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COLLATION OF OPERATIVE TEXT INCLUDING RELATED EXPLANATIONS AND RATIONALE SUBMITTED BY PARTIES, GOVERNMENTS, INTERNATIONAL ORGANIZATIONS, INDIGENOUS AND LOCAL COMMUNITIES AND RELEVANT STAKEHOLDERS ON TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES, CAPACITY AND NATURE

Note by the Executive Secretary

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INTRODUCTION

1. In paragraph 9 of its decision IX/12, the Conference of the Parties invited Parties, other Governments, international organizations, indigenous and local communities, and relevant stakeholders to submit, for further elaboration and negotiation of the international regime on access and benefit-sharing, views and proposals including operational text, where relevant, in respect of the main components listed in the annex I to decision IX/12, preferably with supporting rationale.
2. In paragraph 10 of the same decision, the Executive Secretary was requested “to compile the submissions received and to collate in three separate documents:
 - (a) Any operative text submitted;
 - (b) Operative text including related explanations and rationale;
 - (c) Any other views and information;by subject matter, in accordance with annex I to decision IX/12 and as indicated in the submissions, and to identify in the collation the respective sources.”
3. At the seventh meeting of the Working Group on Access and Benefit-sharing, it was agreed that, in keeping with paragraphs 9 and 10 of decision IX/12, Parties, Governments, international organizations, 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 annex I to decision IX/12 that had not been addressed at the seventh meeting, namely: nature, traditional knowledge associated with genetic resources, and capacity-building.
4. In accordance with the above, in notification 2009-050 of 11 May 2009, the Executive Secretary invited Parties, Governments, international organizations, indigenous and local communities and relevant stakeholders to provide their submissions by 6 July 2009.
5. The present document provides a collation of operative text including related explanations and rationale submitted by Parties, Governments, international organizations, indigenous and local communities and relevant stakeholders. As requested, the text follows the structure and text of annex I to decision IX/12 and includes submitted operative text including related explanations and rationale under each heading. While the submissions on nature are not strictly speaking “operative text” they are included in the present document to facilitate the work of the Working Group.
6. In light of the decision taken at the seventh meeting of the Working Group on Access and Benefit-sharing to no longer distinguish between bricks and bullets, the sub-headings under traditional knowledge associated with genetic resources and capacity-building are consecutively numbered and are no longer separated between “Components to be further elaborated with the aim of incorporating them in the international regime” and “Components for further consideration”.
7. In addition, submissions received by the Secretariat on these topics prior to the seventh meeting of the Working Group have also be included in this document.

**OPERATIVE TEXT INCLUDING RELATED EXPLANATIONS AND RATIONALE RELATED
TO TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES,
CAPACITY AND NATURE FOLLOWING THE STRUCTURE OF ANNEX I TO
DECISION IX/12 ^{1/}**

III. MAIN COMPONENTS

D. *Traditional knowledge associated with genetic resources*²

Canada

1. For the purposes of paragraphs 2 and 3 below, “associated traditional knowledge” means knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity that are:

- (a) associated with an *in-situ* genetic resource; and
- (b) not in the public domain.

2. Each Contracting Party [should][shall] include a requirement in national legislative, policy, or administrative measures that:

- a) a person accessing associated traditional knowledge identify that it is being accessed;
- b) access to associated traditional knowledge is obtained with the approval and involvement of the indigenous or local community that holds it;
- c) access to associated traditional knowledge is based on mutually agreed terms;
- d) mutually agreed terms should be developed at the community level; and
- e) mutually agreed terms address access to, uses of, and benefit sharing arising from the use of the associated traditional knowledge.

3. Each Contracting Party [should] [shall] establish appropriate consultative arrangements to include indigenous and local communities in the development of the legislative, policy or administrative measures about associated traditional knowledge.

Colombia³

PART 2. GENERAL PROVISIONS

Article 7- Associated traditional knowledge, innovations and practices

¹ For ease of reference, the text of annex I to decision IX/12 reproduced in this document has been shaded. In accordance with the decision taken at the seventh meeting of the Working Group on Access and Benefit-sharing to no longer distinguish between bricks and bullets, the sub-headings under “Traditional knowledge associated with genetic resources” and “Capacity” are consecutively numbered.

