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Biological Diversity**

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**AD HOC OPEN-ENDED WORKING GROUP ON
ACCESS AND BENEFIT-SHARING**

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**COLLATION OF OPERATIVE TEXT SUBMITTED BY PARTIES, GOVERNMENTS,
INTERNATIONAL ORGANIZATIONS, INDIGENOUS AND LOCAL COMMUNITIES AND
RELEVANT STAKEHOLDERS IN RESPECT OF THE MAIN COMPONENTS OF THE
INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING LISTED IN
DECISION IX/12, ANNEX I**

Addendum

SUBMISSIONS FROM AUSTRALIA AND SWITZERLAND

Note by the Executive Secretary

1. The Executive Secretary is circulating herewith two separate submissions by Australia and Switzerland as an addendum to the collation of operative text submitted pursuant to decision IX/12 of the Conference of the Parties to the Convention on Biological Diversity (UNEP/CBD/WG-ABS/7/4 and Add.1).
2. The submissions are being circulated as they were received by the Secretariat.

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AUSTRALIA

Taking into account submissions already made by Parties, Australia suggests the following operative text for consideration under the main components listed in annex I to COP decision IX/12.

I. MAIN COMPONENTS

A. *Fair and equitable benefit-sharing*

1. Components to be further elaborated with the aim of incorporating them in the international regime

1) Linkage of access to the fair and equitable sharing of benefits

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

2) Benefits to be shared on mutually agreed terms

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

3) Monetary and/or non-monetary benefits

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

4) Access to and transfer of technology

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

5) Sharing of results of research and development on mutually agreed terms

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

6) Effective participation in research activities, and/or joint development in research activities

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

7) Mechanisms to promote equality in negotiations

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

9) Measures to ensure participation and involvement of indigenous and local communities in mutually agreed terms and sharing of benefits with traditional knowledge holders

Give that this refers to traditional knowledge holders, it is Australia's view that negotiation of text under this element should occur at the 8th Working Group meeting after the Technical Experts Group meeting on TK,

10) Mechanisms to encourage benefits to be directed toward conservation and sustainable use of biodiversity and socio-economic development, in particular the Millennium Development Goals (MDGs) in accordance with national legislation

Australian operative text

Parties should encourage users and providers, in their mutually agreed terms, to consider directing benefits arising from the utilisation of genetic resources towards the conservation and sustainable use of biological diversity in accordance with the objectives set out in Article 1 of the CBD, to contribute to sustainable socio-economic development..

2. Components for further consideration

1) Development of international minimum conditions and standards

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

2) Benefit-sharing for every use

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

3) Multilateral benefit-sharing options when origin is not clear or in transboundary situations

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

4) Establishment of trust funds to address transboundary situations

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

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

6) Enhanced utilization of Bonn Guidelines

Australian operative text

Recognising, in accordance with Decision VI/24, that the Bonn Guidelines are a primary source of advice for guiding national implementation [*perambulatory para*]

Rationale

Many Parties still do not have domestic regulatory frameworks, which is the first step to ensuring compliance. Users and providers need something to comply with, be it contracts or, when a contract doesn't exist, national legislation/regulations on ABS. The Bonn Guidelines remain a principal input to guide national implementation of Article 15.

B. Access to genetic resources ^{1/}

1. Components to be further elaborated with the aim of incorporating them in the international regime

1) Recognition of the sovereign rights and the authority of Parties to determine access

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

2) Linkage of access to fair and equitable sharing of benefits

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

3) Legal certainty, clarity and transparency of access rules

2. Components for further consideration

1) Non-discrimination of access rules

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

2) International access standards (that do not require harmonization of domestic access legislation) to support compliance across jurisdictions

3) Internationally developed model domestic legislation

Australian operative text

Recalling that Article 15(1) of the CBD provides that states have sovereign rights over their resources, and that the authority to determine access to genetic resources rests with the national governments and is subject to national legislation, (preambular)

Recalling that Article 15(5) of the Convention provides that access to genetic resources shall be subject to prior informed consent of the Contracting Party providing genetic resources, unless otherwise determined by that Contracting Party (preambular)

Noting that parties have differing legal systems, and accordingly have chosen to implement the ABS provisions of the CBD according to their national conditions (preambular)

^{1/} The title is without prejudice to the eventual scope of the international regime.

Parties *are encouraged* to provide examples of model provisions for domestic legislation to the Secretariat, and the Secretariat to provide these to parties on request, in order to assist and support those parties in their domestic implementation of the ABS provisions of the Convention.

