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ACCESS AND BENEFIT-SHARING

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**COLLATION OF OPERATIVE TEXT SUBMITTED BY PARTIES, GOVERNMENTS,
INTERNATIONAL ORGANIZATIONS, INDIGENOUS AND LOCAL COMMUNITIES AND
RELEVANT STAKEHOLDERS WITH RESPECT TO NATURE, TRADITIONAL
KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES AND CAPACITY-BUILDING**

Addendum

SUBMISSION BY THE AFRICAN GROUP

Note by the Executive Secretary

1. The Executive Secretary is circulating herewith a submission by the African Group on nature, traditional knowledge associated with genetic resources and capacity-building. The text is being circulated in the form in which it was received by the Secretariat.

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**SUBMISSIONS OF OPERATIONAL TEXT, VIEWS AND PROPOSALS
BY THE AFRICAN GROUP ON NATURE, TRADITIONAL KNOWLEDGE ASSOCIATED
WITH GENETIC RESOURCES AND CAPACITY BUILDING**

The Report of the 7th Meeting of the ABSWG in Paris (UNEP/CBD/WG-ABS/7/8) in Para 121 states that “the Co-Chairs of the Working Group also confirmed that, in keeping with paragraphs 9 and 10 of decision XI/12 of the COP to the Convention, Parties, other Governments, international organizations and indigenous and local communities, and relevant stakeholders would be invited to submit views and proposals including operational text, where relevant, in respect of the main components listed in the annex I to decision IX/12 that had not been addressed at the current meeting namely, nature, traditional knowledge associated with genetic resources, and capacity building. “

In accordance with invitation by the Co-Chairs for submission of operational text, views and proposals on nature, traditional knowledge associated with genetic resources and capacity building, the African Group submits the following operational text and explanations. While the submissions of the African Group do not depart from its original submissions on all the main components in annex I of decision IX/12, the current submissions seeks to adapt the original submissions in the form of new operational text keeping in line with the bricks/bullets breakdown of the main components. The current submissions of the African Group also draws on discussions within the African Group based on the outcomes of the negotiations of the ABSWG7, the Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources (UNEP/CBD/WG-ABS/8/2) and inputs from other African stakeholders.

The African Group based on its experiences during ABSWG 7, is of the view that such a restructuring of its original submissions would better represent its views. This is especially so considering the format of the negotiations is one where operational text for each brick/bullet is taken up separately.

OPERATIONAL TEXT AND EXPLANATIONS:

Main Component D (UNEP/CBD/WG-ABS/7/7)

Traditional knowledge associated with genetic resources:

- The African Group is of the view that there are a number of overlaps between elements (bricks/bullets) under the main component ‘traditional knowledge associated with genetic resources’. For the sake of clarity, we have considered overlapping bricks/bullets together under the broad heads of benefit sharing, access and compliance and proposed specific operational text accordingly.
- The term ‘indigenous and local communities’ refers to either or both of the entities which the term describes, within the definition given by national legislation and international commitments
- Regarding the term ‘misappropriation’ it is used in the context where there is a violation of national access rules or legislation, and where such rules or legislation do not exist, the CBD or any other regulations or administrative provisions that are relevant to access
- The term ‘misuse’ is understood as use that is in breach of an ABS agreement.
- Based on the AHTEG report on traditional knowledge and its useful analysis of the relationship between genetic resources and associated traditional knowledge, the African Group is of the view

that the interpretation of the phrase ‘traditional knowledge associated with genetic resources’ will be subject to negotiation at ABSWG8. The African Group has therefore used the term ‘traditional knowledge’ in its operational text.

- Based on the AHTEG report on traditional knowledge which in Para 10 points out the inseparability of traditional knowledge and genetic resources in co-evolved biological and cultural systems the African Group in its operational text recognizes the interests of indigenous and local communities over genetic resources that have developed as a direct result of their knowledge, innovations and practices, and seeks to protect these interests
- Wherever the term genetic resources is mentioned, it shall be taken in a holistic interpretation of all the provisions of the CBD and of scientific methods currently available or which may become available
- Genetic resource will include a reproducible resource, its functional units of heredity or other components which are expressed by such unit/units, excluding commodities marketed as such rather than as a means for developing such units.

