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### AD HOC OPEN-ENDED WORKING GROUP ON

#### ACCESS AND BENEFIT-SHARING

Montreal, 8-12 October 2007

Item 3 of the provisional agenda\*

### OVERVIEW OF RECENT DEVELOPMENTS AT THE INTERNATIONAL LEVEL RELATING TO ACCESS AND BENEFIT-SHARING

*Note by the Executive Secretary*

#### I. INTRODUCTION

1. In its decision VII/19 D, the Conference of the Parties mandated the Ad Hoc Open-ended Working group on Access and Benefit-sharing to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and 8(j) of the Convention and the three objectives of the Convention. The terms of reference set out for the Working Group on Access and Benefit-sharing provide that the negotiation of the international regime will draw on “*inter alia*, an analysis of existing legal and other instruments at national, regional and international levels relating to access and benefit-sharing, including: access contracts; experiences with their implementation; compliance and enforcement mechanisms; and any other options.
2. An analysis of existing national, regional and international legal instruments relating to access and benefit-sharing was carried out for the third meeting of the Working Group on Access and Benefit-sharing and made available as document UNEP/CBD/WG-ABS/3/2.
3. At its eighth meeting, in decision VIII/4 A, paragraph 3, the Conference of the Parties invited “Parties, Governments, indigenous and local communities, international organizations and all relevant stakeholders to provide information regarding the inputs on an analysis of existing legal and other instruments at national, regional and international levels relating to access and benefit-sharing to the Secretariat of the Convention four months prior to the fifth meeting of the Working Group on Access and Benefit-sharing”. In paragraph 4, it requested the Secretariat to prepare a compilation of the information provided in accordance with paragraph 3 and to make it available for the work of the Working Group. Contributions provided to the Secretariat are compiled in document UNEP/CBD/WG-ABS/5/INF/1.
4. This document updates the information contained in document UNEP/CBD/WG-ABS/3/2 regarding legal and other instruments at international level relating to access and benefit-sharing. An overview of regional and national measures related to access and benefit-sharing is included in document

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\* UNEP/CBD/WG-ABS/5/1.

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UNEP/CBD/WG-ABS/5/4. The information provided in this document provides a basis for the analysis of gaps contained in document UNEP/CBD/WG-ABS/5/3.

## II. OVERVIEW OF RECENT DEVELOPMENTS AT THE INTERNATIONAL LEVEL

5. A general description of the international instruments covered by this section highlighting their relationship to access and benefit-sharing was provided in document UNEP/CBD/WG-ABS/3/2. The following therefore provides an update of recent developments under these respective instruments which are of relevance to access and benefit-sharing.

### A. *Food and Agriculture Organization of the United Nations*

6. Document UNEP/CBD/WG-ABS/4/INF/3 (pp. 43-48) provided information on the role of the Food and Agriculture Organization of the United Nations in access and benefit-sharing for all components of biological diversity of interest to food and agriculture, covering both the Commission on Genetic Resources for Food and Agriculture and the International Treaty on Plant Genetic Resources for Food and Agriculture. It also describes what the Conference of the Parties to the Convention has recognized to be “*the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions*”, and the implications for access and benefit-sharing. <sup>1/</sup>

#### 1. *FAO Commission on Genetic Resources for Food and Agriculture*

7. The ongoing work of the inter-governmental Commission on Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations in relation to access and benefit-sharing is of direct relevance to the deliberations of the Working group.

8. Established in 1983, the Commission on Genetic Resources for Food and Agriculture was the first permanent intergovernmental forum dealing with agricultural genetic resources, including in relation to access and benefit-sharing. At present, 170 Governments and the European Community are members. The Commission’s statutes provide that it shall:

- “*have a coordinating role and shall deal with policy, sectorial and cross-sectorial matters related to the conservation and sustainable use of genetic resources of relevance to food and agriculture*” [...] including “*in the area of genetic resources of relevance to food and agriculture, [...] their conservation and sustainable use and the fair and equitable sharing of benefits derived from their utilization*” [...]
- “*provide an intergovernmental forum for negotiations and [...] oversee the development, upon the request of the FAO Governing Bodies, of other international agreements, undertakings, codes of conduct or other instruments relating to genetic resources of relevance to food and agriculture, and [...] monitor the operation of such instruments*” [...]
- “*facilitate and oversee cooperation between FAO and other international governmental and non-governmental bodies dealing with the conservation and sustainable use of genetic resources, in particular with the Conference of Parties to the Convention on Biological Diversity and the UN Commission on Sustainable Development, and [...] seek to develop appropriate mechanisms for cooperation and coordination in consultation with such bodies*”.

9. In the execution of this mandate, the Commission has over the years developed a number of relevant agreements, codes of conduct and guidelines. In the field of plant genetic resources for food and agriculture, the Commission negotiated the International Treaty on Plant Genetic Resources for Food and Agriculture, and acted as its Interim Committee, including for the negotiation of the Standard Material

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<sup>1/</sup> Decision II/15, reiterated in decision V/5.

Transfer Agreement that governs its Multilateral System of Access and Benefit-sharing, which was adopted by the Governing Body at its first meeting.

