

WORKSHOP REPORT

**SOUTH ASIA WORKSHOP FOR
MEA NEGOTIATORS**

Colombo, Sri Lanka

5 - 7 October 2005

South Asia Co-operative Environment Programme





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FOREWORD

Implementation of Multilateral Environment Agreements is vital in achieving the objectives perceived for the region that would serve achieving the common goal of poverty alleviation. Negotiations to these MEAs by various parties and representation from the region as a whole at the COP sessions henceforth becomes more of a necessity and further becomes part of the implementation process itself.

The process of appreciating the synergies among the MEAs started some years ago for the region and the recommendation to the capacity building by improving the negotiating skills for the MEAs was re-emphasized collectively at a regional workshop for the Asia Pacific region, held in Colombo during September 2003. It is noteworthy to recognise the immediate follow-up from the Secretariat and constant attention from UNEP-DEC, achieving this within just two years following the initial regional workshop.

It is well noted by the region that such capacity building should receive attention with no reservations. The present exercise considered a simulation exercise relating to the Access to Benefit Sharing of the Genetic Resources as a case example, to coincide with the COP sessions that followed immediately after the workshop in October 2005.

The response from the participants at the workshop indicates necessity for attention to such exercises and thus constant capacity building within the region. Certainly, the participants expressed the timely conduct of such exercise and I do hope to undertake training workshops and pre-briefings, especially prior to the COP sessions for various conventions.

Organizing the information under each case and presenting the regional governments is also a challenging job. I hope that the Secretariat will soon be able to take up such obligations and will not lose its sight to the continued capacity building for the region. South Asia Co-operative Environment Programme acknowledges the technical and financial and logistical support from UNEP/DEC, the FIELD, Foundation for International Law and Development, and the Ministry of Environment, Sri Lanka, for the conduct of this workshop within two-years following the recommendation from the region.

Dr. Arvind Boaz
Director General

ACKNOWLEDGEMENT

South Asia Co-operative Environment Programme acknowledges the technical and financial and logistical support from UNEP/DEC, the FIELD, Foundation for International Law and Development, and the Ministry of Environment, Sri Lanka, for the conduct of this workshop within two-years following the recommendation from the region.

It is noteworthy to appreciate the efforts from several individuals in ensuring the workshop details appropriately taken care. Besides many others, it is appropriate to mention the efforts from colleagues at UNEP-DEC, Charlotte Salpin in preparing workshop documents; and Anne Bourdy in finalising the workshop report. Needless to mention, Elizabeth Mrema has undertaken the full coordination in ensuring a proper conduct of this workshop; MJ Mace (FIELD) extended her time to review the workshop report. Active participation from the resources persons has been a boon at this workshop. Dr. Balakrishna Pisupati, despite no prior request, conducted the Simulation Exercise in the best possible way, creating a scenario that could happen at the COP sessions. His sincere efforts in making this exercise a success is appreciated and thankfully acknowledged.

The workshop could not have been a success without the participation from all the countries at such a short notice. SACEP appreciates the support from all the counter parts who joined hands in this process. Continued assistance and guidance from UNEP to the follow up on the workshop recommendations would see fruitful results that are much expected by the region.

EXECUTIVE SUMMARY

In September 2003, South Asia Co-operative Environment Programme (SACEP) and the United Nations Environment Programme (UNEP) organized a regional workshop for Asia and the Pacific on Compliance with and Enforcement of Multilateral Environmental Agreements (MEAs) in Colombo. About 70 participants from Asia-Pacific region at this regional workshop highlighted the need to strengthen the capacity of MEA negotiators as one of the priorities in the region.

Responding to this specific request, SACEP organized in 2005 a regional training workshop in collaboration with the UNEP's Division of Environmental Conventions (DEC), the Ministry of Environment and Natural Resources, the Government of Sri Lanka, the Foundation for International Environmental Law and Development (FIELD). The event addressed *capacity building* under the framework of UNEP's Environmental Legislation, and took place from 5-7 October 2005 in Colombo, Sri Lanka.

The Sri Lanka workshop was part of a larger UNEP initiative to strengthen compliance with and enforcement of MEAs. This initiative has included the development of UNEP Guidelines and a Manual on Compliance with and Enforcement of MEAs, and a series of regional capacity building workshops on compliance and enforcement (SACEP co-sponsored the first one, which was for Asia and the Pacific region, held in Colombo during September 2003) in order to test and finalize the UNEP Manual.

Participants at the workshop came from across the South Asia region, from Afghanistan, Bangladesh, Bhutan, India, Iran, Maldives, Nepal, Pakistan and Sri Lanka. Three participants from each country were formally represented. Governments were requested to nominate, for participation aspiring and novice negotiators, governmental staff who may be called upon to participate in MEA negotiations (e.g., in the Ministry of Environment, Foreign Affairs, Planning, etc.) and those with previous negotiating experience who might be trained as trainers to conduct further national level training workshops.

The primary goals of the workshop addressed the regional recommendations intended to build and enhance the capacity of MEA negotiators and trainers in South Asia; test a Primer developed by UNEP and FIELD for MEA Negotiators; and also to further refine the training materials.

Feedback at the conclusion of this workshop was rather positive with the overall rating from the respondents to the administrative and technical aspects of the workshop as 44% excellent; 33% very good; 18% average and 5% below average. Regional participants found the workshop has been very timely and requested further and more intense training workshops of this type.

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South Asia Regional Training Workshop for MEA Negotiators 5-7 October 2005, Colombo, Sri Lanka

1. Background

In September 2003, South Asia Co-operative Environment Programme (SACEP) and the United Nations Environmental Programme (UNEP) organised a regional workshop for Asia and the Pacific on Compliance with and Enforcement of Multilateral Environmental Agreements (MEAs) in Colombo for about 70 participants from Asia-Pacific region. Participants at this regional workshop highlighted the need to strengthen the capacity of MEA negotiators as one of the priorities in the region.

Responding to this specific request, in 2005, SACEP organised a regional training workshop in collaboration with UNEP's Division of Environmental Conventions (DEC), the Ministry of Environment and Natural Resources, the Government of Sri Lanka, the Foundation for International Environmental Law and Development (FIELD). The event addressed capacity building under the framework of UNEP's Environmental Legislation, and took place from 5 to 7 October 2005 in Colombo, Sri Lanka. The goal of the workshop was to build and enhance the capacity of MEAs negotiators in the South Asia region.

Participants mainly came from the South Asia region, namely from Afghanistan, Bangladesh, Bhutan, India, Iran, Maldives, Nepal, Pakistan and Sri Lanka. Three participants from each country were formally sponsored, and additional participants were welcome though their expenses could not be covered. Eight participants from the Government of Sri Lanka were invited. Governments were requested to nominate, for participation aspiring and novice negotiators, governmental staff who may be called upon to participate in MEA negotiations (e.g., in the Ministry of Environment, Foreign Affairs, Planning, etc.) and those with previous negotiating experience who might be trained as trainers to conduct further national-level training workshops. Gender balance had been taken into account in these nominations. There were 24 men and 8 Women participants.

The workshop agenda, course materials and outline were designed by the UNEP's DEC, in collaboration with FIELD and SACEP.

Moreover, the second Sri Lanka workshop was part of a larger UNEP initiative to strengthen Compliance with and Enforcement of MEAs. This initiative has included the dissemination of the UNEP Guidelines related to this subject and the review of the Manual on Compliance with and Enforcement of MEAs with a series of regional capacity building workshops on these legal issues (SACEP co-sponsored the first one, which was for Asia and the Pacific region, held in Colombo during September 2003). One set of pilot projects seeks to build capacity of MEA negotiators in developing countries and countries with economies in transition. This workshop constituted one of the South Asia component of a set of pilot projects initiated to ensure better implementation of MEAs at regional and national levels.

The workshop was designed to address both aspiring negotiators and those with previous negotiating experience. It was expected that workshop participants trained as trainers would be able to conduct further national-level training workshops using a selection of training materials from this workshop.

An analysis of the evaluation from the participants and feed back is included as Annex 6 to this report. Regional participants found the workshop to have been very timely and requested further and more intense training workshops of this type. The following sections of this report detail the event's working sessions and recommendations from the workshop. It is envisaged that there will be more follow-up activities at national level within the region in order to expand the knowledge base and negotiation skills of current and future negotiators.

