



**Convention on
Biological Diversity**

Distr.
GENERAL

UNEP/CBD/WG-ABS/8/6/Add.2
2 November 2009

ORIGINAL: ENGLISH

AD HOC OPEN-ENDED WORKING GROUP
ON ACCESS AND BENEFIT-SHARING
Eighth meeting
Montreal, 9-15 November 2009

**COLLATION OF CONTRIBUTIONS SUBMITTED BY PARTIES, GOVERNMENTS,
INTERNATIONAL ORGANIZATIONS, INDIGENOUS AND LOCAL COMMUNITIES AND
RELEVANT STAKEHOLDERS ON COMPLIANCE, FAIR AND EQUITABLE
BENEFIT-SHARING AND ACCESS**

Addendum

SUBMISSION BY MEXICO

Note by the Executive Secretary

1. The Executive Secretary is circulating herewith submissions by Mexico regarding operational text related to “Access to genetic resources”, “Compliance”, as well as to the use of terms “derivatives” and “products” as an addendum to the collation of contributions on compliance, fair and equitable benefit-sharing and access made available as document UNEP/CBD/WG-ABS/8/6 and Add.1.
2. These text proposals are in addition to those previously submitted by Mexico and contained in document UNEP/CBD/WG-ABS/8/6.
3. The submissions are being circulated in the form they were received by the Secretariat.

/...

**COLLATION OF CONTRIBUTIONS SUBMITTED BY PARTIES, GOVERNMENTS,
INTERNATIONAL ORGANIZATIONS, INDIGENOUS AND LOCAL COMMUNITIES AND
RELEVANT STAKEHOLDERS ON COMPLIANCE, FAIR AND EQUITABLE
BENEFIT-SHARING AND ACCESS¹**

III. MAIN COMPONENTS

B. ACCESS TO GENETIC RESOURCES ^{2/}

Mexico

6) Internationally developed model domestic legislation

Proposed operative text

Recalling that Article 15.1. of the Convention stipulates that States have sovereign rights over their natural resources, and that the faculty to regulate access to genetic resources rests with national governments and is subject to national legislation *{preambular paragraph}*

Recalling that Article 15.5 of the Convention stipulates that access to genetic resources will be subject to the prior informed consent of the Contracting Party providing the said genetic resources, unless that Party decides otherwise *{preambular paragraph}*

Taking note that the Parties have different legal systems, and have consequently chosen to implement the provisions regarding access and benefit-sharing in the Convention in accordance with their national conditions *{paragraph from the preamble}*

1. Encourages the Parties to provide the Secretariat with examples of provisions for national legislation, and encourages the Secretariat to provide them to the Parties upon request, in order to give assistance and support to said requesting Parties for the implementation of the Convention's provisions regarding access and benefit-sharing on the national level.

2. The Parties will compile examples of provisions for national legislations and examples of frameworks for the adoption of administrative decisions in accordance with the international norms established in {...} and will distribute them via the center for information exchange.

ADDITIONAL PROPOSAL OF OPERATIVE TEXT

3. Provider Countries may make available a subsidiary access procedure, in accordance with Annex XX, for applicants from *Contracting* Parties that have implemented in their national framework measures to monitor compliance referred to in paragraph (a) to (f) of Article XX.

C. COMPLIANCE

Mexico

3) Development of tools to enforce compliance

- a) [...]
b) [...]

¹ For ease of reference, the headings in annex I to decision IX/12 reproduced in this document have been shaded.

² The title is without prejudice to the eventual scope of the International Regime on Access and Benefit-sharing.

- c) [...]
- d) [...]
- e) [...]

ADDITIONAL PROPOSAL OF OPERATIVE TEXT

f) International Compliance Mechanism

Article XX

- 1.-In order to promote compliance with the provisions of this Protocol, to address cases of non-compliance and to provide advice or assistance, where appropriate, Parties shall use the cooperative and effective procedures and the institutional mechanisms established in Annex XX.
2. The measures to be taken in cases of repeated non-compliance shall include a multilateral suspension for the non-compliant Party to use the subsidiary access procedure referred to in Article XX.
3. The procedures and mechanisms of paragraph 1 are separate from and without prejudice to, the dispute settlement procedures and mechanisms established by Article 27 of the Convention on Biological Diversity and Article XX of this Protocol.

