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EXPERT MEETING ON THE MODALITIES
OF OPERATION OF THE ACCESS AND
BENEFIT-SHARING CLEARING-HOUSE

Montreal, 11-14 April 2011

COMPILATION OF SUBMISSIONS PROVIDED BY PARTIES, INTERNATIONAL ORGANIZATIONS, INDIGENOUS AND LOCAL COMMUNITY ORGANIZATIONS AND RELEVANT STAKEHOLDERS ON THE MODALITIES OF OPERATION OF THE ACCESS AND BENEFIT-SHARING CLEARING-HOUSE

Note by the Executive Secretary

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INTRODUCTION

1. In paragraph 12 and annex II of decision X/1, the Conference of the Parties decided that the Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol (the Intergovernmental Committee) will consider the modalities of operation of the ABS Clearing-House, including reports on its activities, at its first meeting, from 6 to 10 June 2011.
2. In preparation for the first meeting of the Intergovernmental Committee, Parties, international organizations, indigenous and local communities, and relevant stakeholders were invited through notifications 2010-216 and 2010-217, dated 16 December 2010, to submit views to the Executive Secretary on the modalities of operation of the ABS Clearing-House by 15 March 2011.
3. Against this background, the present document provides a compilation of the submissions received from Parties, international organizations, indigenous and local communities, and relevant stakeholders on this issue as of 31 March 2011. The contributions have been reproduced in the form and language in which they were received. In addition, contributions provided in a language other than English have been translated into English.
4. Considering that the Expert Meeting on the Modalities of Operation of the ABS Clearing-House is being held in order to assist the Intergovernmental Committee in its consideration of the modalities of operation of the ABS Clearing House at its first meeting, the submissions received in preparation for the first meeting of the Intergovernmental Committee are made available to the expert meeting to inform the discussions of experts.

I. SUBMISSIONS FROM PARTIES

AUSTRALIA

Australia's access and benefit-sharing (ABS) policy and legislation have been operating since 2005. Its experiences in developing and operating a regulatory system may be of interest in implementing the Nagoya Protocol and in the development of the ABS clearing house.

Australia's ABS system

Under Australia's Federal system, existing ownership rights to native biological resources depend on whether they are found in Commonwealth, State or Territory government lands or waters, indigenous lands (of which there are different types with different associated rights), freehold or leasehold lands.

In 2002, Australian governments reached agreement on the 'Nationally consistent approach for access to and the utilisation of Australia's native genetic and biochemical resources'¹ to promote consistency in the regulation and management of access to genetic resources. This sets out the general principles on which legislation would be based in each jurisdiction and some common elements for ABS arrangements. The 'Nationally Consistent Approach' is also consistent with the Bonn Guidelines.

Website

The Australian Government website on 'Australia's biological resources' (<http://www.environment.gov.au/biodiversity/science/access/index.html>) provides general information on accessing Australian genetic resources. It also provides a list of competent national authorities for each jurisdiction and key operational contacts. This has proved to be a useful mechanism for researchers and industry to find appropriate government contacts to facilitate their work. The website also provides specific information on the access process to biological resources in Commonwealth areas.

Regulatory environment

Access to biological resources in Commonwealth areas is governed by the Environment Protection and Biodiversity Conservation Regulations 2000 (Cth) ("the EPBC Regulations").² Under the EPBC Regulations, those seeking access to genetic resources must apply to the Department of Sustainability, Environment, Water, Population and Communities (SEWPAC) for a permit to access biological resources of native species for research and development of any genetic resources, or biochemical compounds, comprising or contained in the biological resource.

Permits

Permits for access to biological resources are available for either commercial, potentially commercial or non-commercial purposes. If the biological resources are for commercial or potentially commercial uses, the permit will not be granted until the applicant has entered into a benefit-sharing agreement with the provider of the biological resources.

Applicants for permits for non-commercial purposes must provide a statutory declaration³ stating that the applicant will not conduct, or allow others to conduct, commercial research without agreeing on

¹ The text can be seen at: <http://www.environment.gov.au/biodiversity/publications/access/nca/index.html>

² The full text of the Commonwealth access regime is set out in Part 8A and Part 17 of the EPBC Regulations and is available at http://www.austlii.edu.au/au/legis/cth/consol_reg/epabcr2000697/

³ The Declaration can be seen at: <http://www.environment.gov.au/biodiversity/science/access/permits/index.html>

appropriate benefit-sharing arrangements. The applicant also agrees to report on the results of the research and offer a taxonomic duplicate of each sample to an Australian public institution that is a taxonomic repository.

Where access is to genetic resources on indigenous people's land, the regulations require the prior informed consent of the indigenous owner or native title holder. A benefit sharing agreement must provide for reasonable benefit-sharing arrangements, including protection for and valuing of any indigenous people's knowledge to be used.

The permits describe the name of the applicant, the period for which access is permitted, the access area, a description of the type and quantity of biological resources and specific conditions relating to the access request. As it is not always possible for researchers to provide a detailed description of biological resources prior to access (particularly where the biodiversity is poorly known, not taxonomically described or because of the nature of the collection methodology) permit holders are required to provide updated lists as this information becomes known. These are loaded on the GRID database.