Operational text:

1. Benefit Sharing

Fair and Equitable Benefit Sharing: Of benefits arising from the utilization of traditional knowledge with the knowledge holders

Relevant bricks and bullets:

- **Measures to ensure the fair and equitable sharing with traditional knowledge holders of benefits arising out of the utilization of traditional knowledge in accordance with Article 8(j) of the CBD (brick D/1/1)**
- **Measures to address the use of traditional knowledge in the context of benefit- sharing arrangement (brick D/1/3)**

Proposal for operational text:

Each contracting party shall take legislative, administrative or policy measures ensuring the sharing with indigenous and local communities in a fair and equitable way the benefits arising from the commercial and other utilization of:

i) genetic resources/biological resources, derivatives or products when such a genetic resource/biological resources, derivatives or products has resulted from or been guided by or whose potential use has been made apparent by a sharing of the traditional knowledge of indigenous or local communities or where indigenous or local communities have collective rights to such genetic resources under national, and

ii) traditional knowledge, when the indigenous or local community has developed or nurtured such traditional knowledge.

These benefits shall be based on MATs agreed with the Competent National Authority with the participation of indigenous and local communities concerned.

Equitable sharing and distribution of benefits shall be guided by respect for the holders of the traditional knowledge as well as other relevant cultural, spiritual, ecological and economic values also including customary norms, customary laws and community protocols.

Parties shall take the necessary legal, policy and administrative measures, to ensure that indigenous and local communities are entitled to benefit sharing with regard to traditional knowledge, when the development or the use of genetic resources is integrally linked to the traditional knowledge of specific indigenous and local communities regardless of whether or not such indigenous and local communities own the said genetic resources

Traditional knowledge of indigenous and local communities accessed prior to the entering into force of the CBD, shall be subject to the International Regime on ABS with:

a) All continuing benefits arising from the use of such traditional knowledge to be fairly and equitably shared with the relevant indigenous and local community.

b) All new uses of such traditional knowledge arising after the entry into force of the CBD to be subject to PIC and MAT negotiated with the relevant indigenous peoples and local communities concerned in accordance with their community procedures, customary laws or community protocols.

c) In cases where the origin of the traditional knowledge is unclear, regional traditional knowledge funds shall be established under the International Regime on ABS and administered by the representatives of indigenous and local communities and a fair and equitable share of the benefits arising from the use of such traditional knowledge shall flow into such funds.

Parties shall take measures to address shared traditional knowledge. In instances when more than one indigenous or local community share traditional knowledge, and an ABS agreement is reached with one indigenous or local community, Parties may take measures to ensure that benefits are shared also with other indigenous or local communities holding the same traditional knowledge. This however does not preclude indigenous and local communities that are the holders of the shared traditional knowledge to with the supervision Competent National Authority enter into separate ABS agreements with the users of such traditional knowledge on the condition that such agreements are non-exclusive and do not adversely affect the rights, customary laws or community protocols of other indigenous and local communities that share such traditional knowledge

Parties may take measures to address the sharing of benefits arising from transboundary traditional knowledge through bilateral or multilateral agreements. This however does not preclude indigenous and local communities that are the holders of the transboundary and shared traditional knowledge to with the supervision of the Competent National Authority to enter into separate ABS agreements with the users of such TK on the condition that such agreements are non-exclusive and do not adversely affect the rights, customary laws or community protocols of other indigenous and local communities that share such traditional knowledge.

Parties, in consultation with indigenous peoples and local communities shall develop minimum conditions and standards for MAT relating to transboundary and shared traditional knowledge that would have to be complied with by users of such traditional knowledge when negotiating MAT with any of the indigenous and local communities sharing such knowledge.

Parties shall establish mechanisms in consultation with all relevant stakeholders to provide information to potential users of traditional knowledge concerning their obligations regarding access to traditional knowledge and benefit sharing arising from the use of such traditional knowledge.

Parties shall also establish mechanisms to ensure that potential users of traditional knowledge honour their obligations regarding access to and benefit sharing arising from the use of traditional knowledge.

