Peer Review of Updated Zero Draft of the Post-2020 GLOBAL BIODIVERSITY FRAMEWORK
(CBD/SBSTTA/24/3/Add.2)

Sociedad Peruana de Derecho Ambiental /
Peruvian Society of Environmental Law

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To adhere to common practice across disciplines, this peer review appears in narrative form rather than in the provided template. The review ends with a recommendation for specific action, which is placed in bold italics.

The twenty targets for the Updated Zero Draft of the Post-2020 Global Biodiversity Framework are not of equal significance for achieving the objectives of the 1992 United Nations Convention on Biological Diversity (CBD). We restrict our comments to what we believe is of greatest importance, viz.

> Target 12. By 2030, increase by [X] benefits shared for the conservation and sustainable use of biodiversity through ensuring access to and the fair and equitable sharing of benefits arising from utilization of genetic resources and associated traditional knowledge (UNSCBD 2021, p. 22).

Many delegations to the Conference of the Parties (COP) assume that bilateral agreements are possible for access to genetic resources and the **fair and equitable** sharing of benefits. Logic and evidence should disabuse them; analysis of the impossibility is abundant. The literature begins the same year as the presentation of the Convention on Biological Diversity at the Earth Summit, Rio'92 (Ruiz Muller, 2015, Foreword). Publications which explore the impossibility are available in every official language of the UN + Portuguese (see, for example, Vogel 1997, 2007, Vogel et al 2011, Oduardo-Sierra et al 2012, Ruiz Muller 2018, Vogel 2018a, b, c, Vogel et al 2018, Ruiz Muller et al 2019). In a nutshell, "fairness and equity" in benefit sharing require abandonment of the bilateral approach and adoption of a Global Multilateral Benefit-Sharing Mechanism (GMBSM), which is the title of Article 10 of the Nagoya Protocol (NP). Only through the

institutionalization of a GMBSM can Target 12 ever ensure that benefits will be "fair and equitable".

The GMBSM must establish, collect and distribute "rents", which is the difference between the price paid and what would have been paid in a competitive market. For genetic material,* competition eliminates rents, no matter whether access is via a physical specimen or one of the 1600+ online databases. Under the bilateral approach, the market clears with a price of "peanuts", to use the colloquialism favored by the legal scholar Peter Drahos (2014, pp. 138-143). The immiserizing competition for Providers is juxtaposed to the monopoly intellectual property rights enjoyed by Users. Such asymmetrical treatment of rents between natural and artificial information,** is not only unfair and inequitable but also inefficient. *Incentives for conservation are eviscerated*. For fairness, equity and efficiency, equal treatment must be institutionalized.

This argument is robust and has even inspired thought experiments on cases as disparate as a rodent, a snail, a sponge and a virus (SPDA 2021, forthcoming). Continued adherence to a bilateral approach in ABS is simply quixotic. Target 12 must not tilt at windmills. The futility of doing so was captured in the title of an SPDA submission for NP3/13: "Even the best case for bilateralism supports the need for a Global Multilateral Benefit-Sharing Mechanism", also uploaded in French, Portuguese and Spanish (2019).

Besides thirty years of published literature, the issue of rents has appeared in peer reviews of commissioned studies on "DSI", submissions of new and emerging issues, and questions submitted for the Webinar series on "DSI" (see, respectively Vogel 2017, 2019a, b, c, 2020; SPDA 2015, 2017; and UNSCBD 2020, 2021). Delegations to COP9 are kindly reminded that rents entered Decision 9/12(14) as one of four questions in preparation for COP10,

> Requests the Executive Secretary to invite, in consultation with the Co-Chairs of the Working Group, relevant experts to address the Working Group on Access and Benefit-sharing, at the appropriate time, on the following issues: Should economic rent be charged for access to genetic resources and what is the justification for such a rent or against such a rent? What should be the basis for the valuation of such rent? (UNSCBD 2009).

"[A]t the appropriate time" was the Achilles' Heel in the Decision. Somehow COPs 10 to 14 were not deemed "the appropriate time" for addressing rents. The ancient wisdom "If not now, when?" has a corollary for the post-2020 Global Biodiversity Framework: "If not here, where?" COP15 seems propitious.

Target 12 should be revised to reflect the issue of rents, which integrates with Target 18: Financial Incentives. The revision should also imply that Parties insert provisions into any pending bilateral agreement so as to subordinate "deals in the pipeline" to a future GMBSM (SPDA 2017, p. 15).

The SPDA-ABS Research team suggests the following wording for Target 12:

Target 12. Ensure measures that the benefits from the successful commercial utilization of genetic resources and related traditional knowledge that enjoy intellectual property protection, be shared fairly and equitably, resulting by 2030 in economic rents being obligatory for at least one-half of the major instruments listed by the World Intellectual Property Organization.

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*"Material" is not defined in the CBD or the NP. Given that a sample denatured will retain its tangible matter yet become worthless for R&D, one may infer that "material" refers to the intangible component of any specimen.
**"Natural Information (biotic) = Any unintentional distinction, non-uniformity or difference extracted from matter that is living or was once alive.
Artificial Information = Any human-made distinction, non-uniformity or difference that is intentional". (SPDA 2021, forthcoming, Diagram 1 "The Phenom").

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