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GROUP OF TECHNICAL AND LEGAL EXPERTS
ON TRADITIONAL KNOWLEDGE
ASSOCIATED WITH GENETIC RESOURCES IN
THE CONTEXT OF THE INTERNATIONAL
REGIME ON ACCESS AND BENEFIT-SHARING
Hyderabad, India, 16-19 June 2009

REPORT OF THE MEETING OF THE GROUP OF LEGAL AND TECHNICAL EXPERTS ON COMPLIANCE IN THE CONTEXT OF THE INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING

Note by the Executive Secretary

INTRODUCTION

A. Background

1. In paragraph 11 of its decision XI/12, the Conference of the Parties to the Convention on Biological Diversity decided:

> "[…] to establish three distinct groups of technical and legal experts on: (i) compliance; (ii) concepts, terms, working definitions and sectoral approaches; and (iii) traditional knowledge associated with genetic resources. The terms of reference of the groups, including the criteria for the selection of experts are laid out in annex II to the present decision;"

2. Section A of annex II to decision XI/12 reads:

> "1. A group of technical and legal experts on compliance is established to further examine the issue of compliance in order to assist the Working Group on Access and Benefit-sharing. The expert group shall provide legal and, as appropriate, technical advice, including, where appropriate, options and/or scenarios. The expert group will address the following questions:
>
> (a) What kind of measures are available, or could be developed, in public and private international law to:
>
> (i) Facilitate, with particular consideration to fairness and equity, and taking into account cost and effectiveness:
>
> a) Access to justice, including alternative dispute resolution;

* The document was previously circulated as UNEP/CBD/WG-ABS/7/3.

b) Access to courts by foreign plaintiffs;

(ii) Support mutual recognition and enforcement of judgments across jurisdictions; and

(iii) Provide remedies and sanctions in civil, commercial and criminal matters;

in order to ensure compliance with national access and benefit-sharing legislation and requirements, including prior informed consent, and mutually agreed terms;

(b) What kind of voluntary measures are available to enhance compliance of users of foreign genetic resources;

(c) Consider how internationally agreed definitions of misappropriation and misuse of genetic resources and associated traditional knowledge could support compliance where genetic resources have been accessed or used in circumvention of national legislation or without setting up of mutually agreed terms;

(d) How could compliance measures take account of the customary law of indigenous and local communities?

(e) Analyse whether particular compliance measures are needed for research with non-commercial intent, and if so, how these measures could address challenges arising from changes in intent and/or users, particularly considering the challenge arising from a lack of compliance with relevant access and benefit-sharing legislation and/or mutually agreed terms.

2. The expert group shall be regionally balanced and composed of thirty experts nominated by Parties and ten observers, including three observers from indigenous and local communities nominated by them, and remaining observers from, inter alia, international organizations and agreements, industry, research institutions/academia and non-governmental organizations."

3. Accordingly, the Group of Legal and Technical Experts on Compliance in the Context of the International Regime on Access And Benefit-Sharing met in Tokyo, from 27 to 30 January 2009, in accordance with the above-mentioned decisions of the Conference of the Parties, with the financial and technical support of the Government of Japan. Financial support was provided by the host country and by the Governments of Austria, Germany and Spain.

B. Attendance

4. In accordance with decision IX/12, annex II, 30 participants were selected among government-nominated experts from each geographic region, taking into account their expertise, the need to ensure faire and equitable geographic distribution, and gender balance. In addition, ten observers were selected from among representatives of indigenous and local communities, international organizations and agreements, industry, research institutions/academia and non-governmental organizations. The list of selected experts and observers was approved by the Bureau of the Conference of the Parties.

5. The meeting was attended by experts nominated by Algeria, Australia, Belarus, Brazil, Cameroon, Canada, Chile, China, Colombia, Comoros, Cuba, Denmark, India, Japan, Malaysia, Mexico, the Netherlands, Nigeria, Norway, Peru, the Philippines, the Republic of Korea, the Republic of Moldova, Senegal, Serbia, Spain, Tajikistan, Uganda, and Ukraine. The expert from Bulgaria, who had been selected and invited to the meeting, was unable to participate.

6. Experts from the following organizations participated in the meeting as observers: the Saami Council**,** Indigenous Peoples' International Centre for Policy Research and Education (Tebtebba), the FAO Commission on Genetic Resources for Food and Agriculture, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), United Nations University/Institute of Advanced Studies (UNU/IAS), the World Intellectual Property Organization (WIPO), Eli Lilly & Company, the Access and Benefit Sharing Alliance (ABSA) and the Berne Declaration. An expert of the

Instituto Indigena Brasileno para Proprieded Intelectual (INBRAPI) was invited to the meeting but was unable to participate.

7. In addition, the Co-Chairs of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, Mr. Timothy Hodges of Canada and Mr. Fernando Casas of Colombia, a representative of the host country of the tenth meeting of the Conference of the Parties (Japan), as well as a representative of the Bureau of the Conference of the Parties attended as *ex officio* observers. A representative of the United Nations Environment Programme also attended.