² The title is without prejudice to the eventual scope of the international regime.

³ Sections of the submission by Colombia contained in this document are drawn from an unofficial translation provided by Colombia. The original version of the submission by Colombia is in the Spanish language.

Access and benefit sharing arrangements relating to associated traditional knowledge should be regulated according to national legislations and according with the arrangements and provisions of the Working Group on Article 8(j).

Parties should recognize and respect the rights of indigenous and local communities regarding their associated traditional knowledge, innovations and practices.

The utilization of traditional knowledge, innovations and practices associated to biological and genetic resources will be subject to the prior informed consent - PIC of the bearers of such knowledge, innovations and practices and to the fair and equitable sharing of the benefits arising from that utilization.

Parties shall ensure that the commercial or any other utilization of genetic resources does not go in detriment of the traditional uses of such resources on behalf of indigenous and local communities, as appropriate.

Access to genetic resources and their derivatives will respect customs, traditions, values and customary practices of indigenous and local communities.

Parties shall develop, adopt or recognize national and/or local *sui generis* systems for the protection of traditional knowledge, innovations and practices associated with genetic resources.

India

Parties shall take measures to ensure fair and equitable sharing of benefits arising from the use of traditional knowledge associated with genetic resources in consultation with the holders of such knowledge.

Mexico⁴

Recognizing the rights of indigenous and local communities to protect their knowledge, innovations and practices associated with genetic resources, and in order to ensure fair and equitable benefit-sharing as a result of their use, subject to the national legislation of those countries where said communities are located.

Reaffirming the Parties' commitment to implement the provisions of decision IX/13 on "Article 8(j) and its related provisions", especially those concerning the "Development of elements of *sui generis* systems for the protection of traditional knowledge, innovations and practices".

Namibia on behalf of the African Group

Operative text

Contracting Parties shall:

- a. With the full and effective participation of the ILCs concerned support and facilitate local, national and/or regional community protocols regulating access to TK taking into consideration the relevant customary laws and ecological values of ILCs in order to prevent

⁴ Sections of the submission by Mexico contained in this document are drawn from a translation provided by Mexico. The original version of the submission by Mexico is in the Spanish language.

the misappropriation of their associated TK and to ensure the fair and equitable sharing of benefits arising from the utilization of such associated TK.

- b. Ensure that any acquisition, appropriation or utilization of TK in contravention of the relevant community protocols constitutes an act of misappropriation.
- c. Ensure that the application, interpretation and enforcement of protection against misappropriation of TK, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the ecological values, customary norms, laws and understandings of the holders of the knowledge.
- d. Encourage and support the development of community protocols that will provide potential users of TK with clear and transparent rules for access to TK where associated TK is shared between: (i) ILCs spread across national boundaries and (ii) between ILCs with different values, customary norms, laws and understandings.
- e. Where such community protocols are developed with the full and effective participation of ILCs, give effect to such community protocols through an appropriate legal framework.
- f. Community protocols in their efforts to prevent misappropriation of associated TK and ensure fair and equitable benefit sharing must also make efforts to respect, preserve and maintain relations within and between ILCs that generate and sustain the TK by ensuring the continued availability of TK for the customary practice, use and transmission.

Related explanations and rationale

Community Protocols

The knowledge, innovations and practices of ILCs emerge at the intersection of their lands and culture. Art 8 j states that that ILCs embodying traditional lifestyles have conserved and sustainably used biological diversity and aspects of those lifestyles relevant to the conservation and sustainable use of biological diversity must be protected and promoted by Contracting Parties. Art 8 j also recognizes the rights of ILCs over their traditional knowledge, innovations and practices and obliges Contracting Parties to ensure that benefits arising from the use of such knowledge, innovations and practices are fairly and equitably shared with the ILCs in question.

