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AD HOC OPEN-ENDED WORKING GROUP ON ACCESS AND BENEFIT-SHARING

Sixth meeting

Geneva, 21-25 January 2008

Item 3 of the provisional agenda*

NOTES FROM THE CO-CHAIRS ON PROPOSALS MADE AT THE FIFTH MEETING OF THE WORKING GROUP ON ACCESS AND BENEFIT-SHARING

Note by the Executive Secretary

1. The Executive Secretary is pleased to circulate herewith, for the information of participants in the sixth meeting of the Ad Hoc Working Group on Access and Benefit-sharing, the notes from the Co-Chairs on proposals made at the fifth meeting of the Working Group, held in Montreal from 8 to 12 October 2007.
2. As noted in the Co-Chairs' letter of 8 November 2007, which was sent to all national focal points by notification SCBD/SEL/VN/GD/60723 (2007-143) of 12 November 2007**, this document is neither a compilation of the statements made at the fifth meeting of the Working Group nor is it intended to be comprehensive. As requested and reflected in the report of the meeting (UNEP/CBD/WG-ABS/5/8, paragraph 96), the submissions on proposals made at the meeting have been attributed to the Parties that made them. Further, and as agreed by the Working Group, the notes include comments provided by delegates, at the invitation of the Co-Chairs.
3. The notes are being circulated in the language and form in which they were received by the Secretariat from the Co-Chairs.

* UNEP/CBD/WG-ABS/6/1.

** <http://www.cbd.int/doc/notifications/2007/ntf-2007-143-abs-en.pdf>.

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NOTES FROM THE CO-CHAIRS ON PROPOSALS MADE AT THE FIFTH MEETING OF THE WORKING GROUP ON ACCESS AND BENEFIT-SHARING

Explanatory note

These notes from the Co-Chairs include proposals made at the fifth meeting of the Working Group on Access and Benefit-sharing. They are neither a compilation of the statements made at the meeting, nor are they comprehensive.

As requested and reflected in the report of the meeting (UNEP/CBD/WG-ABS/5/8, paragraph 96), the submissions on proposals made at the meeting have been attributed to the Parties that made them.

In addition, as agreed by the Working Group, these notes include comments provided by delegates before the end of the meeting, at the invitation of the Co-Chairs (paragraph 97 of the report).

Agenda item 3: International Regime

Australia

The ABS Working Group has several mandates contained in decisions of the Conference of Parties at its sixth, seventh and eighth sessions. Australia supports focused discussion to progress the ‘elaboration and negotiation of an international regime’ on access and benefit sharing at WG5 and WG6 in accordance with decision VIII/4 A and VII/19 D.

Australia also continues to adhere to its interpretative statement made at the World Summit on Sustainable Development in 2002, in which it stated: ‘Paragraph 44(o) is an invitation to the Conference of the Parties of the Convention on Biological Diversity to consider how to promote and safeguard the outcomes of its Decision VI/24...’ Australia notes that parties are yet to reach agreement on the meaning of the term ‘international regime’ or the content of any regime.

Australia supports consideration at Working Group 5 and 6 of what, if any, additional measures states could take collectively to support better and more effective implementation at the domestic level of the access and benefit sharing provisions of the Convention. The discussion should be based on experiences to date in domestic implementation and should be focused on practical and concrete measures.

The aim of these discussions should be to adopt by consensus a decision at COP9 on the meaning, including the nature, scope and objectives, of an ‘international regime’ and the elements such a regime should contain. The decision at COP9 should mandate specific work to complete the elements of the regime for adoption at COP10.

Australia believes that these discussions should proceed in accordance with decision VII/19 D and with the benefit of the inputs identified in decision VIII/4 A. Australia notes that the terms of reference for the elaboration and negotiation of an international regime contained in decision VII/19 D refer to the ‘nature’ of the international regime as follows: ‘The international regime could be composed of one or more international instruments within a set of principles, norms, rules and decision-making procedures, legally binding and/or non-binding’.

Australia continues to support this characterisation of the possible nature of an international regime and supports focused discussion aimed at reaching agreement at COP9 on the nature, scope and elements of an international regime which will be negotiated for adoption at COP10.

The annex to decision VIII/4 constitutes one of several inputs to the Working Group. However, the COP has not made any decision on the nature, scope or elements of the international regime and no agreement has been reached in the Working Group. Australia has consistently maintained the position that it will not enter into textual negotiations on the basis of the annex to VIII/4 A aimed at adoption of a protocol to the Convention.

Canada

- Canada still believes that member states need to better understand what new elements, if any, a new international regime on ABS would have before discussing the nature of the instrument.
- The Gap Analysis document highlights that the majority of Parties have not adopted national ABS measures. This demonstrates the need to increase implementation and awareness of the CBD requirements, as the need for additional measures is assessed.
- There are currently a number of instruments that exist, including the Bonn Guidelines, and we are interested in hearing discussion about whether anything new is needed and if so, what level of international effort and collaboration would be needed.
- What constitutes a gap may be a matter of interpretation.
- Canada supports the approach of the Co-chairs to focus on substantive issues at this juncture.