ITEM 1. OPENING OF THE MEETING

8. The meeting was opened at 9 a.m. on Tuesday, 27 January 2009.

9. Speaking on behalf of the host country, His Excellency Akihiko Furuya, Ambassador for Global Environment of Japan, welcomed the participants and recalled that the international regime on Access and Benefit-sharing was to be concluded at the tenth meeting of the Conference of the Parties, in the city of Nagoya. Japan had decided to host the meeting of experts in order to facilitate the negotiations and with the hope that it would provide precious insights and, thereby, contribute to bridging the gap between provider countries and users of genetic resources. Japan had also contributed to the meeting by making available Professor Hiroji Isozaki, who was the best qualified expert among Japanese professors. It was Japan's hope that the report of the meeting would provide good input and guidance to the Ad Hoc Working Group on Access and Benefit-sharing and would contribute to narrowing the gap between delegations. Indeed, for the negotiations of the international regime to be successful it was essential to ensure a correct understanding of the issues not only by delegations but also by stakeholders in the industry and civil society. Japan had spared not efforts to ensure that the meeting is held in the best possible conditions to allow participants to concentrate on substantive discussions and expressed its gratitude to the Secretariat staff for their cooperation in the organization of the meeting.

9. Mr. Olivier Jalbert, Principal Officer, Secretariat of the Convention on Biological Diversity, speaking on behalf of Mr. Ahmed Djoghlaf, the Executive Secretary of the Convention, expressed his gratitude to the Government of Japan for hosting the meeting. He emphasized the recent initiatives of the Government of Japan in support of the Convention, notably through its generous offer to host the tenth meeting of the Conference of the Parties in Nagoya, Aichi Prefecture, in October 2010, as well as its initiative to include biodiversity as a priority issue of the G8 Environment Minister's Summit, which had led to the *Kobe call for Action on Biodiversity*. Furthermore, Japan's commitment to the sustainable use of biodiversity was evidenced by the *Satoyama Initiative*, an initiative to collect and disseminate information on traditional and local knowledge based on Japan's traditional system of landscape management, which was very similar to the ecosystem approach developed under the framework of the Convention on Biological Diversity. Mr. Jalbert recalled the mandate of the Group of Technical Experts as contained in decision IX/12, annex II, of the Conference of the Parties and emphasized that the participants had been selected on the basis of their expertise and were requested to provide legal and technical expert advice on the issue of compliance, which had been at the heart of the negotiations of the international regime. This expert meeting could contribute significantly to advancing the negotiations because greater certainty and a common understanding on compliance would facilitate the negotiation of the other elements of the regime. Finally, Mr. Jalbert welcomed the Co-Chairs of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, the representative of the Bureau and the President of the tenth meeting of the Conference of the Parties to the Convention on Biological Diversity, as *ex officio* observers, and wished the participants a successful meeting.

ITEM 2. ORGANIZATIONAL MATTERS

2.1. Officers

10. At the opening session, on 27 January 2009, participants elected Prof. Hiroji Isozaki (Japan) and Ms. Dra. Monica Rosell (Peru) as Co-Chairs of the meeting.

2.2. Adoption of the agenda

11. The Group adopted the following agenda on the basis of the provisional agenda (UNEP/CBD/GTLE/2/1):

1. Opening of the meeting.
2. Organizational matters.
3. Compliance in the context of the international regime on access and benefit-sharing.
4. Adoption of the report.
5. Closure of the meeting.

2.3. Organization of work

12. At its opening session, the Group decided to work initially in plenary, with the possibility of breaking up in smaller working groups, as needed, during the following days.

ITEM 3. CONCEPTS, TERMS, WORKING DEFINITIONS AND SECTORAL APPROACHES RELATING TO THE INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING

13. In addressing the items laid down in the terms of references of the expert group, the Group had before it a Compilation of Submissions by Parties, Governments, international organizations, Indigenous People and local communities and relevant stakeholders (UNEP/CBD/ABS/GTLE/2/2), as well as the following information documents: International Standard for Sustainable Wild Collection of Medicinal and Aromatic Plants (ISSC-MAP), submitted by the International Chamber of Commerce (ICC) (UNEP/CBD/ABS/GTLE/2/INF/1), a draft Comparative Study of the Real and Transactional Costs Involved in the Process of Access to Justice Across Jurisdictions (UNEP/CBD/ABS/GTLE/2/INF/2), a draft Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions and International Law (UNEP/CBD/ABS/GTLE/2/INF/3) and draft Studies on Monitoring and Tracking Genetic Resources (UNEP/CBD/ABS/GTLE/2/INF/4).

14. During the four days of the meeting, the experts examined in-depth issues of compliance in the context of the international regime on access and benefit-sharing, based on the five questions posed by the Conference of the Parties in order to assist the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, mindful that their mandate consisted in providing legal and technical advice to the Working Group.

15. The outcome of deliberations is contained in the annex to the present report.

ITEM 4. ADOPTION OF THE REPORT

16. The present report was adopted at the final session of the meeting, at 6.30 a.m. on 31 January 2009.

ITEM 5. CLOSURE OF THE MEETING

17. Participants expressed their appreciation to the Government of Japan for hosting the meeting

18. Following the customary exchange of courtesies, the meeting was closed at 6.30 a.m. on Saturday, 31 January 2009.

Annex

OUTCOME OF THE MEETING OF THE GROUP OF LEGAL AND TECHNICAL EXPERTS ON COMPLIANCE IN THE CONTEXT OF THE INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING

1. The Group of Legal and Technical Experts on Compliance met to provide legal and technical advice, including, where appropriate, options and/or scenarios, regarding the questions identified for its consideration in decision IX/12, annex II, section A, paragraph 1. The following reflects the outcome of discussion.