The dominant interpretation of Art 8 j in the current negotiations towards the IR on ABS seems to focus on the protection of the TK of ILCs and ensuring the fair and equitable sharing of benefits arising from the use of such TK with the ILCs from whom it was taken.

Art 8 j however is far wider in its reach and should be read in the broader context of the CBD, particularly its aims of conserving and sustainably using biodiversity. Article 8 j is clear that the conservation and sustainable use of biological diversity in the context of ILCs is dependent on aspects of their TK which is rooted in their 'ecological values'. This is the reason why Art 8 j does not refer to the protection and promotion of all the TK of all ILCs but specifically the TK of ILCs embodying traditional lifestyles relevant to the conservation and sustainable use of biodiversity. Such ecologically integral TK is based on a value framework that regulates the relationship between the cultures of ILCs and their lands. Thus TK relevant for the conservation and sustainable use of biodiversity rests on 'ecological values' which in turn rests on secure rights to land and culture. The truth of the matter is that ILCs have conserved and sustainably used biological diversity for thousands of years not because they have been able to trade in their TK but because they have been able to live on their traditional lands in accordance with their 'ecological values'.

ABS in the context of ILCs focuses inordinately on an agenda of TK protection that perceives TK outside of the relationships which generate it, divorcing it from the ecological values that lead to its formation. The relations that the ILCs have with nature is one of a perpetual dialogue between land and culture each constituting and reconstituting the other. Ecological values are therefore rooted in an experience of relatedness between community and nature. Current IPR systems perceive TK in a manner that is quite similar to conventional property systems where land for example is viewed as a commodity separate from the network of relations within which it operates. TK is also viewed as an object separate from the cultural and spiritual relationships with the land within which it is embedded.

TK in reality is the manifestation of a particular kind of relationship with nature. TK is not just information but a set of relations that is embodied in traditional lifestyles of ILCs which ensure conservation and sustainable use of biodiversity. Currently there are no internationally agreed definitions of traditional knowledge and all efforts towards defining it tend to treat it as a product rather than as a process.

Efforts to protect traditional knowledge should be oriented less towards protection of knowledge as information and more towards sustaining the relationships based on ecological values that produce the knowledge. It is the ecological values that have sustained indigenous peoples within natural habitats, and the erosion of these values through the dispossession of indigenous lands and consequent annihilation of their cultures has seriously threatened biological diversity. To treat TK as a commodity and to assume that protecting this commodity will ensure conservation and sustainable use of biological diversity is akin to thinking that the sale of ivory will necessarily lead to the conservation of elephants and their habitats.

Community Approaches to Art 8 j:

The real extent of Art 8 j mandates Contracting Parties to go beyond creating databases of TK and ensuring benefit sharing when TK is utilized. The process and the outcome of ABS negotiations must uphold the spirit of Art 8 j and to do so the emphasis should not just be on the sale of TK but focus equally on the conservation and sustainable use of biological diversity and protection and promotion of traditional lifestyles including rights to land and culture. This implies ensuring that the ecological values of the ILCs in question are central to all stages of the ABS negotiation i.e. at the stage of 'PIC', 'MAT' and 'benefit sharing'.

While the overarching framework of ecological values within which ABS agreements must be negotiated does not preclude monetary and non-monetary benefits to ILCs in exchange for the use of their TK, these benefits should not be the sole aim of ABS agreements. The process and the outcome of an ABS agreement between ILCs and the relevant stakeholders must affirm aspects of their traditional lifestyles that conserve and sustainably use biological diversity.

Contracting Parties are also bound by Art 8 j to ensure the wider application of the TK and by inference the ecological ethics of ILCs. This implies that ILCs must be integrally involved in Research and Training (Art 12) and Public Education and Awareness (Art 13). Art 12 and 13 must be read with Art 8 j where the research and training and public education is not only done by scientists, technical experts and ecologists but also by ILC representatives, elders and healers who have ensured the conservation and sustainable use of biodiversity by virtue of their lifestyles. ILCs have much to teach the world about their 'ecological values' and how they can be applied in non-traditional contexts – an application that would lead to genuine in situ conservation by challenging contemporary consumption patterns and lifestyle choices. Art 10c and 18 (4) already point us in this direction and we would do well to pay heed to them.

