



United Nations  
Environment  
Programme



Distr.  
GENERAL

UNEP/Bio.Div/WG.2/3/7  
29 April 1991

ORIGINAL: ENGLISH

AD HOC WORKING GROUP OF LEGAL AND TECHNICAL  
EXPERTS ON BIOLOGICAL DIVERSITY

Third session

Madrid, 24 June - 3 July 1991

NOTE TO FACILITATE UNDERSTANDING OF ISSUES  
CONTAINED IN ARTICLES UNDER CONSIDERATION  
BY SUB-WORKING GROUP II

I. Introduction

The provisions of Articles 13 through 17 of the original draft Convention (UNEP/Bio.Div/WG.2/2/2) have been separated and placed within each article under one of five headings: scope, purpose, principles, conditions or measures. This has been done in accordance with Sub-Working Group II's (SWG II) working method and the instruction of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity at its second session (see UNEP/Bio.Div/WG.2/2/5 paragraphs 63 and 74 (1)). The working method and this paper are intended to focus discussion on what issue or issues are being addressed within each provision of the original and revised draft Conventions. In addition, some of the material that appears in the pages that follow is derived from the discussions of SWG II as reflected in the Meeting Report for the second session of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity (UNEP/Bio.Div/WG.2/2/5). The derivation of the new provisions is noted in footnotes to facilitate cross-referencing to the Meeting Report and the original draft Convention.

Na.91-2485-3363L

**II Provisions**

**Article 13 : Access to [Biological Diversity][Genetic material]<sup>1</sup>**

**Scope**

1. The scope of biological diversity to which this Convention's provisions related to access shall apply include: genetic material, both in situ and ex situ, from both wild and domestic species, from both terrestrial and non-terrestrial species, and from both within and beyond national jurisdiction.

2. Access to biological diversity is defined to include both direct physical access to the genetic material and access to information about the genetic material.

3. Arrangements for access to migratory species shall be made on a case-by-case basis. Access shall not be denied solely because the species in question is migratory.<sup>2</sup>

**Purpose**

4. The general purposes of access to [biological diversity] [genetic material] include the conservation and the promotion of:

- the rational use of biological diversity;
- sustainable development;
- the continued functioning of the biosphere;
- environmentally sound uses and uses for the collective benefit of humankind including economic development;
- scientific research.

5. Access to [biological diversity] [genetic material] shall support and reinforce the collection and study of wild relatives of crop plant species with the aim of facilitating utilization of the wild species in plant breeding programmes.<sup>3</sup>

<sup>1</sup> Consideration should be given to which of these terms is more appropriate and in what context. It may, for instance, be appropriate to use the broader term biological diversity in certain contexts while genetic material is used in others.

<sup>2</sup> Article 13, paragraphs 1,2 and 3 are derived from the discussions of Sub-Working Group II (SWG II) (see UNEP/Bio.Div/WG.2/2/5 paragraph 64) and from Article 13, Alternative 1, paragraph 1 and Alternative 2, paragraph 1 (in situ and ex situ) of the original draft convention (UNEP/Bio.Div/WG.2/2.2).

<sup>3</sup> Article 13, paragraphs 4 and 5 are derived from the discussions of SWG II (see UNEP/Bio.Div/WG.2/2/5 paragraph 65) and Article 13, Alternative 1, paragraphs 3, 4, 6 and Alternative 2, paragraph 1 of the original draft convention.

### Principles

6. Nothing in this Article shall infringe upon the principle of the permanent sovereignty of States over the natural resources under their jurisdiction.
7. The Contracting Parties shall provide [fair and equal] [free] [open] access to genetic material.
8. Activities undertaken pursuant to this Article shall be carried out with due regard for the relevant ownership rights of the countries of origin of wild species.
9. Mutual agreements made related to access to biological diversity shall be based on the principle of equitable sharing.
10. [Access to genetic material shall be based on the prior informed consent of the country of origin of the genetic material.]
11. Access to genetic material shall not be regulated in such a manner that it results in the blanket prevention of access.
12. Access provided for research and studies related to biological diversity shall be carried out preferentially in situ.
13. Modalities of access to genetic material shall be developed without prejudice to owners, users and developers.<sup>4</sup>

### Conditions

14. Access to genetic material shall not endanger viable populations.
15. [Access to genetic material shall be at a recovery cost.]
16. The activities under this Article shall be undertaken on a commercial basis upon mutual agreement.<sup>5</sup>
17. [Access to genetic material shall be linked with access to related technologies, the results of research and products developed and to the sharing of commercial products developed and to the sharing of commercial profits].