The Australian permit system has been developed to be transparent. The Genetic Resources Information Database (GRID) has been developed to provide a mechanism to manage permit applications, approvals and related reporting. The database generates a list of permits that have been issued and samples collected under those permits⁴ which is available for public viewing⁵. At 1 March 2011, 98 permits have been issued through the Protected Areas Policy and Biodiscovery Section under Part 8A of the EPBC Regulations since December 2005. All but one of these permits have been for non-commercial purposes.

Benefit-sharing agreements

SEWPAC has developed model contracts as a guide to assist parties developing benefit-sharing agreements, where the Commonwealth is the access provider and where the Commonwealth is not the access provider (such as Indigenous people in the Commonwealth's jointly managed national parks)⁶. Benefits are as determined by the parties to the contract, and can include contributions to conservation and scientific knowledge or any other agreed benefit as well as any revenue generated by the commercialisation of IP related to the genetic resource.

There are currently seven access and benefit-sharing contracts completed for organisations engaged in commercial research. Four of these are with Australian Public Institutions and three with foreign research organisations. A further contract with an Australian research institution is under consideration. The mutually agreed terms for benefit-sharing followed the model contracts provided by SEWPAC closely.

Accreditation

Further, the EPBC Regulations also provide a mechanism to accredit existing administrative or regulatory regimes that are consistent with the EPBC Regulations' purpose to minimise duplication. Agreements that bring existing permit arrangements within the benefit-sharing policy of the Australian Government have been made with the Great Barrier Reef Marine Park Authority, the Australian National Botanic Gardens, the Australian Institute of Marine Sciences and the Australian Antarctic Division. In total, over 450 permits have been issued under Part 8A of the EPBC Regulations and other regimes accredited under the Regulations.

⁴ Browse the record of permits at <http://www.environment.gov.au/grid/public/perrep.jsp>

⁵ Provision is made for applicants to request that permit information is treated as confidential, no requests have been made to date.

⁶ The model contracts are available at <http://www.environment.gov.au/biodiversity/science/access/model-agreements/index.html>.

ARGENTINA

Se considera que el modelo de funcionamiento de la Convención CITES es un buen ejemplo de mecanismo de articulación a seguir.

English translation:

The operating model of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is considered an example of a good coordination mechanism.

CHINA

Recognizing the capacity gap for developing countries to effectively use the ABS Clearing House, proposes to identify the modalities of operation of the ABS Clearing House based on full consideration of solutions to the gap. And it is suggested that at current stage, ABS Clearing House operates for a trial period and to carry out performance assessment later on.

III. With regard to the awareness raising, it is proposed that the Secretariat of the Convention to promote activities through the ABS Clearing House which countries carry out to raise awareness.

In addition, the Executive Secretary of the Convention is requested to convey the proposal to Global Environment Facility that funds to aforementioned activities be prioritized during its 5th replenishment period.

ECUADOR

Usar los protocolos informáticos desarrollados para el Centro de Intercambio de Información del Convenio (CHM) sobre la Diversidad Biológica, así como el del Protocolo de Cartagena.

Asegurar el intercambio de información y una armonización en la gestión con otros Convenios/Tratados e iniciativas de información internacionales, subregionales relacionados con la temática.

English translation:

Using the computer protocols designed for the Clearing-House Mechanism (CHM) of the Convention on Biological Diversity and of the Cartagena Protocol;

Ensuring information exchange and harmonization of management with other Conventions/Treaties and international and subregional information initiatives related with the subject.

EUROPEAN UNION

The EU⁷ is pleased to share with the Secretariat further views on “the modalities and operation of the Access and Benefit-sharing Clearing-House” in preparation for the first meeting of the Intergovernmental Committee (ICNP-1) for the Nagoya Protocol as requested in CBD Notification 2010-216.

First and foremost, the EU believes that the development of the modalities and operation of the Access and Benefit-sharing (ABS) Clearing-House (CH) should be based on the principle that “form should follow function”. We are of the opinion that the ABS CH is an important tool to promote and enhance legal certainty, clarity and transparency in the implementation of the Nagoya Protocol. In this respect, we also believe that one of the main goals of the CH should be to support compliance through contributing to clearness, transparency and certainty. Bearing in mind that the Nagoya Protocol foresees the effective implementation, not only of Article 15 of the CBD, but also of Article 8(j), the EU is of the opinion that the CH should adequately address issues related to traditional knowledge (TK) associated with genetic resources (GR) that are relevant for the implementation of the Nagoya Protocol.

1. Organization of the CH

Formally the ABS Clearing-House will be established as part of the Clearing-House Mechanism of the CBD, as is the Biosafety Clearing-House. “Being a part of the CBD Clearing-House” in reality means that it may be technically administered by the same institution administering the CBD Clearing-House Mechanism. However, the ABS Clearing-House will have distinct tasks and features and therefore requires its own structures and channels, taking into account that on the national level the competent authorities or the focal point for ABS may be different to that of the CBD or the Biosafety Protocol. However, there are great similarities of the ABS Clearing-House with the Biosafety Clearing-House, which has a central hub at the CBD Secretariat and national nodes preferably in each Contracting Party. Therefore, the nature of the ABS Clearing-House could be a combination of a **distributed system of national ABS Clearing-House nodes** (the national ABS focal point has an important role to play in this respect) **and a central hub at the CBD Secretariat**.