3.1. Fair and equitable sharing of benefits

Malaysia on behalf of the Group of Like-Minded Mega Diverse Countries

Minimum conditions and standards for the fair and equitable sharing of the benefits arising out of the use of genetic resources, derivatives and/or associated traditional knowledge shall be stipulated in national legislations and shall be based on mutually agreed terms and on prior informed consent.

The conditions for the equitable sharing of the benefits arising out of the use of traditional knowledge, innovations and practices associated with genetic resources and derivatives shall be stipulated in mutually agreed terms, in accordance with national legislations: a) between the indigenous or local communities and the users; or b) between users and the national authority of the provider country, with active involvement of concerned indigenous and local communities.

Parties shall establish, taking into account Article 16, paragraph 3 and 4, Article 19, paragraph 1 and 2, and Article 20, paragraph 4 of the Convention, measures to ensure the fair and equitable sharing of benefits from the results of research and development, including through facilitating access to the results of such research and development and through access to and technology transfer, and other utilization of genetic resources, derivatives and/ or associated traditional knowledge, including technology protected by patents and other intellectual property rights on concessional and preferential terms to developing countries, taking into account prior informed consent and mutually agreed terms and respecting national legislations of the country of origin of such resources or the parties that have acquired the resources in accordance with the Convention.

Parties that develop technologies making use of genetic resources, derivatives and/or associated traditional knowledge shall establish national legislation to facilitate access to, joint development and transfer of those technologies to developing countries that are the origin of such resources, derivatives and/or associated traditional knowledge under mutually agreed terms.

Namibia on behalf of the African Group

The International Regime must:

- clearly set minimum conditions, standards and requirements for benefit sharing

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- cover derivatives and products of genetic resources
- link access to benefit-sharing
- address genetic resources whose origin is not known or not from within national jurisdiction
- include indigenous and local communities in benefit-sharing
- direct benefits to promote conservation and sustainable use of biodiversity in country of origin
- provide for disclosure of country of origin of genetic resources, derivatives and products and associated traditional knowledge in intellectual property rights applications

Colombia

Meaning of derivatives needs to be clarified: products naturally steaming from biological metabolism of genetic resources, e.g. latex production (unlike products with value added)

Portugal on behalf of the European Community and its Member States

International Regime could provide for a standardized MTA on a sectoral basis

International regime to build on and maximize the use of modern communication tools to promote transparency and legal certainty

Australia

- Australia encourages parties to implement domestic legislation to generate benefits from research on, and utilisation of, genetic resources that are within the scope of the Convention.
- Australia notes that, in its domestic experience, the most benefits generated under access and benefit sharing legislation and contracts are in the fields of taxonomy, scientific research and environmental knowledge. Australian contracts also ensure that benefits from utilisation and commercialisation are returned to providers on mutually agreed terms.
- Australia supports the flexible use of contracts to allow providers and users to define benefits according to their particular preferences and circumstances.
- Australia is willing to discuss the concept of minimum standards for benefit-sharing but would not support any prescriptive or binding list which limited the flexibility of Australian providers to negotiate contracts.
- Australia could support additional work aimed at lifting the information base for providers to negotiate with users in different sectors.

Thailand

International Regime to facilitate setting favourable terms for benefit-sharing of genetic resources and associated knowledge to encourage scientific research activities.

International Regime to provide for the development of guidelines to assist countries in facilitating determination of MATs for benefit-sharing to differentiate between scientific and commercial uses.

Indigenous and local community representatives

The International Regime is to provide for the effective implementation of PIC of indigenous and local communities reflected in MATs involving not only states but indigenous peoples.

The International Regime to support indigenous participation in any national, regional or sub-regional body established to implement any ABS regime.

The International Regime to ensure that indigenous and local communities are principle parties to ABS arrangements on all levels (not only third-party beneficiaries, but active parties in the process).

The International Regime to provide for culturally appropriate monetary and non-monetary benefit-sharing, such as social and cultural support, including capacity and institution building.

The International Regime to provide for benefit-sharing consistent with indigenous peoples customary law

ABS arrangements are to be applied to *in situ* and *ex situ* sources of genetic resources and associated traditional knowledge

Canada

- All countries are both users and providers of genetic resources.
- What constitutes fair and equitable sharing of benefits may well best be determined by the provider and user of genetic resources in direct discussions and negotiations. One way of doing this may be a contract.
- A key question: do users/providers have the capacity for a fair and equitable negotiation? It is important to have:
 - National/sub-national implementation
 - Negotiation capacity
 - Consistency with the Bonn Guidelines
 - Monetary and non-monetary benefits;
 - capacity-building
 - Sectoral approaches
 - Model contracts provisions
 - Standardization
- Derivatives, while outside the scope of the CBD, can easily be accommodated in contracts.
- Any International Regime must be enabling and flexible enough to accommodate national regimes.
- Most benefits - and certainly those of an immediate nature - will be non-monetary rather than monetary, but contracts can address both.
- Countries providing genetic resources should consider the importance of capacity-building, collaborative research, technology transfer training etc., as benefits.