---

<sup>4</sup> Article 13, paragraphs 6-13 are derived from the discussions of SWG II (see UNEP/Bio.Div/WG.2/2/5 paragraph 66) and from Article 13, Alternative 1, 2, and 6 of the original draft convention.

<sup>5</sup> Article 13, paragraph 16 potentially conflicts with paragraph 15 of the same Article.

18. Any system created to regulate access must in general promote and not prevent access.<sup>6</sup>

#### Measures

19. A clearing-house for information and research results shall be established.

20. A data base of information relevant to the conservation and rational use of biological diversity shall be created and made available to the clearing-house established by paragraph 19 of this Article.

21. The Contracting Parties shall endeavor to undertake joint research and the sharing of benefits from joint research and to develop with the full participation of the countries of origin of genetic material the scientific research programmes. The Contracting Parties shall endeavour to carry out these efforts in the countries of origin of genetic material.

22. Measures to facilitate co-operation among the Contracting Parties and to ensure that undue restrictions are not placed on access to genetic material shall be developed.

23. Access to genetic material shall be based upon mutual agreement.

24. Access to genetic material shall be regulated in accordance with Protocols adopted by the Contracting Parties on bilateral and multilateral levels and in co-operation with relevant research institutions.<sup>7</sup>

---

<sup>6</sup> Article 13, paragraph 18 reinforces the principle articulated in paragraph 11 of this Article.

Article 13, paragraphs 14-18 are derived from the discussions of SWG II (see UNEP/Bio.Div/WG.2/2/5 paragraph 66) and from Article 13, Alternative 1 paragraphs 1 and 2 of the original draft convention.

<sup>7</sup> Article 13, paragraphs 19-24 are derived from the discussions of SWG II (see UNEP/Bio.Div/WG.2/2/5 paragraph 67) and from Article 13, Alternative 1, paragraphs 2 and 4, Alternative 2, paragraph 1 of the original draft convention.

/.....

Article 14. Access to Technology and InformationScope

1. ~~The countries of origin of genetic material shall have [equitable] [preferential] access to the benefits and profits arising from commercial exploitation of the relevant genetic material.~~
2. [Access to technology and information under this Article means access to the technology and information that is relevant to the conservation and sustainable use of biological diversity.]
3. [Access to technology and information under this Article is not confined to the technologies relevant for conservation and sustainable utilization of biological diversity, but is also defined to include technologies that make use of genetic resources for other purposes, such as the production of pharmaceuticals.]<sup>8</sup>
4. Access to technology and information includes access to the [published results of] scientific research, training and surveying, know-how, traditional knowledge as such and in combination with technologies.
5. The Contracting Parties shall promote access to environmentally sound technologies for conservation and sustainable utilization of biological diversity.<sup>9</sup>
6. Access to technology is defined to include access to know-how relevant to conservation and sustainable use of biological diversity.<sup>10</sup>

<sup>8</sup> Paragraphs 2 and 3 clearly conflict. Paragraph 2 is derived from Article 14, paragraph 1 of the original draft convention. Both paragraphs 2 and 3 are derived from the discussion of the SWG II (see UNEP/Bio.Div/WG.2/2/5 paragraph 69).

<sup>9</sup> This scope is implied from Article 14, paragraph 4 of the original draft convention. It overlaps with Article 14, paragraph 2.

<sup>10</sup> Article 14, paragraph 6 is derived from Article 15, paragraph 6 of the original draft convention. It is more appropriately placed here under the Article concerned with access to technology. This new paragraph overlaps with the new paragraph 2 and 5 of the same Article. Paragraph 6 is more explicit than paragraph 2 because it specifies that access to relevant information includes access to know-how. Know-how, however, is not a clearly defined term.

Article 14, paragraphs 1-6 on the scope of access to technology and information are derived from the discussions of SWG II (see UNEP/Bio.Div/WG.2/2/5 paragraph 69) and from Article 13, paragraph 5; Article 14, paragraphs 1, 2, 4; and Article 15, paragraph 6 of the original draft convention.

### Purpose

7. Access to technology shall promote the joint development of environmentally sound technologies for the conservation and sustainable use of biological diversity.<sup>11</sup>

### Principles

8. Access by the countries of origin of genetic material to the benefits and profits arising from the commercial exploitation of the relevant genetic material shall be on a [equitable] [preferential] basis.<sup>12</sup>

9. Modalities of access to technology related to biological diversity, including biotechnology, shall be developed without prejudice to owners, users and developers.<sup>13</sup>

10. The Contracting Parties shall provide [fair and equal] [free] [open] access to technology and information on [preferential and noncommercial] [fair and favourable] basis.

