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AD HOC OPEN-ENDED WORKING GROUP

ON ACCESS AND BENEFIT-SHARING

Fifth meeting

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Item 3 of the provisional agenda*

COMPILATION OF SUBMISSIONS BY PARTIES ON EXPERIENCES IN DEVELOPING AND IMPLEMENTING ARTICLE 15 OF THE CONVENTION AT THE NATIONAL LEVEL AND MEASURES TAKEN TO SUPPORT COMPLIANCE WITH PRIOR INFORMED CONSENT AND MUTUALLY AGREED TERMS

Addendum

SUBMISSION BY AUSTRALIA

Note by the Executive Secretary

1. The Secretariat is circulating herewith, as an addendum to the original compilation of submissions on this subject (UNEP/CBD/WG-ABS/5/INF/2 of 20 July 2007), a submission from the Government of Australia on measures taken to support compliance with prior informed consent and mutually agreed terms.
2. The contribution has been reproduced in the form and language in which it was received.

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

AUSTRALIA

Introduction

1. Under the Convention on Biological Diversity's (CBD) provisions on Access and Benefit Sharing (ABS) of genetic resources and the Bonn Guidelines a number of tools and measures are identified to encourage and ensure compliance. These include clear national legislation, sound administration of national regulations, outreach awareness-raising amongst users of genetic resources, a strong contractual system, and recourse to enforcement.
2. Effective national legislation is the starting point for ensuring compliance, as there cannot be compliance without clear and enforceable legislation. Regulations should clearly set out what genetic resources are covered, and in which situations prior informed consent is required. Approval processes for ABS activities outlined under the legislation should be simple, timely and low-cost, providing legal certainty for both users and providers, without creating impediments and administrative blockages which create disincentives for research bodies and the biotechnology industry.
3. The vast majority of users want to act in good faith and comply with national regulations, as to be accused of biopiracy would cause significant damage to the reputation and financial standing of a research institute or biotechnology company, and put future opportunities at risk, even if unproven. Allegations of biopiracy would make it difficult for research institutes and commercial enterprises to negotiate legitimate ABS agreements with other parties and access potential funding sources, likely causing significant loss of commercial opportunities which may be available to their competitor. With this in mind, the most likely cause of non-compliance on the part of users is ignorance, rather than any conscious decision to pursue biotechnology activities in a manner which does not comply with national laws.
4. Therefore, outreach to industry groups by Governments to explain domestic regulation on access and benefit sharing is an essential part of encouraging compliance. This has been particularly important in Australia, with our federal system and complex web of existing property rights. Australia has found that the awareness within the scientific community of the CBD's provisions and national legislation has increased significantly with Government outreach efforts. These outreach efforts have also identified that users and potential users are anxious to receive further information on national and international developments in the CBD and are concerned to ensure that their internal compliance policies are adequate and up to date.
5. The Commonwealth, Queensland and the Northern Territory (the three jurisdictions with ABS legislation in place) continue to work closely with researchers and the biotechnology industry to highlight requirements under ABS regulations. For example, in order to assist foreign researchers better understand compliance obligations, the Commonwealth ABS requirements have been translated into Japanese and provided to the Japanese Biotechnology Association.
6. In Queensland, cooperation between the biotechnology industry and the Government, led to the development of a Biotechnology Code of Ethics, which all biotechnology companies working with the State Government must adhere to. The development of such a code demonstrates the willingness of users of genetic resources to comply with local ABS regulations and could serve as a model for government/industry relations in other countries. In addition, many major research organisations in Australia have developed their own ABS compliance policies to ensure compliance and to use as a basis for education programmes.
7. Despite these efforts there may still be examples of non-compliance, and two scenarios warrant attention: firstly, where a user breaches the terms of an ABS contract, and secondly where a user takes genetic resources without a permit/contract required by national law.

Contracts: the CBD's primary compliance mechanism

8. By requiring mutually agreed terms, the CBD's provisions on access and benefit sharing envisage contracts as the primary mechanism for ensuring compliance. This is supported by Appendix 1 of the Bonn Guidelines, which suggest elements for inclusion in Material Transfer Agreements.

9. In order for contracts to be effective at ensuring compliance they should set out the identity of the proposed user, the conditions of access, the material and uses permitted by the contract, terms of benefit sharing, and provisions restricting third party transfers. While all ABS contracts should have these common elements, one of the strengths of the CBD is that it gives parties the flexibility to tailor ABS regulations to their own circumstances and for this reason, contracts will necessarily be different in each country as a result of particular legal requirements. It may also be necessary to tailor contracts for particular uses, for example, a contract covering access for the purpose of taxonomic research will not require the sample complex monetary benefit sharing provisions as a contract covering access for the purpose of commercial biodiscovery research.

10. Provisions to support compliance can, and should, be included as terms of all ABS contracts. These provisions include mandatory periodic reporting from the user to the provider, provisions on disposal of material at the conclusion of the contract, and terms restricting the transfer of material by the user to a third party.