(a) What kind of measures are available, or could be developed, in public and private international law to:

(i) Facilitate, with particular consideration to fairness and equity, and taking into account cost and effectiveness:

a) Access to justice, including alternative dispute resolution;

b) Access to courts by foreign plaintiffs;

(ii) Support mutual recognition and enforcement of judgments across jurisdictions; and

(iii) Provide remedies and sanctions in civil, commercial and criminal matters;

in order to ensure compliance with national access and benefit-sharing legislation and requirements, including prior informed consent, and mutually agreed terms;

2. In order to address Question (a), the experts first considered within what context the issue of compliance was to be examined and determined that they should consider whether there has been:

(a) Compliance with ABS domestic law; and

(b) Compliance with ABS agreements (contracts).

3. Although it was considered outside of the terms of reference, issues of non-compliance by Parties with CBD provisions were addressed, including reference to dispute settlement mechanisms. Also some experts suggested that the international regime may result in international components that could require a full compliance mechanism.

4. However, the experts agreed to consider in further detail situations of non-compliance with national ABS law or mutually agreed terms as reflected in ABS agreements (contracts) in order to determine in each of these situations how to:

(a) Facilitate access to justice, including alternative dispute resolution;

(b) Facilitate access to courts by foreign plaintiffs;

(c) Support mutual recognition and enforcement of judgments across jurisdictions; and

(d) Provide remedies and sanctions in civil, commercial and criminal matters.

5. The experts examined:

(a) Whether public international law and/or private international law could be applied;

(b) Whether existing instruments could be adapted; and

(c) Whether new measures could be envisaged as part of an international regime.

On the last point, additional approaches to facilitate compliance were proposed.

6. In discussions, a number of general considerations were put forward by some experts:

(a) Recognizing the sovereign rights of States over their resources, although complete harmonization of national measures was not feasible and/or desirable, the inclusion of a set of minimum requirements for benefit-sharing regimes could be included in the international regime to facilitate compliance across jurisdictions;

(b) In order to secure compliance with ABS requirements, a clearer understanding by the users and providers should be achieved (awareness raising);

(c) It would be more cost-effective, from a practical standpoint, to establish internationally agreed obligations to ensure compliance with national ABS laws and the international regime and prevent misappropriation misuse and biopiracy of genetic resources and/or associated traditional knowledge, than to divert resources to expensive and time-consuming judicial processes for addressing issues of non-compliance.

A. ABS domestic law

1) If no domestic law exists

a) What existing measures can be used to address this at national and international levels?

7. The experts first addressed the situation where no ABS legislation exists. A number of situations were considered.

8. It was recognized that, depending on its legal system, a country's ratification or accession of the Convention may require national implementing legislation to give the Convention's provisions effect as a basis for compliance.

9. In some countries ratification or accession may result in the Convention's direct incorporation into national law. However, compliance would depend on the nature and extent to which the Convention's provisions are detailed enough to be directly enforceable.

10. Bearing in mind that Article 15 of the Convention on Biological Diversity, while requiring Parties to endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses, does not compel countries to adopt access legislation, some Parties may choose not to put in place any measures on access. However, Parties have an obligation to take legislative, administrative or policy measures, as appropriate, with the aim of sharing benefits pursuant to article 15(7).

11. A situation was discussed whereby a country may not have instituted legislative measures on access and benefit-sharing potentially leaving individuals, particularly indigenous and local communities, without the possibility for a remedy. To consider those cases, the international regime could call for national legislation to ensure protection of rights to genetic resources and/or associated traditional knowledge. In countries where such national legislation is not possible as a matter of state policy the international regime could develop and/ or make references to international law principles and mechanisms to ensure that the same set of protections are accorded to indigenous and local communities. Further views on this topic were expressed under section D.

12. It might be considered that other Parties may wish to enact legislative measures but may not have the capacity to develop these. In these cases the international regime could provide for capacity-building and financial measures in order to assist Parties in developing ABS legislation, which would in turn facilitate compliance. Previous experience, for example the Cartagena Protocol, has shown that the international regime could stimulate the development of national legislation dealing with compliance. However, countries need not wait for the development of an international regime to develop their own legislation, taking into account the Bonn Guidelines.

13. Alternatively, internationally agreed minimum standards and conditions could be used as a default procedure. An industry expert added that the Working Group on Access and Benefit-sharing

should consider developing within the international regime provisions specifically addressing the needs of the majority of Parties to the Convention on Biological Diversity lacking national regimes on access and benefit-sharing so as to include minimum necessary elements to enable engagement in access and benefit-sharing activities in those jurisdictions, *inter alia*, (i) identification of National Focal Points; (ii) National Competent Authorities; (iii) establishment of a requirement that users and providers enter into written ABS agreements (contracts) to address PIC, MAT and other relevant issues.

