for Food and Agriculture) of FAO, which enables parties to conduct practical certification by obliging providers to report MTA on the plant genetic resources and by reviewing them in the Governing Body to see if they are pursuant to SMTA.

(b) What kind of voluntary measures are available to enhance compliance of users of foreign genetic resources?

As stated above, when appropriate MTA is concluded between users and providers on the use of genetic resources, dispute can be avoided or solved in a facilitated manner to a certain extent. The case to be further discussed is the situation in which MTA is not concluded or providers and users have different understanding due to the lack of clear provision in the original contractual agreements.

Voluntary measures are useful and effective in keeping users and providers away from getting into difficult situations mentioned above. For example, the advantages of agreed contracts could be well explained by means of awareness raising activities, including public seminars that our country has been implementing actively. These activities encourage users and providers of genetic resources to agree with appropriate contracts and inform them of the appropriate formulation of MTA by presenting best practices of MTA or internationally recognized components of MTA. Furthermore, it would be necessary to consider a broader range of voluntary measures such as presentation of MTA model clauses or other options and examine mechanisms which could enable countries to cooperate in this regard.

(c) Consider how internationally agreed definitions of misappropriation and misuse of genetic resources and associated traditional knowledge could support compliance where genetic resources have been accessed or used in circumvention of national legislation or without setting up of mutually agreed terms;

In order to avoid misappropriation or misuse, intensified efforts may be necessary and measures encouraging appropriate MTA can have good effect for this purpose as well. Once the definition of those terms is internationally agreed, we may be able to expect positive outcomes, especially when national judgments are made on the basis of the definition, Nevertheless, it needs to be reminded that countries

would need to overcome a lot of difficulties for sure before reaching an internationally common understanding on these terms.
Putting in place domestic ABS laws, which make certain type of MTA mandatory, can be effective to avoid misappropriation or misuse. However, many hurdles still exist for international harmonization of these domestic laws that have respective differences in implementation.

(d) How could compliance measures take account of the customary law of indigenous and local communities?
It is important to ensure transparency in a sense that users could obtain information on customary law of indigenous and local communities prior to utilization of genetic resources. In this regard, provider countries need to take measures to enhance transparency. Codification of such customary law could be one of options to avoid the subsequent challenge by indigenous and local communities .

(e) Analyse where particular compliance measures are needed for research with non-commercial intent, and if so, how these measures could address challenges arising from changes in intent and/or users, particularly considering the challenge arising from a lack of compliance with relevant access and benefit-sharing legislation and/or mutually agreed terms.
Japan can agree with the difficulty in bifurcated approach by making clear categorization between commercial use and non-commercial use. Distinctive separation of measures according to those two categories has much difficulty as well. It can be pointed out that the definition of non-commercial research, if possible, can contribute to tackling this issue. For example, ITPGR provides the definition on “commercialization” in “2. Definitions” of SMTA, and the application of that definition to the more general use of genetic resources could be pursued in our discussion.

The following procedures could be recommended and actually are in practice in many occasions, and need to be further elaborated in the future course of our discussion; When non-commercial use is changed to commercial use and if the change was unforeseen, the original contract would be revisited and MTA could be redrafted. If any change of intent is foreseen at the first stage, the conditions related to commercial use could be included in the contracts in advance.