Rationale: *National implementation of Article 15 is the key to ensuring compliance. Without domestic implementation, users and providers have nothing to comply with in the absence of a contract. Some parties have concerns regarding a lack of capacity to implement ABS provisions. The creation of model provisions for domestic legislation may assist those parties, at their discretion, in drafting their domestic legislation. Australia is open to assisting with this process, given our existing national system on ABS.*

4) Minimization of administration and transaction costs

5) Simplified access rules for non-commercial research

Australia's Operational text

Parties *should endeavour* to provide simplified access rules for non-commercial research, whilst also considering taking measures to ensure that new terms can be negotiated in relation to benefit-sharing with any subsequent commercial users of the genetic resource.

Rationale: *The international regime should not act as a disincentive for non-commercial research. Simplified access will ensure that any additional compliance measures in the IR shall not prejudice non-commercial research, such as taxonomic research.*

C. Compliance

1. Components to be further elaborated with the aim of incorporating them in the international regime

1) Development of tools to encourage compliance:

(a) Awareness-raising activities

Australian Operative text

Noting that awareness of domestic ABS regulatory frameworks is important for users and providers to ensure compliance

Parties should, as appropriate, take measures to raise awareness of ABS issues, including by making available up to date information about their domestic ABS regulatory framework, in particular national laws, policies and procedures;

2) Development of tools to monitor compliance:

(a) Mechanisms for information exchange

Australian Operative text

- Parties are encouraged to, as appropriate, exchange information with other parties, providers and users of genetic resources, on codes of conduct and best practice in access and benefit sharing
- Parties are encouraged to, as appropriate, exchange information with other parties, providers and users of genetic resources relating to their domestic ABS legislation and regimes

Rationale: Information exchange in the context of IR should be limited to exchanging general information on ABS regulatory frameworks. Often ABS agreements will involve non-state actors, either as providers (private land owners, indigenous land councils) or users (universities, researchers, companies) and there may be no state involvement in the agreement, and therefore the state may not have any information to share. In addition Australia has restrictions on its ability to share information on individual universities, research institutions, companies, and providers of genetic resources without their permission, because of privacy legislation.

(b) Internationally recognized certificate issued by a domestic competent authority

Australia's Operational text

- Parties may, on a voluntary basis, make available to users a certificate of compliance with domestic ABS legislation issued by a relevant national authority, allowing users to demonstrate compliance with national ABS legislation..

Rationale: Australia believes that a certificate of **compliance** issued by a relevant national authority may help users demonstrate compliance with domestic regulatory frameworks. This approach would allow the continuation of the variety of national approaches to implementing the Convention. There are limits

to the parameters of certificates. Certificates can not supplant or constitute a form of legal title, they must not be mandatory, and should cover Article 15 and not Article 8(j), as Article 8(j) deals with intangible knowledge, while a certificate covering Article 15 would simply cover the physical sample of genetic resources.

3) Development of tools to enforce compliance

2. Components for further consideration

1) Development of tools to encourage compliance:

(a) International understanding of misappropriation/misuse

(b) Sectoral menus of model clauses for material transfer agreements

- Parties shall, in consultation with users and providers from key sectors, develop sectoral menus of model clauses for contracts.
- Parties shall encourage users and providers to use these sectoral menus of model clauses when negotiating mutually agreed terms

Rationale:

Contracts should be the IRs' principal mechanism by which compliance could be assessed. When sufficiently comprehensive, contracts provide options to enforce compliance. Providing model contracts, or model clauses would be beneficial in assisting users and providers to ensure that contracts contain provisions to cover issues such as change of use, any mandatory reporting requirements, and options for dispute settlement.

The international regime can't force providers and users (who in many cases will not be parties) to use these model clauses, but parties can encourage users to use the model clauses when negotiating their mutually agreed terms.

(c) Codes of conduct for important groups of users

Australian Operative text

Recognising the existence of a range of national and international, sectoral or company specific codes of conduct and best practice guidelines on access and benefit-sharing and their importance in achieving the fair and equitable sharing of benefits arising out of the the utilization of genetic resources, the third objective of the Convention. [Preamble Paragraph]

- Parties *shall* support, as appropriate, the development, review and update of ABS-related voluntary codes of conduct for users of genetic resources.
- Parties *shall* take measures to [encourage] users to adhere to the codes of conduct.