11. In Australia, the standard contracts of the Commonwealth of Australia, the Northern Territory and Queensland all require the user to obtain the written consent of the provider before transferring material to a third party. Standard contracts in all three jurisdictions also require periodic reporting by users on their aims, activities and findings. It is also important for requirements under the contract to be practical and not create unnecessary bureaucratic burdens as this may act as a disincentive to access, and in a worst case an incentive to operate outside the ABS regime.

12. Contracts can not only encourage compliance through their terms but can also provide options in the event of breach of contract, particularly when a user and provider are located in different countries. The existing body of private international law provides a range of options for dispute resolution across national borders. Just as international commercial contracts contain provisions on choice of law and avenues of redress and enforceability, so should ABS contracts.

13. In Australian contracts, in the event of a dispute or alleged breach of contract a mediated negotiation is the usual first step. As a next step these contracts typically provide the option of parties submitting their dispute to arbitration with an independent authority or person. If arbitration fails to produce a satisfactory outcome, parties may then commence legal action in either the user or provider's country, or potentially in a third country, if agreed to under choice of law and forum provisions in the contract.

14. Under choice of law and forum principles enshrined in private international law, parties set out in the contract the jurisdiction to which they will subject any dispute resolution processes. In addition to the court system of any given country, there are a number of competent bodies set up for international dispute resolution, such as the International Chamber of Commerce's International Court of Arbitration or the International Ombudsman Organisation, which parties may select under the terms of their contract.

15. There is often a concern about the ability to enforce a judgment against an overseas domiciled organisation. In the context of ABS agreements, the particular concern is that there may be difficulties for a provider in enforcing a monetary or other judgment against a user domiciled in another jurisdiction. There is an established body of private international law on this issue which seeks to ensure that a provider would not be disadvantaged in these circumstances. For example, where two countries are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards one party can apply to have the application of an arbitral decision of one country enforced in the other country. If a foreign court has issued a judgment, this may also be enforceable in other jurisdictions provided that procedural requirements are complied with. In Australia, for example, provided a foreign judgement satisfies the requirements for enforcement and meets certain legal criteria, it will be treated as

conclusive and is capable of enforcement by Australian courts. This would mean that a monetary judgment could be enforced against the assets of an Australian-based user.

16. A comprehensive contract which provides for international dispute resolution should therefore be sufficient to allow the parties to enforce ABS contracts across national jurisdictions in accordance with the established body of private international law. This means that providers have recourse should a user domiciled or operating in a different jurisdiction breach a contract.

Penalties for illegal access of genetic resources

17. The other scenario of non-compliance which is worth examining is when a provider accesses genetic resources illegally, without an ABS contract or permit in place. In this scenario national legislation can provide penalties and sanctions. Given the importance of compliance to maintain the integrity of the ABS system and to minimise damaging effects on biodiversity, Australian jurisdictions have significant penalties in place for misappropriation of genetic resources, including prison sentences or large financial penalties. For instance, under Queensland's Biodiscovery Act, individuals taking biological material for biodiscovery without the necessary authorisation face a maximum penalty of two years imprisonment or a fine of AUD 225,000 (approx USD 175,000).

18. Again, a user being domiciled or operating in another country is not an insurmountable obstacle to countries enforcing laws against misappropriation of genetic resources. Countries can legislate against actions in other jurisdictions, such as unauthorised use or commercialisation, taken with respect to genetic resources which have been illegally misappropriated from their own jurisdiction. The ability to enforce such criminal offences may be dependent upon arrangements for extradition, mutual assistance, and foreign enforcement of judgements. For instance, Australia has bilateral agreements with a number of countries which allow the enforcement of each country's court's decisions in the other country.

19. Criminal legislation can also provide penalties, including confiscating profits made as a result of illegally misappropriating genetic resources, even if commercialisation occurs in a foreign jurisdiction. For example, under the Australian Proceeds of Crime Act, profits earned by a person as a result of illegally taking genetic resources could be confiscated. This can still occur when the offender is in a foreign jurisdiction, provided that some of their assets are located in Australia.

Conclusion

20. To conclude, effective compliance with the CBD's provisions on ABS requires clear national regulations, a strong contractual system backed by the existing body of private international law, and recourse to enforcement in the event of breach of contract or illegal access. Australia believes that our administration of ABS regulations provide the necessary tools for securing compliance. On important aspect of this is model contracts including options for recourse, appropriate choice of law provisions and options for cross-jurisdictional enforcement of the contract. Another aspect is appropriate legal mechanisms for the cross-jurisdictional prosecution for misappropriation of genetic resources.

21. While the Bonn Guidelines provide some useful points on Material Transfer Agreements and compliance, these could be developed further. Given some parties' concerns over compliance, the Working Group should look further at this question. Working Group Meetings 5 and 6 could recommend to COP9 that guidance (including model provisions) be developed for states to use as a basis for more appropriate and effective contracts. Guidance could be prepared by international private law experts, reviewed by an expert legal-scientific group, and eventually be adopted as part of the 'international regime' at COP10.