10. The Commission has also overseen the preparation of the International Technical Conference on Animal Genetic Resources, hosted by the Government of Switzerland in Interlaken (3-7 September 2007), where the *State of the World's Animal Genetic Resources for Food and Agriculture* will be presented, and the *Global Plan of Action for Animal Genetic Resources* adopted. In decision VI/5, the Conference of the Parties

*“invite[d] Parties, other Governments, the financial mechanism and funding organizations to provide adequate and timely support to [...] implement follow-up actions identified through the process that will contribute to conservation sustainable use, access and benefit-sharing of animal genetic resources for food and agriculture”.*

11. At its Tenth Regular Session in 2005, the Commission:

*“recommended that FAO and the Commission contribute to further work on access and benefit-sharing, in order to ensure that it move in a direction supportive of the special needs of the agricultural sector, in regard to all components of biological diversity of interest to food and agriculture.”*

12. At its Eleventh Regular Session in 2007, the Commission adopted a rolling Ten-year Multi-year Programme of Work (MYPOW), <sup>2/</sup> which covers all components of biological diversity of interest to food and agriculture, including animal genetic resources, aquatic genetic resources, forestry genetic resources, the genetic resources of micro-organisms and invertebrates, and plant genetic resources. In adopting its MYPOW, the Commission:

*“recommended that FAO continue to focus on access and benefit-sharing for genetic resources for food and agriculture in an integrated and interdisciplinary manner”. It “agreed on the importance of considering access and benefit-sharing, in relation to all components of biodiversity for food and agriculture. It decided that work in this field should be an early task within its Multi-year Programme of Work”.*

13. The Commission accordingly plans to consider the development of policies and arrangements for access and benefit-sharing for genetic resources for food and agriculture as a priority in its MYPOW, at its Twelfth Regular Session, currently planned for the third quarter of 2009.

## 2. *FAO International Treaty on Plant Genetic Resources for Food and Agriculture*

14. The International Treaty on Plant Genetic Resources for Food and Agriculture entered into force on 29 June 2004. As of 20 June 2007, there were 113 Parties to the Treaty.

15. The objectives of the Treaty are the conservation and sustainable use of Plant Genetic Resources for Food and Agriculture and the fair and equitable sharing of benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.

16. As highlighted in document UNEP/CBD/WG-ABS/3/2, one of the main components of the Treaty, the Multilateral System of Facilitated Access and Benefit-sharing, addresses access and benefit-sharing. As highlighted in article 10 of the Treaty, the Contracting Parties recognize the sovereign rights of States over their own plant genetic resources for food and agriculture and agree to establish a multilateral system to facilitate access to these resources, and to share, in a fair and equitable way, the benefits arising from their utilization. As provided for in Articles 12 and 13, the mechanism for facilitated access and benefit-sharing is a Standard Material Transfer Agreement (SMTA) setting out the conditions for access to these genetic resources and benefit-sharing. The Standard Material Transfer

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<sup>2/</sup> For the MYPOW, see *Appendix E* CGRFA-11/07/Report, at <ftp://ftp.fao.org/ag/cgrfa/cgrfa11/r11repe.pdf>.

Agreement is meant to standardize access and benefit-sharing for the 35 food crops as well as 29 general forages listed in annex 1 of the International Treaty.

17. The Standard Material Transfer Agreement was adopted by Resolution 2/2006 of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture at its first session held in Madrid, Spain, from 12 to 16 June 2006.

18. The Standard Material Transfer Agreement provides a fully operational, international commercial benefit-sharing mechanism under which the recipient of a plant genetic resource from the Treaty's Multilateral System must contribute a fixed percentage of the gross sales from a new commercial product to an international benefit-sharing trust fund under the Treaty under certain conditions.

19. Under the Standard Material Transfer Agreement there are two benefit-sharing options: the first option provides for payment to the Treaty's funding strategy of 1.1 percent of the sales of a commercialized product (less 30 percent), such as a new crop variety, which incorporates material accessed from the Multilateral System, when there are restrictions, such as patent protection, which result in the product not being freely available to others for research, training and breeding. Under the second benefit-sharing option, the user of the System can opt for a crop-based payment system, whereby they pay a lower rate, namely 0.5 percent, on *all* their commercialized products of a particular crop, regardless of whether material from the Multilateral System is incorporated in those products, and regardless of whether or not they are freely available to others for research and breeding through the exercise of intellectual property rights or other rights.

20. Through the funding strategy of the Treaty the funds generated from this benefit-sharing mechanism will eventually benefit farmers and agricultural priority programmes in developing countries and countries with economies in transition. The Standard Material Transfer Agreement is already being applied worldwide by the International Agricultural Research Centers (IARCs) of the Consultative Group on International Agricultural Research (CGIAR) since early 2007, and other International Institutions holding *ex situ* collections of plant genetic resources for food and agriculture that have signed agreements under Article 15 of the Treaty, bringing their collections under the Treaty. The experience gained with the application of the Standard Material Transfer Agreement under the Treaty's Multilateral System of Access and Benefit-sharing might therefore provide a practical body of experience in the future for the design and implementation of international benefit-sharing instruments through multilaterally negotiated access and benefit-sharing contracts and other mechanisms.

21. It is worth noting that while the Treaty applies to all plant genetic resources for food and agriculture, the Multilateral System of access and benefit-sharing only covers those crops and forages contained in annex 1 of the International Treaty, when they are accessed "solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses." <sup>3/</sup>

22. In addition to the Multilateral System (Articles 10, 11, 12 and 13), Article 15 of the Treaty provides for the inclusion of the wide variety of resources held by the International Agricultural Research Centres and other International Institutions, including both annex 1 and non-annex 1 crops, which are also subject to the access and benefit-sharing provisions.