2. Preparation of a MOP-1 decision on the modalities of the ABS Clearing-House

The mandate of the ABS Clearing-House is based on Article 14 paragraph 1 and its tasks mainly on paragraphs 2 and 3, as well as Articles 6, 12, 13, 17, 21, 22 and 24. However, the modalities of operation of the ABS Clearing-House shall be considered and decided upon by the first MOP meeting and need to be prepared by the First Meeting of the Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on ABS (ICNP-1) in June this year. It needs to be pointed out that together with the consideration of the modalities and operation of the ABS Clearing-House and its mandate a potential multi-year programme of work may need to be considered by the first meeting of the COP/MOP as done by COP/MOP1 of the Cartagena Protocol.

The EU believes the following potential features and specifications need to be taken into account in the development of the modalities of the ABS CH:

2.1 Institutional actors that generate information relevant to the ABS CH

Under the Cartagena Protocol, both a national focal point and a Biosafety Clearing-House (BCH) focal point are in place, although no explicit distinction is made between them in the Protocol text. The main role of the BCH focal point is to ensure the well-functioning of the BCH and to make sure data is entered in a standardised form and by means of a controlled vocabulary. By contrast, the national focal point supervises the general functioning of the Protocol at national level and is responsible for liaison with the CBD Secretariat concerning substantial matters. Users who are authorized on national level (including competent national authorities) can publish information on the BCH, but theoretically only after validation by the BCH focal point.

⁷ Within the context of this notification, the EU refers to the European Union and its 27 Member States.

The Nagoya Protocol refers in its provisions to different actors that have the potential to generate information relevant to the ABS CH: national focal points, competent national authorities. Other relevant actors, in particular Indigenous and Local Communities, will also have the potential to generate such information, for example with regard to community protocols and procedures. The ABS CH should establish a robust and transparent system that facilitates the availability of comprehensive information that clearly identifies and differentiates its source.

2.2 National nodes and the central portal

The BCH operates by means of a central portal, supervised by the CBD Secretariat, and national nodes in the different Parties. In theory there should be an interoperable information-exchange between national nodes and the central portal, meaning that any changes made to national nodes will automatically be reflected in the central portal as well. However, in practice relatively few Parties have established an operational national node that is interoperable with the central portal and many Parties actually publish information directly on the central portal. In this light, the EU believes it is important that the national nodes being set up by Parties for the ABS CH will have an efficient and effective interoperability with the central portal which will be supervised by the CBD Secretariat. For the BCH, the CBD Secretariat has developed interoperable modules that Parties can use when setting up their national nodes. These modules might also be useful for setting up national nodes for the ABS CH.

2.3 How to work with confidential information?

According to Article 17 paragraph 4 of the Nagoya Protocol the minimum information that shall be contained in the internationally recognised certificate of compliance when it is not confidential comprises:

- (a) Issuing authority;
- (b) Date of issuance;
- (c) The provider;
- (d) Unique identifier of the certificate;
- (e) The person or entity to whom prior informed consent was granted;
- (f) Subject-matter or genetic resources covered by the certificate;
- (g) Confirmation that mutually agreed terms were established;
- (h) Confirmation that prior informed consent was obtained; and
- (i) Commercial and/or non-commercial use.

The EU believes that the above list is the minimum information that, in principle, is not confidential, unless otherwise determined by the respective providers and users (*'when it is not confidential'*). The EU is of the view that what constitutes confidential information under the Nagoya Protocol differs significantly from confidential information under the Cartagena Protocol, and therefore believes that the characterisation and treatment of confidential information in the context of the ABS CH will need substantial further work. The EU reserves its right to come back on this with more concrete proposals and recommendations.

2.4 Should translation of information be provided for?

To enable global access to information, the central portal of the ABS Clearing-House at the CBD Secretariat needs to operate in all six UN languages for both reporting and retrieving data. However, to achieve this, a Clearing-House would need to use common formats for reporting information from distributed sources, and standardized terminology or "[controlled vocabulary](#)" to categorize the information contained within the databases. This allows the users of the Clearing-House to use the same terms whether they are registering information or searching for it, including synonyms within a language; relationships between terms; and between languages. The EU is of the view that all information should be submitted to the ABS Clearing-House in one of the six official languages of the United Nations, while recognizing that full information sources and documents that are linked to records from the ABS

Clearing-House may be available only in a language of the submitting Government and not in an official language of the United Nations.

2.5 *What information concerning the national ABS systems, the permit or its equivalent should be notified/made available to the Clearing-House?*

The EU believes that by publishing details, including dates of entry into force, of relevant domestic legislation or regulatory requirements on the ABS CH Parties will provide greater clarity and transparency to users and providers of genetic resources and traditional knowledge associated with genetic resources and help fulfil their commitments under Article 6.3 of the Protocol.

Article 14.2.c) of the Protocol requires Parties to make information available, without prejudice to the protection of confidential information, including information about permits or their equivalent issued, while Article 17.2 states that a permit or its equivalent issued and made available to the ABS Clearing-House constitutes an internationally recognised certificate of compliance, which shall serve as evidence that the genetic resource has been accessed in accordance with PIC and that MAT have been established.