- **Community-level distribution of benefits arising out of traditional knowledge (bullet D/2/4)**

Fair and Equitable Benefit Sharing: Within communities that are holders of traditional knowledge

Proposal for operational text:

Where benefits arise from the use of traditional knowledge, Parties shall support indigenous peoples and local communities to facilitate the fair and equitable sharing of such benefits at the community level in accordance national law taking into account customary laws, values or community protocols of the holders of such knowledge.

Fair and Equitable Benefit Sharing: Development of model clauses

- **Incorporation of traditional knowledge in development of model clauses for material transfer agreements (brick D/1/5)**

Proposal for operational text:

Parties shall incorporate traditional knowledge in the development of model clauses for material transfer agreements, based on best practices.

2. Access

Access: Free Prior Informed Consent

Relevant bricks and bullets:

- **Access with approval of traditional knowledge holders (brick D/1/7)**
- **No engineered or coerced access to traditional knowledge (brick D/2/8)**
- **Prior informed consent of, and mutually agreed terms with, holders of traditional knowledge, including indigenous and local communities, when traditional knowledge is accessed (bullet D/2/1)**

Proposal for operational text:

Parties shall respect, recognize and protect the collective rights of indigenous and local communities within their jurisdiction to their traditional knowledge and shall establish an appropriate national regulatory framework to effectively protect and implement such rights. Until, and to the extent such policies and measures have not been put in place, the state shall nonetheless uphold its obligations under the Regime .

Parties shall take legislative, administrative or policy measures ensuring prior informed consent by indigenous and local communities before access is granted to:

- i) genetic resources when the indigenous or local community has rights to such genetic resources under national law, and*
- ii) traditional knowledge, when the indigenous or local community has developed or nurtured such knowledge.*

If PIC is granted, this shall be documented in MATs as agreed with the National Competent Authority with the participation of indigenous and local communities concerned

When seeking to access indigenous or local communities' traditional knowledge, PIC shall be obtained from their relevant authorities pursuant to their customary laws, community protocols or as otherwise appointed by them in accordance with national legislation. Such authorities shall be registered with the Competent National Authority and such PIC shall be granted under the supervision of the Competent National Authority

The Competent National Authority shall supervise and assist indigenous and local communities in developing PIC procedures and involve them in the development of MAT procedures.

Parties shall:

- (a) Ensure that any access to and use of traditional knowledge shall be based on the prior informed consent of indigenous and local communities who are the holders of such knowledge*
- (b) Ensure that the commercialization and any other use of genetic resources/biological resources and traditional knowledge should not prevent traditional use of such genetic resources/biological resources and traditional knowledge in accordance with national law and consistent with the CBD*
- (c) Make available all relevant information in order to facilitate the effective participation and PIC of indigenous and local communities in any ABS agreement relating to their traditional knowledge. This provision shall not undermine the interest of the applicant regarding confidential business information approved by the Competent National Authority*
- (d) Ensure that any documentation of traditional knowledge of indigenous and local communities should be subject to the prior informed consent of the indigenous and local communities;*
(d)biz Ensure that the documented traditional knowledge is safeguarded and does not enter the public domain
- (e) Ensure that decisions regarding access to traditional knowledge made by indigenous or local communities authorities established in accordance with their customary norms, laws or community protocols or otherwise appointed by them in accordance with national law are made available to other relevant stakeholders;*
- (f) Require that MAT address scope of use of traditional knowledge, and that substantially new or changed uses of traditional knowledge beyond the intended use of what has been consented by PIC and agreed to under MAT, are subjected to new PIC and MAT from the indigenous and local communities who are the holders of such traditional knowledge.*

Access: Identification of appropriate authority

Relevant bricks and bullets:

- **Identification of individual or authority to grant access in accordance with community level procedures (brick D/1/6)**

Proposal for operational text:

Parties shall designate one or more Competent National Authorities who shall guide and link potential users of traditional knowledge to the relevant indigenous or local community authorities for the purposes of PIC and MAT.

Parties shall provide support to indigenous and local communities to develop mechanisms where such mechanisms do not exist for the appointment of their legitimate authorities and recognize such ILC authorities

Access: Community level procedures

Relevant bricks and bullets:

- **Measures to ensure that access to TK takes place in accordance with community level procedures (brick D/1/2)**

Proposal for operational text:

Parties shall, with the full and effective participation of the indigenous and local communities concerned, support and facilitate local, national and/or regional community protocols regulating access to traditional knowledge, taking into consideration the relevant customary laws and ecological values relevant for conservation and sustainable use of biological diversity of indigenous and local communities in order to prevent the misappropriation of their traditional knowledge.