23. With respect to *ex situ* collections of plant genetic resources held by the eleven Centres of the Consultative Group on International Agricultural Research, agreements were signed between the centres of the Consultative Group on International Agricultural Research and the Governing Body of the ITPGRFA on 16 October 2006, placing the collections they hold under the Treaty. Similar agreements have been signed or are in the process of signature with the Regional Collections of the International Coconut Genetic Resources Network (COGENT), the Tropical Agricultural Research and Higher

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<sup>3/</sup> See Article 12.3 (a) of the International Treaty on Plant Genetic Resources for Food and Agriculture.

Learning Centre (CATIE), and the Mutant Germplasm Repository of the Joint FAO/International Atomic Energy Division, and discussions are underway with other institutions. Consequently, the genetic resources held by these centres and included on the list of crops and forages under annex 1 of the Multilateral System will be distributed using the Treaty's Standard Material Transfer Agreement, while other resources will be available in line with Article 15.

24. Useful lessons can be learned from the negotiations of the International Treaty and its Standard Material Transfer Agreement which could usefully inform the negotiation process of the International Regime. In particular, the Standard Material Transfer Agreement can provide lessons learned on the practical administration of international benefit-sharing mechanisms with thousands of transfers occurring under the system every year; on the definition of certain terms, such as "provider", "recipient", "product", "genetic material under development"; on the use of multiple benefit-sharing options under a single, international access and benefit-sharing system; on information and reporting obligations of providers and recipients of genetic resources and the practical administration of related information management systems; on the role and relevance of intellectual property rights in benefit-sharing; and on alternative dispute resolution procedures for possible disputes arising in relation to individual transfers or access and benefit-sharing arrangements.

#### **B. The WTO Agreement on Trade-related Aspects of Intellectual Property Rights**

25. In response to the notification of 25 May 2006, through a communication dated 13 November 2006, the Secretariat of the World Trade Organization (WTO) provided the following contribution to the analysis of existing legal and other instruments at national, regional and international levels relating to access and benefit-sharing and relevant to the gap analysis:

26. "Work in the WTO on the relationship between the TRIPS Agreement and the Convention on Biological Diversity first began in the WTO Committee on Trade and Environment following the mandate given in the decision on Trade and Environment adopted at Marrakesh in April 1994. The principal forum for this subject in the WTO moved to the Council for TRIPS in 1999 when the review of Article 27.3(b) of the TRIPS Agreement, which relates to the patentability of plant and animal inventions, was initiated. Since the adoption of the Doha Ministerial Declaration on 14 November 2001, which in paragraph 19 instructed the Council for TRIPS to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity and the protection of traditional knowledge and folklore, work has been undertaken on these issues in the regular meetings of the Council for TRIPS. The Doha Ministerial Declaration also dealt with the issue of Implementation-Related Issues and Concerns in its paragraph 12. The relationship between the TRIPS Agreement and the Convention on Biological Diversity is one of the outstanding implementation issues. The decision on the Doha Work Programme, adopted by the General Council on 1 August 2004 (the so-called "July Package"), reaffirmed the existing mandates on Implementation-Related Issues and Concerns and called for a redoubling of efforts in order to find appropriate solutions. A consultative process of the Director-General was undertaken to this effect. In its treatment of the outstanding implementation issues, the Hong Kong Ministerial Declaration of December 2005 specifically mentioned the relationship between the TRIPS Agreement and the Convention on Biological Diversity (in addition to the issue of extension of geographical indications). It provided for the consultative process to be further intensified and for the Director-General to report to each regular meeting of the TNC and the General Council.

27. Accordingly, the issue of the relationship between the TRIPS Agreement and the Convention on Biological Diversity has been addressed on two tracks: in the regular meetings of the Council for TRIPS and in the consultative process for addressing the outstanding implementation issues. The discussion in the regular meetings of the TRIPS Council has considered a proposal made by a group of developing countries, led by India, Brazil and Peru, to amend the TRIPS Agreement to include an obligation on patent applicants to disclose the origin of biological resources and of traditional knowledge used in inventions as well as evidence of prior informed consent and of fair and equitable benefits-sharing. Norway has supported an amendment of the TRIPS Agreement to introduce a mandatory requirement to

disclose the source of genetic resources and traditional knowledge or the country of origin if it is known, provided the penalties for non-disclosure lie outside the patent system. The European Union has supported a mandatory requirement to disclose the origin or source of genetic resources and associated traditional knowledge that would cover all national, regional and international patent applications, while insisting that the legal effect of failure to disclose should be outside the patent system. Switzerland has proposed making explicit in the regulations of the World Intellectual Property Organization's Patent Co-operation Treaty (PCT) that parties to the PCT may require patent applicants to disclose the source of genetic materials and traditional knowledge on which inventions are directly based. The United States, supported by some other Members, has the position that a national-based approach using tailored national solutions, including contracts, is sufficient to ensure the that objectives of the Convention on Biological Diversity in relation to access and benefit-sharing are met and that it would neither be helpful nor desirable to involve the patent system. Some Members have expressed their desire to have a fact-based discussion based on national experiences in order to examine the issues involved.

28. The work done in the regular meetings of the TRIPS Council from 1999 to February 2006 has been summarized in Secretariat notes IP/C/W/368/Rev.1, IP/C/W/369/Rev.1 and IP/C/W/370/Rev.1. The discussions in the TRIPS Council at its meetings of March and June 2006 are recorded in the minutes of the Council for TRIPS (IP/C/M/50-51) and those at the October meeting will be recorded in IP/C/M/52. At these meetings, papers, including certain proposals on access and benefit-sharing, were submitted by a group of developing countries (IP/C/W/470 and IP/C/W/474 and its Addenda), Brazil (IP/C/W/475), Peru (IP/C/W/484), the United States (IP/C/W/469), Japan (IP/C/W/472) and Norway (IP/C/W/473). Copies of all the above mentioned documents can be found on the WTO website ([www.wto.org](http://www.wto.org)).