2. Objectives and Expected deliverables from the Workshop

The primary goals of the workshop address the regional recommendations:

- i) To build capacity of potential 32 MEA negotiators in the South Asia region;
- ii) To build capacity of potential trainers in South Asia to deliver such a course at the national level; and
- iii) To develop and refine training materials for MEA negotiators (including a primer developed by UNEP and FIELD), which addressed:
 - The life cycle of an MEA (pre-negotiation, negotiation, adoption, signature, ratification, entry into force, accession, Conferences of the Parties (COPs), decisions, reporting, compliance and enforcement mechanisms, etc.
 - What a beginner negotiator can expect to experience in negotiations
 - The basic regional and interest group negotiating blocs most relevant to developing countries, and in particular to the South Asia region (e.g., G-77, Least Developing Countries, Small Islands Developing States, African Group, and Alliance of Small Island States (AOSIS))
 - Caucuses and their role
 - Basic negotiating etiquette
 - Basic negotiating language
 - Basic negotiating strategies, and
 - The strategic use of basic negotiating terms

Access and Benefit Sharing (ABS) under the Convention on Biological Diversity was chosen as the specific case study and MEA for the workshop to highlight, illustrate, and apply the lessons learned in the primer through negotiating exercises placed in context. A session on synergies among MEAs related to the CBD was also included, as appropriate to South Asia.

Expected Deliverables:

The Secretariat will keep in constant touch with the workshop participants to observe their participations at the negotiations. While SACEP Secretariat intends to ensure the capacity building within the region through further follow-up activities such as repeated training workshop and specifically prior briefings to the participants at the negotiations, the following outputs were aimed to be achieved at the workshop:

- (i) Pilot test a draft Primer for MEAs Negotiators that FIELD and UNEP developed, and collected suggestions for revision and strengthening of the guide;
- (ii) Development and finalization of regional training materials that will complement the MEA Negotiators Primer;
- (iii) Strengthened capacity of at least 25-30 MEA Negotiators in South Asia to participate effectively in the negotiation of MEAs, as well as serving as potential trainers in national-level training courses;
- (iv) Identification of at least three or four countries that may be interested in subsequent national-level training of MEA negotiators;
- (v) Recommendations to improve subsequent training activities with a training evaluation, and;
- (vi) Final detailed project substantive and financial reports which will include the workshop report and lessons learned from the project.

3. Workshop Proceedings

THE INAUGURAL (5 October 2005)

Hon'ble Mr. A.H.M. Fowzie, the Minister for Environment and Natural Resources, Government of Sri Lanka, chaired the formal inaugural session of the training workshop.

Dr. A.A. Boaz, Director General of SACEP, welcomed the guests and the participants to the workshop. He elaborated the long standing involvement of UNEP and SACEP in organizing specific sessions of workshops related to MEAs, including the workshop on MEA compliance that was held in 2003. Reflecting on the need for such workshops to ensure better participation of delegates to the multilateral environmental negotiations, he emphasised the relevance of this second workshop and the painstaking efforts of UNEP and FIELD to design the current workshop contents and delivery mechanisms.

Welcoming the participants on behalf of the Government of Sri Lanka, Mr. P.M. Leelaratne, Secretary at the Ministry of Environment and Natural Resources, recalled contributions from the region in the environmental agenda at national, regional and global levels. Acknowledging the efforts from UNEP and FIELD, he reiterated the need for such training workshops aimed to help negotiators sharpen their strategic, technical and persuasive skills. He called on the participants to benefit from the workshop through better interactions and discussions.

Ms. M.J. Mace of FIELD outlined the complexities involved in negotiating processes at global level and how national preparatory processes could help in achieving the desired results for national agencies and Governments.

In her opening remarks, Ms. Elizabeth Mrema, Senior Legal Officer of UNEP in the Division of Environmental Conventions described various initiatives by UNEP to enhance the capacities of Governments to effectively participate in the negotiation process of environmental agreements. She recalled the outcomes of the workshop on compliance that was held for the Asian region in Colombo in 2003 and welcomed the participants to provide vigilant inputs. Highlighting the need and rationale for the current workshop, Ms. Mrema outlined the workshop design and the intended outcomes that UNEP is expecting from the workshop. With the renewed emphasis on local actions to implement the global environmental agreements, the need for better participatory processes at national level was highlighted by her.

Finally, in his keynote address, Hon'ble Mr. Fowzie recalled the contributions of Sri Lanka to the environmental debates and welcomed the continued support from UNEP and SACEP to these activities. He identified the need for better preparation and cooperation within the South Asian region and emphasised that negotiations at global events require not just technical expertise, but also negotiating skills to achieve better outcomes.

THE WORKSHOP and AN OVERVIEW

Welcoming the participants to the technical sessions, Ms. Mrema outlined elements of the workshop and discussed the structure of the sessions as well as the simulation exercises. She presented the intended/expected outputs from the workshop and requested all participants to fully use the opportunity provided through the workshop.

Ms. M.J. Mace, of FIELD introduced elements of *A Simple Guide for Negotiators of Multilateral Environmental Agreement (MEAs)* prepared by FIELD and UNEP to help negotiators of MEAs. She outlined the life cycle of an MEA, including: pre-negotiation, signing and adoption, ratification, entry into force, implementation, and expansion through decisions and amendments through the COPs. She also provided general pointers on negotiating etiquette. She welcomed input, comments and suggestions from workshop participants for improvement of the Guide.

In his presentation that outlined the system, evolution and linkages between environmental agreements, Mr. Lal Kurukulasuriya, consultant to UNEP, presented the process of implementation and enforcement of MEAs in general, with an overview of MEAs relevant to South Asia. The session detailed on the UN system and UNEP in particular, the process of Development of MEAs at various levels, and activities handled by DEC for capacity building of developing countries or countries with economies in transition. The session also introduced various conventions under different systems. The session also discussed key events in an MEA, key provisions, key issues (with particular reference to the ASEAN Haze Agreement) and detailed on the role of Conference of Parties (COPs), Meetings of the Parties (MOPs) and Subsidiary Bodies.

PREPARING FOR NEGOTIATIONS

Ms. M.J. Mace highlighted the importance of an advance preparation for international negotiations. She walked through a series of steps individual negotiators might take to prepare themselves substantively prior to attending a particular negotiating session. She explained that after understanding where the session sits within the institutional structure of the MEA, it is essential to: review the meeting agenda to identify key issues of national importance; research the history of these issues; identify the relevant outcomes of previous negotiations on these issues in the form of decisions, conclusions or recommendations; and liaise with other relevant national agencies and other national delegates in advance of the session to clarify national positions. She suggested some considerations to keep in mind when Governments have to select appropriate delegations to send to negotiations. She further explained the importance of advance coordination with other like-minded countries and discussions with countries with opposing concerns.

Dr. Balakrishna Pisupati, Head of IUCN Regional Biodiversity Programme in Asia, made a presentation on preparatory process at national level for participation in MEA negotiations. He reiterated the role and relevance of MEAs and discussed priorities and key questions related to environmental governance which are relevant for South Asia. He highlighted the issues for consideration such as cost-benefit analysis, developing national priorities, building institutional structures, institutional arrangements at various levels and Processes and tools to achieve such considerations. He also introduced details under the whole process at all stages of negotiations.

IN NEGOTIATIONS

Following-up on previous sessions, Ms. M.J. Mace provided an overview of the negotiating process from opening plenary, to contact group, drafting group, the bracketing of text, the deletion of brackets and final agreement. She explained that both proactive and reactive approaches might be taken in negotiations, and identified ways that national positions could be put forward though oral interventions and the tabling of draft text. She discussed the purpose and value of negotiating coalitions, the various roles that individual negotiators might play in a negotiating context, standard negotiating etiquette for oral interventions, and steps for easy document management. The presentation concluded with an explanation of the bracketing process, and sample bracketed text.

Continuing the discussion on global MEAs, Mr. Kurukulasuriya presented issues for consideration for the “Following-up on negotiations of MEAs”. The session considered national actions for becoming a party to an MEA: reporting on outcomes, including briefing to relevant ministries/agencies the evaluation of financial and human resources for the implementation; identification of responsibilities for the follow-up; national measures/plans to implement MEAs and COP-MOPs decisions, including options for clustering the implementation of decisions of various MEAs which touch upon a similar issue; and consultations among countries between negotiating sessions. The session further discussed on the national consultations, synergies and inter-linkages to be considered among the MEAs for collective action.

Discussing the follow-up that is needed for delegates after the MEA meetings, Ms. Mace presented the details from the Primer and requested comments from the participants for the improvement of the draft guide provided to them.