Exclusions from the regime

- Derivatives and products fall outside of the scope of the Convention.
- Genetic resources provided or acquired after the entry into force of the Convention in 1993.
- Genetic resources from areas beyond national jurisdiction.

3.2. Access to genetic resources

Argentina

Throughout this section refer to geographical origin.

Malaysia on behalf of the Group of Like-Minded Mega Diverse Countries

Access to genetic resources and derivatives

States have sovereign rights over their own genetic resources and derivatives and the authority to determine access rests with national Governments and is subject to national legislation.

Indigenous and local community representatives

The United Nations Declaration on the Rights of Indigenous Peoples (DECRIPS) to be respected and promoted by national legislation

Namibia on behalf of the African Group

Derivatives and products to be included

Access linked to benefit-sharing

No distinction between commercial and non-commercial uses

Third-party users must gain PIC of country of origin

Where there is no country of origin identifiable, benefits accrue to international community

Provisions on third-party transfers needed

To be further discussed: biological vs. genetic resources; derivatives; country of origin

Portugal on behalf of the European Community and its Member States

International Regime to build on Bonn Guidelines, move beyond them and establish international minimum requirements for access

Simplified access procedures for research undertaken with non-commercial intent

International guidance on ABS legislation, including model legislation and technical protocols

Deliverables for ABS regime to be in accordance with Article 15:

- specific rules on PIC requirements or existence of other norms for obtaining PIC
- clear legal status and rules on ownership of genetic resources found in *in situ* and *ex situ* conditions
- availability and accessibility of information on how to obtain PIC
- limitations on time and costs for obtaining PIC decisions
- existence of procedures for simplified access for non-commercial research

Supplying up to date information to an international Clearing House Mechanism on national provisions and administrative contacts for access to genetic resources and associated traditional knowledge

Non-discriminatory application of ABS requirements

Tanzania

Application to pre-existing collections

Canada

- Canada supports facilitated access to genetic resources in national implementation of access and benefit-sharing.
- A key challenge in facilitated access is capacity-building, including:
 - Awareness, information exchange regarding genetic resources information, management and technology.
 - Competent authorities/focal points (in Canada: federal, provincial territorial, aboriginal as appropriate)
 - Access should be facilitated in a manner that is respectful of the different rights of Canadian aboriginal peoples.
 - Tools could include contractual arrangements that recognize monetary and non-monetary benefits.
 - Sectoral approaches (eg. standard material transfer agreement used in the International Treaty on PGRFA).
- Regulatory frameworks at the national level should provide legal certainty and predictability while not being onerous, burdensome or lengthy.
- Any international regime must be flexible enough to accommodate varying national circumstances, such as the different levels of governments found in a federal system.
- Article 15 of the CBD entails obligations for fair and equitable sharing of the benefits but also for providing facilitated access to genetic resources for environmentally sound uses by other Contracting Parties.
- An international regime must fully and appropriately address facilitated access to genetic resources, as without access, there can be no benefits arising from their use and therefore no benefit-sharing.
- More work needs to be done by Parties to clarify the conditions regulating facilitated access both for users and providers of genetic resources.
- Canada is currently exploring the possibility of developing codes of conduct, guidelines and other measures for our domestic providers and users of genetic resources aimed in part at facilitating access to its genetic resources.

Australia

- Australia notes that parties have chosen to utilise their sovereignty over genetic resources in a wide variety of ways reflecting their differing national circumstances, policies and legal systems. Australia notes in particular fundamental differences in legal status of genetic resources between parties – including how genetic and biological resources may be differentiated and the nature of ownership in different jurisdictions – identified in paper WG-ABS/5/5.
- Australia observes that Article 15 does not envisage the standardisation of national access systems or of domestic legal systems relevant to access and benefit sharing.
- Australia is willing to discuss the concept of minimum access standards, but would expect any outputs to focus primarily on procedural aspects of access systems. Australia could not support minimum access standards which intruded on the rights of private or indigenous landholders under Australian domestic law or diminished the ability of Australian governments to determine domestic ABS policy.

Japan

International Regime must be practical, flexible and cost-effective.

Indigenous and local community representatives

International Regime must pertain not only to access to genetic resources but also to associated traditional knowledge

Parties shall establish measures requiring that access to genetic resources and traditional knowledge shall be subject to the free, prior and informed consent of country of origin and indigenous peoples, as applicable.