Article 17 para. 4 indicates the type of information which shall be contained in the certificate of compliance, which is: the issuing authority, date of issuance, the provider, a unique identifier of the certificate, the person or entity to whom PIC was granted, subject-matter or genetic resources covered by the certificate, confirmation of mutually agreed terms (MAT), confirmation of PIC and lastly about the commercial and/or non-commercial use. All this information covered by the certificate of compliance shall be made available, when it is not confidential, to the ABS Clearing-House when the Party is informing the Clearing-House according to Art. 14.2.c) of the Protocol. A unique identifier could take different forms while still assisting in facilitated identification of where and by whom the original PIC for access to a GR was granted. Therefore, as for the ABS Clearing-House in its entirety the principle of "form follows function" is important.

2.6 *Overview of useful sections of the modalities and operation of the Biosafety CH*

The EU sees merit in several sections of the modalities and operation of the Biosafety CH, which could be used as a blueprint when developing the ABS CH. These include:

- ***Role of the ABS Clearing-House***

The ABS CH has a great role in the provision and exchange of information and also in awareness-raising in support of the implementation of the Nagoya Protocol. With respect to the information to be made available on the ABS CH, the EU believes the following provisions of the Nagoya Protocol are particularly relevant:

- Article 14.2 and 14.3
- Article 8
- Article 17.1(a) (iii) and 17.2
- Article 21(d).

- ***Characteristics of the ABS Clearing-House***

- ***Reports on activities***

- ***Periodic review***

INDIA

The Biosafety Clearing House (BCH) presents a valuable precedent for the ABS Clearing House. In this regard, it would be important to take on board the various critiques and assessments of the BCH as has been documented since 2009. One of the criticisms of the BCH for instance has been its lack of a strong user interface. The BCH by its very nature demanded a higher degree of complex technical as well as confidential business information, and understanding this information has been one of the major criticisms. In contrast, the ABS Clearing House may be a simpler proposition to put in place, since the level of technical information required may be lesser. Any recommendations would also have to consider the ease with which Parties and others would be able to comply with such requirements as providers as well as users.

An important aspect in the ABS Clearing House is clear information on legislative, administrative and policy measures on access and benefit sharing. A few important aspects that need to be flagged are as follows:

- A user-friendly interface and a tool-kit that can have multiple search options, is material for any effective functioning of the clearing-house.
- It is not sufficient, therefore for texts of laws themselves to be submitted by parties. Instead parties should be asked to explain the various steps involved- such as the applicable rules, forms to be filled, authorities to be approached, timelines, etc.
- Measures for access both in respect of in-situ and ex-situ collections would need to be clearly identified.
- Language related requirements would also need to be addressed in order to ensure that accurate translations of all laws, regulations and administrative measures are available.
- It is also important to assess whether or not the ABS Clearing House can play a more active role than just being a repository of information. For instance, could the operational modalities envisage a role for the ABS-CH which entails that once a patent office in a CBD member receives an application involving a patent, the information could be immediately sent to the ABS-CH which can access the relevant regulatory information on the country from which the resource has been accessed. The important aspect to bear in view if this system is built into the ABS-CH, the role of the ABS-CH should be clearly specified as one only relevant for providing relevant information, and should not in any way dilute the responsibility of the concerned patent office to make its more detailed assessment.
- Adequate budgeting and sources of funding would need to be worked on in order to ensure the robust functioning of the system.
- Other network information centres would need to be studied and investigated more thoroughly. The experience of the ITPGFRA, and Consultative Group on International Agricultural Research (CGIAR) is cited, for instance, as a framework that could be used as a valuable example. The CGIAR's role is envisaged to be wider- as an institute that actively engages in research and diffusion of results of the research. The CGIAR's functioning could however provide insights.
- Institutional factors would ultimately determine the effectiveness of the ABS-CH.

NIGERIA

- i) Designation of a focal point for ABS clearing house for managing the process.
- ii) Creation of a website for storing and accessing/dissemination of information.
- iii) Access to fund for the operation.
- iv) Operation to be guided by the principles of transparency, inclusiveness and equity.
- v) Equipment with a central database for making information available through ABS clearing house where information from other countries can be accessed.
- vi) Provision of access to information to assist Convention on Biodiversity for the implementation of the protocol.
- vii) Easy access to information on expert rosters, national focal points and national competent authorities.
- viii) Performance of other functions as directed by the COP.
- ix) Facilitation of the development of network of multi-sectoral and interdisciplinary partners.
- x) Implementation to be subjected to periodic review to include consultation with a wide variety of countries.

SRI LANKA

Establishment of central portal of Access to genetic resources & benefit sharing clearing house, with the options for submission of information.

- Using the Access to genetic resources & benefit sharing clearing house central portal by country parties.
- Non internet sending information by post, fax, e-mail, CD-ROM
- Sending information to the central portal by national portal.

TOGO

Pour un bon fonctionnement du Centre d'échange APA, le Togo souhaiterait que les pays soient dotés des équipements informatiques pour leur structure de coordination et d'une connexion internet permanent pour leur centre d'échange national APA.