14. However, in the absence of ABS legislation a contract could still be concluded between a provider and a user, in accordance with existing administrative and regulatory mechanisms. This contract could provide for a range of provisions to facilitate compliance with the contract, including a dispute settlement clause.

2) If breach of national law:

a) What existing measures can be used to address this?

i) Within country's territory?

15. In principle, each party has the power to develop and enforce within its own jurisdiction a range of criminal, civil and administrative options for situations constituting breach of ABS legislation and to tailor these to its own national circumstances. Nevertheless, reference can be made to section 1 (a) of this report in relation to cases where national legislation is absent.

ii) Across jurisdictions?

16. Legally, it is not possible for a provider country to enforce its criminal and administrative sanctions across jurisdictions. This should be distinguished from the situation where the provider country may seek the assistance of other countries to enforce its criminal sanctions in its own jurisdiction (e.g. mutual legal assistance and extradition in criminal matters). It has to be taken into account that bilateral treaties dealing with criminal sanctions may require proof of dual criminality in both countries and that this could be difficult since many countries do not have ABS legislation.

17. Therefore, the international regime could provide measure to facilitate international cooperation for enforcement across jurisdiction. This concept is further developed in section (c) below.

18. Examples of existing mechanisms include:

(a) Bilateral agreements such as mutual legal assistance and extradition agreements and multilateral agreements such as the *Convention against Transnational Organised Crime*. These instruments could be applicable in cases of violation of domestic ABS law, but only if their specific conditions are fulfilled in a particular case.

(b) *UNESCO Convention on the Protection of the Underwater Cultural Heritage and UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, draft WHO Protocol on the Trafficking in Illicit Tobacco Products and Substances.* These instruments address issues which are in some respects analogous to ABS issues and could be used as reference for further consideration of the violation of domestic ABS law.

b) Could existing measures be adapted to fill any gap. If so, is there a role for the international regime to address this?

19. Even if there are existing mechanisms that could serve as examples for enforcement across jurisdictions such as those listed above, the question that remains to be answered is if those instruments are sufficient. Violations of domestic ABS laws and CBD requirements could fit into some of the listed instruments, but in some cases an instrument may need to be amended, where applicable. It would be advisable to consider issues of cost, time, limits in coverage and political will. Parties may wish to evaluate the usefulness of such instruments, where used.

20. It must be considered that existing bilateral mutual legal assistance and extradition treaties are typically premised on offences with criminal intent. However, some cases of non-compliance with ABS laws result from a lack of awareness or understanding. In such cases, these treaties may not apply.

21. Nevertheless, in the event that there are existing international mechanisms to address misappropriation or misuse of genetic resources and associated traditional knowledge, this would not prevent the international regime from considering these issues.

c) Could additional international measures be envisaged to address this as part of an international regime?

i) Expand on existing bilateral arrangements for cross-border enforcement 1/

22. In order to enhance the application of existing mechanisms, some degree of harmonization could be considered in the international regime. For example, due process of law standards, mutual recognition, basic remedies and time limits. The challenge is to ensure flexibility in any harmonization requirements.

ii) Additional international measures

23. The international regime could consider the need for cooperation among Parties for cross-jurisdiction issues. The international regime could also include criteria to guide courts in addressing ABS compliance across jurisdictions.

24. Another possibility is to tailor new provisions through the international regime in order to cover the enforcement of an internationally agreed obligation for domestic legislations to provide for any user to comply with national ABS laws and/or requirements of a provider country. Also new provisions can be tailored for CBD obligations when accessing genetic resources and-or associated traditional knowledge in that provider country for using the genetic resources accessed.

25. Others felt that it would be unusual in criminal matters to agree to enforce the unexamined criminal or quasi-criminal laws of any state around the world.

26. Any additional measures should be cost-effective; should focus on efforts where there are substantial cases of non-compliance; should not be "one size fits all" in order to be efficient, to maximize the allocation of limited resources; to prevent non-compliance and, ultimately, to avoid disputes.

27. The following measures could be considered:

(a) Internationally recognized certificates of compliance 2/ as a means of confirming whether national laws have been complied with. A certificate system could avoid the difficult process of totally harmonizing substantive national laws. 3/ The international regime could address the possible consequences of not having the certificate. For example, if the international regime does not require a country to issue a certificate, or where the lack of a certificate is due to infringement of existing national access legislation, the international regime could provide remedies, sanctions, the opportunity to prove bona fide acquisition and/or the possibility to amend the situation;

(b) The certificate needs to be standardised format-wise. It could be associated with a codified unique identifier. 4/ All implications would need to be considered such as costs, benefits and feasibility taking into consideration the report of the Meeting of the Group of Technical Experts on an Internationally Recognized Certificate of Origin/Source/Legal Provenance (i.e. paragraphs 43 and 44). Examples like CITES or the Multilateral System of the FAO International Treaty could serve as reference;

1/ The introduction of an enabling clause in the IR to expedite civil liability could also be considered.

2/ Report of the meeting of the Group of Technical Experts on an Internationally Recognized Certificate, (UNEP/CBD/WG-ABS/5/7), para. 7.

3/ See the report of the Group of Technical Experts on an Internationally Recognized Certificate, (UNEP/CBD/WG-ABS/5/7).

4/ Ibid. para. 22.