11. Provisions for access to technology and information shall have due regard for patents and property rights derived from genetic diversity under as well beyond national jurisdiction and control.

12. Access to technology and information shall be provided taking into consideration the special needs of developing countries.

13. [Access to technology and information shall have due regard for the legitimate interests of the public and private sectors.]

14. The stimulation of private companies to facilitate access and joint development of technologies provided for under paragraph 24 of this Article shall be done on a preferential basis to governmental institutions and private companies in developing countries.

---

<sup>11</sup> Article 14, paragraph 7 is derived from Article 14, paragraph 4 of the original draft convention. No other reference is made to the purpose of the provisions related to access to technology nor was this explicitly discussed by SWG II. Conceivably, the same broad purposes outlined in Article 13, paragraphs 4 and 5 would apply to the purpose section of access to technology and information.

<sup>12</sup> Article 14, paragraph 8 is derived from Article 13, paragraph 5 of the original draft convention, but is more appropriately placed in this Article. It presupposes acceptance that the scope of access to technology includes access to the benefits and profits arising from commercial exploitation of the relevant genetic material (see paragraph 1 of this Article).

<sup>13</sup> Article 14, paragraph 9 is derived from Article 13, paragraph 6 of the original draft convention, which dealt with modalities of access to biological diversity and technology. Because Article 13 and 14 treat these separately, the original paragraph has been divided and the relevant portions placed in the appropriate Article.

15. Activities undertaken under this Article shall have due regard for the relevant ownership rights of the countries of origin of wild species.<sup>14</sup>

#### Conditions

16. [Access to technology and information shall take place upon request of qualified biologists].

17. The activities commenced pursuant to this Article shall be undertaken on a commercial basis upon mutual agreement.

18. Provisions for access to technology and information must make allowance for the necessity of providing additional financial resources to enable developing countries to acquire and apply environmentally sound technology for conservation and sustainable use of biological diversity.<sup>15</sup>

#### Measures

19. The Contracting Parties shall take appropriate measures to provide for [equitable] [preferential] access by the countries of origin of genetic material to the benefits and profits arising from commercial exploitation of the relevant genetic material.<sup>16</sup>

20. The conditions of access shall be subject to mutual agreement between Parties concerned [without prejudice to the negotiations on intellectual property rights within the framework of WIPO and GATT].<sup>17</sup>

---

<sup>14</sup> Article 14, paragraphs 8-15 are derived from discussions of SWG II (see UNEP/Bio.Div/WG.2/2/5 paragraph 70) and from Article 13, paragraphs 5 and 6, and Article 14, paragraphs 1, 3, 5, and 6 of the original draft convention.

<sup>15</sup> Article 14, paragraphs 16-18 are derived from Article 14, paragraphs 2, 3 and 6 of the original draft convention.

<sup>16</sup> Article 14, paragraph 19 is derived from Article 13, paragraph 5 of the original draft convention, but is more appropriately placed in the Article concerned with access to technology. It is requiring that measures be taken to implement paragraph 1 under the scope of Article 14.

<sup>17</sup> Article 14, paragraph 20 is taken directly from the second half of Article 13, paragraph 5 of the original draft convention. It is more appropriately placed here with the provisions concerned with access to technology and information.

21. Additional financial resources shall be provided to enable developing countries to acquire and apply environmentally sound technology for conservation and sustainable use of biological diversity.<sup>18</sup>
22. The Contracting Parties shall promote, where appropriate, arrangements for joint development of environmentally sound technologies for conservation and sustainable use of biological diversity.
23. The Contracting Parties shall endeavor to stimulate the private companies under their jurisdiction or control to facilitate access to and joint development of environmentally sound technologies for conservation and sustainable use of biological diversity.
24. Access to technology and information shall be improved through exchange of information on bilateral and multilateral bases, utilizing, as appropriate, the institutions established in accordance with Articles..... of the present Convention.<sup>19</sup>

Article 15. Transfer of technology

Scope

1. Technology covered by this Article includes [those technologies that support conservation and sustainable use of biological diversity].
2. Technology under this Article shall be defined to include traditional technologies.<sup>20</sup>

---

<sup>18</sup> Article 14, paragraph 21 is derived from Article 14, paragraph 3 of the original draft convention. It overlaps with the condition stated in Article 14, paragraph 18. It may be sufficient to have the substance covered in the original Article 14, paragraph 3 placed as a condition in this Article and as a measure under Article IX Financial Mechanism.