Access: Transboundary traditional knowledge and Shared traditional knowledge

Relevant bricks and bullets:

No brick or bullet in TK section but an important issue raised in discussions.

Proposal for operational text:

Parties shall take measures to address transboundary and shared traditional knowledge. In instances when more than one indigenous or local community share traditional knowledge, Parties shall prevent potential users from gaining access from an indigenous or local community with no or limited access regulation, if this causes harm to other indigenous or local communities holding the same traditional knowledge. Parties shall also establish a mechanism for indigenous or local communities to alert the relevant competent authority if such harm has occurred.

In instances when more than one indigenous or local community share traditional knowledge, and an ABS agreement is reached with one indigenous or local community, Parties may take measures to ensure that PIC is obtained from other indigenous or local communities holding the same traditional knowledge. This however does not preclude indigenous and local communities that are the holders the transboundary and shared traditional knowledge to give PIC and to enter into separate ABS agreements with the users of such TK on the condition that such PIC and agreements are non-éexclusive and do not adversely affect the rights and customary laws of other indigenous or local communities that share such traditional knowledge.

Parties shall encourage and support the development of community protocols that will provide potential users of traditional knowledge with clear and transparent rules for access to shared traditional knowledge of indigenous and local communities within their jurisdiction

3. Compliance

Compliance: International Certificates

Relevant bricks and bullets:

- **Declaration to be made on the international recognized certificate as to whether there is any associated traditional knowledge and who owners of traditional knowledge are (bullet D/2/3)**

Proposal for operational text:

An internationally recognized certificate of compliance shall establish that genetic resources/biological resources, derivatives and products and traditional knowledge have been duly acquired. Each party, upon request, shall issue a certificate of compliance with international legal effectiveness and applicability that certifies that genetic resources/biological resources, derivatives and products and traditional knowledge have been acquired in accordance with the laws of the provider country and the PIC of relevant indigenous or local communities. The certificate shall denote who the holders of relevant genetic resources/biological resources, derivatives and products and traditional knowledge are as documented in MATs.

For tracking access to traditional knowledge the certificate shall include but not be limited to the following minimum information:

- a) *Licensing terms, including permitted uses and restrictions of use, for:*
 - *Research not aiming at commercialization*
 - *Research and development aiming at commercialization; and*
 - *Commercialization;*
- b) *Conditions of transfer to third parties including licensing terms.*

Compliance: Misappropriation

Relevant bricks and bullets:

No specific brick or bullet under the Traditional Knowledge component, but the issue with relevance to traditional knowledge has been raised under the component on Compliance under Section 3- Development of tools to enforce compliance.

- **Measures to ensure compliance with customary laws and local systems of protection (bullet C/3/4)**

Proposal for operational text:

For the purposes of the International Regime, it constitutes an act of misappropriation to access and/or use of traditional knowledge without obtaining the PIC of the relevant indigenous or local communities, in accordance with the international regime

Compliance: Non-commercial research

Relevant bricks and bullets:

- **Identification of best practices to ensure respect for traditional knowledge in ABS related research (brick D/1/4)**

Proposal for operational text:

Parties shall ensure the application of measures and best practices to respect the rights of the holders of traditional knowledge in non-commercial research.

For the purposes of the International Regime non-commercial research shall be understood as research with the goal of adding knowledge to the public domain, without restrictions or proprietary ownership.

Parties may take measures to prevent traditional knowledge and non-commercial research based on it from entering the public domain until such traditional knowledge and non commercial research have been evaluated for the associated or potential intellectual property implications

Parties shall ensure that non-commercial users comply with customary laws, community protocols or any other community level procedures where required.

Compliance: Further points

No specific bricks or bullets

Proposal for operational text:

Parties shall ensure that users disclose the country providing the resources/country of origin, the identity of the traditional knowledge holders and evidence of PIC, where available in applications for intellectual property rights, product registration and plant variety protection.

Lack of PIC, where required by national legislation or customary laws or community protocols shall be grounds for disqualification/invalidation in product registration or grant of intellectual property rights.