Le Togo propose que des ateliers de formation des gestionnaires de ce centre d'échange soient organisés aussi bien au niveau national que régional sans oublier le renforcement des capacités techniques, scientifiques et juridiques de tous les acteurs sur toutes les thématiques APA afin de leur permettre de participer à la mise en œuvre du Protocole de Nagoya sur l'accès et le partage des avantages.

English Translation

For the ABS Clearing-house mechanism to run smoothly, Togo thinks countries should be equipped with computerized equipment for their coordination structure and a permanent internet connection for their national ABS clearing-house mechanism.

Togo suggests that training workshops for managers from this clearing-house mechanism should be organized both at national and regional levels without neglecting technical, scientific and legal capacity-building in all aspects of ABS topics so managers can take part in implementing the Nagoya Protocol on access and benefit sharing.

II. SUBMISSIONS FROM INTERNATIONAL ORGANIZATIONS, INDIGENOUS AND LOCAL COMMUNITY ORGANIZATIONS AND RELEVANT STAKEHOLDERS

GERMAN RESEARCH FOUNDATION

Running an Access and Benefit-sharing Clearing-House in Germany is, from the viewpoint of research, a complex and multifaceted matter. This is due to the fact that in Germany non-commercial biodiversity research projects are funded by many agencies, including federal and state ministries as well as NGOs and are performed to a large extent in cooperation with the more than 100 German universities. The majority of the non-commercial biodiversity related research projects are performed in Germany and therefore do not require specific regulations for access to genetic resources. On the other hand, commercial biodiversity research is not only conducted by the industry, but by universities too, e.g. in the pharmaceutical departments.

While it appears technically feasible to record the projects run by associations, like the Max Planck Society or funded by agencies, like the German Research Foundation or the Federal Ministry of Education and Research, track keeping with all the biodiversity-related Bachelor, Masters and PhD theses going on in the German universities is extremely time-consuming and costly and in many cases appears simply not doable. Thus, only part of the required information will be made available to the ABS-CHM.

One of the major problems is the decision whether a research project is related to biodiversity issues or not. There are clear cases, but in ecosystem research, in particular so, if social and economic problems are tackled, such decision is not trivial.

For all these reasons the German Biodiversity Research Community, as far as it is represented by the German Research Foundation, will not be proactive with respect to the ABS-CHM, but will duly participate in the discussion of modalities when invited by the European Union through the relevant Federal Ministry for the Environment, Nature Conservation and Nuclear safety.

ASSEMBLY OF FIRST NATIONS

1) The Modalities of Operation of the Access and Benefit Sharing Clearing House

Article 14(4) of the Nagoya Protocol provides that

1. An Access and Benefit-sharing Clearing-House is hereby established as part of the clearing-house mechanism under Article 18, paragraph 3, of the Convention. It shall serve as a means for sharing of information related to access and benefit sharing. In particular, it shall provide access to information made available by each Party relevant to the implementation of this Protocol.

AFN perspective of this issue is that proper protection will be needed and that this article must be implemented in a manner that provides an opportunity for indigenous peoples to provide the information which most accurately reflects their genetic resources that they hold as well as their associated traditional knowledge.

2. Without prejudice to the protection of confidential information, each Party shall make available to the Access and Benefit-sharing Clearing-House any information required by this Protocol, as well as information required pursuant to the decisions taken by the Conference of the Parties serving as the meeting of the Parties to this Protocol. The information shall include:

(a) Legislative, administrative and policy measures on access and Benefit-sharing;

The AFN views are that legislation is required for inventors to apply for permits or clearance certificates from the indigenous focal point. No patents should be granted to the inventor unless they go through the indigenous focal point. These types of measures will have to be developed to reflect the rights to their genetic resources and their traditional knowledge should be applied consistent with any rights that indigenous peoples may obtain in the future in the development of other international and national processes. Additional information that should be provided by each Party include measures which already exist, including existing legal and policy measures, such as those that are flowing from their constitutional rights within their respective country as well as those measures that they are entitled to as a result of jurisprudence and those under international law such as the *Declaration on the Rights of Indigenous Peoples*.

(b) Information on the national focal point and competent national authority or authorities;

It is AFNs perspective that a key aspect of the national focal point should include procedures for obtaining the free and prior informed consent of indigenous peoples and their communities and that this should be carried out in a manner established by those particular communities. This principle should be applied before consideration of the terms mutually agreed upon. Reasonable time and capacity should be provided in indigenous communities to ensure that terms are mutually agreed upon.

Focal points should be determined by indigenous people's respective communities or region. Competent authorities must include those that indigenous peoples determine as required given their own governance and organizational structures.

(c) Permits or their equivalent issued at the time of access as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms.

This is a particularly important part of the clearing house in the view of AFN. The conditions of the permit should be on the free and informed consent of indigenous peoples and measures should be taken to ensure that the terms of the permit are understood by the members of the indigenous people and their communities. Mutually agreed terms will require a precondition or pre requisite including the capacity of indigenous communities and increased capacity to negotiate these terms. These terms will have to be developed in good faith. This permit should include the acknowledgement of the right of indigenous peoples to their genetic resources.