Ms. Makiko Yashiro, from the Global Environmental Information Center, United Nations University, presented effective approaches to follow-up on MEA negotiations highlighting the lessons learnt from Inter-linkages Case Studies conducted by the GEIC for the Asia Pacific region. She stressed that environmental problems are complex in nature and often limited resources are available to deal with such issues. For this reason, it is useful to exploit inter-linkages at the international and national levels, including synergies between MEAs, in order to reduce duplication of efforts at the national level in the implementation. She presented the key findings under the National Capacity Self Assessment (NCSA) studies on effective follow-up to MEA negotiations, highlighting the need for debriefing, strategic planning, identification of gaps and conflicts among legal frameworks, and recommendations to enhance implementation. She concluded the session with possible future directions that could be considered, highlighting key capacity challenges related to negotiations and management of MEAs, and proposed future activities for the South Asian region to address these challenges, such as the establishment of a Regional Network of Centers of Excellence (CoEs).

THE SIMULATION EXERCISE

Ms. Elizabeth Mrema presented the details to the Simulation Exercise, which considered a practical case on Access and Benefit Sharing (ABS). She explained to the group the aim of the exercise and the negotiation process being proposed under various parties and observers. The participants were then grouped to represent different parties and observers indicated and instructions to the parties were then introduced. A time table for the exercise was then suggested for the negotiation process.

This was followed by a brief technical presentation by Dr. Balakrishna on the issue of ABS where he traced the history of the debates and current status of discussion of the International Regime on ABS.

He further volunteered to preside over the negotiating process at the request from UNEP’s representative.

The participants were then divided into pre-assigned country groups (**Annex 1**), and given national positions and briefing notes as if they were participating in actual negotiations within the Convention on Biological Diversity’s Working Group on Access and Benefit Sharing (WGABS). In addition to increase awareness on ABS issues, the exercise sought to develop understanding on the dynamics and etiquette of multilateral environmental negotiations. The Working Group met in plenary and contact groups. Between sessions, participants entered into caucuses and regional groups to coordinate positions. Finally, the group negotiated actual text projected on a

screen, adding and removing brackets until the text was finally agreed upon.

The plenary for the Simulation Exercise was held under the presidency of Dr. Balakrishna Pisupati. Mr. Jamil Ahmad, from Pakistan, accepted the group's nomination to serve as Chair of the Contact Group.

After negotiations concluded, Ms. Elizabeth Mrema congratulated the group for their earnest participation in the simulated negotiating exercise, commenting that the dynamic had been quite representative. Workshop resource persons provided constructive feedback on the group's performance.

Ms. Mrema requested workshop participants to complete workshop evaluation forms and reiterated UNEP's commitment to considering further training courses to address capacity building needs in the region. Participants expressed their interest in further training opportunities, and resource persons provided information on upcoming capacity building events in the region over the next few months.

The participants thanked the organizers for the efficient and effective conduct of the workshop and extended their appreciation for discussions throughout the workshop, especially the thorough reasoning to the queries, with specific examples from Dr. Balakrishna.

4. Workshop Analysis and Recommendations

Ms. Mrema circulated evaluation forms to the participants (**Annex 5**) and requested a prompt response so that training workshops could be strengthened in the future.

19 out of 30 questionnaires were returned. The Table below indicates the responses related to the general evaluation of the workshop, with scores ranging from 1 (poor) to 5 (excellent). Participants indicated that it would have been useful to have more time in before the workshop to review materials, documents and prepare the session. However, on the whole the conduct of the workshop scored a "very good" note from the participants.

Individual Responses to the Evaluation Form (Annex 5):

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	◀◀◀ RESPONDENT #	
Q1	5	2	3	3	3	4	3	1	1	4	3	2	2	2	2	1	2	5	5	Q1	workshop duration
Q2	5	5	5	4	5	4	4	3	5	4	5	4	4	5	4	4	5	5	5	Q2	overall benefit
Q3	3	5	5	4	5	4	4	3	5	3	5	4	4	5	5	3	5	5	5	Q3	relevance quality of discussions and material
Q4	5	5	5	5	5	5	4	3	5	4	4	5	4	4	4	3	5	3	5	Q4	venue and organization of the w/s
Q5	5	5	5	5	5	5	5	3	5	4	5	5	4	4	3	4	5	3	5	Q5	w/s facilities and administration
Q6	5	4	4	5	5	4	4	3	5	3	5	5	3	3	3	4	4	3	5	Q6	Relevance of the Draft Primer
Q7	5	4	5	5	3	4	3	3	5	5	5	5	4	4	3	4	5	4	5	Q7	Usefulness to the work?
Q8	5	5	4	5	5	4	4	3	5	4	5	4	4	5	5	3	5	4	5	Q8	Objectives have been met?
Q9	5	4	5	5	5	4	3	2	5	4	5	4	3	4	4	4	3	4	5	Q9	Expectations met?
Q10	4	4	5	5	5	4	3	3	5	4	4	4	3	4	4	3	4	4	5	Q10	

RATING CODE:

1 = Poor; 2 = Fair; 3 = Good; 4 = Very Good; 5 = Excellent

WORKSHOP EVALUATION ANALYSIS
32 PARTICIPANTS, 19 RESPONDENTS

	RESPONSES GROUPED ACCORDING TO RATING (1 TO 5)																			
	1	1	1	2	2	2	2	2	2	2	3	3	3	3	3	4	4	4	4	4
Q1	1	1	1	2	2	2	2	2	2	2	3	3	3	3	3	4	4	4	4	4
Q2	3	4	4	4	4	4	4	4	4	4	5	5	5	5	5	5	5	5	5	5
Q3	3	3	3	3	4	4	4	4	4	4	5	5	5	5	5	5	5	5	5	5
Q4	3	3	3	4	4	4	4	4	4	4	5	5	5	5	5	5	5	5	5	5
Q5	3	3	3	4	4	4	4	4	4	5	5	5	5	5	5	5	5	5	5	5
Q6	3	3	3	3	3	3	4	4	4	4	4	4	4	4	5	5	5	5	5	5
Q7	3	3	3	3	4	4	4	4	4	4	4	5	5	5	5	5	5	5	5	5
Q8	3	3	4	4	4	4	4	4	4	4	5	5	5	5	5	5	5	5	5	5
Q9	2	3	3	3	4	4	4	4	4	4	4	4	4	4	5	5	5	5	5	5
Q10	3	3	3	3	4	4	4	4	4	4	4	4	4	4	4	5	5	5	5	5

PARTICIPANTS RATING 1: POOR - 5: EXCELLENT				
	2	3	4	5
Q1	16	32	26	11
Q2	0	0	5	42
Q3	0	0	21	26
Q4	0	0	16	32
Q5	0	0	16	21
Q6	0	0	32	32
Q7	0	0	21	32
Q8	0	0	11	37
Q9	0	5	16	42
Q10	0	0	21	53

PERCENTAGE RATING

RATING CODE:

1 = Poor; 2 = Fair; 3 = Good; 4 = Very Good; 5 = Excellent

A general and unanimous feeling from the group was observed to the high quality of the technical sessions. Feedback at the conclusion of this workshop was extremely positive with the respondents overall rating to the workshop as 44% excellent; 33% very good; 18% Average and 5% Below Average indicating necessary attention to the status. Details to this evaluation analysis are included as Annex 6 to this report. Regional participants found the workshop to have been very timely and requested further and more intense training workshops of this type.

Following specific suggestions were also noted.

Recommendations:

1. Selection of the participants should include individuals who will be directly involved in the negotiating process.
2. Continuity on the trainees should be observed.
3. Negotiation simulation exercise materials should be made available much in advance, prior to the actual training workshop.
4. The workshop should be considered for longer duration, for example five to seven days. The present schedule and time frame was short and the sessions through the day were rather long (0900hrs.-1800hrs.).
5. The workshop documents may include more information related to other MEAs additional case studies, and critical reviews for example, on success and failures of earlier CBD and UNFCCC negotiations that should be considered in-country preparatory meetings.
6. The technical sessions (simulation exercises) must ensure mandatory participation from all the participants and get everyone speaking during the sessions.
7. The simulation exercise should also ensure clearer mandate for NGOs, so that they have ideas on how to interject their ideas.
8. NGOs should be encouraged towards more involvement at the simulation exercises.
9. More frequent country workshops, and sub-regional meetings should be considered. Such consideration would also ensure continuity in skills.
10. The organisers should consider continuity in participants – to develop human resources.
11. Training workshops should be conducted prior to the COPs events and be targeted to focus on upcoming issues.

12. Regional training workshops organised prior to the COPs events will also help in regional consensus on the issues.
13. The training workshops may address Environment and Trade related issues and specific areas such as Sustainable Production and Consumption to maintain SD or UNFCCC/ Kyoto Protocol and further focus on inter-linkages.
14. Where possible the regional workshops may be conducted away from the main city to ensure participation full-time from the local participants.

Suggestions to the follow-up:

The training workshop was conducted as a follow-up to the recommendation from the region which was voiced at the earlier Regional Workshop on *Compliance with and Enforcement of Multilateral Environmental Agreements (MEAs)* in Colombo from 14 to 19 September 2003.