Annex XX

Subsidiary Access Procedure³

General Provisions

1. Contracting Parties have sovereign rights over their natural resources and the authority to determine access to [genetic resources][biological resources][, their derivatives][and products] rests with the national governments.
2. Access to associated traditional knowledge shall be subject to the free prior informed consent of indigenous and local communities.
3. Each Party shall ensure that users of genetic resources, [biological resources] [their derivatives] [and products] and/or associated traditional knowledge under its jurisdiction comply with the national legislation of the countries of origin of such resources and/or traditional knowledge or of the Parties that have acquired the genetic resources, their derivatives and products in accordance with the Convention, when accessing and/or using such resources, their derivatives and products and/or associated traditional knowledge.
4. The subsidiary access procedure shall be available only for *Contracting* Parties that have implemented in their national framework measures securing the fair and equitable benefit sharing as referred in Articles XX and XX.
5. Subject to national laws, the subsidiary access procedure may be available for applications made by nationals of the Country of Origin.
6. For Parties with no ABS framework the subsidiary access procedure is intended as a transitory mechanism. For Parties with an ABS framework, the subsidiary access procedure may act as an incentive to accelerate the implementation of the Protocol.

Submission of applications

7. Access applications shall be submitted, in writing, to the National Competent Authority of the Country of Origin. The application shall contain, at a *minimum*, the following information:
 - (a) Legal entity and affiliation of the applicant and/or collector and contact person when the applicant is an institution;
 - (b) Type and quantity of genetic resources to which access is sought;
 - (c) Starting date and duration of the activity;
 - (d) Geographical prospecting area;
 - (e) Evaluation of how the access activity may impact on conservation and sustainable use of biodiversity, to determine the relative costs and benefits of granting access;
 - (f) Accurate information regarding intended use (e.g.: taxonomy, collection, research, commercialization);
 - (g) Identification of where the research and development will take place;
 - (h) Information on how the research and development is to be carried out;
 - (i) Identification of local bodies for collaboration in research and development;
 - (j) Possible third party involvement;
 - (k) Purpose of the collection, research and expected results;

³ This subsidiary procedure used as a reference (i) the Protocol on Biosafety; (ii) the Bonn Guidelines; (iii) the WG-7 Paris Report; and (iv) the Mexican submissions for operative text.

- (l) Kinds/types of benefits that could come from obtaining access to the resource, including benefits from derivatives and products arising from the commercial and other utilization of the genetic resource;
- (m) Indication of benefit-sharing arrangements;
- (n) Budget;
- (o) Treatment of confidential information;
- (p) The prior informed consent of the owner or tenant of the land where the resource is located.

8. Contracting parties shall ensure that there is a legal requirement for the accuracy of information provided by the applicant.

Acknowledgement of Receipt of Application

9. The National Competent Authority of the Country of Origin shall acknowledge receipt of the application, in writing, to the applicant within [thirty] days of its receipt.

10. The acknowledgement shall state:

- (a) The date of receipt of the application;
- (b) Whether to proceed according to the domestic regulatory framework of the Country of Origin or according to this subsidiary Access Procedure.

11. The domestic regulatory framework referred to in paragraph 8 (b) above, shall be consistent with this Protocol.

12. A failure by the Country of Origin to acknowledge receipt of a notification shall not imply its consent to an intentional transboundary movement.

Decision Procedure

13. Within [60] days of the date of receipt of notification, the National Competent authority of the Country of Origin shall communicate to the applicant, in writing, the request of any additional relevant information. In calculating the time within which the National Competent Authority of the Country of Origin is to respond, the number of days it has to wait for additional relevant information shall not be taken into account.

14. Within [270] days of the date of receipt of notification, the National Competent Authority of the Country of Origin shall communicate, in writing, to the applicant and to the Access and Benefit Clearing-House the decision:

- (a) Approving the access application;
- (b) Denying the access application;
- (c) Informing the notifier that the period specified in this paragraph is extended by a defined period of time.

15. A decision under paragraph 14 above, shall set out the reasons on which it is based, and shall clearly establish, *inter alia*:

- (a) The identification of the resources that are being accessed;
- (b) The permitted uses, including the obligation to submit a new application in case of changes of intent;

- (c) Provisions regarding the use by third parties, including the obligation of third parties to abide and respect the original access conditions;
 - (d) Any additional conditions required to secure compliance.
15. A failure by the Party of import to communicate its decision within [one hundred and eighty] days of the date of receipt of the notification shall not imply its consent.
16. Decisions under paragraph 14 above shall be registered in a national database that shall be updated periodically in the Access and Benefit Clearing House Mechanism.
17. The National Competent Authority, before taking the decision under paragraph 14 above, shall verify that the applicant has concluded, in writing, mutually agreed terms. Such mutually agreed terms shall include, *inter alia*:
- (a) Provisions on the fair and equitable sharing of benefits, subject to articles XX;
 - (b) Provisions regarding the use by third parties, including the obligation of third parties to abide and respect the original access conditions;
 - (c) A clause on the settlement of disputes.
18. If access is sought to associated traditional knowledge, the National Competent Authority, before taking the decision under paragraph 14 above, shall verify that the relevant traditional and local communities have:
- (a) Granted their previous informed consent;
 - (b) Entered into mutually agreed terms in relation to benefit sharing.
19. Following a decision under paragraph 14 (a) above, the National Competent Authority shall issue a certificate of compliance in accordance to articles XX and XX.