<sup>19</sup> Article 14, paragraph 24 is derived from Article 15, paragraph 6 of the original draft convention. Because it deals with methods to improve access to technology and information, it seems more appropriately placed here in the Article concerned with access to technology and information.

Article 14, paragraphs 19-24 are derived from Article 13, paragraph 5; Article 14 paragraphs 3, 4, 5; and Article 15, paragraph 6 of the original draft convention.

<sup>20</sup> Article 15, paragraph 2 is derived from Article 15, paragraph 5 of the original draft convention.

/.....



3. The provisions of the present Article do not apply to genetic technology.<sup>21</sup>

#### Purpose

4. The purpose of transfer of technology is to ensure that:

- a) developing countries develop their own capabilities to address their special needs, including policies on biotechnology development;
- b) experts, specialists and other qualified personnel in the field of technologies for the conservation and sustainable use of biological diversity are trained;
- c) special attention is given to the development of local and indigenous technologies;
- d) research programmes are carried out in the countries of origin of genetic material.<sup>22</sup>

#### Principles

5. The developed countries have an obligation to transfer technology to the developing countries on a [preferential and noncommercial] [fair and most favourable] basis.<sup>23</sup>

6. [The legitimate interests of the private sector shall be protected in all activities undertaken pursuant to this Article related to transfer from that sector.] [Activities related to transfer of technology from the private sector undertaken pursuant to this Article shall be undertaken for the mutual benefit of the Parties concerned.]<sup>24</sup>

<sup>21</sup> Article 15, paragraph 3 is derived directly from Article 15, paragraph 11 of the original draft convention. The meaning of genetic technology in this context is unclear.

<sup>22</sup> Article 15, paragraph 4 is derived from Article 15, paragraphs 2, 3, 7, 8 and 9 of the original draft convention.

<sup>23</sup> Technology may be left undefined here, implying whatever definition is decided upon under the scope paragraphs applies here. If the technology covered by this section is to be broader or more restricted than as defined under the scope paragraphs it should be made explicit in this paragraph.

<sup>24</sup> Article 15, paragraph 6 is derived directly from the second half of Article 15, paragraph 3 of the original draft convention.

/.....

7. The Contracting Parties shall endeavor that the investments made by the private sector in developing technologies are secured on a [fair and equitable] [fair and most favourable] [preferential] [the most favourable] basis.<sup>25</sup>

#### Conditions

8. The provisions of paragraph 7 of this Article shall not undermine the special needs and legitimate interests of developing countries.<sup>26</sup>

#### Measures

9. The obligation defined in paragraph 5 of this Article shall be implemented [by means of technical co-operation and assistance in acquiring relevant technology] to the developing countries.<sup>27</sup>

10. The Contracting Parties shall encourage elaboration and adoption of national policies, plans and strategies for the conservation and sustainable use of biological diversity.<sup>28</sup>

11. The Contracting Parties shall report on measures undertaken pursuant to the provisions of paragraph 10 of this Article to the Secretariat established in accordance with Article.... of the present Convention.<sup>29</sup>

25 Technology may be left undefined here implying whatever definition is decided upon under the scope paragraphs applies. If the technology covered by this section is to be broader or more restricted than as defined under the scope paragraphs it should be made explicit in this paragraph.

Article 15, paragraph 7 is derived directly from Article 15, paragraph 5 of the original draft Convention.

26 Article 15, paragraph 8 is derived directly from the last sentence of Article 15, paragraph 5 of the original draft convention.

27 Article 15, paragraph 9 is derived from Article 15, paragraph 1 of the original draft convention.

28 Article 15, paragraph 10 is derived from the second half of Article 15, paragraph 2 of the original draft convention.

29 Article 15, paragraph 11 is derived directly from Article 15, paragraph 4 of the original draft convention.

/.....