It may be considered rather a quick response to have conducted the present workshop just within 2 years, since such general notion could have taken much longer time to conceive the status. On a unanimous tone the workshop received a very good rating. Participants openly expressed their views that the rating to the quality of the technical sessions superseded their expectations. The workshop strongly recommended SACEP to follow up on future trainings at national and regional level prior to COPs sessions, which would form a thorough understanding to the participants and have a clear say at the formal sessions.

While keeping the details of the workshop contents in view for further improvement in the following sessions, below observations are the views and suggestions from the region for an immediate consideration.

1. Training workshops should be conducted prior to the COPs events; be targeted focusing on upcoming issues.
2. Regional training workshops organised prior to the COP events will also help in regional consensus on the issues.

As such SACEP strongly recommends/requests to UNEP that an immediate follow-up to the programme and training workshops prior for each of the COP sessions be considered at national and regional level.

As an initial attempt the two countries Sri Lanka and India should be considered for the national level training workshops, extending such events to be conducted in sequence for the rest of the region.

SACEP will draft a plan for the conduct of such training workshops for negotiations considering the schedule of events for the next year and after, prior to each of the COPs. Such workshops will assist each of the countries of the region in participating more effectively in MEA negotiations.

SACEP's role thus will address better MEA implementation, capacity building and networking among the countries in a timely manner through partnerships with the Governments, NGOs, CBOs and others. Each of such events would also prepare and publish a report on the outcome thus enabling the wider knowledge and awareness to each of the issues.

ANNEX 1



SOUTH ASIA WORKSHOP FOR MEA NEGOTIATORS

Colombo, Sri Lanka

5-7 October 2005

DRAFT AGENDA & PROGRAMME

WEDNESDAY 5th
October 2005

TOPIC

09:00 – 09:30	Registration of participants
09:30 – 10:15	OPENING OF THE WORKSHOP
09:30 – 09:35	Lighting of Traditional Oil Lamp
09:35 – 09:40	Welcome statement by Mr. P.M. Leelaratne, Secretary, Ministry of Environment & Natural Resources (MoENR)
09:40 – 09:45	Welcome statement by Dr. A. A. Boaz, Director General, SACEP
09:45 – 09:50	Welcome statement by Mr. M. J. Mace, FIELD Representative
09:50 – 10:00	Welcome statement by Mrs. Elizabeth Mrema, UNEP Representative
10:00 – 10:15	Address by Hon. A.H.M. Fowzie, Minister of Environment & Natural Resources
10:15 – 10:45	TEA/COFFEE BREAK
10:45 – 11:30	ORGANIZATIONAL MATTERS AND OVERVIEW OF RELEVANT MATERIALS AND GUIDES Elizabeth Mrema, UNEP M.J. Mace, Foundation for International Environmental Law and Development - Objectives and expected outputs of the workshop, and organizational matters - UNEP/FIELD Primer - UNEP Guidelines and Manual on Compliance with and Enforcement of MEAs - Other training materials
11:30 – 13:00	OVERVIEW OF THE INTERNATIONAL SYSTEM FOR NEGOTIATING MEAs <i>Lal Kurukulasuriya, UNEP Consultant</i> This overview will address: - The UN system; - MEA life cycle (negotiation, entry into force, implementation), key provisions, institutional structure; - MEA texts and subsequent governing bodies' decisions – what is the difference? - Convention implementation and enforcement - Overview of MEAs relevant to South Asia; - Discussion and identification of negotiating needs by participants

- 13:00 – 14:00 LUNCH BREAK
- 14:00 – 16:00 SESSION 1: PREPARING FOR NEGOTIATIONS
M.J. Mace, Foundation for International Environmental Law and Development
Balakrishna Pisupati, IUCN Regional Biodiversity Programme
This session will cover the basic steps in preparing for negotiations, including:
- Getting familiar with a particular MEA, its institutional structure, previous decisions, prior national position if any, etc.;
 - Undertaking a cost/benefit analysis of becoming a party to a specific MEA;
 - Reading the meeting's background documents
 - Identifying key issues (both those that are likely to create controversies and those of priority for the country);
 - Developing the national position on an issue, through coordination and consultation among relevant ministries and with stakeholders, including Parliament, the private sector, NGOs, local communities, academia, etc.;
 - Considering possible synergies with other MEAs or international instruments, contacting relevant national focal points for these MEAs or instrument;
 - Additional stakeholder consultations
 - Selecting the delegation, including identifying lead negotiator; and
 - Getting to know the various players/coordinating with countries with similar interests.
- 16:00 – 16:30 TEA/COFFEE BREAK
- 16:30 – 18:00 SESSION 2: CONDUCTING NEGOTIATIONS
M.J. Mace, Foundation for International Environmental Law and Development
This session will cover various issues to ensure effective participation in negotiations, including:
- Attributes of a good negotiator;
 - Negotiating etiquette and negotiating language;
 - Strategies for negotiation;
 - Making interventions;
 - Identifying negotiating groups, caucuses;
 - Making alliances to strengthen negotiating positions; and
 - Document management.
- 19:00 DINNER HOSTED BY THE HON. MINISTER, OF ENVIRONMENT & NATURAL RESOURCES

THURSDAY 6TH October 2005

- 9:00 – 10:30 SESSION 3: FOLLOWING UP ON NEGOTIATIONS
Lal Kurukulasuriya, UNEP Consultant / Balakrishna Pisupati, IUCN Regional Biodiversity Programme
This session will address activities to follow up on negotiations, including:
- Reporting on outcomes, including briefing relevant ministries/agencies;
 - Evaluation of financial and human resources for implementation;
 - Identification of responsibilities for follow up;
 - National measures/plans to implement MEAs and COP/MOP decisions, including options for clustering implementation of decisions of various MEAs which touch upon a same issue; and
 - Consultations among countries between negotiating sessions

- 10:30 – 11:00 TEA / COFFEE BREAK
- 11:00 – 11:30 SESSION 4: INTRODUCTION TO SIMULATION EXERCISES
Elizabeth Mrema, UNEP
This Session will prepare the participants for the following sessions, which will involve simulation exercises by which the participants will put into practice the theory of negotiations presented during previous sessions.
- 11:30 – 13:00 SESSION 5: SIMULATION EXERCISE #1: PREPARING FOR NEGOTIATIONS
Facilitator: Balakrishna Pisupati, IUCN Regional Biodiversity Programme
Participants will be allocated a country and will be required to develop national positions on a topic – which will be selected according to regional priorities and upcoming meetings of the COP/MOPs of various MEAs
- 13:00 – 14:00 LUNCH BREAK
- 14:00 – 16:00 SESSION 6: SIMULATION EXERCISE #2: NEGOTIATING
Facilitator: Lal Kurukulasuriya, UNEP Consultant
This session will include:
- Plenary simulation: on the basis of the national positions developed during session 5, participants will make opening statements.
- Caucus coordination: on the basis of statements made in Plenary, participants will enter into caucuses to coordinate positions and develop strategies for contact group simulations
- 16:00– 16:30 TEA/COFFEE BREAK
- 16:30 – 18:00 SESSION 7: SIMULATION EXERCISE #3: NEGOTIATING
Facilitator: M.J. Mace, Foundation for International Environmental Law and Development
- Contact group simulations: Participants will enter a contact group format and negotiate text for consideration by the COP.
- FRIDAY 7TH October 2005
- 9:00 – 10:30 SESSION 8: SIMULATION EXERCISE #4: NEGOTIATING
Facilitator: M.J. Mace, Foundation for International Environmental Law and Development
- Caucus coordination
- Contact group simulations (*cont.*)
- 10:30 –13:00 SESSION 9: SIMULATION EXERCISE #5: NEGOTIATING
Facilitator: Elizabeth Mrema, UNEP
- Plenary simulation: Participants/the COP will adopt decisions
- 13:00 – 14:00 LUNCH BREAK
- 14:00 – 16:00 SESSION 10: DISCUSSION ON WAYS TO FOLLOW UP ON OUTCOMES OF NEGOTIATIONS
Makiko Yashiro, United Nations University
- Follow-up on negotiations: Experiences and lessons learned from the Inter-linkages case studies
Facilitator: Pradyumna Kumar Kotta / MJ Mace
Participants will discuss plans, strategies to follow up on the outcomes of the negotiations of the previous days, and identify possible synergies with other MEAs.
- 16:00 – 16.30 TEA/COFFEE BREAK
- 16:30 – 18:00 FEEDBACK SESSION
Elizabeth Mrema, UNEP
- Debriefing, feedback from participants and identification of further needs Feedback on the UNEP/FIELD Primer
- 18:00 – 18: 30 CLOSING SESSION
- Closing Statement by Secretary Ministry of Environment & Natural Resources ME&NR

ANNEX 2A



SOUTH ASIA WORKSHOP FOR MEA NEGOTIATORS

Colombo, Sri Lanka

5-7 October 2005

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ANNEX 2B

RESOURCE PERSONS

Elizabeth Maruma Mrema Senior Legal Officer, UNEP

A lawyer and career diplomat with LLB (Upper Second Honours); LLM and Postgraduate Diploma in International Relations and Diplomacy (Summa Cum Laude). She has worked with the Tanzania Ministry of Foreign Affairs and International Cooperation as the Legal Advisor for over thirteen years focusing on various international and national law issues. She was a part-time Lecturer in Public International Law and Conference Diplomacy courses at the Centre for Foreign Relations and Diplomacy in Tanzania.