Non governmental organization

Biological control agents to be exempted from International Regime, instead compliance to be required with the regulations of International Plant Protection Convention of the FAO

3.3. Compliance

Australia

- Australia stresses that domestic implementation is the foundation of compliance and encourages parties to implement domestic access and benefit sharing systems including strong compliance and enforcement measures.
- Australia notes that a multi-layered approach to compliance is appropriate, including awareness raising, codes of conduct, effective use of contracts, and criminal sanctions.
- Australia believes that strong tools already exist through contract law and private international law for providers to develop and use contracts with strong compliance provisions, including with respect to reporting and monitoring, third party transfers, dispute resolution, enforcement, and disposal of material.
- Australia would support development of model contractual provisions and advice within the Convention to assist providers in negotiating strong and effective contracts and utilising fully existing legal mechanisms.
- Australia supports criminal penalties in domestic law for breach of domestic access requirements, and notes existing arrangements for extradition, mutual assistance, and foreign enforcement of judgements are applicable and can assist states in enforcing their laws.
- Australia notes the proposal to define misappropriation and create a new legally-binding obligation for all states to prohibit use of misappropriated material. Australia is willing to continue discussion of this proposal but its initial evaluation of the proposal identified serious reservations, including the need to standardise terms and concepts in domestic ABS systems, the potential to criminalise breaches of contract, the problem of unwitting use of misappropriated material, and the implications of creating extraterritorial and/or cross-jurisdictional offences in criminal law.
- Australia believes that proposals on disclosure in patent applications cannot be advanced in the CBD since the WIPO IGC and WTO TRIPS Council have the appropriate mandates and expertise to consider intellectual property issues.
- Australia believes that a certificate of compliance with domestic access requirements could help users demonstrate that acquisition of genetic resources was in accordance with domestic requirements. Australia would support the voluntary issuance of certificates by domestic authorities in accordance with a common international format provided that: certificates supplement but do not supplant contracts; that certificates are confined to the scope of Article 15; and that mandatory 'checkpoints' do not exist. Australia notes that the absence of a certificate would not mean that a genetic resource was illegally-acquired.

3.3 (a) Measures to support compliance with prior informed consent and mutually agreed

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terms;

Namibia on behalf of the African Group

International Regime to include strong, legally binding and readily accessible measures to support compliance by users with prior informed consent requirements, mutually agreed terms and national ABS laws, such as:

- Measures to monitor that prior informed consent has been obtained from the provider country, country of origin and from the indigenous and local community providing associated traditional knowledge, taking into account the interests of disadvantaged groups amongst them, i.e. women and children
- Sanctions to prevent the use of genetic resources, derivatives and associated traditional knowledge without compliance with provisions of the International Regime and national legislation, in particular those related to access and benefit-sharing

Misappropriation to be defined, reference to UNEP/CBD/WG-ABS/5/2, page 8, paragraph 12 (a) to (f)

Malaysia on behalf of the Group of Like-Minded Mega Diverse Countries

Disclosure of origin of genetic resources, derivatives and /or associated traditional knowledge

Intellectual property rights applications whose subject matter concerns or makes use of genetic resources, derivatives and/or associated traditional knowledge shall disclose the country of origin or source of such genetic resources, derivatives and /or associated traditional knowledge, as well as evidence that provisions regarding prior informed consent and benefit sharing have been complied with, in accordance with the national legislation of the country providing the resources.

National legislation shall provide for remedies to sanction lack of compliance with the requirements set out in the above paragraph which must include inter alia revocation of the intellectual property rights in question, as well as co-ownership of the IPR and its transfer.

Portugal on behalf of the European Community and its Member States

International minimum requirements on access required as a condition of supporting enforcement of ABS requirements across different jurisdictions

Private international law already helps to solve problems with respect to compliance with mutually agreed terms across jurisdictions

Further improvements possible through sectoral work on standardizing choices in Material Transfer Agreements (e.g. model clauses on choice of law and on dispute settlement) for compliance with mutually agreed terms

To support compliance with PIC of provider countries introduce mandatory requirement to disclose origin or source of genetic resources and associated traditional knowledge in patent applications

International definition of misappropriation of genetic resources linked to international obligation for all parties to the CBD to prohibit the use of misappropriated genetic resources

Role of International Regime in promoting ABS related codes of conduct for important user groups and identifying codes of conduct that are best practices

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Potential role of public research funding agencies in supporting compliance

Thailand

Disclosure of origin requirement in patent application is instrumental as evidence of PIC

Japan

Disclosure of origin in patent applications to be addressed in specialized agencies, such as WIPO, in order to avoid overlapping discussions

Canada

Measures to support compliance with prior informed consent and mutually agreed terms

- We share the view that contracts provide a strong compliance tool and also agree that private international law already addresses transboundary contractual situations. We would be interested in exploring ideas regarding the development of model clauses on choice of law and dispute settlement as this may enhance the quality of MTAs that are negotiated
- Discussions on intellectual property should take place in fora that have established expertise and capacity in that area, namely WIPO and the WTO.
- We would like to underscore progress accomplished at the last two sessions of the WIPO-Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC on IP, GR, TK &F) with respect to genetic resources and traditional knowledge.
- With regards to proposals to include mandatory disclosure requirements in patent applications for Intellectual Property Rights and in ABS arrangements, Canada continues to be of the view that there is no contradiction between the CBD and intellectual property systems and that they both can be implemented in a mutually supportive manner.
- Canada further believes that discussions on disclosure should continue to occur within the WIPO-IGC on IP, GR, TK &F, in light of its recently renewed mandate by the WIPO General Assembly.
- Canada continues to support prior informed consent and mutually agreed terms, as expressed in the CBD, as key principles for access and benefit-sharing agreements.
- Canada also believes that the issues of intellectual property and traditional knowledge fall within the mandate of WIPO.