12. The Contracting Parties shall ensure, through national policy and legislation, that private enterprises within their jurisdiction transfer technology to the developing countries [and that the technology recipient countries encourage relevant investments by the private sector.] [Appropriate measures shall be taken to protect the legitimate interests of the private sector.]<sup>30</sup>

13. The Contracting Parties shall promote co-operation in training of experts, specialists and other qualified personnel in the field of technologies for conservation and sustainable use of biological diversity.<sup>31</sup>

14. The Contracting Parties shall promote co-operation between developed and developing countries, and also between developing countries, in the establishment of joint ventures for research and development of technologies in the field of conservation and sustainable use of biological diversity.<sup>32</sup>

15. The Contracting Parties shall promote co-operation in scientific research for technologies in the field of conservation and sustainable use of biological diversity, intending where appropriate to carry out research programmes in the countries of origin of biological diversity.<sup>33</sup>

16. The Contracting Parties, for the purposes of technology transfer pursuant to paragraphs 1-15 of the present Article [and for facilitating access of the developing countries to relevant patents], shall use to the maximum extent possible the clearing-house mechanism established in accordance with Article..... of the present Convention and the financial mechanism established in accordance with Article..... of the present Convention.<sup>34</sup>

---

30 Article 15, paragraph 12 is derived from Article 15, paragraph 3 of the original draft convention. Paragraph 12 of this Article overlaps with paragraph 6 under the principles section of this Article.

31 Article 15, paragraph 13 is derived directly from Article 15, paragraph 7 of the original draft convention. Paragraph 13 of this Article overlaps with paragraph 4 under the purposes section of this Article.

32 Article 15, paragraph 14 is derived directly from the first sentence of Article 15, paragraph 8 of the original draft convention.

33 Article 15, paragraph 15 is derived directly from Article 15, paragraph 9 of the original draft convention.

34 Article 15, paragraph 16 is derived directly from Article 15, paragraph 10 of the original draft convention.

Article 16            Technical Co-operation<sup>35</sup>

**Scope**

1. Technical co-operation is defined to mean [rational] [technical co-operation with] ~~[international co-operation with]~~ developing countries in the field of conservation and sustainable use of biological diversity.<sup>36</sup> It includes co-operation in the development and use of biotechnologies for conservation and sustainable use of biological diversity.<sup>37</sup>

**Purpose**

2. The purpose of this Article is:
- a) to promote, co-ordinate and facilitate technical co-operation among the developed and developing countries, Parties to the present Convention, as well as strengthen for these purposes the existing [institutions] [clearing-house mechanisms].<sup>38</sup>
  - b) to encourage and develop methods of co-operation in the development and use of biotechnologies for conservation and sustainable use of biological diversity.<sup>39</sup>

**Principles**

3. The developed States have an [obligation][commitment] to promote, without prejudice to their contributions in accordance with the Articles .... of the present Convention, technical co-operation on a bilateral and multilateral basis.

---

35 In accordance with the decision of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity at its second session, the words Technical Assistance have been replaced with Technical Co-operation [see UNEP/Bio.Div/WG.2/2/5 paragraph 73].

36 Article 16, paragraph 1 is derived from Article 16, paragraph 1 of the original draft convention. References to technical assistance have been removed (see footnote 35).

37 The second sentence of Article 16, paragraph 1 is derived from Article 16, paragraph 4 of the original draft convention.

38 Subsection a) of Article 16, paragraph 2 is derived from Article 16 paragraph 3 of the original draft convention.

39 Subsection b) of Article 16, paragraph 2 is derived from Article 16, paragraph 4 of the original draft convention.

/.....

### Conditions

4. The [obligation] [commitment] to promote technical co-operation articulated in paragraph 3 of this Article shall be subject to mutual agreement.<sup>40</sup>
5. [The promotion of technical co-operation as outlined in paragraph 6 of this Article shall be subject to the availability of relevant funds.]<sup>41</sup>

### Measures

6. The Contracting Parties shall promote technical co-operation [on the basis of mutual agreement] through institutions established on national and international levels in accordance with Article .... of the present Convention.<sup>42</sup>
7. The Contracting Parties shall use the clearing-house mechanism to promote, co-ordinate and facilitate technical co-operation.<sup>43</sup>
8. The Contracting Parties shall encourage and develop methods of co-operation in the development and use of biotechnologies for conservation and sustainable use of biological diversity through co-operative agreements, exchange of information, technical training and other arrangements.<sup>44</sup>

---

40 Article 16, paragraphs 3 and 4 are derived from Article 16, paragraph 2 of the original draft convention.

41 Article 16, paragraph 5 is derived from the final brackets of Article 16, paragraph 1 of the original draft convention.

42 Article 16, paragraph 6 is derived from Article 16, paragraph 1 of the original draft convention.

---

43 Article 16, paragraph 7 is derived from Article 16, paragraph 3 of the original draft convention.

44 Article 16, paragraph 8 is derived directly from Article 16, paragraph 4 of the original draft convention.