She has worked with the United Nations Environment Programme for over a decade focusing generally on all environmental law issues, in particular, development of international law both hard and soft law, as well as provision of technical assistance and support to developing countries on the development and implementation of environmental laws including training programmes on the field. Until end of August 2005, she was the Task Manager and Coordinator of a Project on Capacity Building for the Development of Environmental Laws and Institutions in Africa as well as Acting Chief of the Implementation of Environmental Law Branch in the UNEP-Division of Environmental Policy Implementation (DEPI) and also responsible for the Programme on Compliance with and Enforcement of environmental laws including environmental conventions. Currently, she is a Senior Legal Officer and Chief of the Multilateral Environmental Agreements (MEAs) Support and Cooperation Branch in the Division of Environmental Conventions (DEC).

MJ Mace

Foundation for International Environmental Law and Development

joined FIELD's Climate Change and Energy Programme as a Staff Lawyer after working for many years for the National Government of the Federated States of Micronesia. As an Assistant Attorney General for the FSM Department of Justice. M.J. represented the FSM at numerous climate change negotiations, assisted in the formulation of the FSM's National Biodiversity Strategy and Action Plan, served as a member of the President's Council on Sustainable Development, and participated in numerous regional and national workshops on international environmental law issues. At FIELD, M.J. provides legal advice and assistance to the Alliance of Small Island States (AOSIS) in support of the ongoing development and implementation of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol. M.J. received her B.A. from Yale University in 1985, and her J.D. from the University of Chicago in 1988. Before moving to the Pacific, M.J. specialized in environmental law and international trade in the Washington D.C. law firm of Skadden, Arps, Slate, Meagher and Flom. M.J. is a member of the New York, District of Columbia, and Federated States of Micronesia Bars.

Dr. Balakrishna Pisupati is currently the Head of IUCN Regional Biodiversity Programme, Asia based in Colombo. The Programme has activities in about 14 countries in Asia with a specific focus on helping countries in the region implement biodiversity related MEAs in general and the Convention on Biological Diversity in particular. Dr. Balakrishna holds a Ph.D. in Genetics and has been working on policy development on conservation and sustainable development for the past decade. He is an advisor to several governments in the region on conservation policy and is currently an invited member of CBD's Expert Panel on Technology Transfer and Cooperation and a member of Expert Group on Capacity Building.

He has published about 18 books and 48 research articles on various conservation and development issues and is an invited member of New York Academy of Sciences, American Association of Advancement of Sciences (AAAS) and a Fellow of Linnean Society, London. Currently he is focusing on issues of trade and biodiversity and mainstreaming biodiversity into the Millennium Development Goals (MDGs).

Mr. Lal Kurukulasuriya was Senior Advisor and Chief of UNEP's Environmental Law Programme at the UNEP Headquarters in Nairobi, Kenya until his retirement in March 2005. In this capacity he was in charge of UNEP's environmental law activities in the areas of progressive development of environmental law including support to the negotiation of major environmental conventions, capacity building and technical assistance to developing countries in the field of environmental law and the development and dissemination of information and publications on environmental law. Before joining UNEP in 1990 he was the Legal Adviser to the Ministry of Foreign Affairs of Sri Lanka and served as Sri Lanka's Ambassador to Sweden and the other Nordic countries from 1982-1987. He was the Assistant Secretary General of the Asian African Legal Consultative Committee from 1978-1980. He has an LLB from the University of Sri Lanka and M.Phil in International Law from the Jawaharlal Nehru University in New Delhi, and has extensive experience in teaching and training in the field of environmental law and policy.

Mr. Kurukulasuriya is currently the UNEP Special Representative to Sri Lanka on the Asian Tsunami and the Director General of the Centre for Environmental Research, Training and Information (CERTI), dedicated to supporting the further development of environmental law and strengthening the capacity of various governmental and non governmental stakeholders in developing countries, including judicial officers, lawyers and enforcement officers in this field.

Ms. Makiko Yashiro

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Ms. Yashiro is involved in the UNU's Inter-linkages Initiative, particularly, activities in South Asia. From September 2004 to March 2005, she was assigned to the University of Peradeniya, Sri Lanka, to coordinate Inter-linkages project activities in the South Asian region. She has also been involved in other activities of UNU/GEIC, such as the Innovative Communities project and environmental leadership training, as well as the UNU's initiative on ISO14001 as a steering committee member. Ms. Yashiro holds an M.A. in International Environmental Policy from the Monterey Institute of International Studies, California, U.S.A.

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Mr. Kotta is currently the project coordinator for the UNEP assisted project titled South Asia Environment Natural Resources Information Centre based at SACEP, Colombo. He has been involved in the coordination and conduct of the MEA related workshop(s) for South Asia. The project SENRIC facilitates the implementation of UNEP's strategy to the Early Warning and Assessment activities for South Asia.

ANNEX 3

WORKING GROUP ON ACCESS TO GENETIC RESOURCES & BENEFIT SHARING (ABSWG)

- **AIMS OF THE EXERCISE**-It exposes you to:
 - the realities of MEA negotiations
 - complexities, etiquette and dynamics of negotiations
 - Increase awareness and understanding of ABS issue
 - importance of coalition groups
 - Language and context of negotiating text etc.

WHO WILL BE INVOLVED IN THE ABSWG NEGOTIATION?

- **Eight Parties:** Australia, Brazil, Germany, India, Mexico, South Africa, Switzerland and Tanzania
- **Five observers:** United States of America, International Indigenous Forum on Biodiversity (IIFB), Food and Agriculture Organization (FAO), International Organization of Biotechnology Industries (IOBI), and Greenpeace International (GI)
- ❖ **Chair of the ABSWG.....**

DOCUMENTATION AVAILABLE


- Provisional Agenda ABSWG/1
- Annotated Provisional Agenda of the ABSWG (ABSWG/1/Add 1)
- Background note on the ABS issue within the context of CBD - Annex I-Bonn Guidelines on ABS
- Note by the CBD Secretariat on Analysis of Existing National Regional and International Legal Instruments Relating to ABS.(ABSWG/2)
- Proposed draft recommendation on intern'l regime on ABS with Annex I providing for various options for consideration
- Annex II-CBD decision VII/19 & TOR for ABSWG to negotiate
- Non-paper submitted by India for consideration by ABSWG

OTHER DOCUMENTATION AVAILABLE

- Instructions and position papers (**in envelopes**)
- Delegations sharing your positions explained
- Note also provides background to decisions calling for the dev't of the intern'l regime on ABS (Ad Hoc Open-ended WG on ABS -ABSWG)
- Note also provides outcome of CBD COP-7 mandating ABSWG to negotiate an intern'l regime on ABS to implement Articles 15 & 8(j) of CBD

SIMULATION TIMETABLE

- 11:00-11:45 hrs Introduction to the Simulation Exercise
- Distribution of envelopes with roles or position papers for each delegation
- 11:45-13:00 hrs to review content of the envelopes and develop national positions with your delegation
- 14:00-16:00 hrs In Plenary session for delegates to make opening statements on the basis of national positions
- 16:30-18:00 & 8:30-10:00 hrs Contact Group Sessions- negotiate recommended text to CBD-COP on the nature, scope and possible elements of an international regime on ABS
- 10:30-13:00 hrs Plenary session to present outcome of Contact Group and adopt decision on the nature, scope and elements for an intern'l regime on ABS to be submitted to CBD-COP
- Caucuses/coalition groups will consult during the Contact Group and Plenary sessions informally or break times




Preparing for Negotiations

Individual Preparations

Session 1


M.J. Mace
South Asia Regional Training Workshop
for MEA Negotiators

5-7 October 2005
Colombo, Sri Lanka




How do I get ready?

