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

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Item 3 of the provisional agenda *

**VIEWS OF THE AD HOC INTERSESSIONAL WORKING GROUP ON ARTICLE 8(j) AND
RELATED PROVISIONS ON THE ELABORATION AND NEGOTIATION OF THE
INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING**

Note by the Executive Secretary

The Executive Secretary is transmitting herewith, on behalf of the Chair of the Ad Hoc Intersessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, the views of the Working Group on Article 8(j) on the elaboration and negotiation of the international regime on access and benefit-sharing relevant to traditional knowledge, innovations and practices associated with genetic resources and to the fair and equitable sharing of benefits arising from their utilization., which were adopted by the Working Group at its sixth meeting, on 6 November 2009.

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*Annex***INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING: PROVISION OF VIEWS TO THE AD HOC WORKING GROUP ON ACCESS AND BENEFIT-SHARING**

1. In accordance with the mandate expressed in paragraph 12 of decision IX/13 A and paragraph 20 of decision IX/12, the Working Group on Article 8(j) reviewed the reports of the Expert Group on traditional knowledge associated with genetic resources and the Expert Group on compliance and provides a range of detailed and focused views as input to the Working Group on Access and Benefit-sharing in order to assist with the further elaboration and negotiation of the International Regime on Access and Benefit-sharing on issues related to traditional knowledge associated with genetic resources.

2. In elaborating the views below, the sixth meeting of the Working Group on Article 8(j) applied the following methodology: Parties and observers were invited to submit elements and concepts in the reports of the Expert Group on traditional knowledge associated with genetic resources and the Expert Group on compliance, that they considered as particularly important, focusing on those elements and concepts that in their view received the broadest support from the experts attending the expert groups.

3. The Working Group on Article 8(j) agreed to convey the paragraphs below to the Working Group on access and benefit-sharing, being concepts and elements that should be considered as input to the work of the Working Group on Access and Benefit-sharing in the further elaboration and negotiation of the International Regime on Access and Benefit-sharing on issues related to traditional knowledge associated with genetic resources.¹

- (i) Article 15 and 8(j) are mutually supportive. The development of the International Regime should support Article 8(j) in respecting, preserving and maintaining the knowledge, innovations and practices of indigenous and local communities and encouraging the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. It was further emphasized that Article 8(j) as a stand alone provision protects traditional knowledge relevant for the conservation and sustainable use of biological diversity within the mandate of the Convention on Biological Diversity, including traditional knowledge associated with genetic resources.
- (ii) In situations where traditional knowledge is associated with genetic resources, it was highlighted by many experts that traditional knowledge and genetic resources are inseparable.
- (iii) In essence, traditional knowledge that sparks the process or provides the lead to the properties of a genetic resource although it may not be reflected in the end product remains associated to that product. There is not always a relationship between the owners of genetic resources accessed and the holders of traditional knowledge. It was noted that the relationship between access and use may vary depending on the nature of State sovereignty.
- (iv) Biological resources is an umbrella term used by some countries and communities in addressing access and benefit-sharing in order to encompass not only genetic resources, but also biochemical properties, organic extracts and others.
- (v) Even though further work is needed to determine the exact relationship between genetic resources and associated traditional knowledge, given that most traditional knowledge is intrinsically linked to a genetic resource, the International Regime should embrace traditional knowledge.
- (vi) There is also a need to address not only traditional knowledge associated with genetic resources that is accessed *in situ* but also traditional knowledge and genetic resources accessed *ex situ*, including in databases, or libraries and the potential sharing of benefits.
- (vii) Some common characteristics of traditional knowledge associated with genetic resources include:

¹ Neither the concepts, elements nor the specific wording of the following paragraphs were negotiated.

- (a) A link to a particular culture or people – knowledge is created in a cultural context;
 - (b) A long period of development, often through an oral tradition, by unspecified creators;
 - (c) A dynamic and evolving nature;
 - (d) Existence in codified or uncoded (oral) forms;
 - (e) Passed on from generation to generation – intergenerational in nature;
 - (f) Local in nature and often imbedded in local languages;
 - (g) Unique manner of creation – (innovations and practices);
 - (h) It may be difficult to identify original creators.
- (viii) The development, adoption and implementation of the International Regime should not restrict the exchange of genetic resources and traditional knowledge among indigenous and local communities for traditional purposes.
 - (ix) There exists a wide diversity of community level procedures, which address access to natural, biological and genetic resources. When indigenous and local communities have customary laws and community level procedures pertaining to traditional knowledge associated with genetic resources, these laws and procedures are relevant to the International Regime.
 - (x) When indigenous and local communities have well defined structures and have established indigenous or local community authorities, national regulations can directly rely on these. In cases where such structures do not exist, their establishment would be desirable. It was suggested that community protocols may provide a useful approach.
 - (xi) Community level procedures are in constant evolution and may not be well known to non-members. Therefore, although customary laws and practices may not provide specific procedures for access to genetic resources at this time, these may evolve in response to the development of the International Regime and national legislation. Due to the diversity of community level procedures there is no one-size-fits-all approach to address access to genetic resources and associated traditional knowledge at the community level.
 - (xii) The International Regime needs to address the issue of the ownership of traditional knowledge which is already documented in databases and scientific publications.
 - (xiii) The International Regime should provide basic principles to ensure respect for customary laws and community level procedures.
 - (xiv) Competent national authorities and focal points for access and benefit-sharing would have the responsibility to inform applicants on access granting procedures and rights of indigenous and local communities. They should also direct applicants to relevant authorities established by indigenous and local communities when access to traditional knowledge associated with genetic resources was concerned. These authorities could ensure respect for customary laws and procedures.
 - (xv) Capacity-building at the community level is required in order to develop clear procedures for access to traditional knowledge associated with genetic resources, such as community protocols.
 - (xvi) Mechanisms are needed at the national level for governments to empower indigenous and local communities to make decisions that are informed and clearly understood. Indigenous and local communities also need to have the ability to engage on their own terms and therefore would need to be involved in the development of these mechanisms.
 - (xvii) Some suggested that the International Regime should contain specific language that speaks to the rights of indigenous and local communities over their traditional knowledge and associated genetic resources.