(c) Checkpoints, e.g. commercial and non-commercial, including registration points beyond intellectual property rights, research funding, publishing, ex-situ collections. For example, in the context of certificates, a useful reference may be made to check points elaborated and identified in paragraphs 31-36 of the report of the meeting of the Group of Technical Experts on an Internationally recognized Certificate;

(d) A clearing-house mechanism modelled on Cartagena Protocol for information exchange. Databases could also be considered. Competent authorities could be required to register certificates in such a clearing-house mechanism;

(e) Monitoring mechanisms. One possibility is for user countries to monitor compliance with provider country national laws where such activities come to their attention, for example, via check points, and to notify provider country focal points and the clearing-house mechanism;

(f) Notification and reporting mechanisms. Provider countries could notify instances of such activities to user country focal points and the clearing-house mechanism. Another possibility is for provider countries to report information to a database on their national prior informed consent decisions;

(g) Internationally agreed obligation for the user to state that he is in compliance with the laws of a provider country at designated checkpoints;

(h) An international public participation body to conduct investigations of non-compliance able to provide fact finding reports admissible as evidence in litigation;

(i) Disclosure obligations in the patent system and marketing approval procedures to prevent misappropriation and/or misuse of genetic resources and associated traditional knowledge taking into account that disclosure is a controversial issue with several different perspectives;

(j) A mandatory requirement that detailed contracts be entered into at the time of access for bioprospecting purposes in order to avoid subsequent disputes, minimize transaction costs and provide certainty for providers and users, taking into account the relative capacities of contracting parties;

(k) A requirement to appoint a representative in the provider country for notification purposes so that administrative and/or criminal procedures can be facilitated;

(l) A dispute settlement mechanism that could resemble the individual/state mechanism as considered in bilateral investment treaties;

(m) Incentives such as preferential access including market based incentives;

(n) Traditional knowledge digital libraries, registries or other compilations, on a voluntary basis.

B. ABS agreements (contracts)

28. This section refers to bilateral ABS mutually agreed terms.

29. Mutually agreed terms may take various forms and involve different actors. In some scenarios, one of the players may be a Government and the other a private entity and in other cases both parties may be private entities.

1) If no ABS agreement (contract) exists

a) What existing measures can be used to address this at national and international levels?

30. There are no measures available addressing access and benefit-sharing, if neither ABS legislation exists nor an ABS agreement (contract) has been concluded.

2) If non-compliance with an ABS agreement (contract)

a) What existing measures can be used to address this? in public and private international law?

(i) Access to justice, including alternative dispute resolution
(ii) Access to courts by foreign plaintiffs
(iii) Mutual recognition and enforcement of judgements

Private international law

31. Contractual arrangements usually determine the way in which a dispute should be settled and include appropriate dispute settlement clauses.

32. Private international law regulates relationships between private entities across borders. In particular, it seeks to regulate (i) which jurisdiction applies to a dispute; (ii) which laws apply to the dispute; (iii) whether and how eventual decisions or judgements are recognized and may be enforced in another jurisdiction. Each State has its own national rules on conflicts of laws, but some of these may have been harmonized through conventions, guidelines and model laws.

33. There are three main organizations involved in the harmonization of private international law, namely the Hague Conference on Private International Law, the UN Commission on International Trade Law (UNCITRAL) and the International Institute for Unification of Private Law (UNIDROIT).

34. However, some of the instruments developed by the Hague Conference, 5/ UNCITRAL and UNIDROIT have only a small number of Parties and therefore only limited application or are not yet in force. It should also be noted that they mainly apply, in some cases exclusively, to commercial transactions.

35. In the situation where the defendant court is selected, issues related to financial costs and legal assistance to foreigners may arise and mechanisms are sometimes provided for in the country of the defendant. The Hague Conference has adopted a Convention on International Access to Justice, which provides that nationals of any Contracting State shall be entitled to legal aid for court proceedings in civil or commercial matters on the same conditions as if they were nationals, although this Convention has only 24 Parties. It was also noted that some States already provide, under certain circumstances, free access to justice, to both nationals and foreigners. As these measures are not available under all jurisdictions the development of a programme(s) within the international regime of legal assistance in litigation could help facilitate compliance across jurisdictions.

5/ The following conventions were adopted by the Hague Conference (http://www.hcch.net/index_en.php?act=text.display&tid=10#litigation).

- Convention of 5 October 1961 on Abolishing the Requirement of Legalisation for Foreign Public Documents;
- Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;
- Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters;
- Convention of 25 October 1980 on International Access to Justice;
- Convention of 1 March 1954 on civil procedure;
- Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods;
- Convention of 25 November 1965 on the Choice of Court;
- Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters;
- Supplementary Protocol of 1 February 1971 to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters;
- Convention of 30 June 2005 on the Choice of Court Agreements.

36. In the situation where a plaintiff would institute a case in his country, it may be difficult to enforce the judgment across jurisdictions. Enforcement will usually depend on national laws. International efforts to create a mechanism for the recognition and enforcement of foreign judgements have not been very successful. While the Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters provides for an enforcement mechanism between its Parties, it has a limited membership of four Parties.

37. The 2005 Convention on Choice of Court Agreements, adopted under the Hague Conference, once in force, will become relevant within the jurisdiction of States that are Parties to the Convention.