Prior Informed Consent (PIC)

- The CBD provides considerable flexibility concerning PIC. According to CBD Article 15.5, “access to genetic resources shall be subject to PIC ... unless otherwise determined by that Party”.
- Prior informed consent should be flexible, centered in national /sub-national legislation and consistent with the CBD and Bonn Guidelines:
 - apply to both providers and users of genetic resources and associated traditional knowledge;
 - be simple, transparent, efficient and timely
- Encourages the elaboration of national codes of ethics/codes of conduct/Models of prior informed consent.

Mutually Agreed Terms (MAT)

- Contractual negotiations of mutually agreed terms should take place within the legal framework of national jurisdiction, bearing in mind the various elements set out in the Bonn Guidelines.

3.3(b) Internationally recognized certificate of origin/source/legal provenance

Namibia on behalf of the African Group

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In favour of certificate of origin and/or source, certificate of compliance not useful if no ABS legislation
Certificate of origin and/or source and disclosure requirement in patent applications two distinct concepts, each could exist without the other

International Regime has to provide certainty to users.

Main remaining key questions are

- Determination of who would be required to obtain certificates?
- When would the presentation of a certificate be required?
- What checkpoints would be established?
- What would be the sanctions for not presenting a certificate or presenting a false certificate?

Uganda

Certificate of origin/source should move with the genetic resources in the chain of use

A certificate of compliance with national law could not replace or substitute for the certificate of origin/source

A certificate of compliance would be associated with PIC (i.e. national law) and would only apply at the end of the process to prove that the user in question has complied with the requirements of the given national law

A certificate of origin would be proof that the user is recognizing the owner as the provider and therefore the potential beneficiary

The process to acquire a certificate of origin/source should be simple and short and easy to obtain

No need for exemptions, except for genetic resources covered by the ITPGRFA

Ukraine

A certificate should be mandatory

Certificate system could be adapted from CITES

Model certificates could be helpful

System of reporting needed

Portugal on behalf of the European Community and its member States

A certificate should be a document demonstrating compliance with national access provisions

Integration of traditional knowledge still requires further consideration.

Malaysia on behalf of the Group of Like-Minded Mega Diverse Countries

The certificate should be an integral part of the international regime

Elements of the certificate are:

- compliance with national law (including exemptions)

- international recognition
- mandatory
- effective supporting mechanisms in user countries to prevent misappropriation or abuse (effective checkpoints, such as registration for commercial application; IPRs offices; entities funding research) to provide evidence of PIC
- To provide for consequences of infringement – sanctions

(Comment: Nature and scope of the certificate could be based on paragraphs 15 and 16 of the Report of the meeting of the Group of Technical Experts on an Internationally Recognized Certificate of Origin/Legal Provenance; certificate could be referred to as a certificate of compliance with national law, in accordance with the Convention, and its basic role should be to provide evidence of compliance with national access and benefit-sharing regimes, as mentioned in paragraph 7 of the report.)

Canada

- We welcome the work of the group of technical experts on certificates as well as the Australian submission on certificates of compliance. These will be useful as we develop our domestic regime. We believe we should consider the feasibility of certificates of compliance as a means to provide assurance that users have filled the requirements of domestic measures.
- We should also consider the potential administrative and compliance burden often associated with certificates although information technologies could help.
- Parties should also consider whether this approach is equally applicable across all types of activity, or whether particular issues will need to be addressed depending on the application in question.
- Application of any such system to plant genetic resources for food and agriculture should recognize the Standard Material Transfer Agreements of the International Treaty on Plant Genetic Resources for Food and Agriculture as the certificate concerning materials that were obtained under that Treaty's Multilateral System for ABS.
- Some elements of a certificate system could be useful in a future international regime but it will also require Parties to enact national ABS legislation and develop potentially costly and complex implementation systems.
- The idea of an electronic certificate, while appealing, must take into consideration the technological capacity of countries providing genetic resources, particularly least developed countries. A country's technical capacity to ensure compliance should not become a potential barrier to participation in international research and development activity.

Colombia

Minimum checkpoint system could be expanded as necessary

Japan

Initial cost and benefit analysis necessary prior to introducing certificate system

Need to identify objectives of certificate

Monitor and evaluate effectiveness of certificate system and re-evaluate cost/benefits

Argentina

How to accommodate derivatives in certificate systems?

Brazil

Binding/mandatory; non-compliance resulting in sanctions

Clearing House Mechanism/ International repository for monitoring

Philippines

The limitations of contracts demonstrate the need for supplementary mechanisms to ensure that the terms are complied with faithfully and there is transparency in every step

Peru

Tie certificate to national level database

United States of America

Certificate system could not be modelled on CITES system because of high volume of genetic resources transactions

Indigenous and local community representatives

Certificate of national compliance has to include compliance with indigenous customary law and also cover traditional knowledge

3.3 (c) Monitoring, enforcement and dispute settlement

Malaysia on behalf of the Group of Like-Minded Mega Diverse Countries

Access to justice

Measures to ensure access to justice and redress.