Conclusion- Working towards Community Protocols:

In order for ILCs to realise the full extent of their rights under Art 8 j it is crucial for them to develop community protocols based on their 'ecological values' that will inform all future ABS negotiations between them and other stakeholders who want access to their TK. While the ILCs themselves may be aware of their 'ecological values' on which their traditional lifestyles are based, setting them out in the form of community protocols would give parties interested in accessing the TK of ILCs clear guidelines as to the ethical preconditions and terms of potential ABS agreements. Community protocols amongst ILCs that are spread across national boundaries and/or between ILCs that share the same TK but belong to different cultural and ethnic groups would also be the only way in which to provide potential non community users of TK transparent instructions as to how and from whom to secure PIC, negotiate MAT and share benefits with.

States can at best insist that any access to TK must be based on ABS agreements with communities to whom the TK belongs, but neither national nor international law can go any further than this. It is communities to whom the TK belongs that must through community protocols guide parties interested in using TK on how to secure legitimate use rights. If this is not done than every potential user of TK despite having negotiated an ABS agreement risks being accused of misappropriation by: (i) either the community members who feel that the community representative who negotiated the agreement had no authority to do so or (ii) by other communities that share the same TK who feel that they were wrongfully excluded from the ABS agreement.

The process of developing community protocols would involve communities developing ethical guidelines for ABS negotiations and agreements involving their TK that include but go beyond highlighting best practice standards for obtaining PIC and MAT. A community protocol is an outlining of ecological values on which PIC, MAT and benefit sharing would be based. A useful analogy for a community protocol would be the 'bill of rights' in the Constitution of a country that lists the core values of a people. It enunciates a community's core values and while it remains a flexible instrument, it provides community members and outside interests a level of certainty about the principles upon which any ABS agreement will be negotiated.

Community protocols are perhaps the best chance for ILCs to ensure that their ways of life and values are respected and promoted. Merely relying on the benefits of ABS agreements without affirming their 'ecological values' would reduce ILCs to sellers of TK who warm themselves on the embers of a lifestyle that is fast dying out.

Norway

Operative text

Indigenous peoples and local communities shall be consulted by the appropriate national authorities, and their views taken into consideration, when their rights are associated with the genetic resources being accessed or where traditional knowledge associated with these genetic resources is being accessed, including:

- a) When determining access, prior informed consent, and when negotiating and implementing mutually agreed terms, and in the sharing of benefits;
- b) In the development of a national strategy, policies or regimes on access and benefit-sharing.
- c) Appropriate consultative arrangements, such as national consultative committees, comprising relevant stakeholder representatives, should be established.
- d) Providing information in order for them to be able to participate effectively;

- e) Prior informed consent of indigenous peoples and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices, in accordance with their traditional practices, national access policies and subject to national legislation.
- f) Documentation of traditional knowledge, innovations and practices, should be subject to the prior informed consent of indigenous peoples and local communities;
- g) Providing support for capacity-building, in order for them to be actively engaged in various stages of access and benefit-sharing arrangements, such as in the development and implementation of mutually agreed terms and contractual arrangements.

1) 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 Convention on Biological Diversity

Mexico

1. Users must obtain prior informed consent from the indigenous and local communities possessing traditional knowledge associated with genetic resources, in accordance with Article 8 (j) of the Convention on Biological Diversity, subject to the national legislation of the countries in which said communities are located.
2. In accordance with Article 15.7 of the Convention on Biological Diversity, the users and indigenous and local communities possessing traditional knowledge associated with the genetic resources of the Contracting Party where said communities are located, shall, under mutually agreed conditions, define the terms under which they will share, in a fair and equitable manner, the results, development and benefits derived from the various uses of genetic resources and the traditional knowledge associated with said resources, including scientific research and commercial use.
3. Each Party shall stipulate in its national legislation measures to ensure the fair and equitable sharing of benefits derived from the use of genetic resources and/or associated traditional knowledge. These measures shall include mutually agreed terms and prior informed consent.”
4. The conditions for equitable sharing in the benefits derived from the use of traditional knowledge, innovations and practices associated with genetic resources shall be stipulated in terms mutually agreed upon, in accordance with national legislation: a) between indigenous and local communities and users; or b) between users and the national authority of the supplier country, with the active participation of the indigenous and local communities involved, and prior informed consent.