38. This Convention sets rules for when a court shall have and shall not decline to exercise jurisdiction where commercial parties have entered into an exclusive choice of court agreement. The Convention also provides for the recognition and enforcement of resulting judgements, with an option for States party to agree on a reciprocal basis to recognize judgements based on a choice of court agreement that was not exclusive.

39. While private international law rules do provide for cross border litigation, the absence of full harmonization, as well as the lack of capacities in developing countries and indigenous and local communities, *inter alia*, may pose challenges for the resolution of ABS disputes. The development of special provisions in the international regime on private international law could therefore be considered.

Alternative dispute resolution

40. Parties to an ABS agreement (contract) may choose to avoid difficulties arising from the absence of harmonized private international law rules, by opting for alternative dispute resolution. 6/

41. A significant advantage of alternative dispute resolution is the relative ease of enforcement of foreign arbitral awards due to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). An arbitral award originating in a country that is a Party to that Convention may be enforced in any other Party without a review of the merits except on limited specified grounds. As of 29 January 2009, the New York Convention had 144 Parties. However, exceptions to the Convention and reservations by States regarding the application of the Convention should be taken into account. A number of States have limited the application of the Convention to disputes considered as commercial under their national law. In such case the Convention would only apply to ABS agreements (contracts) considered as commercial.

42. It should also be noted that, although alternative dispute resolution mechanisms – amicable dispute resolution, conciliation, mediation, arbitration - may be less expensive than seeking redress in court, they may still remain too expensive for parties from developing countries, and especially for

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6/ The International Chamber of Commerce (ICC) adopted the following rules; ICC International Court of Arbitration and ICC 1998 Rules of Arbitration.
ICC rules of Arbitration are selected for arbitral dispute settlement under the SMTA as default rules i.e. rules of arbitration that apply failing the agreement on arbitration rules of an international body by the parties to the dispute.
The International Centre for Settlement of Investment Disputes (ICSID) adopted the following rules; Administrative and Financial Regulations; Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules); Rules of Procedure for Arbitration Proceedings (Arbitration Rules); Rules of Procedure for Conciliation Proceedings (Conciliation Rules); Administrative and Financial Rules (Additional Facility); Conciliation (Additional Facility) Rules; Arbitration (Additional Facility) Rules; Fact-Finding (Additional Facility) Rules.
The UN Commission on International Trade Law (UNCITRAL) adopted the following rules; UNCITRAL Arbitration Rules (1976); UNCITRAL Conciliation Rules (1980); UNCITRAL Notes on Organizing Arbitral Proceedings (1996); UNCITRAL Model Law on International Commercial Arbitration; UNCITRAL Model Law on International Commercial Conciliation.
Other administered systems include the London Court of International Arbitration, the American Arbitration Association, the China International Economic and the Inter-American Commercial Arbitration Commission.
The Permanent Court of Arbitration (PCA) adopted Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment 2001. PCA also adopted the Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment on 16 April 2002.

indigenous and local communities. Therefore, the international regime could consider developing a programme to provide legal assistance in these cases similar to those proposed in paragraph 35.

iv) Remedies and sanctions

43. In the case of a breach of an ABS agreement (contract), the parties to the agreement may terminate the ABS agreement (contract) or seek continued performance of the ABS agreement (contract) and/ or, if damage occurred, seek compensation for non-performance of the ABS agreement (contract), consistent with applicable jurisdictional requirements, under the applicable national law.

44. In addition, it is not considered good practice to use criminal provisions to attain civil remedies such as enforcing contracts.

v) Others

45. The listing of defaulters of ABS agreements ('Name and shame') was considered.

b) Could existing measures be adapted to fill any gaps?

46. It was suggested to further explore existing mechanisms provided by the Permanent Court of Arbitration for environment and natural resources, such as lists of possible arbitrators with specific expertise in accordance with Article 27 of the *Permanent Court of Arbitration Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment.*

c) Could additional international measures be envisaged to address this as part of an international regime

47. The following measures could be considered:

(a) A check-list could be established which inter alia allows, on a case-by-case basis, to identify relevant instruments aiming at the harmonization of private international law;

(b) Model clauses to be developed under the international regime;

(c) The possibility of including in the IR rules related to the mutual recognition and enforcement of foreign judgments was recognized. (See para. 39 above);

(d) There are a number of types of arbitration and arbitration bodies, such as the ICC International Court of Arbitration, the London Court of International Arbitration (LCIA) and the Permanent Court of Arbitration. It was suggested that the IR could provide its own arbitration mechanism, probably applying existing rules, in order to respond to the particular needs of ABS, such as the need for arbitrators with expertise in ABS, 7/ the need for expediency as well as to address issues of costs of particular concern to developing countries and indigenous and local communities;

(e) Information-exchange mechanisms involving both users and providers could be established/strengthened;

(f) The designation of national focal points and competent national authorities as well as the clarification of their roles and responsibilities and to enhance their performance, is critical to the implementation of ABS legislation;

(g) The importance of information sharing as a preventive measure was considered essential. Clear information on ABS requirements related to genetic resources and associated traditional knowledge on the one hand, and the monitoring of genetic resources by users on the other hand, is crucial;

(h) Unilateral declarations by users and due diligence were suggested as additional tools for consideration.