Measures to guarantee and facilitate expeditious, effective and at a low transaction cost access to justice and redress, tailored to the subject of this regime, including administrative and judicial remedies, as well as alternative dispute resolution mechanisms by providers and users.

Measures to ensure cooperation, including procedures and institutional mechanisms, between contracting parties to address infringements of national legislation and of agreements on access and benefit-sharing.

Compliance and enforcement

Parties shall develop national legislation for the implementation of the international regime.

Each Party shall comply with national legislation of the countries of origin of such resources or of the Parties that have acquired the genetic resources in accordance with the Convention, regarding access and benefit-sharing when accessing and/or using genetic resources, derivatives and/or associated traditional knowledge.

Parties shall take measures to ensure that the use of genetic resources accessed within their jurisdiction comply with the Convention on Biological Diversity and with the conditions under which access was granted.

Parties shall establish mechanisms to facilitate collaboration among relevant enforcement agencies in both provider and user countries.

Without prejudice to specific remedies concerning IPR applications, national legislations shall provide for sanctions to prevent the use of genetic resources, derivatives and/or associated traditional knowledge without compliance with provisions of the international regime, in particular those related to access and benefit-sharing legislations from countries of origin of such resources or from the Parties that have acquired the genetic resources in accordance with the Convention.

Parties shall take all appropriate measures to prevent and combat misappropriation of genetic resources, their derivatives and/or associated traditional knowledge.

(Comment: examples mentioned in paragraph 12 of the Annex to Dec. COP/8 could be considered as inputs for the consideration of the issue of misappropriation in the context of the elaboration and negotiation of the international regime)

Dispute settlement mechanism

Parties shall establish a dispute settlement mechanism for the international regime.

Financial mechanism

Parties shall establish a financial mechanism for the international regime including for benefit-sharing arrangements.

Namibia on behalf of the African Group

Compliance and enforcement

The following are considered acts or cases of misappropriation:

- (a) Use of genetic resources, their derivatives and products and/or associated traditional knowledge without compliance with the provisions of the international regime;
- (b) Any acquisition, appropriation or utilization of genetic resources, their derivatives and products and/or associated traditional knowledge by unfair or illicit means;
- (c) Deriving commercial benefits from the acquisition, appropriation or utilization of genetic resource, derivatives and products and/or associated traditional knowledge when the person, using genetic resource, derivatives and products, knows, or is negligent in failing to know, that these were acquired or appropriated by unfair means;
- (d) Other commercial activities contrary to honest practices that gain in equitable benefit from the genetic resource, derivatives and product and/or associated traditional knowledge.
- (e) Use of genetic resources, their derivatives and products and/or associated traditional knowledge for purposes other than for which it was accessed; and
- (f) Obtaining unauthorized information that can be used for the reconstitution of genetic resources, derivatives or products or traditional knowledge.

International Regime to set out specific requirements for monitoring and enforcement to be implemented by both provider and user countries

Need for additional dispute settlement mechanism in addition to Art. 27 of the CBD

Portugal on behalf of the European Community and its member States

Distinctions between dispute settlement between parties vs. issue of non-compliance with PIC and MAT dealing with specific providers and users of genetic resources

Colombia

International recognition of wrongful acts/cooperation between court systems

Argentina

Monitoring, enforcement and dispute settlement have to be reviewed in light of cost-benefits

Mexico

Create Compliance Committee to promote compliance

Thailand

User countries to facilitate access to their judicial and other systems for providers to seek remedies

Peru

Co-operative mechanisms for dispute settlement have to include indigenous and local communities

Tuvalu on behalf of Pacific Small Island Developing States

Create indicative list of misappropriation acts.

Dispute Settlement should include non-parties.

Philippines

Use term “biopiracy” instead of “misappropriation”

Canada

- It may be premature to address enforcement mechanisms until we agree on what needs to be enforced.
- We need to further distinguish between compliance and enforcement of contracts, national laws and international law.
- We are open to ideas that are practical and build on existing mechanisms that already exist. We consider domestic legal remedies provided through contracts and national courts, supplemented by existing private international law to be a tried and true system that is available in every country
- We also believe that national laws can provide potentially more powerful sanctions directly against any offending individuals or corporations.
- We think developing a definition of “misappropriation” will not be helpful and will simply confuse the debate on compliance
- Similarly, proposals that countries would be asked to enforce the laws of other countries would present legal challenges of extra territorial enforcement that we do not support.

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- Canada continues to be of the view that this issue can best be fully addressed later in our discussions.
- Once we have clarity on how best to share benefits and achieve facilitated access, and have addressed issues related to prior informed consent and mutually agreed terms, we will be in a position to determine which mechanisms, if any, are most effective to ensure compliance.
- It is important during discussions to differentiate between civil remedies and criminal/regulatory prosecution penalties.