Annex XX

PROCEDURES AND MECHANISMS ON COMPLIANCE UNDER THE PROTOCOL ON ACCESS AND BENEFIT SHARING⁴

The following procedures and mechanisms are separate from, and without prejudice to, the dispute settlement procedures and mechanisms established by Article 27 of the Convention on Biological Diversity and Article XX of the Protocol.

I. Objective, nature and underlying principles

1. The objective of the compliance procedures and mechanisms shall be to promote compliance with the provisions of the Protocol, to address cases of non-compliance by Parties, and to provide advice or assistance, where appropriate.
2. The compliance procedures and mechanisms shall be simple, facilitative, non-adversarial and cooperative in nature.
3. The operation of the compliance procedures and mechanisms shall be guided by the principles of transparency, fairness, expedition and predictability. It shall pay particular attention to the special needs of developing country Parties, in particular the least developed and small island developing States among them, and Parties with economies in transition, and take into full consideration the difficulties they face in the implementation of the Protocol.

II. Institutional mechanisms

1. A Compliance Committee shall be established to carry out the functions specified herein.
2. The Committee shall consist of 15 members nominated by Parties and elected by the Conference of the Parties serving as the meeting of the Parties to the Protocol on Access and Benefit Sharing on the basis of three members from each of the five regional groups of the United Nations.
3. Members of the Committee shall have recognized competence in the field of access and benefit sharing, associated traditional knowledge or other relevant fields, including legal or technical expertise, and serve objectively and in a personal capacity.
4. Members shall be elected by the Conference of the Parties serving as the meeting of the Parties to the Protocol on Access and Benefit Sharing for a period of four years, this being a full term. At its first meeting, the Conference of the Parties serving as the meeting of the Parties to the Protocol on Access and Benefit Sharing shall elect five members, one from each region, for half a term, and ten members for a full term. Each time thereafter, the Conference of the Parties to the serving as the meeting of the Parties to the Protocol on Access and Benefit Sharing shall elect for a full term, new members to replace those whose term has expired. Members shall not serve for more than two consecutive terms. [Something on replacement]
5. The Committee shall meet twice a year, unless it decides otherwise. The Secretariat shall service the meetings of the Committee.
6. The Committee shall submit its reports including recommendations with regard to the discharge of its functions to the next meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol for consideration and appropriate action.

⁴ This is based in the Compliance Mechanism developed under the Cartagena Protocol on Biosafety.

7. The Committee shall develop and submit its rules of procedure to the Conference of the Parties serving as the meeting of the Parties for its consideration and approval.

III. Functions of the Committee

1. The Committee shall, with a view to promoting compliance and addressing cases of non-compliance, and under the overall guidance of the Conference of the Parties serving as the meeting of the Parties to the Protocol, have the following functions:

(a) Identify the specific circumstances and possible causes of individual cases of non-compliance referred to it;

(b) Consider information submitted to it regarding matters relating to compliance and cases of non-compliance;

(c) Provide advice and/or assistance, as appropriate, to the concerned Party, on matters relating to compliance with a view to assisting it to comply with its obligations under the Protocol;

(d) Review general issues of compliance by Parties with their obligations under the Protocol, taking into account the information provided in the national reports communicated in accordance with Article XX of the Protocol and also through the Access and Benefit Sharing Clearing-House;

(e) Take measures, as appropriate, or make recommendations, to the Conference of the Parties serving as the meeting of the Parties to the Protocol;

(f) Carry out any other functions as may be assigned to it by the Conference of the Parties serving as the meeting of the Parties to the Protocol.

IV. Procedures

1. The Committee shall receive, through the Secretariat, any submissions relating to compliance from:

(a) Any Party with respect to itself;

(b) Any Party, which is affected or likely to be affected, with respect to another Party.

The Committee may reject to consider any submission made pursuant to paragraph 1 (b) of this section that is *de minimis* or ill-founded, bearing in mind the objectives of the Protocol.

2. The Secretariat shall, within fifteen days of receipt of submissions under paragraph 1 (b) above, make the submissions available to the Party concerned, and once it has received a response and information from the concerned Party, it shall transmit the submission, the response and information to the Committee.