- All successful negotiators *prepare thoroughly in-country* long before the actual negotiations take place.
- For your delegation to be successful, you will need:
 - an understanding of your country's interests in the issues under negotiation, and
 - an understanding of the interests of other delegations or groups
- *Pick the most significant agenda items* for your country and focus closely on those issues.
- A negotiating team should be identified and mobilised well in advance, so negotiators have sufficient time to become familiar with the agenda, and sufficient time to highlight and brief important issues for government policy-makers.




How do I learn more about the MEA?

- Open the MEA's website and look for a summary of the MEA's objectives and list of Parties
 - Simple Guide's Annexes list of websites or use google
- Look on the website for the Convention text, skim the obligations sections
- Check Earth Negotiations Bulletin online
 - see if ENB has a summary of the decisions taken at the last COP (www.usd.org). ENB also provides introductory overviews of many MEAs.
- Read the last session's conclusions/decisions
- Find meeting agenda on MEA website, preferably an annotated version



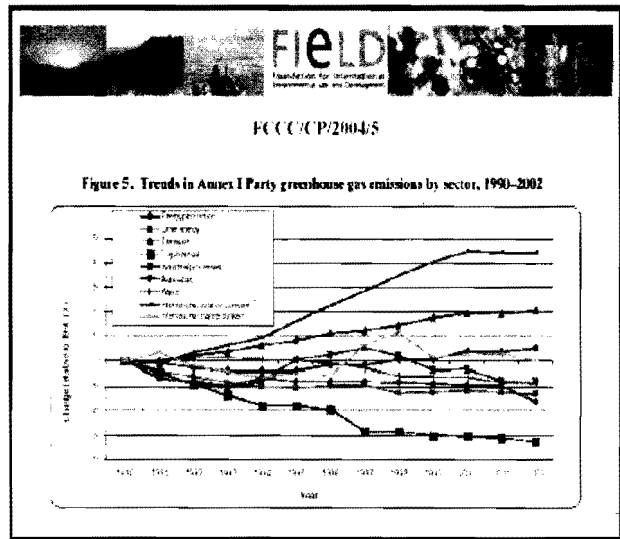
After reviewing the Agenda:

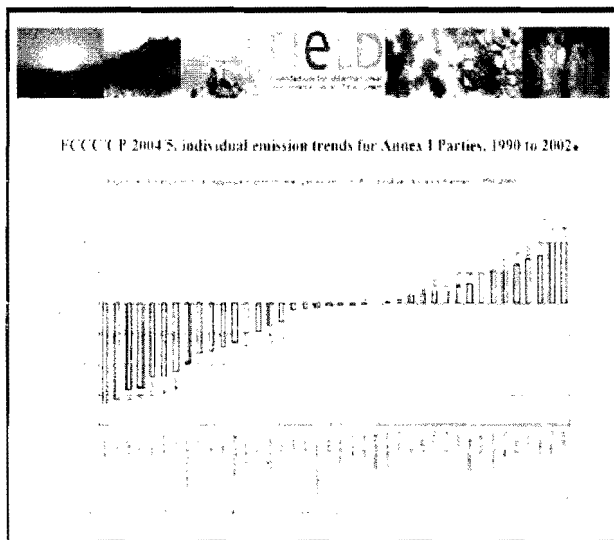
- What are the expected outcomes for your session? Conclusions? Recommendations? Decisions?
- Are there draft texts that will need to be advanced?
 - Locate and read these draft texts
- Are there agreed Rules of Procedure?
 - How are decisions taken? By consensus, 2/3 majority, 3/4 majority, etc.
- Are there existing coalitions in the negotiating process? If so, which coalitions is your country in?
- Will your coalition meet in advance of the negotiating session to talk strategy?



Identifying Key Issues

- Locate Agendas for each session
 - Highlight significant issues for your country
- Find documents that will be considered at upcoming session on Convention website
 - Read all documents related to agenda items of interest
 - Read all draft texts that need to be advanced
 - If you cannot locate documents, contact the Secretariat and seek assistance
 - What do these documents indicate about progress toward Convention objectives?

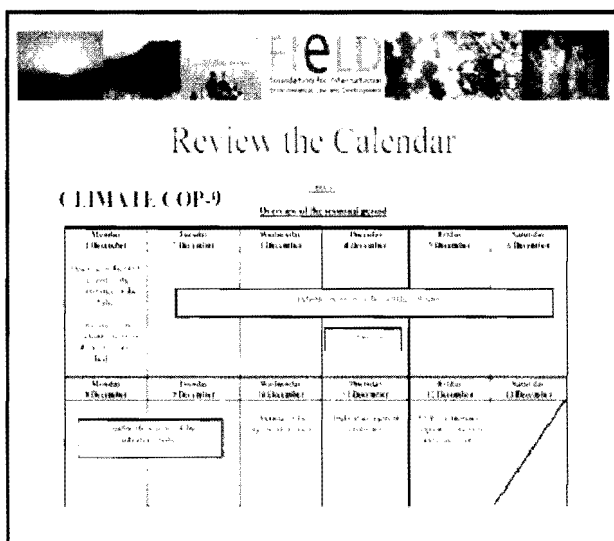




Networking with your Colleagues

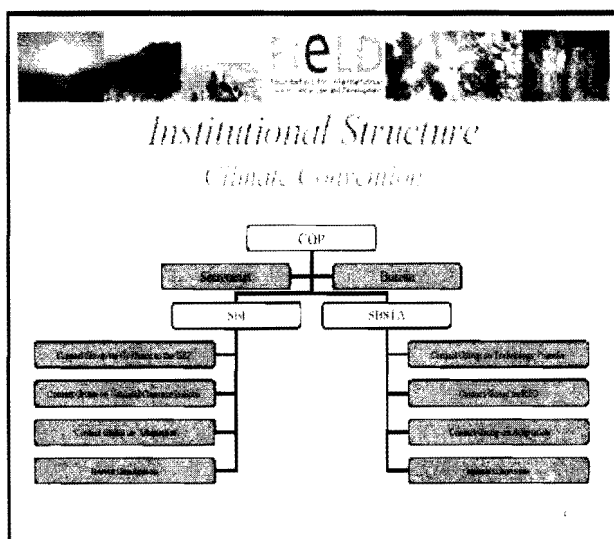
Questions to ask:

- Was attended the last negotiating session?
- Are there final reports available from each former delegate?
- What issues have been particularly significant, controversial and why?
- What issues did your colleagues follow at the last session?
 - Did they take any positions you should be aware of that you will be expected to be familiar with and defend?
 - If there are open issues, which delegations supported which language at the last negotiation?
- Which other delegations are particularly active? Which countries tend to share your country's views?




Preliminary questions to ask:

- What *kind* of negotiation are you going to attend?
 - COP? Meeting of the Subsidiary Bodies?
 - Marine Environment Pollution Committee?
 - Expert Workshop?
- Where does the session *fit* within the MEA's institutional structure?
 - (e.g., Climate COP meets each year, SBI and SBSTA meet twice a year)
 - (Biodiversity COP meets every two years, SBSTIA meets before COP)
- How are decisions taken?
 - Consensus? 2/3 majority? 3/4 majority? Double majority?



Selecting the Delegation

- Mixture of talents and skills
 - Technical/scientific, diplomatic, legal
 - Identify Head of Delegation
- Submit names early
 - Impacts funding
 - Impacts travel arrangements
- Continuity is critical: also important to train up new negotiators through session attendance.




Briefing Papers

Prior to negotiations, on significant issues, containing:

- Agenda item name and number for key issues
- Relevant MEA articles and provisions
- Relevant documents for discussion under that agenda item, with document numbers
- Relevant previous decisions, conclusions or recommendations on the issue, esp. from immediately preceding session
- National goals on this issue, if known
- Positions of other Parties or interest groups, if known
- Contentious issues
- Outcome expected at session
- Recommendation for a national position

13



Oral Statements


Plenary

- You or your delegation may wish to prepare a brief written statement for your head of delegation to present orally in the opening plenary, if appropriate, or at the opening sessions of subsidiary bodies on particular issues of national interest.
- Statements should highlight issues of particular concern for your country, and be concise.
- Check calendar for high-level segments for Ministers.