4. *Traditional knowledge and genetic resources*

Thailand

Sui generis systems to protect traditional knowledge and the development of a code of ethical conduct to protect the cultural and intellectual property of indigenous and local communities could assist addressing the traditional knowledge related elements in the International Regime.

Refer issue of traditional knowledge and international certificate of origin/source/legal provenance to Working Group on Article 8(j) and an international indigenous and local community expert meeting on traditional knowledge and certificates for deeper consideration.

Namibia on behalf of the African Group

Close connection between traditional knowledge and genetic resources.

Access to traditional knowledge should be on the equal level as access to genetic resources; both should require prior informed consent and mutually agreed terms and equitable benefit-sharing.

International regime could contribute to the retention and use of traditional knowledge and that an international regime must include specific mechanisms to protect traditional knowledge.

Sui generis systems are desirable to protect traditional knowledge.

Norway

DECRIPS provides useful guidance on the rights of indigenous peoples in the context of the International Regime.

Portugal on behalf of the European Community and its member States

The effective participation of indigenous and local communities is essential to international regime's development

Uganda

International regime to accommodate rights of States and rights of indigenous peoples, particularly women and marginalized groups

Access to genetic resources and traditional knowledge must be subject to PIC and MAT.

Sanctions should be imposed for misappropriation of genetic resources and associated traditional knowledge.

Malaysia on behalf of the Group of Like-Minded Mega Diverse Countries

Recognition and protection of traditional knowledge associated with genetic resources and derivatives

(Comment: *sui generis* systems for the protection of the knowledge, innovations and practices of indigenous and local communities should be developed; sui generis systems should be complementary to the international regime; classical instruments of intellectual property rights have revealed themselves insufficient to ensure respect for the rights of the holders of traditional knowledge.)

The elements of the international regime shall be developed and implemented in accordance with Article 8(j) of the Convention on Biological Diversity:

- (a) Parties may consider developing, adopting and/or recognizing, as appropriate, sui generis systems for the protection of traditional knowledge, innovations and practices associated to genetic resources and derivatives;
- (b) Parties shall recognize and protect the rights of indigenous and local communities to their knowledge, innovations and practices and ensure the equitable sharing of benefits arising from the utilization of the knowledge, innovations and practices associated with genetic resources and derivatives, subject to the national legislation of the countries where these communities are located;
- (c) Users shall obtain the prior informed consent of indigenous and local communities holding traditional knowledge associated with genetic resources and derivatives, in accordance with Article 8(j) of the Convention on Biological Diversity, subject to national legislation of the country where these communities are located.

Argentina

“Fair” should be added to the phrase equitable sharing of benefits.

Did not agree with the addition of the word “derivatives”

Did not agree with the removal of “subject to national legislation”

“Users” to be added to instances of where parties occur to include non-Parties

Brazil

Equal attention should be given to both indigenous communities and local communities.

Peru

Traditional knowledge adds value to genetic resources.

Sui generis systems should be based on prior and informed consent.

Australia

- Australia proposes that a set of guidelines on traditional knowledge and genetic resources be negotiated to assist states in their domestic implementation of the Convention.
- Australia believes that traditional knowledge should be addressed specifically in any outcome.
- Australia could not support work on the basis of the Declaration on the Rights of Indigenous Peoples.

Portugal on behalf of the European Community and its member States

Tentative list of issues that required indigenous and local community advice, including:

- a. The proposed certificate and inclusion (or not) of traditional knowledge;
- b. An ethical code of conduct;
- c. ABS related research and respect for traditional knowledge;
- d. Traditional Knowledge and prior and informed consent and how to incorporate this in an international regime;
- e. Traditional Knowledge and MAT options and examples;
- f. Traditional knowledge and capacity-building.

List to be further developed and indigenous experts and the Working Group on 8(j) should provide advice.

Canada

- Canada has read the reports submitted to the CBD by the Sixth Session of the United Nations Permanent Forum on Indigenous Issues Workshop and the report of the recent CBD consultation of indigenous and local communities with great interest.
- The reports address many conceptual issues related to TK associated with genetic resources that need to be more fully elaborated.
- The federal system of government in Canada creates many levels of complexities in implementing ABS, and suggest that other federal States may face similar legal and social complexities
- Our government is engaging Aboriginal peoples in Canada in the development of national ABS policy.
- Canada has many existing government-to-government mechanisms such as self-government agreements, park MOUs and wildlife co-management that may be relevant instruments in the context of access to traditional knowledge associated with the use of genetic resources.
- Canada is supportive of working towards developing workable, practical mechanisms for accessing traditional knowledge associated with genetic resources.

Japan

There is not sufficient information at this time on the issue, therefore the development of an international regime on ABS should wait for the outcomes of WTO and WIPO as knowledge on many issues was insufficient.

Mexico

The Article 8(j) Working Group and programme of work should be strengthened to aid international regime development and to ensure the fair and equitable sharing of benefits regarding traditional knowledge.

Access to traditional knowledge should be dependant on PIC. There are obligations on both providers and users of genetic resources.