BIO and PhRMA

Operative text

“Parties may require that prior informed consent for access to knowledge, innovations, and practices referred to in Article 8(j) shall be obtained based on mutually agreed terms between the provider and the user in accordance with the Convention.”

“The International Regime shall not apply to knowledge, innovations, and practices referred to in Article 8(j) which, for the Party concerned, have fallen into the public domain.”

Related explanations and rationale

BIO and PhRMA support further consideration of measures to ensure the fair and equitable sharing of benefits with traditional knowledge holders. However, any such measures should be clear and transparent to ensure legal certainty regarding the access of traditional knowledge and benefit-sharing arising therefrom.

The CBD and the Bonn Guidelines are based on the fundamental principle that access and equitable benefit-sharing will be based on mutually agreed terms. This principle appears to be adaptable to associated traditional knowledge.

In addition, any provision relating to traditional knowledge should not attempt to regulate or repatriate information that has entered, or may enter, the public domain (i.e., where the information is now available for use or known or used by others outside the relevant indigenous or local community without restriction). This could have significant ramifications beyond the CBD context and would provide great uncertainty.

2) Measures to ensure that access to traditional knowledge takes place in accordance with community level procedures

Mexico

1. The Parties, in accordance with the principles of international law and their national legislation, shall recognize the traditional forms of organization of each indigenous and local people and community.
2. Regarding access and the use of traditional knowledge associated with genetic resources, the Parties shall include prior free and informed consent, as well as the Mutually Agreed Terms, in the Contract, wherein the benefits to be obtained, whether monetary or not, shall be specified, without in any way limiting the indigenous and local communities' ability to seek advisory mechanisms for the sharing of benefits."

3) Measures to address the use of traditional knowledge in the context of benefit-sharing arrangements

4) Identification of best practices to ensure respect for traditional knowledge in ABS related research

5) Incorporation of traditional knowledge in development of model clauses for material transfer agreements

6) Identification of individual or authority to grant access in accordance with community level procedures

Mexico

1. In accordance with the traditional forms of organization of each indigenous and local community, the latter shall define the appropriate authorities and entities to serve as

interlocutors in order to grant, or not, access to and use of traditional knowledge, innovations and practices associated with genetic resources.

7) Access with approval of traditional knowledge holders

Mexico

1. Without prejudice to the sovereignty of States over their natural resources and the authority of national governments to determine access to genetic resources, access to the associated traditional knowledge of indigenous and local communities shall be subject to their prior informed consent

8) No engineered or coerced access to traditional knowledge

Mexico

1. The Parties shall consider, within their national legislation, appropriate measures to recognize, protect, respect and safeguard the rights of the holders of traditional knowledge associated with genetic resources.
2. In accordance with Articles 8(j) and 15.5 of the Convention, access to genetic resources shall be subject to prior informed consent.
3. Any undue acquisition or appropriation, or inadequate use of the traditional knowledge associated with genetic resources, shall be subject to sanctions established in national legislation.

9) Prior informed consent of, and mutually agreed terms with, holders of traditional knowledge, including indigenous and local communities, when traditional knowledge is accessed

10) Internationally developed guidelines to assist Parties in the development of their domestic legislation and policies

11) Declaration to be made on the internationally recognized certificate as to whether there is any associated traditional knowledge and who owners of traditional knowledge are

12) Community-level distribution of benefits arising out of traditional knowledge

E. Capacity

Canada

1. Contracting Parties [should][shall] cooperate in the development and/or strengthening of human resources and institutional capacities with regards to access to genetic resources and benefit sharing 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, sub-regional and national institutions and organizations and, as appropriate, through facilitating private sector involvement.