29. As regards the Director-General's consultative process, the discussions this year have focussed both on the merits of different policy options in this area and on the relation of this issue to the Doha Round of negotiations. Some countries sought a clear agreement that a solution would be negotiated as part of the outcome to the Round. Some other WTO Members considered that there was no negotiating mandate on this matter and that it would not be appropriate to create one."<sup>4/</sup>

30. One of the latest proposals introduced by Brazil, China, Colombia, Cuba, Ecuador, India, Pakistan, Peru, Thailand, Tanzania and South Africa in June 2006 proposes an amendment to the TRIPS Agreement to incorporate requirements for disclosure of the origin of genetic resources and associated traditional knowledge in patent applications along with evidence of prior informed consent and benefit-sharing.<sup>5/</sup> At a later meeting of the TRIPs Council in June 2007, additional countries have added their support to this proposal, including Venezuela, members of the African Group and the members of the Group of Least Developed Countries. Although a permanent agenda item in the TRIPS Council and also of the outstanding implementation issues in the context of the Doha Work Programme, no significant outcomes have yet been reached.

### ***C. World Intellectual Property Organization***

31. The World Intellectual Property Organization (WIPO), in particular its Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) has carried out a number of activities of relevance to the work of the Convention on Biological Diversity since it was established by the General Assembly in 2000 as further described in document UNEP/CBD/COP/8/INF/41.

32. In addition to the work carried out on IP and Traditional knowledge, the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore of the

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<sup>4/</sup> Contribution by WTO Secretariat included in document UNEP/CBD/WG-ABS/5/INF/1.

<sup>5/</sup> For further details see documents WT/GC/W/564/Rev.2, TN/C/W/41/Rev.2, IP/C/W/474 and WT/GC/W/564/Rev.2/Add.2, TN/C/W/41/Rev.2/Add.2, IP/C/W/474/Add.2.

World Intellectual Property Organization has carried out the following activities related to genetic resources:

33. With respect to intellectual property issues related to mutually agreed terms on access and benefit-sharing, an on-line database of biodiversity-related contracts is available on the website of the World Intellectual Property Organization with a particular emphasis on the IP aspects of such agreements. In addition, the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore has developed general principles and draft guidelines on intellectual property aspects of access and benefit-sharing contained in document WIPO/GRTKF/IC/7/9 of the World Intellectual Property Organization.

34. On the issue of the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications, the Conference of the Parties issued two invitations to the World Intellectual Property Organization to prepare studies on issues regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property applications. "In both cases, WIPO responded positively and undertook extensive data collection, consultations, and review and commentary by Member States and other stakeholders to produce two closely related information resources. This included the creation of a specific consultation and review process by the WIPO General Assembly, and a detailed technical questionnaire directed to all WIPO Member States. Both of these studies have been transmitted to the Conference of the Parties as technical materials to assist it and other bodies of the Convention on Biological Diversity in their work." These studies do not promote a policy position but rather provide technical background information.

35. The first study of these studies was carried out by the World Intellectual Property Organization following an invitation by the Conference of the Parties at its sixth meeting. The World Intellectual Property Organization was invited to "prepare a technical study, and to report its findings to the Conference of the Parties at its seventh meeting, on methods consistent with obligations in treaties administered by the World Intellectual Property Organization for requiring the disclosure within patent applications of, *inter alia*:

- (a) Genetic resources utilized in the development of the claimed inventions;
- (b) The country of origin of genetic resources utilized in the claimed inventions;
- (c) Associated traditional knowledge, innovations and practices utilized in the development of the claimed inventions;
- (d) The source of associated traditional knowledge, innovations and practices; and
- (e) Evidence of prior informed consent."

36. The technical study was noted with appreciation by the Conference of the Parties at its seventh meeting. At this meeting, the Conference of the Parties further invited the World Intellectual Property Organization to examine, and where appropriate address, taking into account the need to ensure that this work is supportive of and does not run counter to the objectives of the Convention on Biological Diversity, issues regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications, including, *inter alia*:

- (a) Options for model provisions on proposed disclosure requirements;
- (b) Practical options for intellectual property rights application procedures with regard to the triggers of disclosure requirements;
- (c) Options for incentive measures for applicants;

(d) Identification of the implications for the functioning of disclosure requirements in various WIPO-administered treaties;

(e) Intellectual property-related issues raised by proposed international certificate of origin/source/legal provenance.

37. This second study was presented to the Conference of the Parties at its eighth meeting.

38. While some countries were of the opinion that the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore was the most appropriate body to respond to the invitations by the Conference of the Parties to examine issues related to the disclosure requirement, others were of the view that the protection of genetic resources and traditional knowledge against misappropriation should be addressed in patent-related legal instruments and, in particular, by introducing the necessary changes to those instruments so as to ensure that they provided for the declaration of source of genetic resources or traditional knowledge. These countries therefore suggested that the issue of disclosure should be addressed in the context of the Patent Cooperation Treaty (PCT) reform and of discussions regarding the draft Substantive Patent Law Treaty (SPLT).