7/ By way of comparison, the Governing Body of the ITPGRFA may develop a list of experts from which parties to a dispute under the SMTA may choose arbitrator(s).

(b) What kind of voluntary measures are available to enhance compliance of users of foreign genetic resources;

48. A compilation of voluntary measures submitted by the Parties was provided to the experts. In relation to the list provided, it was highlighted that it might be useful to distinguish the measures listed according to criteria such as: (i) International and national; (ii) state and non-state; (iii) existing and possible future measures; and (iv) those which enhance compliance as a primary purpose and other purposes. In addition, some additional measures were suggested and added to the list. A revised version of the list is presented in an appendix to this report. Notwithstanding the measures listed additional discussion is required.

49. Some experts expressed the view, that voluntary measure are a supplementary tool which cannot substitute mandatory measures to ensure compliance.

50. The group's mandate was to identify voluntary measures to enhance compliance, not necessarily to ensure compliance. It was recognised that some voluntary measures, such as best practices and codes of conduct among others, are unilateral commitments of self-regulation by the non-state actors that developed them. These are potentially only applicable to the members of that community and those ultimately who want to apply them. They would not necessarily ensure benefit-sharing or compliance directly, but they could promote and facilitate compliance and furthermore have a useful role in building confidence and could be effective in supporting the implementation of international and national measures, whether binding or non-binding.

51. The efficacy of best practices and codes of conduct will be dependent on the will of the community that subscribes to them, and the extent to which they are supported by information and awareness campaigns. They can be self-reinforcing through peer pressure, particularly in sectors where they are already operating. Their effectiveness can also be enhanced by measures promoting transparency and a demonstration that they were actually complied with.

(c) Consider how internationally agreed definitions of misappropriation and misuse of genetic resources and associated traditional knowledge could support compliance where genetic resources have been accessed or used in circumvention of national legislation or without setting up of mutually agreed terms;

52. At the national level, terms such as "misappropriation", "misuse" and "biopiracy" do not necessarily have the same meaning. Harmonization of these concepts in the international regime could be considered.

53. If the introduction of definitions into the international regime is decided there are at least four other aspects that should be considered:

54. First, is the need for a definition. It was recognized that although definitions might be useful, even desirable, they are not essential. Several international legal instruments have successfully established rights and obligations without resorting to definitions. The use of definitions might even be regarded within the sovereign right of the State to decide within their own national context. Once a definition is established at international level, pre-existing national level definitions would need to be amended otherwise there would be problems of implementation.

55. Second, is the scope. In this case the type of actions that would be covered by terms such as misappropriation and misuse need to be clearly identified. Some experts requested the consideration of the term biopiracy.

56. Third, is the implementation in countries. Vague definitions will not enable compliance. Strict standard precision is particularly required for definitions to be used in criminal law.

57. Fourth, is the need to consider consequences. For example the international regime could provide for criminalization of certain acts in provider and user countries, the prohibition of use of genetic resources, the obligation to enter into mutually agreed terms, or allow countries to apply remedies or sanctions for breach of benefit sharing obligations among others.

(d) How could compliance measures take account of the customary law of indigenous and local communities?

58. Customary laws of indigenous and local communities generally also address natural resources, including genetic resources and associated traditional knowledge. These laws vary between indigenous and local communities in different countries and within countries. Their level of incorporation into national laws also varies between countries and within countries.

59. An effective and pragmatic way to take account of customary laws could be to ensure respect for customary law in access agreements and/or the international regime. In such cases the legal effect will be the protection of the rights of indigenous and local communities. However, there are indigenous and local communities that may not wish to enter into such agreements.

60. The respect of the rights of indigenous and local communities will constitute the basis for prior informed consent and mutually agreed terms. In particular, the involvement of indigenous and local communities representatives in the negotiation of mutually agreed terms would enable customary laws regarding genetic resources and associated traditional knowledge to be taken into account. The resulting agreement would then govern the relationship between indigenous and local communities and the user.

61. The international regime could address the rights of indigenous and local communities, including their rights to genetic resources and associated traditional knowledge. The recognition of their rights in the international regime would indirectly promote respect for customary laws in the national laws of countries where indigenous and local communities are located. Another possibility could be to let national law deal with the issue of customary law.

62. Such an approach would take into account that recognition of customary law varies amongst the Parties to the Convention on Biological Diversity. It would also cater for respect of the cultural specificity and variety of customary laws among indigenous peoples, avoiding a one-size-fits-all approach.

63. Specific measures to promote compliance could include:

(a) Establishment or recognition of indigenous competent authorities to advise on applicable processes for prior informed consent of indigenous and local communities, respecting the rights of the indigenous and local communities;

(b) An internationally recognized certificate of compliance could contain minimum information related to indigenous and local communities, including details of the rights holders of traditional knowledge associated with genetic resources, as appropriate; 8/

(c) Recognition of existing rights of indigenous and local communities in minimum and standard contractual terms for ABS arrangements as outlined in the draft study on compliance in relation to the customary law of indigenous and local communities, national law, across jurisdictions, and international law (UNEP/CBD/ABS/GTLE/2/INF/3, p. 25);

8/ See Report of the Group of Technical Experts on an Internationally recognized certificate, UNEP/CBD/WG-ABS/5/7, paragraph 22.