3. Additional information, if available and as appropriate, may include:

- (a) Relevant competent authorities of indigenous and local communities, and Information as so decided;*
- (b) Model contractual clauses;*
- (c) Methods and tools developed to monitor genetic resources; and*
- (d) Codes of conduct and best practices.*

4. The modalities of the operation of the Access and Benefit-sharing Clearing-House, including reports on its activities, shall be considered and decided upon by The Conference of the Parties serving as the meeting of the Parties to this Protocol at Its first meeting, and kept under review thereafter.

The AFN views on this issue include the characteristics of the clearing house to be guided by the principles of transparency, accountability, and are to be administered through a process that is agreed upon by indigenous peoples and the involvement of indigenous peoples and local communities is recommended.

THE MARITIME ABORIGINAL PEOPLES COUNCIL, IKANAWTIKET ENVIRONMENTAL INCORPORATED, THE NATIVE COUNCIL OF NOVA SCOTIA, THE NATIVE COUNCIL OF PRINCE EDWARD ISLAND, THE NEW BRUNSWICK ABORIGINAL PEOPLES COUNCIL, AND THE CONGRESS OF ABORIGINAL PEOPLES

At the national level, no two countries share identical political and legal experiences, especially on the subject of Indigenous knowledge, biodiversity governance, and ABS. The structure and operational framework of any ABS Clearing-House should be negotiated in the context of a country's particular reality. For instance, in Canada, Aboriginal Peoples have been tending sources and carrying forward Aboriginal knowledge about genetic diversity and genetic practices for several millennia. Aboriginal knowledge about the access, use, and conservation of a vast diversity of genetic material has sustained and advanced the continuum of Aboriginal Peoples, in some cases for over 10,000 years. Through transfer of Aboriginal knowledge to other Canadians, in some instances willingly and in many more instances through unscrupulous exploitation of Aboriginal Peoples, the reality exists that Aboriginal Peoples' knowledge is the grandfather or forerunner of what we term today "bio-technology".

As a first step, taking into consideration the objectives of Article 1 of the CBD and that of Article 1 of the *Nagoya Protocol*, Parties to both the CBD and the *Nagoya Protocol* have an obligation to liaise with their constituent Indigenous Peoples and various other stakeholders to establish a "National Focal Point" or a "Competent National Authority" on the subject of ABS; to act in liaison with the "Global ABS Clearing-House" pursuant to Article 14 of the *Nagoya Protocol*.

As its primary objective, a National ABS Focal Point should serve as a "National ABS Clearing-House". In the context of ABS, the National ABS Focal Point does not need to re-invent the wheel. Rather, it should build upon and give effect to the general principles such as, disclosure of *Source of Origin* (SoO), obtaining *Free, Prior, and Informed Consent* (FPIC), and developing *Mutually Agreed Terms* (MAT), established first pursuant to the *Bonn Guidelines*, most of which is now affirmed in the text of the *Nagoya Protocol*.

For Aboriginal Peoples within Canada, Articles 6 and 8(j) of the CBD, requires Canada to not only respect, preserve, and maintain knowledge, innovations, and practices of the Indigenous Peoples, but also to develop national strategies, plans, and programmes, which promote the widest application of such knowledge, innovations, and practices, with the approval and involvement of the holders of such knowledge, innovations, and practices.

For greater certainty, Article 8(j) also requires Canada to encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices. It would require in some cases an adjustment or calibration of existing or emerging national bureaucracy on the governance of Indigenous knowledge and biodiversity, in order to realise some of the new dynamics and orientation on ABS introduced by the *Nagoya Protocol*.

The operational imperatives for the Competent National Authority, as a National ABS Clearing-House, include the need to prioritize transparency, accountability, ensure certainty and efficacy, and to eschew burdensome formality.

A National ABS Focal Point or National ABS Clearing-House from our perspective requires a broad approach. Canada has recognized that the founding Peoples of Canada include the French, the English, and in 1982, finally recognized "*the Aboriginal Peoples of Canada*" within the Federation of the Peoples of Canada. This supreme recognition in effect includes the seventy-three remaining Aboriginal Nations of Aboriginal Peoples continuing throughout traditional ancestral homeland territories nested within the present borders of the Federation of the Peoples of Canada.

In Canada, a National ABS Focal Point or National ABS Clearing-House would require a multi-government accord between the federal government, provincial governments, territorial governments, and Aboriginal Peoples (who hold Treaty Rights, Aboriginal Rights, and other rights protected under Section 25 and 35 of the *Constitution Act, 1982* and the force of common law).

The reality of a multi-Peoples, multi-diverse, multi-lingual, multi-cultural, multi-mosaic character, and multi-relationship history between Aboriginal Peoples within Canada and the French and English pre-Confederation sovereign powers requires that a National ABS Focal Point or National ABS Clearing-House to foremost recognize, respect, and accommodate the different worldviews and approaches of the different Aboriginal Peoples to our natural resources, genetic resources, knowledge, uses, and benefits arising therefrom. In other words, the clearing-house concept, nationally and globally, must take into account the “*homo-centric worldview*” of dominating developed States and the “*eco-centric worldview*” of Indigenous Peoples of the world whose knowledge, innovations, and concepts of benefit-sharing are integral, interconnected, and integrated with the land, water, air, and all natural life itself.