2. The needs of developing country Parties, in particular the least developed and small island developing States among them, for financial resources and access to genetic resources and transfer of

technology in accordance with the relevant provisions of the Convention, [should][shall] be taken into account in implementing paragraph 1.

3. Developing country Contracting Parties [should] [could] identify national needs and priorities, including those of indigenous and local communities, for capacity-building in access and benefit sharing of genetic resources and provide this information to the Secretariat for distribution through the Clearing House Mechanism of the Convention.

4. Cooperation in capacity-building [should][shall] include scientific and technical training in the management of genetic resources.

5. Parties [should][shall] exchange information on best practices, as appropriate, in the domestic implementation of the international regime and the use of genetic resources and benefit sharing in enhancing sustainable development.

Colombia

PART 2. GENERAL PROVISIONS

Article 4- Measures to promote and encourage compliance

Capacity Building

4.1. The Parties agree to make all the necessary efforts to strengthen compliance on behalf of the users of genetic resources, their derivatives and associated traditional knowledge innovations and practices, in order to comply with and respect the national and foreign ABS laws, including prior informed consent - PIC and mutually agreed terms - MAT. Parties shall encourage and cooperate in the training of patent examiners for the study of patent applications related to genetic resources, their derivatives and associated traditional knowledge, innovations and practices, particularly the determination of the state of the art, so as to guarantee the rights of countries of origin and bearers of such knowledge.

The Secretariat of the CBD will establish a fund to support joint programs with the objective described. This fund will be established within 6 months following to the entry into force of this Regime, and will be constituted by donations from developed countries, among other contributions.

The Parties agree to create a program to support the required institutional developments in each country, especially developing countries, for the implementation of the commitments establish in this international regime, including certificate of compliance and disclosure of origin.

Mexico

1. The Parties shall cooperate in the development and/or strengthening of human resources and institutional capacities for the purpose of the effective implementation of this International Regime, including through existing global, regional, subregional and national institutions and organizations and, as appropriate, through facilitating participation of all involved stakeholders.

2. Contracting Parties shall undertake capacity building measures at all relevant levels particularly in the following items:

- a) Development of national legislation
- b) Participation in negotiations, including contract negotiations
- c) Information and communication technology

- d) Monitoring and enforcing compliance
- e) Access and benefit-sharing

3. Contracting Parties shall undertake national capacity self-assessments to be used as a guideline for minimum capacity-building requirements
4. Contracting Parties shall undertake capacity building measures for technology transfer and cooperation
5. Contracting Parties shall undertake special capacity-building measures for ILCs
6. Contracting Parties shall where required provide support for the development of menus of model clauses for potential inclusion in material transfer agreements.
7. Facilitate adequate funding and capacity building for effective participation in the Access and Benefit-sharing Clearing House Mechanism, taking into account the special needs of developing country Parties, in particular the least developed among them and small island developing States, and countries with economies in transition as well as countries that are centers of origin and centres of genetic diversity;
8. Assist Parties to implement this International Regime on Access and Benefit-sharing, taking into account the special needs of developing country Parties, in particular the least developed and small island developing States among them, and countries with economies in transition as well as countries that are centres of origin and centres of genetic diversity ;

Namibia on behalf of the African Group

Operative text

1. Contracting Parties shall ensure that capacity building measures in accordance with Art 8 j and 10 c of the CBD will promote the wider application of indigenous knowledge, innovations and practices by actively involving ILCs 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).
2. Contracting Parties shall undertake capacity building measures at all relevant levels for:
 - (a) Development of national legislation
 - (b) Participations in negotiations, including contract negotiations
 - (c) Information and communication technology
 - (d) Development and use of valuation methods
 - (e) Bioprospecting, associated research and taxonomic studies
 - (f) Monitoring and enforcing compliance
 - (g) Use of access and benefit-sharing for sustainable development
3. Contracting Parties shall undertake national capacity self-assessments to be used as a guideline for minimum capacity-building requirements
4. Contracting Parties shall undertake capacity building measures for technology transfer and cooperation
5. Contracting Parties shall undertake special capacity-building measures for ILCs
6. Contracting Parties shall where required provide support for the development of menus of model clauses for potential inclusion in material transfer agreements

Norway

Operative text

Parties shall take measures to contribute to fulfilment of the Action Plan for Capacity-Building for Access to Genetic resources and Benefit-sharing as laid down in COP Decision VII/19. The Action Plan should provide a framework for identifying country and stakeholder needs, priorities and mechanisms of implementation and sources of funding.