Contact Groups

- Statements require more flexibility

14



Getting to Know the Players; Coordinating with Other Countries


EU 25 –

- Begin coordination months ahead
- Identify key issues, nominate issue leaders
- Develop strategy to relate to each major country and country grouping and to address their known priorities
- Identify venues to discuss issues with countries

AOSIS 40 –

- joint brief ahead of time for member countries; at negotiations, pool efforts with input from countries following specific issues
- Meet daily to form group positions

15




In Negotiations

Session 2

M. J. Mace
South Asia Regional Training Workshop
for MEA Negotiators


5-7 October 2005
Colombo, Sri Lanka



Approaches to MEA Negotiations

Proactive v. Reactive

- Proactive
 - Submitting views in advance of negotiations
 - Tabling draft text, proposing alternative text
 - Seeking out and making alliances
- Reactive
 - Listening to interventions
 - Relying on group spokespersons
- Avoid the Tourist Syndrome!
 - Everyone has something to contribute
 - An individual can make a difference



Overview of Process

Opening Plenary may take general opening comments on an agenda item/issue from Coalitions and Parties, may refer issue...

To a Contact Group for further discussion, with a Chair appointed to assist the Parties in reaching agreement


Draft text is produced that reflects these ideas

- Source of text depends upon complexity of issue

Contact Group 'marks up' the draft text, going section by section, paragraph by paragraph


- 'Brackets' note areas of disagreement
- Various 'Options' may be presented - often by different negotiating blocks

Agreement comes back to Plenary for acknowledgment or formal adoption



Attributes of a Good Negotiator

- Well-prepared
- Shows patience
- Controls his or her emotions
- Is able to break bigger issues down into smaller ones
- Looks for interest-based decisions
- Rejects weak solutions
- Is able to see the bigger picture
- Uses respect and diplomacy when presenting positions or commenting on another delegation's position
- Strong language skills
- Strong analytical skills
- Knows own country's interests and positions
- Knows positions of other States and coalitions
- Has knowledge of prior negotiations and their outcomes




Negotiating Coalitions

Advantages

- Coalitions increase the manageability of negotiations by decreasing the number of negotiating groups.
- For smaller developing countries, coalitions can help increase negotiating leverage and reduce transaction costs.
- Coalitions may also be successful in advancing agendas or points of views that might otherwise be overshadowed or neglected.
- Coalitions may also use their position to break or modify a consensus.


Challenges/disadvantages

- Difficult or impossible to move between coalitions.
- Consensus within a coalition may be difficult or impossible to achieve
- Once a consensus position is taken within a group, it may be difficult to shift from that position



Identifying Negotiating Groups


- **Power-based**
 - JUSCANSZ - developed, non-EU EU (15-25)
 - G-77 and China (130+) I.D.C Group (-47)
- **Interest-based**
 - SIDS/AOSIS - Alliance of Small Island States (-43) (Climate)
 - Like-minded groups
- **Convention-specific Groups**
 - e.g. Like Minded Mega Diverse (17) - ABS, Miami Group-Biosafety Protocol
- **UN Regional Groupings**
 - 1 Western Europe and Others-WEOG (28) (EU, USA, NZ, Canada, Aus.)
 - 2 GRULAC (Latin American and Caribbean Group) (33)
 - 3 African Group (55)
 - 4 Economies in Transition (22) (Eastern Europe)
 - 5 Asian Group (52) (China, Japan, Suse, Saudi Arabia)



Identifying Your Coalitions

Key Questions to ask yourself:

- 1 Is my country part of a coalition or regional group? Which?
- 2 Who is the spokesperson for each of my coalitions?
- 3 When does my coalition meet to discuss common positions? Where?
- 4 Are my country's concerns reflected in positions taken by my coalition?
- 5 If not, have I tried to express my country's national needs and concerns?
- 6 How can I make sure that my national concerns are being addressed?
- 7 If my country is part of more than one coalition, are there any inconsistencies between the positions taken by these groups?
- 8 If an issue I am following has been referred to a contact group or informal working group, who is representing my interests in that group?
- 9 When and where are those meetings being held?



Negotiator Roles

Within an MEA Process:


- Chairs of Subsidiary Bodies, Chairs of Contact groups, Rapporteurs, Members of Expert Groups
- More senior negotiators will be called upon to fill these positions of greater responsibility, due to greater familiarity with the issues being negotiated.
- *Required to be impartial*

Within Coalitions:

- Spokesperson for a coalition (e.g., Chair of the African Group), issue coordinator (e.g., G-77 Coordinator on agenda item 4(b))
- *Must represent the interests of their constituencies effectively.*


Within Delegations:

- Head of Delegation, issue negotiator, facilitator (working between different groups or coalitions to help reach compromise).



Negotiating Etiquette


- Before speaking, obtain permission
- Once you have been granted permission to speak, you may:
 - (i) put forward your country position;
 - (ii) raise a point of order; or
 - (iii) make a motion.



Negotiating Etiquette (2)


Review Rules of Procedure

- **Points of order**
 - if President or Chair has not followed the rules of procedure
 - make a "T" sign with country placard and hands to provide notice
 - "I would like to make a point of order"
- **Motions**
 - to offer input into how the President or Chair should deal with a certain issue
 - Make a T, "I would like to make a motion"
- **Intervention**
 - To present your coalition or Country positions
 - Hold your flag up over your head, or stand it up in its stand, until called upon to speak or until your country is recognized.




Negotiating Etiquette (3)

- Representatives of coalitions take the floor first (EU, G-77 and China, African Group, LDC Group etc.).
- If you are speaking on behalf of your own delegation, wait to put your flag up until flags go up from countries speaking on behalf of coalitions.
- Be strategic in raising your country flag!
- Begin your intervention by lending support to the expressed position of your coalition representative.
- The President will take note of country flags that have been put up, and call upon countries in turn.




Negotiating Etiquette (4)

- **Never contradict statements made by the representative of a coalition to which you belong** – these statements are made on your behalf.
- **Use your intervention to**
 - Support statement made by Coalition spokesperson
 - Elaborate upon that statement or present additional arguments
 - Explain why the issue is of particular concern to your delegation
 - Provide your support to previous speakers who have expressed a viewpoint with which you agree.
- **When you agree**
 - Save time by referencing positions taken or arguments made by others
 - Note the areas in which you agree
- **When you disagree** with what another speaker has said, refrain from naming that group or country (do not personalise positions)
 - State your position affirmatively
 - Raise difficulties posed by other position for achieving agreed ends




Interventions in Plenary/Contact Groups

- The President Chair will take note of country flags that have been put up, and call upon countries in turn.
 - "I have Jamaica, Sudan and then Pakistan; Jamaica you have the floor"*
- Make a brief acknowledgement of the President or Chairperson.
 - "Thank you Mr. President Madame Chair"*
- Begin your intervention by lending support to the expressed position of your coalition representative
 - "I would like to associate myself with the remarks made by Jamaica on behalf of the G-77 and China, Bangladesh on behalf of the LDC Group, and Bhutan on behalf of the Asian Group"*
- Detail the importance of the issue at hand for your country or coalition
 - "Mr. President, this issue is very important to my delegation - to members of the LDC Group. We have found in recent years that..."*




Interventions in Plenary/Contact Groups (2)

- Remain positive and remark on positive aspects of the negotiation.
 - "As my colleague from Brazil has already so eloquently expressed..."*
- Stay focused and on topic - make a clear and concise statement.
 - Mr. Chairman, my intervention will be brief. My delegation would simply like to highlight..."*
- If necessary, offer a different view point to interventions made on behalf of other states or coalitions, in a diplomatic manner
 - "Mr. Chairman, one issue that perhaps the group has overlooked is..."*
- Conclude by commenting on the reasonableness of your position.
 - I have every confidence Mr. Chairman that with this issue addressed we will be able to move forward in a constructive manner."*
- Thank the President/Chairman for the opportunity to speak.




Making Alliances to Strengthen Your Position

- Within your coalition
 - Gain trust and respect, and support for your ideas
- Across coalitions
 - Sensitise your negotiating partners to your needs
 - Create room for tradeoffs



Document Management

- What do I bring with me?
- What do I carry with me all day?
- Do I have a system for managing new documents?
- Do I have a notebook to serve as my diary of the negotiations?
 - Label with name of negotiation, date, morning or afternoon session, plenary, contact group meeting, level, who is speaking? What are key points?
- Do I have clean paper to write my interventions?
- Do I have enough pens? Pencils? Highlighters? Post-it notes? Folders? Tabs?



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- 'Brackets' note areas of disagreement
- Various 'Options' may be presented - often by different negotiating blocks

Agreement comes back to Plenary for acknowledgment or formal adoption




Negotiating Text - Bracketing

Your country is eager to see all national reports submitted in early 2006 to assess progress toward an important MEA target. You propose the following language:

"All Parties shall submit their national reports by May 1, 2006"

What might you expect other Parties to bracket?

[All] Parties [shall] submit their national reports by [May 1, 2006].



Which presents the strongest language?


Option 1:
The Parties decide that developing countries shall submit reports by May 1, 2006.

Option 2:
The Parties invite developing countries to submit reports no later than April 1, 2006.