39. In this context, a proposal was put forward by Switzerland regarding the declaration of the source of genetic resources and traditional knowledge in patent applications to the Working Group of the World Intellectual Property Organization on Reform of the Patent Cooperation Treaty in May 2003. The proposal has been summarized as follows:

“In summary, Switzerland proposes to amend the Regulations under the PCT (PCT Regulations) to explicitly enable the national patent legislation to require the declaration of the source of genetic resources and traditional knowledge in patent applications, if the invention is directly based on such resources or knowledge (see proposed new Rule 51bis.1 (g)). Furthermore, Switzerland proposes to afford patent applicants the possibility of satisfying this requirement at the time of filing an international patent application or later during the international phase (see the proposed new Rule 4.17 (vi)). Under present Rule 48.2 (a)(x), such declaration of the source would be included in the international publication of the international application concerned.

In order to advance the discussions on its proposals, Switzerland presented two further submissions to the WIPO Working Group on PCT Reform in April 2004 and April 2005, respectively, containing more detailed explanations on its proposals. These submissions address the use of terms, the concept of the “source” of genetic resources and traditional knowledge, the scope of the obligation to declare this source in patent applications, the possible legal sanctions for failure to declare the source or for wrongful declaration of the source, and its optional vs mandatory introduction at the national level.”<sup>6/</sup>

40. For information purposes, Switzerland also presented its proposals to the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization, to the WTO TRIPs Council and to the third and fourth meetings of the Working Group on Access and Benefit-sharing.<sup>7/</sup>

41. A separate proposal was put forward by the European Community and its Member States on the “disclosure of origin or source of genetic resources and associated traditional knowledge in patent applications”<sup>8/</sup> to the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization. “This proposal

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<sup>6/</sup> See WIPO document WIPO/GRTKF/IC/11/10 submitted by Switzerland to contribute to the discussions of the Committee on Genetic Resources at its eleventh session.

<sup>7/</sup> See UNEP/CBD/WG-ABS/3/INF/7 and UNEP/CBD/WG-ABS/4/INF/12.

<sup>8/</sup> A copy of the full proposal is available in WIPO document WIPO/GRTKF/IC/8/11 and CBD document UNEP/CBD/WG-ABS/4/5, Annex.



calls for the establishment of a multilateral requirement for patent applicants to disclose the country of origin or, if it is unknown, the source of genetic resources on which an invention is based. A patent applicant who refuses to disclose this information would simply not obtain a patent: its application would not be processed until he/she discloses. In case a patent applicant disclosed but provided incorrect information, effective, proportionate and dissuasive sanctions would apply outside the field of patent law. The creation of such requirement, when agreed internationally, would entail changes in two intellectual property rights treaties administered by the World Intellectual Property Organization”, <sup>9/</sup> the Patent Law Treaty (PLT) and the Patent Cooperation Treaty (PCT).

42. The work of the IGC on genetic resources has also involved the consideration of proposals to improve the recognition of genetic resources as prior art in patent examination, as well as enhanced IT capacity to monitor and review the status of international patent applications making use of genetic resources.

43. The Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization, at its eleventh session in July 2007, recommended that the General Assembly of the World Intellectual Property Organization should renew its mandate to continue its work on intellectual property and traditional knowledge, traditional cultural expressions and genetic resources, on questions included in its previous mandate.

#### ***D. International Convention for the Protection of New Varieties of Plants***

44. A general description of the International Union for the Protection of New Varieties of Plants was provided in document UNEP/CBD/WG-ABS/3/2 which highlights its relationship to access and benefit-sharing. The views of the International Union for the Protection of New Varieties of Plants (UPOV) with respect to the work of the Working Group on Access and Benefit-sharing on an international regime on access and benefit-sharing, adopted by the Council of UPOV at its thirty seventh ordinary session on 23 October 2003, were provided to the Secretariat prior to the second meeting of the Working Group. These are available at [http://www.upov.int/en/news/2003/intro\\_cbd.html](http://www.upov.int/en/news/2003/intro_cbd.html) and provide a useful overview of issues related to the negotiation of an international regime from the perspective of UPOV.

45. A further contribution was provided by the UPOV Secretariat in preparation for the fourth meeting of the Working Group on Access and benefit-sharing and was made available in document UNEP/CBD/WG-ABS/4/INF/3 which highlights that the UPOV Convention is not an instrument relating to access and benefit-sharing. As further detailed in the UPOV contribution, it was requested that “consideration is made that any measures pursued in the international regime do not undermine plant variety protection according to the UPOV Convention. For its part UPOV supports the view that the Convention on Biological Diversity and relevant international instruments dealing with intellectual property rights, including the UPOV Convention, should be mutually supportive.”

#### ***E. Law of the Sea***

46. As highlighted in document UNEP/CBD/WG-ABS/3/2, the study of the relationship between the Convention and United Nations Convention on the Law of the Sea (UNCLOS) with regard to conservation and sustainable use of genetic resources of the deep seabed <sup>10/</sup> concludes, *inter alia*, that the provisions of the United Nations Convention on the Law of the Sea and the Convention are complementary and mutually supportive regarding the conservation and sustainable use of marine and

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<sup>9/</sup> See submission by EC and its Member States reproduced in document UNEP/CBD/WG-ABS/4/5, section III, B.

<sup>10/</sup> The study was carried out by the Secretariat and the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations and was made available at SBSTTA-8 as document UNEP/CBD/SBSTTA/8/INF/3/Rev.1.

biological diversity. While article 15 of the Convention on access and benefit-sharing applies only to genetic resources under national jurisdiction, access and benefit-sharing relating to marine genetic resources beyond areas under national jurisdiction is not covered by that article.