- (xviii) The International Regime should call on state legislation to recognize rights of indigenous and local communities to prior informed consent and benefit-sharing when their knowledge is accessed and utilized.
- (xix) The International Regime could consider the inclusion of a legal aid body, such as an ombudsperson, that includes representatives of indigenous and local communities that could assist in addressing imbalances in legal capacity between providers and users of genetic resources and associated traditional knowledge in order to create a level playing field.
- (xx) The International Regime could require that national law builds upon the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization (Bonn Guidelines).
- (xxi) Essential to the access regime established by domestic law is the creation of a Competent National Authority (CNA) and a national access point. At minimum, a CNA is needed to promote certainty over the domestic process governing prior informed consent of indigenous and local communities when access to associated traditional knowledge is sought. In this regard, the CNA will be guided by the customary laws, community procedures or community protocols where they exist.
- (xxii) A competent national authority would significantly contribute to promote compliance and to ensure that prior informed consent of indigenous and local communities was freely and properly given
- (xxiii) To enhance legal certainty, clarity and transparency, the International Regime could suggest the inclusion of provisions for obtaining prior informed consent of indigenous and local communities when accessing traditional knowledge associated with genetic resources in national access and benefit-sharing frameworks.
- (xxiv) Compliance measures that support the prior informed consent of indigenous and local communities regarding the use of their traditional knowledge associated with genetic resources, could include disclosure requirements concerning the origin or source of genetic resources and associated traditional knowledge to which access is granted.
- (xxv) Existing international instruments and processes as well as a growing body of individual State and regional practice demonstrate a progressive trend towards international law mandating a requirement for the prior informed consent of indigenous and local communities for traditional knowledge associated with genetic resources. There is hence a clear trend that provides a basis in international law for the International Regime to require such prior informed consent.
- (xxvi) The following are desirable elements for the prior informed consent of indigenous and local communities:
 - (a) Competent national authority
 - (b) Competent authority at the level of indigenous and local communities with a statutory authorization/mandate established by indigenous and local community authorities.
 - (c) Elements of process including:
 - Written application
 - Wide notification of applications sought
 - Applications to be widely accessible
 - Legitimate process
 - Adequate timing and deadlines

- Specification of use with clause to address change of use and transfer to third parties
- (d) Prior informed consent granted on the basis of mutually agreed terms
- (e) Consultation process with indigenous and local communities
- (f) Procedures consistent with customary practices
- (xxvii) In cases where associated traditional knowledge is accessed *ex situ*, benefit-sharing arrangements should be negotiated.
- (xxviii) Recognizing that many countries have not yet established competent national authorities as well as appropriate prior informed consent procedures for the full inclusion of indigenous and local communities, the International Regime could provide incentives or even require Parties to establish such institutions and to develop relevant procedures.
- (xxix) In transboundary situations, to the extent possible, the prior informed consent procedures of countries concerned should be required from all entitled communities. The same applies to benefit-sharing. Dispute resolution mechanisms, if established, should be used in case of conflict. Benefit-sharing trust funds may be appropriate if common traditional knowledge is accessed and used.
- (xxx) Internationally recognized certificates could provide evidence that prior informed consent from indigenous and local communities has been achieved in relation to traditional knowledge associated with genetic resources.
- (xxxi) A competent domestic authority would issue an internationally recognised certificate. The law establishing a country's access and benefit-sharing framework would identify who acts as the domestic competent authority.
- (xxxii) Certificates could also include information on whether or not traditional knowledge associated with genetic resources has been accessed and whether prior informed consent and mutually agreed terms obligations have been fulfilled.
- (xxxiii) The work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/IGC) was noted and its general conclusion that *sui generis* solutions may be required to truly and substantively protect traditional knowledge. That is, the WIPO/IGC has developed *sui generis* draft provisions for the protection of traditional knowledge in light of the increasing recognition that existing intellectual property tools are not fully adequate in protecting traditional knowledge.
- (xxxiv) A critical distinction between traditional knowledge associated with genetic resources being in the "public domain" versus being "publically available" was recognized.
- (xxxv) Traditional knowledge has often been judged to be in the public domain and hence freely available once it has been accessed and removed from its particular cultural context and disseminated. It cannot be assumed that traditional knowledge associated with genetic resources that has been made available publicly does not belong to somebody. Within the concept of public availability, prior informed consent from a traditional knowledge holder that is identifiable, could still be required, as well as provisions of benefit-sharing made applicable including when a change in use is discernible from any earlier prior informed consent provided. When a holder is not identifiable, beneficiaries could still be decided for example by the State.
- (xxxvi) The phrase public domain in the context of traditional knowledge needs to be more correctly re-phrased as publically available.
- (xxxvii) 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.

- (xxxviii) 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.
- (xxxix) 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;
 - (c) Recognition of existing rights of indigenous and local communities in minimum and standard contractual terms for ABS arrangements;
 - (d) Monitoring of the use of traditional knowledge through checkpoints;
 - (e) Capacity-building of indigenous and local community representatives to facilitate their participation in prior informed consent and mutually agreed terms.