A National ABS Clearing-House must reflect a national strategy and be accredited or accepted by an international body to confirm that it is compliant with the *Nagoya Protocol*, is transparent, is approachable with clearly defined operational procedures, and is independent of national self-interest. It is imperative that Indigenous Peoples be full participating members of any national decision-making council or oversight council for any national or global ABS Clearing-House on National ABS Focal Point.

Operational procedures should be subject to testing and challenge at the national level and at the international level for final determination. Operational procedures should espouse the principles and purposes of the UN Charter, to be in good faith. In Canada, operations must be subject to the paramountcy of the *Constitution Act, 1982*, uphold the *Honour of the Crown*, without sharp dealings, and the common law on Aboriginal, Treaty, and other rights of Aboriginal Peoples.

The expropriation of a genetic resource without disclosure of its *Source of Origin*, or reluctance to disclose the *Source of Origin* proprietary to an Indigenous People within a traditional ancestral homeland territory, or reluctance to recognize an Indigenous People’s traditional ancestral homeland territory by a State’s federal or provincial government power would require more than a criminal arm of an existing judiciary or civil arm of a domestic judiciary to examine and render a decision on the matter of proper disclosure of *Source of Origin*. This same principle applies to disputes for ownership, access, use, *Free, Prior, and Informed Consent, Mutually Agreed Terms*, and allegations of bio-piracy.

In light of the international global scope of Indigenous knowledge and ABS, an international tribunal or court should be given the responsibility to justiciate on vital matters such as disclosure of *Source of Origin*, ownership, *Free, Prior, and Informed Consent, Mutually Agreed Terms*, fairness of equitable benefit-sharing agreements, and claims of bio-piracy.

In establishing National ABS Clearing-Houses or National ABS Focal Points, States must accommodate Article 17 for “*exchange of information*”, Article 18 for “*technical and scientific cooperation*”, and Article 19 for “*handling of biotechnology and distribution of its benefits*”.

Within a modality of a National ABS Clearing-House, there is required to be established an investigatory branch, which could be associated with university research centres and other fora of international experts who could render or conduct unbiased investigations and provide guidance on best practices or *bona fides* of and to both providers and users.

Indigenous Peoples need to have the opportunity themselves to turn to a National ABS Focal Point to ascertain questions of *bona fides* of a biotechnical company. Conversely, a biotechnical company should have the ability to contact a National ABS Focal Point and be supplied with contacts for all the Indigenous Peoples within a State, who have or may have any interest, knowledge, stake, say, or who should provide or enter into a *Free, Prior, and Informed Consent* agreement or be a party to *Mutually Agreed Terms* for access, use, and fair and equitable benefits-sharing.

Article 6.3(a) of the *Nagoya Protocol* requires a National ABS Clearing-House to have in place all necessary legislative, administrative, or policy measures, as appropriate, to provide “legal certainty, clarity, and transparency of their domestic access and benefit sharing legislation or regulatory requirements”. This provision must be provided equally to both provider and user to create a playing field where well informed decisions can be made by both the provider and user. Sharp dealings will not be tolerated on the matter of access, use, and fair and equitable benefits-sharing arising from the knowledge, innovations, or practices of Indigenous Peoples about a genetic resource or traditional knowledge sourced from Indigenous Peoples on their traditional ancestral homeland territories.

National and Global ABS Clearing-House operations must be effective and must be subject to all form of scrutiny by all levels of interests, including the different levels and forms of Indigenous Peoples governments and Indigenous Peoples representative, advocacy, and technical organizations and institutions. As an example in Canada, if a genetic resource user wanted to negotiate *Free, Prior, and Informed Consent* or *Mutually Agreed Terms* with the Mi’kmaq People, the user would first be required to make contact with the Mi’kmaq Grand Council, then the five Native/Aboriginal Councils, which represent Mi’kmaq persons continuing on the traditional ancestral homelands (i.e., not living on a reserve), and then the thirty-two Mi’kmaq federal reserve communities in the five provinces of Eastern Canada. Together these contacts constitute a minimum first approach.

In Canada, with the *Nagoya Protocol*, it is not acceptable to simply contact a federal government Department of Indian and Northern Affairs, who’s role is restricted to the administration of *Indian Act* reserve lands and communities. Such a limited contact would leave out the vast majority of Aboriginal Peoples, their Native/Aboriginal Councils, their traditional Grand Councils, and other Aboriginal technical, social, and economic advocacy organizations or entities.

Measures of the machinery of governments must be laid out and examined to integrate or implement into the operations of a transparent National ABS Focal Point and National ABS Clearing-House. States need to provide legal certainty to both provider and user. In addition, a National ABS Clearing-House should aspire to create a model of operation attuned to constantly balance the interest of providers and users or those who seek access to genetic resources and associated knowledge.

A National ABS Clearing-House must reach out and involve representative organizations of Indigenous Peoples if it is to meet the intent of Article 13.1 of the *Nagoya Protocol*. Where the State itself cannot, or is not trusted to, validate the transparent, neutral operations of a National ABS Focal Point, there needs to be a mechanism for international oversight, such as a Global ABS Clearing-House.