(d) Monitoring of the use of traditional knowledge through checkpoints;

(e) Capacity-building of indigenous and local communities representatives to facilitate their participation in prior informed consent and mutually agreed terms.

64. Traditional knowledge databases or registries that respect prior informed consent of indigenous and local communities can also be helpful to promote compliance with the rights of indigenous and local communities to genetic resources and associated traditional knowledge, and their customary laws, as they could provide proof in litigation and bring transparency and certainty over those practices. However, there are indigenous and local communities that consider that these types of instruments may in fact promote biopiracy since they will foster public diffusion of traditional knowledge without the necessary international guarantees that the rights of indigenous and local communities will be respected.

(e) Analyse whether particular compliance measures are needed for research with non-commercial intent, and if so, how these measures could address challenges arising from changes in intent and/or users, particularly considering the challenge arising from a lack of compliance with relevant access and benefit-sharing legislation and/or mutually agreed terms.

65. To differentiate between commercial and non-commercial research activities may prove difficult in regard to the use of genetic resources and/or associated traditional knowledge. Compliance measures then become difficult as their final purpose may change.

66. In this sense non-commercial applications could be regulated under national ABS regimes. Two possibilities were considered. The first was to provide simple, straightforward access procedures backed by strong remedies and sanctions for both commercial and non-commercial uses.

67. The other option is to establish a separate more streamlined access process for non-commercial use. In this case, several national legislations have distinguished based on the intent, track record and collaborating partners of the user at the time of application for prior informed consent allowing for the possibility of change of intent with the approval of the provider of prior informed consent. Also, some of these have provided for remedies and/or sanctions in the case of non-approved changes in intent.

68. Changes of intent can also be addressed in any mutually agreed terms.

69. Recognizing the sovereign rights of States over their natural resources and their authority to determine access to their genetic resources, it was generally considered by the experts that the decision to adopt simplified procedures for access with non-commercial intent should be determined at the national level.

70. In response to question (e), no special compliance mechanism would be required.

Appendix

INDICATIVE LIST OF VOLUNTARY MEASURES 9/

1. Declarations by users of genetic resources of PIC and MAT compliance.
2. Third party certification.
3. Internationally recognized certificate of compliance.
4. Sector specific codes of conducts and guidelines, as well as cross-sector guidelines explaining the steps and stakeholders involved in ABS.
    a. *Guidelines for Access to Genetic Resources for Users in Japan*, (METI and JBA)
    b. *ABS Management Tool - Best Practice Standard and Handbook for Implementing Genetic Resources Access and Benefit-sharing Activities* (Stratos and Swiss Department of Economic Affairs)
    c. *Access and Benefit-sharing, Good practice for academic research on genetic resources* (Swiss Academy of Sciences)
    d. *Guidelines for BIO Members Engaging in Bioprospecting* (Biotechnology Industry Organization)
    e. *Principles on Access to Genetic Resources and Benefit-sharing* (Botanical Garden Conservation International)
    f. *Guidelines for IFPMA Members on Access to Genetic Resources and Equitable Sharing of the Benefits Arising out of their Utilization* (International Federation of Pharmaceutical Manufacturers and Associations)
    g. *MOSAICC* (BCCM) (http://www.belspo.be/bccm/mosaicc)
    h. *Principles on Access to Genetic Resources and Benefit Sharing* (Different botanical gardens and herbaria)(http://www.kew.org/conservation/principles.html)
    i. *Code of Conduct for botanic gardens governing the acquisition, maintenance and supply of living plant material* (IPEN)
    j. Some individual companies have developed or publicly committed themselves to respect ABS requirement, for example:
        i. GlaxoSmithKline (http://www.gsk.com/responsibility/cr_issues/ei_biodiversity.htm)
        ii. NovoNordisk Guiding Principles (http://www.novonordisk.com/old/press/environmental/er97/bio/biodiversity.html)
5. Awareness raising and education modules.
6. Clearing-House Mechanism (CHM), including databases of best practices and electronic databases to support monitoring and enhancing compliance of users of foreign genetic resources.
7. Establishment of an ombudsperson.
8. Setting up national focal points.
9. Patent search tools.
10. Model clauses.
11. Making adherence to ABS principles a requirement for research funding from government sources or private foundations (e.g. German Research Foundation Guidelines, http://www.dfg.de/forschungsfoerderung/formulare/download/1_021e.pdf).
12. Monitoring compliance with ABS agreements (contracts) as part of the peer review system of scientific journals and the professional standard for scientific publication.

9/ This indicative list does not prejudge the status within the international regime of any of the items listed.

13. Creating more transparent systems of tracking the loan, exchange, and/or utilization of genetic resources that are transferred to and between *ex situ* collections in museums, herbaria, culture collections and other biological repositories.

14. In negotiating ABS agreements (contracts), differentiating between projects proposed by researchers affiliated with institutions with CBD-compliant policies and practices and demonstrated records of compliance, as opposed to researchers affiliated with institutions without such policies, or without institutional affiliations;

15. Creating positive incentives for research organizations, professional societies, and publishers to adopt institutional policies, procedures, and compliance monitoring systems that are consistent with CBD principles and ABS provisions.