47. Whereas the conservation and sustainable use of genetic resources of the deep seabed beyond the limits of national jurisdiction has been addressed by SBSTTA <sup>11/</sup> and the Conference of the Parties to the Convention, <sup>12/</sup> the specific issue of the legal status of genetic resources beyond areas of national jurisdiction and the related issue of access to, and equitable sharing of benefits arising from such resources, were not discussed under the Convention on Biological Diversity in depth. In particular, the Conference of the Parties at its eighth meeting, in decision VIII/21, paragraph 6, recognized that the United Nations Convention on the Law of the Sea regulates activities in the marine areas beyond national jurisdiction, and urged Parties and other States to cooperate within the relevant international and/or regional organizations in order to promote the conservation, management and sustainable use of marine biodiversity in areas beyond national jurisdiction, including deep seabed genetic resources.

48. Issues relating to marine genetic resources beyond areas under national jurisdiction are being discussed in the context of the United Nations General Assembly, in particular the Ad-hoc Open-ended Informal Working Group established by the General Assembly to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (the GA Working Group). Furthermore, the issues have also been discussed at the fifth and the eighth meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (the Consultative Process) and the Meeting of the State Parties to the United Nations Convention on the Law of the Sea (MSP). <sup>13/</sup>

49. Discussion of the United Nations General Assembly, which convened from 13 to 17 February 2006, at United Nations Headquarters in New York, on marine genetic resources focused on the legal status of marine genetic resources beyond areas of national jurisdiction. In their summary of trends, which were not negotiated and represented the Co-Chairs' general understanding of the issues, possible options and approaches that emerged from the meeting, the Co-Chairs pointed out, *inter alia*, that this issue needs further discussions "in order to clarify how such resources may have to be regulated, whether existing tools and arrangements are sufficient or whether new tools are required for their conservation and sustainable use, including consideration of access and benefit sharing." Moreover, the Co-Chairs highlighted the "symbiotic relationship between the genetic resources of the deep seabed, the biological diversity of the deep seabed water column and the non-living resources beyond national jurisdiction". <sup>14/</sup> The next meeting of the Working Group will be held in 2008.

50. At their sixteenth meeting, held from 19 to 23 June 2006, in New York, several state parties to UNCLOS addressed the subject of genetic resources, in particular the need to consider new approaches on the basis of the UNCLOS to promote international cooperation and access and benefit-sharing. One delegation stated that in order to prevent a situation of unregulated and unilateral use of those resources, future negotiations should aim at adopting a binding instrument which would further elaborate the provisions of the Convention on marine scientific research on the basis of the principle of the common heritage of mankind. However, another delegation stated that existing instruments provided the

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<sup>11/</sup> See recommendation XI/8 on Marine and coastal biological diversity: conservation and sustainable use of deep seabed genetic resources beyond the limits of national jurisdiction.

<sup>12/</sup> See decision VIII/21 on Marine and coastal biological diversity: conservation and sustainable use of deep seabed genetic resources beyond the limits of national jurisdiction.

<sup>13/</sup> There are diverging views regarding the mandate of MSP, with some States supporting a broader mandate which would encompass substantive issues related to the implementation of UNCLOS and others favouring a narrow focus on only administrative issues.

<sup>14/</sup> See A/61/65, annex I, para. 12.

framework for the conservation and sustainable use of biodiversity beyond areas under national jurisdiction and their strengthening and more effective implementation should be considered before taking decisions on the elaboration of new instruments. <sup>15/</sup>

51. Within the Consultative Process, the issue of seabed biodiversity beyond national jurisdiction was addressed in particular at its fifth meeting, held from 7 to 11 June 2004 in New York. During the discussions, some delegations pointed out “that there were complementarities between the UNCLOS and the Convention on Biological Diversity, as both instruments emphasized the fair and equitable distribution of benefits from the resources, and therefore commercially oriented activities in the Area regarding biological diversity should be subject to those legal frameworks. Access to the biodiversity and genetic resources in the Area should be equitable and subject to the regime of marine scientific research. The derivatives of such research should be subject to benefit-sharing, on a non-discriminatory basis. Several delegations stressed that the improper use of intellectual property rights was prejudicial to countries that had not yet achieved the advanced level of technology necessary to carry out bioprospecting, depriving those countries’ present and future generations of the benefits derived from such activity in the Area”. <sup>16/</sup>

52. At its eighth meeting, held from 25 to 29 June 2007, in New York, the Consultative Process focused on marine genetic resources (MGRs). It considered the nature of marine genetic resources and current activities in research and commercialization. The Consultative Process did not reach agreement on the elements to be suggested to the General Assembly for consideration under its agenda item on “Oceans and the law of the sea”. The Co-Chairpersons’ report of the meeting included possible elements suggested by the Co-Chairpersons to the General Assembly representing their understanding of the progress in the consideration of the elements at the conclusion of the eighth meeting of the Process. <sup>17/</sup> During the discussions delegations highlighted the important role of the Convention on Biological Diversity and UNCLOS. In relation to the Convention on Biological Diversity, it was indicated that its provisions on access and benefit-sharing do not cover genetic resources beyond national jurisdiction.

53. Report A/62/66 of the Secretary General, which served as the basis for discussions at the eighth meeting of the Consultative Process, addresses comprehensively issues related to marine genetic resources, such as various activities related to marine genetic resources and the services these resources provide. As regards the Convention on Biological Diversity, the report points out that provisions of the Convention do not apply to components of biological diversity beyond the limits of national jurisdiction and that, in accordance with article 5, parties are required to cooperate directly, or through competent international organizations, in respect of areas beyond national jurisdiction, for the conservation and sustainable use of biological diversity. <sup>18/</sup> The Report also indicates that in the context of its activities on access to genetic resources and benefit sharing, the Secretariat of the Pacific Environment Programme, is planning on establishing a database of bioprospecting activities in the Pacific. It further states that work is also ongoing, with other partners, on monitoring and management needs for bioprospecting in Pacific Small Island developing States. <sup>19/</sup>

#### ***F. The Convention on International Trade in Endangered Species of Wild Fauna and Flora***

54. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) itself does not address specifically the issue of access to genetic resources and benefit-sharing. However, it has been suggested that the permit system of CITES to regulate the trade of endangered species could

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<sup>15/</sup> See SPLOS/148 para. 87.