Indigenous and local community representatives

DECRIPS is a useful standard that needs to be taken into account in the development of the International Regime. In particular, they drew attention to article 31 to 39 as directly relevant.

International regime to recognize both State sovereignty and the rights of indigenous peoples and emphasized that otherwise IR should not apply or include genetic resources on indigenous territories and/or traditional knowledge.

Do not include phrase “subject to national legislation”: international human rights are not subject to national legislation.

Establish international group of indigenous experts and an expert meeting to address the outstanding issues.

Report of UNPFII’s International Expert Group Meeting on the Convention on Biological Diversity’s International Regime on Access and Benefit-sharing and Indigenous People’s Human Rights and the Report of the International Indigenous and Local Community Consultation on Access and Benefit Sharing and the Development of an International Regime provide useful advice to the ABS WG on development of international regime.

Pacific Model Law provides useful *sui generis* system to protect traditional knowledge.

Registers are not an effective single answer to protect traditional knowledge.

The current intellectual property systems do not provide adequate protection to traditional knowledge.

United Nations Permanent Forum on Indigenous Issues

DECRIPS very relevant to developing the International Regime, in particular articles 26.2, 31 and 34 referring specifically to traditional knowledge.

Development of *sui generis* systems based on the relevant customary laws of indigenous peoples and calls for the recognition of customary law relevant to traditional knowledge.

Strong code of ethics, in line with international standards, may be a useful contribution to International Regime.

5. *Capacity-building*

Namibia on behalf of the African Group

Capacity-building and technology transfer as integral part of International Regime built on locally identified needs and priorities

Mandatory minimum capacity-building requirements in the International Regime

Technology for adding value to genetic resources in country in developing countries (e.g., North-South; South-South)

ABS area complexity demands multi-disciplinary cooperation

Appropriate technology especially needed

Indigenous and local communities capacity-building issues to be addressed under international regime and also at national level

Direct involvement of scientists from countries of origin in users' research

Capacity-building channelled through a multilateral system

Malaysia on behalf of the Group of Like-Minded Mega Diverse Countries

Capacity-building and technology transfer (to be revisited)

The international regime shall include provisions for the building and enhancement of capacity in developing countries, least developed countries and small-island developing States, as well as countries with economies in transition, for the implementation of the international regime at national, regional and international levels.

Measures for effective technology transfer and cooperation so as to support the generation of social, economic and environmental benefits

Building of human, institutional and scientific capacities including for putting in place a legal mechanism, taking into account Articles 18, 19 and 20.4 of the Convention

Thailand

International regime capacity-building to be treated in parallel with awareness raising

User countries to facilitate capacity-building of provider country representatives in monitoring and enforcing terms of ABS contracts

Portugal on behalf of the European Community and its member States

Identification of capacity-building needs should be integral to the international regime negotiations

CBD financial mechanism important to support future ABS-related capacity-building (additional guidance to CBD financial mechanism needed)

Switzerland

Knowledge/awareness gaps on ABS requirements and practice slow down implementation

Solomon Islands

CBD ABS Capacity Building Action Plan good source of guidance for international regime

Technology transfer, training and joint research needed

Capacity and technology transfer needs to be country driven (national needs assessments), flexible and demand driven

Cuba

Training a central element to capacity-building

Brazil

Capacity-building should not replace international regime's mandatory requirements of ABS in particular PIC and MAT

Areas of capacity-building could include

- Contract negotiation
- assisting indigenous and local community representatives to implement their right to free and prior informed consent
- PIC and MAT

Canada

- We believe capacity-building is one of the major gaps in access and benefit sharing. It might even be understated in document UNEP/CBD/WG-ABS/5/3, that is the gap analysis.
- Canada is committed to supporting the development of ABS-related capacity in developing countries, with a particular focus on locally-driven initiatives and those that best reflect the capacity-building needs and priorities of developing countries.
- To date, Canada has supported many capacity-building projects, including the Canada-Colombia Pilot Project, the Canada - Mexico ABS Experts Workshop and capacity-building initiatives of the Centre for International Sustainable Development Law.
- Most recently, Canada supported the workshop on ABS capacity-building for African delegations held last week with the contribution from government of Quebec and the production of the related handbook.
- Canada recognizes the importance of building capacity domestically including for Aboriginal communities.
- Inclusion of any capacity-building measures in a potential international regime would need to be consistent with the relevant provisions of the CBD and relevant COP decisions, and be built on existing efforts (e.g. Global Environment Facility) with a possible focus on regional approaches.
- Canada supports the strategic objectives under the Global Environment Facility (GEF) and the actions of the CEO of the GEF and the ABSWG Co-Chairs.
- Canada notes that during the second meeting of the Working Group on Review of Implementation of the Convention (WGRI-2) last July in Paris, la Commission des Forêts d'Afrique Centrale (COMIFAC) identified the implementation of capacity-building action plans as a priority area, at the same time requesting support for the development of ABS legal and administrative frameworks in African countries.

Indigenous and local community representatives

International Regime to reflect capacity-building measures for indigenous and local community representatives