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In such cases of disqualification/invalidation the right to apply for the product registration or intellectual property rights vests with the country providing the resources/country of origin or the holders of the traditional knowledge.

Parties shall ensure that any benefits arising out of the misappropriation of genetic resources and/or traditional knowledge are directed as compensation towards the relevant holders/owners of such traditional knowledge and/or genetic resources.

Main component E (UNEP/CBD/WG-ABS/7/7)

E. Capacity Building:

Operational text

Parties shall establish ways and means, including a financial mechanism to facilitate the required intellectual, technological and financial resources for capacity requirements of the relevant stakeholders.

Parties shall cooperate in the development and/or strengthening of human resources and institutional capacities in ABS, for the purpose of the effective implementation of the International Regime, in developing country Parties, in particular the least developed and small island developing States among them, and in Parties with economies in transition, including through existing global, regional, subregional and national institutions and organizations and, as appropriate, through facilitating private sector involvement

Parties shall ensure that capacity building will be in accordance with nationally identified capacity building needs and will consist of but not limited to:

- 1) transferring knowledge to provider countries and transferring the skills and technology required to operationalise this knowledge*
- 2) facilitating and supporting structures and mechanisms to sustain and develop the knowledge and the skills*

Capacity requirements of Governments may include but not be limited to:

- 1) Capacity to set up a well-functioning ABS legal system that includes providing the necessary knowledge and skills to all relevant levels of government and the executive, legislature and judiciary*
- 2) Capacity to monitor and enforce compliance*
- 3) Capacity to document their biological resources and genetic resources both in-situ and in ex-situ collections*
- 4) Capacity to conserve, sustainably use and promote their traditional knowledge*
- 5) Capacity to identify, assert and protect their different forms of IPRs relating to their genetic resources*

- 6) *Capacity to promote the use of genetic resources and traditional knowledge for socio-economic development*
- 7) *Capacity to ensure communication, education and public awareness regarding ABS*

Capacity requirements of Indigenous or Local Communities may include but not be limited to:

- 1) *Capacity to conserve, sustainably use and promote their traditional knowledge*
- 2) *Capacity to identify, assert and safeguard their rights over their traditional knowledge in the context of negotiation and implementation of ABS agreements*
- 3) *Capacity to develop and enforce community protocols relating access to traditional knowledge*
- 4) *Capacity to document their traditional knowledge including the capacity to enforce their rights over the process and outcome of such documentation*
- 5) *Capacity to ensure that the database of traditional knowledge is protected from unauthorized use*
- 6) *Capacity to ensure communication, education and public awareness regarding ABS*
- 7) *Capacity in accordance with Art 8 j and 10 c of the CBD to promote the wider application of indigenous knowledge, innovations and practices by actively involving indigenous peoples and local communities with their consent in the planning and implementation of 'Research and Training' (Art 12), 'Public Education and Awareness' (Art 13), 'Exchange of Information' (Art 17.2) and 'Technical and Scientific Cooperation' (Art 18.4)*

Capacity requirements of Academia and Research Institutions may include but not be limited to:

- 1) *Capacity for curriculum development, training, research and technical support and institutional capacity for ABS and biodiversity.*
- 2) *Capacity to use IP systems and community-public-private partnerships in commercialization of research results*
- 3) *Capacity to increase collaboration and understanding between researchers and indigenous peoples and local communities.*
- 4) *Capacity to ensure communication, education and public awareness regarding ABS*

Capacity requirements of the Private Sector may include but not be limited to:

- 1) *Capacity for bioprospecting and to ensure best practice ABS processes and agreements i.e. PIC, MAT and benefit sharing*
- 2) *Capacity to identify and utilize business opportunities that arise from being ABS compliant*

- 3) *Differentiated capacity development for different kinds of businesses relating to ABS which include contract negotiation, product development, creating good value chains, access to markets and sustainable management and utilization of natural resources*
- 4) *Capacity to ensure communication, education and public awareness regarding ABS*

IV. Nature (UNEP/CBD/WG-ABS/7/7)

Operational text

The International Regime shall be a comprehensive legally binding instrument containing among others a set of principles, norms, rules and compliance and enforcement measures.