<sup>16/</sup> See A/59/122, para. 90.

<sup>17/</sup> See [http://www.un.org/depts/los/consultative\\_process/consultative\\_process.htm](http://www.un.org/depts/los/consultative_process/consultative_process.htm) for a copy of the report.

<sup>18/</sup> See A/62/66, para. 201, which refers also to A/59/62/Add.1, paras. 254-260.

<sup>19/</sup> See A/62/66, para. 248.

provide useful experience for the development and implementation of a certificate of compliance with national laws on Access and Benefit-sharing 20/. Moreover, in the aftermath of the Workshop “Promoting CITES-CBD Cooperation and Synergy”, held 20 to 24 April 2004 on the Isle of Vilm, Germany, the issue was raised in different fora of CITES.

55. First of all, the Conference of the Parties to CITES, at its thirteenth meeting in October 2004, directed the Standing Committee to CITES at its 53rd meeting to “(a) consider the findings and recommendations of the Vilm report, taking into account the Secretariat’s conclusions (referred to in decision 13.5), and any comments by the Parties, and identify possible priority actions to improve synergies between the two conventions in areas of common concern in order to contribute to reaching the 2010 target of the World Summit on Sustainable Development, considering *inter alia* Sustainable Use, the Ecosystem Approach and Access and Benefit-sharing; and (b) provide guidance, on that basis, to the Standing Committee’s Strategic Plan Working Group on the items to be considered in the revision of the Strategic Vision and Action Plan.”21/

56. Thereupon, at its 53rd meeting in summer 2005, the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora introduced a document on the Secretariat’s review of the Vilm Report on CITES-CBD synergy, 22/ which provoked divergent views. One of the concerns was, *inter alia*, that some of the suggested subjects of synergy, such as access and benefit-sharing, were still under discussion within the Convention on Biological Diversity itself. 23/ However, the Standing Committee established a working group on this agenda item and adopted the report of their work 24/ identifying a number of possible priority actions to improve synergies between the two conventions in areas of common concern in order to contribute to reaching the 2010 target of the World Summit on Sustainable Development, and suggested that in accordance with decision 13.3 of the Conference of the Parties, these are sent as guidance to the Secretariat in order for them to revise, in conjunction with the Secretariat of the Convention on Biological Diversity, the Work Plan for Implementation of Joint Activities attached to the Memorandum of Cooperation between them. With regard to access and benefit-sharing, one possible priority action was identified: “Providing CBD with CITES experiences on; the design and implementation of licensing and permitting systems and training on their use.” 25/

57. With respect to decision 13.2 b), the working group suggests that the Standing Committee instruct its Strategic Plan Working Group to consider the whole of the Vilm Report (see document CoP13 Doc. 12.1.1, annex 2) in its consideration of the revision of the Strategic Vision and Action Plan.

### **G. The Antarctic Treaty**

58. Parties to the Antarctic Treaty have been considering the issue of bioprospecting in the governing body, the Antarctic Treaty Consultative Meeting (ATCM), since 1999. In 2003, at ATCM XXVI, the Committee on Environmental Protection (CEP) adopted ‘Biological Prospecting’ for the first time as an agenda item. Two information papers by New Zealand 26/ and the United Kingdom and Norway 27/ were

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20/ See UNEP/CBD/WG-ABS/3/2, p. 8.

21/ Decision 13.2 of the Conference of the Parties to CITES.

22/ See SC53 Doc. 8 (Rev.1), which contains the and highlights several areas which are of particular importance in furthering collaboration and synergy between the two Conventions. With regard to access and benefit sharing the following activities were identified: “Providing CBD with CITES experiences on the design and implementation of licensing and permitting systems”, as well as “[i]ncluding access and benefit issues in CITES outreach and capacity building activities and material to ensure that decisions taken under CITES are compatible with obligations of the Parties to CBD.”

23/ See SC53 Summary Record (Rev. 1), item 8 p.4.

24/ See SC53 Doc. 8.1, with a few changes as reflected in SC53 Summary Record (Rev. 1), item 8 p.4.

25/ SC53 Doc. 8 (Rev.1), item 4. c), p.2.

26/ ATCM XXVI, IP 47, ‘Bioprospecting in Antarctica, An Academic Workshop’.

27/ ATCM XXVI, IP 75, ‘Bioprospecting’.

introduced and the Committee on Environmental Protection noted that the question of biological prospecting raised “many complex legal and political issues”. Thus, it was agreed to refer the legal and political issues associated with biological prospecting to a future Antarctic Treaty Consultative Meeting for further consideration.