3. A Party that has received a submission regarding its compliance with the provisions of the Protocol should respond and, with recourse to the Committee for assistance if required, provide the necessary information preferably within three months and in any event not later than six months. This period of time shall commence on the date of the receipt of the submission as certified by the Secretariat. In the case where the Secretariat has not received any response or information from the concerned Party within the six months as referred to above, it shall transmit the submission to the Committee.

4. A Party, in respect of which a submission is made or which makes a submission, is entitled to participate in the deliberations of the Committee. This Party shall not participate in the elaboration and adoption of a recommendation of the Committee.

V. Information and consultation

1. The Committee shall consider relevant information from:
 - (a) The Party concerned;
 - (b) The Party that has made a submission with respect to another Party in accordance with paragraph 1 (b) of section IV.
2. The Committee may seek or receive and consider relevant information from sources, such as:
 - (a) The Access and Benefit Clearing-House, the Conference of the Parties to the Convention, the Conference of the Parties serving as the meeting of the Parties to the Protocol, and subsidiary bodies of the Convention on Biological Diversity and the Protocol;
 - (b) Relevant international organizations.
3. The Committee, in undertaking all of its functions and activities, shall maintain the confidentiality of any information that is confidential under Article XX of the Protocol.

VI. Measures to promote compliance and address cases of non-compliance

1. The Committee may take one or more of the following measures with a view to promoting compliance and addressing cases of non-compliance, taking into account the capacity of the Party concerned, especially developing country Parties, in particular the least developed and small island developing States amongst them, and Parties with economies in transition, to comply, and such factors as the cause, type, degree and frequency of non-compliance:
 - (a) Provide advice or assistance to the Party concerned, as appropriate;
 - (b) Make recommendations to the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol regarding the provision of financial and technical assistance, technology transfer, training and other capacity-building measures;
 - (c) Request or assist, as appropriate, the Party concerned to develop a compliance action plan regarding the achievement of compliance with the Protocol within a timeframe to be agreed upon between the Committee and the Party concerned; and
 - (d) Invite the Party concerned to submit progress reports to the Committee on the efforts it is making to comply with its obligations under the Protocol;
 - (e) Pursuant to paragraph 1 (c) and (d) above, report to the Conference of the Parties serving as the meeting of the Parties on efforts made by Parties in non-compliance to return to compliance and maintain this as an agenda item of the Committee until adequately resolved.
2. The Conference of the Parties serving as the meeting of the Parties may, upon the recommendations of the Committee, taking into account the capacity of the Party concerned, especially developing country Parties, in particular the least developed and small island developing States amongst them, and Parties with economies in transition, to comply, and such factors as the cause, type, degree and frequency of non-compliance, also decide upon one or more of the following measures:
 - (a) Provide financial and technical assistance, technology transfer, training and other capacity-building measures;
 - (b) Issue a caution to the concerned Party;

(c) Request the Executive Secretary to publish cases of non-compliance in the Access and Benefit Clearing-House;

(d) In cases of repeated non-compliance, take such measures as may be decided by the Conference of the Parties serving as the meeting of the Parties to the Protocol at its first meeting. The measures shall include a multilateral suspension for the non-compliant Party to use the subsidiary access procedure set out in Annex I of the Protocol, subject to paragraph 6 of Annex I.

VII. Review of the procedures and mechanisms

The Conference of the Parties serving as the meeting of the Parties to the Protocol shall, at its third meeting and thereafter, in line with Article XX of the Protocol, review the effectiveness of these procedures and mechanisms, address repeated cases of non-compliance and take appropriate action.

SUBMISSION RELATED TO THE USE OF TERMS

Mexican proposal to define derivatives and products

1. Definition of Derivatives:

“Derivatives” is a key element for the negotiation of an international regime on genetic resource access. Mexico proposes the following definition:

Article X

USED TERMS

For the purposes of this Protocol, it will be understood as:

x) “Derivative”.- any material contained in, or generated by, the genetic and/or biological resource, without human manipulation, subject to Access.

The elements that support this definition are:

- a) The “Derivatives” from the Genetic Resources are tangible;
- b) The “Derivatives” are an integral part of the organism, or may be the result of metabolic processes of the biological/genetic resource; and finally,
- c) No human manipulation is involved

2. Definition of Product.

Article X

USED TERMS

For the purposes of this Protocol it will be understood as:

x) “product” .- any material created or modified as a result of human manipulation of a Genetic and/or Biological resource, or its Derivatives

Mexico considers that fair and equitable sharing of benefits derived from the utilization of genetic resources may be originated by their use or by use of the derivatives or by the products, as well as from the traditional knowledge associated to genetic resources and its derivatives.

Human intervention is the element that supports Mexico’s definition for product.