The *Nagoya Protocol* establishes a Global ABS Clearing-House in Article 14. Taking into consideration the existing clearing-house mechanism of the CBD established pursuant to Article 18.3 thereof, the new Global ABS Clearing-House can primarily advance the objectives of the *Nagoya Protocol*. Consequently, the Global ABS Clearing-House does not need to re-invent the wheel; however, it can be positioned to build and improve on the existing CBD Clearing-House through promotion of information exchange relevant to ABS among stakeholders within States. To that extent the clearing-house becomes the hub for advancing other measures such as capacity building, promotion of awareness, and enforcement/compliance with the *Nagoya Protocol*.

In addition, a Global ABS Clearing-House would provide clarity in regard to acceptable international standards on ABS and advance the aspirations and rights of Indigenous Peoples, articulated in international conventions, protocols, statements, and declarations, notably UNDRIP. From this understanding and these best practices, the Global ABS Clearing-House should guide the activities of the Competent National Authorities, with the effective participation of Indigenous Peoples, on the design and implementation of their National ABS Focal Points and National ABS Clearing-Houses.

As a matter of utmost importance, one of the modalities for the operation of the Global ABS Clearing-House is to position it to truly serve as a “clearing-house” to illuminate overlapping inter-regime dynamics on the subject of ABS beyond the *Nagoya Protocol*. In this regard, Article 4 of the *Nagoya Protocol* recognizes that by itself it only addresses ABS in the context of the CBD.

4.2 *Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.*

Consequently, given ongoing deliberations relevant to ABS at diverse international and multi-lateral forums, including the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore of the *World Intellectual Property Organization* (WIPO), the *Nagoya Protocol* is not an exclusive instrument on the subject. As such, a Global ABS Clearing-House contemplated under the *Nagoya Protocol* should facilitate exchange of information in regard to ABS governance in other regimes to advance the practical and operational interests of owners and users of genetic resources.

In Canada, Aboriginal Peoples within the Federation of the Peoples of Canada must have an opportunity or be involved in validating a National ABS Focal Point or a National ABS Clearing-House. As indicated earlier, the complexities of a federal State, particularly one like the Canadian Federation, with its division of jurisdictions and recent 1982 constitutional recognition of the Treaty Rights, Aboriginal Rights, and other rights of Aboriginal Peoples, hold paramountcy as a supreme national law. This fact, including recent Supreme Court of Canada jurisprudence, the common law, and the Government of Canada’s requirement to respect the *Honour of the Crown* in its dealings with Aboriginal Peoples, requires the ABS national strategy, national policy, national legislation, and administrative thereof to be developed and implemented with the full involvement and effective participation of Aboriginal Peoples. This is fundamental and anything less is wrong in law, subverts the purposes and principles of CBD and the *Nagoya Protocol*, and violates the ethic of good faith, peace, and friendship between Peoples.

In Canada, an advisory body of Aboriginal Peoples, selected by the five National Aboriginal Organizations, and appointed by Order-in-Council, can be established under a National ABS Clearing-House implementation act. The advisory body can monitor and report on the implementation and administration of the National ABS Focal Point or National ABS Clearing-House. Such advisory bodies within national legislation already exist; for example Canada’s *Species at Risk Act*, for the national conservation of biodiversity, legislates the National Aboriginal Council on Species at Risk to advise the competent ministers on the implementation and administration of the act.

The clearing-house model of operation must be more than a “body sympathetic” to Indigenous Peoples. It must, in the spirit of the evolution of international policy and international law hold under constant review UNDRIP and the CBD, and ensure that the *Nagoya Protocol*’s intent by application of procedures and process does not knowingly or unknowingly resurrect the *doctrine of dominance* and mindsets of the past. We do not want to resurrect subjugation; suffering; injustices; dispossession of lands and resources

and benefits therefrom; disinheritance of identity, worldviews, and knowledge; and the denial of rights and our continuum as Indigenous Peoples, part of the *family of humankind* on Mother Earth.

The superior views, actions, and doctrines of the past have already taken their toll to relegate Indigenous Peoples to be the most vulnerable, the most discriminated, and the most oppressed throughout the world, and the most illegally dispossessed of resources, innovations, and technologies, without benefit or gain. Those days, those eras, those mind-sets, those doctrines must be abandoned. This era, for fair and equitable sharing of benefits of genetic resources and Indigenous knowledge must take a path for the life-serving and life-saving benefit of humankind, through honest dealings and fair sharing.

RED DE COOPERACIÓN AMAZONICA

En vista de la importancia de los CCTT para los pueblos indígenas y comunidades locales y su destacada lugar en el marco del PdN, se hace necesario que el CHM, le le de la misma importancia al manejo del tema y a la participación de PI y Clos ,a través de :

- Establecer sub-mecanismo o instrumento apropiado que permita el tratamiento y manejo del tema en su justa dimensión.
- Participación plena y efectiva de representantes de comunidades locales y sus organizaciones.

English translation

In light of the significance that traditional knowledge has for indigenous peoples and local communities and the prominent place it occupies in the framework of the Nagoya Protocol, the treatment of this issue and the participation of indigenous people and local communities must be given the same degree of importance in the Clearing-House Mechanism by:

- Establishing an appropriate sub-mechanism or instrument to enable the issue to be addressed and treated with the attention it deserves;
- Fully and effectively engaging representatives of local communities and their organizations.