59. Accordingly, ATCM XXVII in 2004 took up the issue and considered it under item 17 “Biological Prospecting in Antarctica”. An information paper on industrial involvement in Antarctic biological prospecting by the United Nations Environment Programme was introduced [28/](#), and a number of Parties emphasized the increasing importance of biological prospecting for the Antarctic Treaty Consultative Meeting and urged interested Delegations to introduce working papers at the next meeting, “so that the consideration of this important subject can progress”. Moreover, the Antarctic Treaty Consultative Meeting stressed the need to be informed of developments of the topic in other international fora.[29/](#)

60. At the opening of the ATCM XXVIII, the issue of bio-prospecting was mentioned as one of the highest priorities by the Chair of the Meeting, Ambassador Hans Corell, and considered under agenda item 18 “Biological Prospecting”.[30/](#) One working paper [31/](#) and two information papers [32/](#) were presented. After a wide-ranging discussion, the Meeting finally approved Resolution 7 (2005) *Biological Prospecting in Antarctica*, which reaffirmed the importance of Article III (1) of the Antarctic Treaty with regard to scientific activities relating to biological prospecting and recommended that governments continue to keep under review the issue in the Antarctic Treaty Area and exchange relevant information and views on an annual basis as appropriate. [33/](#)

61. In 2006, at ATCM XXIX, “Biological Prospecting in Antarctica” was further considered under its agenda item 18. Papers put forward by France, [34/](#) Argentina [35/](#) and UNEP [36/](#) relating respectively to a legal regime for bioprospecting in the Antarctica, and activities and trends in biological prospecting, were considered. With regard to the paper of France, which addressed, *inter alia*, the relationship of the Convention on Biological Diversity with the Antarctic Treaty System in relation to access and benefit-sharing and recognised that current legal ambiguities required a political solution, some delegations noted with appreciation that important legal issues were raised, including a possible legal regime within the Antarctic Treaty system framework. It was confirmed that bioprospecting would be discussed again at the next Antarctic Treaty Consultative Meeting and Parties were urged to continue to provide updates of their bioprospecting activities. [37/](#)

62. ATCM XXX in 2007 considered the issue once more as “Biological Prospecting in Antarctica” under agenda item 17. The Parties welcomed and applauded the work that went into two presented papers [38/](#) and the meeting confirmed its readiness to push forward with work on this topic. Moreover, the Meeting agreed after a lengthy discussion “to establish an informal open-ended web-based Intersessional Contact Group (ICG) working until ATCM XXXI to examine the issue of biological

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[28/](#) ATCM XXVII, IP 106, ‘Industry Involvement in Antarctic Bioprospecting’.

[29/](#) ATCM XXVII Final Report, p. 34.

[30/](#) ATCM XXVIII, Final Report, p. 5.

[31/](#) ATCM XXVIII, WP 13, ‘Biological Prospecting in Antarctica’.

[32/](#) ATCM XXVIII, IP 8, ‘Biological Prospecting in Antarctica’ by Spain; and IP 93, ‘Recent Developments in Biological Prospecting Relevant to Antarctica’ by UNEP.

[33/](#) See ATCM XXVIII, Final Report, p. 37 and <http://reco.ats.aq/ats.reco/details.aspx?id=352&lang=e>.

[34/](#) ATCM XXIX, IP 13, ‘In Search of a Legal Regime for Bioprospecting in Antarctica’.

[35/](#) ATCM XXIX, IP 112, ‘Argentine Activities of Bioprospecting and Bioremediation in Antarctica’.

[36/](#) ATCM XXIX, IP 116, ‘Recent Trends in the Biological Prospecting’.

[37/](#) ATCM XXIX, Final Report, p. 37.

[38/](#) ATCM XXX, WP 36, ‘Biological Prospecting in the Antarctic Treaty Area – Scoping for a Regulatory Framework’ by the Netherlands, Belgium and France; and IP 67, ‘Biological Prospecting in Antarctica: Review, Update and Proposed Tool to Support a Way Forward’ by UNEP.

prospecting in the Antarctic Treaty Area with the following terms of reference: a) the Intersessional Contact Group will identify issues and current activities related to biological prospecting in the Antarctic Treaty Area with a view to assisting the Antarctic Treaty Consultative Meeting considering the matter, including, if appropriate, working modalities; and b) Observers and Experts participating in ATCM XXX will be invited to send information to the Intersessional Contact Group”. <sup>39/</sup>

63. The continued and growing interest in conducting further research into commercially useful genetic resources and biochemical processes in Antarctica <sup>40/</sup> is thus clearly reflected in the Antarctic Treaty Consultative Meeting process, which gives the issue a more and more prominent role in its deliberations.

#### *H. Human rights instruments*

64. Building on the human rights analysis supplied in the Report of the Group of Technical Experts on an Internationally Recognized Certificate of Origin/Source/Legal Provenance (UNEP/CBD/WG-ABS/3/2), in recent times the Declaration on the Rights of Indigenous Peoples has been adopted by the Human Rights Council, (Resolution 2006/2) and is presently before the General Assembly. The Declaration on the Rights of Indigenous Peoples <sup>41/</sup> is regarded as the most relevant developing human rights standard for indigenous peoples and indigenous peoples themselves regard it as the most up to date articulation of what they consider to be minimal standards. Article 29 of the Declaration refers to the rights of indigenous peoples to “*special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, ...*”. Clearly, this article is relevant to the development of access and benefit-sharing regimes. Furthermore the standards articulated in the Declaration provide a comprehensive framework for developing access and benefit-sharing regimes and other standards in general, relevant to indigenous peoples.

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<sup>39/</sup> See ATCM XXX, Final report, p.34

<sup>40/</sup> ATCM XXX, IP 67 by UNEP entitled ‘Biological Prospecting in Antarctica: Review, Update and Proposed Tool to Support a Way Forward’, p. 5.

<sup>41/</sup> As adopted by Human Rights Council, Resolution 2006/2. Working Group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994.