1) Capacity-building measures at all relevant levels for:

(a) Development of national legislation

(b) Participation in negotiations, including contract negotiations

(c) Information and communication technology

(d) Development and use of valuation methods

(e) Bioprospecting, associated research and taxonomic studies

(f) Monitoring and enforcing compliance

(g) Use of access and benefit-sharing for sustainable development

2) National capacity self-assessments to be used as a guideline for minimum capacity-building requirements

3) Measures for technology transfer and cooperation

4) Special capacity-building measures for indigenous and local communities

5) Development of menus of model clauses for potential inclusion in material transfer agreements

6) Establishment of a financial mechanism

IV. NATURE

Text of decision IX/12, annex I

Compilation of proposals on nature^{5/}

1. Recommendation of Co-Chairs of the Working Group

Options

1. One legally binding instrument

⁵ These proposals were neither discussed, negotiated nor agreed.

2. A combination of legally binding and non-binding instruments
3. A non-binding instrument

2. Submissions

Option 1

The international regime should be legally binding. In addition, it should stress more cooperative enforcement between parties and not refer conflicts primarily to private international law, which is not only expensive, but also a strain on resource poor countries.

Option 2

1. One legally binding instrument
2. A combination of legally binding and/or non-binding instruments
3. A non-binding instrument

Option 3

The international regime shall be composed of a single legally binding instrument containing a set of principles, norms, rules and compliance and enforcement measures.

Option 4

The nature should be discussed after deliberations of the substance of an international regime are completed. For the time being, Japan suggests the following: the international regime could be composed of one or more non-binding instruments within a set of principles, norms, rules and decision-making procedures.

Option 5

The international regime should be composed of one or more legally binding and/or non-binding instruments within a set of principles, norms, rules and procedures, legally binding and non-binding.

India

The international regime shall be composed of a single legally binding instrument containing a set of principles, norms, rules and compliance and enforcement measures.

Mexico

Mexico considers that the nature of the International Regime should be legally binding, though it could incorporate voluntary mechanisms and even mechanisms combining both criteria (combined mechanisms).

I. Compulsory mechanisms to ensure the fulfilment of IR-ABS

- 1) Prior informed consent (PIC) to obtain access to the Genetic Resource (GR) and associated Traditional Knowledge (TK) under conditions of equality (non-discrimination), in accordance with Article 15 of the Convention on Biological Diversity (CBD), establishing the specific use of the GR and the TK for which the said PIC has been granted.
- 2) Mutually agreed terms (MAT), establishing the terms under which there shall be a fair and equitable sharing in the benefits, whether monetary or not. Art. 15.7 of the CBD.
- 3) Certificate of Fulfilment, as a compulsory and legal international document, to be issued by a National Authority.
- 4) A fair and equitable sharing of the benefits derived from the use of genetic resources and the traditional knowledge associated with genetic resources.
- 5) Development of an International Registry of certificates of fulfilment.

- 6) Designation of a Competent National Authority and National Focus Point.
- 7) Definition of National Verification items in the Certificate of Fulfilment.
- 8) Respect for the rights of indigenous and local peoples and communities in the terms of relevant international instruments.
- 9) Mechanisms to prevent the undue appropriation and use of the TK associated with genetic resources, in accordance with the text of Article 8(j) of the Convention on Biological Diversity (CBD).
- 10) Establishment, in national legislations, of sanctions and corrective measures in cases of non-fulfilment.
- 11) Establishment of financial support mechanisms for the implementation of IR-ABS in developing countries.
- 12) The IR-ABS and other multilateral treaties concerning access and benefit-sharing derived from the use of genetic resources shall be implemented in a harmonious and mutually supportive manner.
- 13) Establishment of an international fulfilment mechanism (as in the Basle Convention, the Cartagena Protocol on Bio-Security, etc.)