Rationale: *As noted above, industry has an interest in complying with national legislation. Codes of conduct are a useful way for governments and industry to aid compliance with ABS regulatory frameworks. These codes of conducts could be developed for different sectors to reflect the issues facing different sectoral users.*

(d) Identification of best-practice codes of conduct

Australia can support the EU text contained in UNEP/CB/WG-ABS/7/4 under this component

(e) Research funding agencies to oblige users receiving research funds to comply with specific access and benefit sharing requirements

(f) Unilateral declaration by users

(g) International access standards (that do not require harmonization of domestic access legislation) to support compliance across jurisdictions

2) Development of tools to monitor compliance:

(a) Tracking and reporting systems

(b) Information technology for tracking

(c) Disclosure requirements

(d) Identification of check points

3) Development of tools to enforce compliance:

(a) Measures to ensure access to justice with the aim of enforcing ABS arrangements

(b) Dispute settlement mechanisms:

(i) Inter-State

(ii) Private international law

(iii) Alternative dispute resolution

see below under (c) Enforcement of judgments and arbitral awards across jurisdictions)

(c) Enforcement of judgments and arbitral awards across jurisdictions

Noting the importance of compliance with ABS agreements/contracts to the international regime [preambular para]

Noting also that the existing body of private international law provides a range of options for dispute resolution across national borders [preambular paragraph]

Noting the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the assistance it provides parties in the enforcement of foreign arbitral awards [preambular para]

Parties [should] encourage ABS users and providers to include provisions in ABS contracts to cover international dispute resolution including

- 1) the jurisdiction to which they will subject any dispute resolution processes
- 2) options for alternative dispute resolution, such as mediation or arbitration, in the event of contractual disputes.

Rationale: *Contracts are the Convention's principal mechanism for compliance, as Article 15 identifies prior informed consent and mutually agreed terms as the normal method for ABS transactions. Contracts should be comprehensive in order to effectively ensure compliance with PIC and MAT. Part of this is to identify both the jurisdiction to which parties will subject and options for alternative dispute resolution.*

(d) Information exchange procedures between national focal points for access and benefit-sharing to help providers obtain relevant information in specific cases of alleged infringements of prior-informed-consent requirements

(e) Remedies and sanctions

4) Measures to ensure compliance with customary law and local systems of protection

SWITZERLAND

OBJECTIVE

Operational text:

The objective of the International Regime is to facilitate, in a practical, coherent and transparent way, and in accordance with the Convention on Biological Diversity:

- *the access to genetic resources and associated traditional knowledge; and*
- *the fair, equitable and effective sharing of the benefits arising out of the utilization of genetic resources and associated traditional knowledge.*

Rationale:

Paragraph 1 of the decision VII/19 describes the aim of the IR negotiations as follows: “to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing 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”.

The objective of the IR should reflect this mandate in a general manner without drawing on text of Articles 15 and 8(j) or operational text of the main components of the IR.

Other terms that led to intensive discussions during the elaboration of the proposals for the objective were “facilitating access” and “derivatives”. The first term should be specified by replacing it with “appropriate access”, which is reflected by Article 1 of the Convention. Derivatives could be understood

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as a result of human activity utilizing a genetic resource¹ and as such derivatives are already included by referring to “*the fair and equitable sharing of the benefits arising out of the utilization of such resources*”.

SCOPE

Operational text:

1. *The International Regime applies to all genetic resources and associated traditional knowledge covered by the Convention on Biological Diversity;*
2. *Notwithstanding para. 1, the International Regime does not apply to*
 - a. *Human genetic resources,*
 - b. *Genetic resources beyond national jurisdiction;*
3. *The provisions of this International Regime are subject to intergovernmental multilateral agreements on access to genetic resources, associated traditional knowledge and the fair and equitable sharing of benefits arising from the utilization of such resources, provided they are in harmony with the objectives of the CBD and the IR.*

Rationale:

In order to create legal certainty the IR has to apply to all GR resources covered by the Convention on Biological Diversity with the exception of the GR that are excluded by the Convention.

At the same time there is widespread recognition that a “one-size fits all approach” across all sectors of users or categories of genetic resources does not work for the IR. Many see an approach for the regulation of ABS that follows industry sector lines as more practical.

A realistic approach for the IR in this regard is to first identify **general ABS-principles, specific ABS-provisions and ABS-instruments, all of which should be applicable across all sectors**. The main components of the IR identified in Annex I of COP decision IX/12 include the components that should be further elaborated to ABS-principles, ABS-provisions and ABS-instruments that are applicable across all sectors.

In addition, **the ABS-IR should leave room for existing internationally recognized sectoral ABS-instruments** (i.e. the MLS of the IT-PGRFA) **and be flexible enough to allow other international bodies with regulatory competence to develop and implement more specific ABS-provisions and sectoral ABS-instruments** (e.g. CGRFA of FAO for genetic resources for food and agriculture; IGC of WIPO for disclosure requirement in patent applications, GISP of WHO for genetic resources related to human health, such as influenza viruses)

As a result of the approach described above, the **ABS-provisions and ABS-instruments of the IR would apply to all genetic resources covered by the CBD if no other more specific international ABS-systems** (i.e. provisions on a specific issue that relates to ABS, or sector-specific ABS-instrument) **were in place, while the general ABS-principles would apply in any case.**

^{1/} Report of the TLEG on Concepts, Terms, Working Definitions and Sectoral Approaches