II. Voluntary implementation mechanisms

- 1) Codes of conduct (codes of ethics) which could be by sector (for example, those established for researchers by the Kew Botanical Gardens)
- 2) Arbitration procedures
- 3) Resource management funds
- 4) Advisory mechanisms for indigenous peoples and local communities

III. Combined mechanisms (compulsory-voluntary implementation)

- 1) Dispute settlement (clause for controversy resolution)
- 2) Model clauses for PIC and MAT.

Namibia on behalf of the African Group

The International Regime should be composed of a single legally binding instrument containing among others a set of principles, norms, rules and compliance and enforcement measures

Norway

The regime should be composed of, but not limited to, a single legally binding international agreement, namely a Protocol under the CBD. It should *inter alia* build upon and further develop the Bonn Guidelines.

BIO and PhRMA

BIO and PhRMA support the view that it is premature to agree to a “binding” International Regime at this time. This is based on a number of factors, including: (i) many countries have only recently implemented or have not yet implemented national ABS systems; (ii) until further experience is gained, maximum flexibility should be afforded under the CBD while still documenting best-practices and norms to enhance operability of the agreement; and (iii) further consideration of utility of existing mechanisms, i.e., ABS agreements, alternative dispute resolution mechanisms, etc., should be pursued prior to entering into a binding regime.

However, we recognize that, after further development of the substance of the International Regime, the nature of the International Regime may need to be further considered. In that light, at the present time, the ABS Working Group should not preclude any outcome. Therefore, we suggest retaining Option 2 from the list of Options in the Annex to Decision IX/12 at this time, that is the International Regime shall be comprised of:

1. One legally binding instrument
2. A combination of legally binding and/or non-binding instruments, or
3. A non-binding instrument

This Option would maintain all scenarios without prejudice to the outcome of the negotiations. Once the substantive provisions are more fully developed, then a more informed discussion may take place regarding the nature of the International Regime.

IIED and partners

In order to improve implementation of the CBD's third objective on Access and Benefit-sharing (ABS), the International Regime should be a legally binding instrument. Experience suggests that this objective is not being effectively implemented. Fifteen years after the CBD entered into force, the number of countries that have received benefits and the number of ABS agreements remains fairly limited. Although many developing countries (providers) have introduced national legislation on ABS, very few user countries have done so. A legally binding international regime is needed to ensure that the CBD's third objective is also actively implemented in user countries. Otherwise, commercial users of genetic resources can access genetic resources that have already been transferred to their countries, or gain access through other institutions sourcing the materials in-country, with no obligation to implement these objectives. This means that the onus to comply with ABS regulations falls on intermediary organisations in developing countries, which cannot afford the extra costs. Thus, a legally binding international regime is needed to ensure that the commercial end-users in industrialised countries that generate the benefits also comply with ABS regulations.

The ABS objective underpins the whole CBD – at the Rio Earth Summit, biodiversity-rich but resource-poor countries agreed to protect the biodiversity in their countries and forego economic opportunities in return for a share of the benefits from the use of genetic resources. The 2002 World Summit on Sustainable Development (WSSD) Plan of Implementation called on governments to improve implementation of the CBD's ABS objective by negotiating an international ABS regime. The CBD COP Decision VII/19 mandated the ABS Working Group to develop an international regime “with the aim of *adopting an instrument/instruments to effectively implement* the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention” (emphasis added). This language strongly implies that the regime should be legally binding. A non-binding regime would add little value – we already have the widely respected voluntary Bonn Guidelines on ABS. Thus, we urge the governments of industrialised countries in particular to take their commitments seriously and join other CBD Parties in developing a legally binding ABS regime, with an effective enforcement mechanism that can ensure compliance by all Parties, in order to effectively implement all three objectives of the CBD.