Option 3:
The Parties urge developing countries to submit reports no later than April 1, 2006.

Option 4:
The Parties decide that developing countries may submit reports at their discretion.

Option 5:
The Parties invite developing countries to submit reports at their discretion.




How can these options be represented?

The Parties decide that developing countries may shall
invite urge developing countries to submit reports by April
1 by May 1 no later than April 1 at their discretion .


Developing countries may shall are urged to are invited to submit reports
no later than April 1 by April 1 by May 1 at their discretion .

The Parties decide that developing countries shall submit reports by May 1.
The Parties urge developing countries to submit their reports no later than April 1.
The Parties invite developing countries to submit reports no later than April 1.
The Parties decide that developing countries may submit reports at their discretion.



A Simple Guide for MEA Negotiators


M.J. Mace
South Asia Regional Training Workshop for MEA Negotiators
5-7 October 2005
Colombo, Sri Lanka



Contents


1. Introduction
2. Life Cycle of an Multilateral Environmental Agreement
3. Preparing for Negotiations
4. The Role of Coalitions in Negotiations
5. The Negotiating Process
6. Negotiating Draft Text
7. Reporting Back from Negotiations
8. Summary

2



- 2.0 Life Cycle of an Multilateral Environmental Agreement**
 - Pre-negotiation, signing and adoption, ratification, entry into force
 - MEA Implementation – institutions and mechanisms
 - MEA expansion - decisions, amendments, protocols Annexes
- 3.0 Preparing for Negotiations**
 - Identifying country needs, developing a country position
 - Mobilising a team
 - Briefing Papers and Introductory Statements
- 4.0 Role of Coalitions in Negotiations**
 - Regional and Interest Group Blocs, Coalitions
- 5.0 The Negotiating Process**
 - Negotiating Etiquette, Language, Drafting Text, Brackets, Supplies
- 6.0 Reporting Back from Negotiations**

3



We want your comments!

- What sections are useful, which are not?
- Do some sections need more/less detail?
- Is the language used too complicated?
- What information is missing that would be helpful?
- Are there places where further examples would be helpful?
- What regional MEAs should be added to the Annexes?
- What else would you like to see in here?

4

Preparing for Negotiations

Balakrishna Pisupati
Head, IUCN Regional Biodiversity Programme-Asia

Multilateral Environmental Agreements (MEAs): Role and Relevance

Sustainable Development

```

    graph TD
        ED((Economic Development)) --> SD[Sustainable Development]
        SS((Social Security)) --> SD
        EM((Environmental Management)) --> SD
    
```

Environmental Issues are about livelihoods !

- ✓ Water
- ✓ Energy
- ✓ Health
- ✓ Agriculture
- ✓ Biological Diversity
- ✓ Climate Change
- ✓ Economic well-being

Figure 5 – Biodiversity Links to the Dimensions of Poverty

Example of Biodiversity Factors	Dimensions of Poverty	Elements of Well-being
Ecological integrity	Vulnerability to biodiversity loss and livelihoods and resource scarcity	Sustainable Livelihoods
Investment Approach		
Access to Resources	Access to income and resources	Sustainable Livelihoods
Benefit Sharing		
In-situ Conservation	Life insurance policy for life	Reducing vulnerability
Sustainable Use		
Environmental Management	Health, Sanitation, Energy, Water and governance	Reducing vulnerability

IUCN

Asia

- Progressive economic and social development in the 1990s
- Indicators of growth strong (under 5 mortality rates from 129/1000 to 99/1000; malnutrition 64% to 53%, reduced tariff rates from 100% to 17%)
- However, challenge is the increasing population, reduced availability of resources and increasing degradation of environment

The Transition in Asia

FROM	TO
Develops and implements a single 'master plan' for SD (that gets increasingly out of date)	Builds a system of <i>coordinated mechanisms & processes</i> dealing with SD priorities step-by-step
Fixed ideas and solutions	An <i>adaptive, learning</i> system offering coherence between activities
One-off initiative	A <i>continuous</i> process
Management based on <i>precedent</i> or <i>evidence</i> only	Also <i>experimentation</i> and managing uncertainty
<i>State alone</i> is responsible	<i>Society as a whole</i> is responsible
<i>Narrow</i> participation	<i>Multi-stakeholder</i> approach
Focus on <i>outputs</i> (projects, laws, etc.)	Focus on <i>outcomes</i> (impacts) and the quality of participation and management processes
<i>Sector-based</i> research and planning	<i>Partnerships</i> and <i>integrated</i> research and planning
Focus on <i>costly projects</i> (and a consequent dependence on external assistance)	Focus on <i>cost savings</i> and <i>domestically-driven</i> and <i>financed</i> investment and development

If

Environmental Goods and Services (eg. Biodiversity) offers billions of dollars as goods and services.

S. Asia is characterised by poor people dependant on natural resources

Already people are at risk of losing resources due to various reasons (land degradation, climate change, lack of tenure etc.)

where are the priorities ?

Key Questions on Env. Governance relevant to S. Asia

1. How severe is the Issue?
2. How does it relate to people?
3. How best can we invest in actions?
4. What have been the outcomes from past actions?

Key areas for policy action to improve environmental outcomes

Reform Intl. and National policies

Enhance Assets of Poor

Improve Quality of Growth

Improve Governance

↔

M

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As

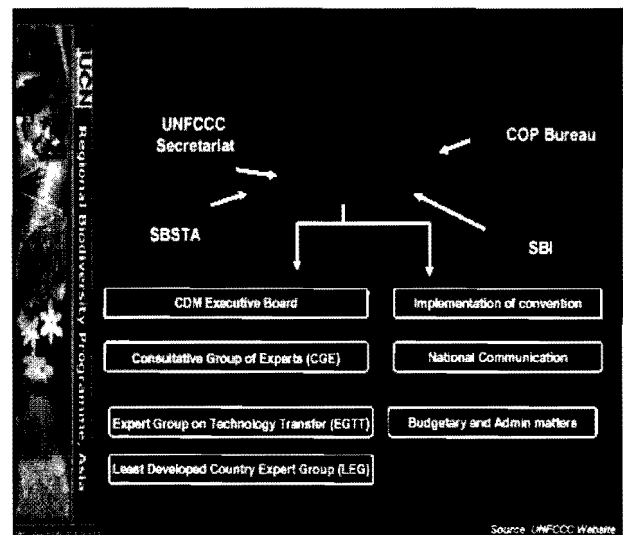
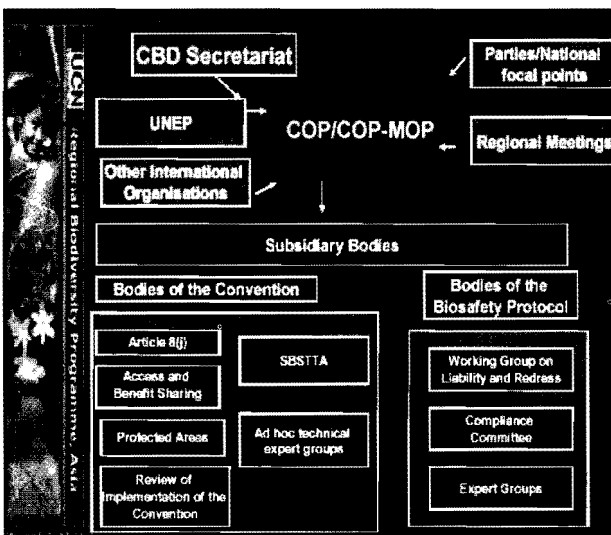
The Integrated Approach

The needs of local people are being reflected in national policy and planning frameworks

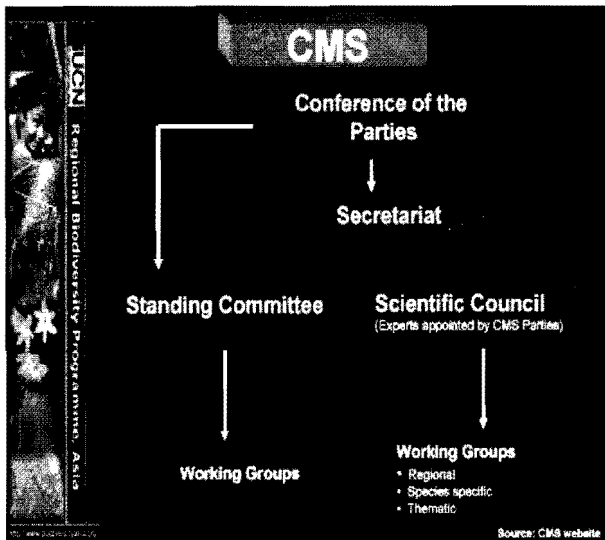
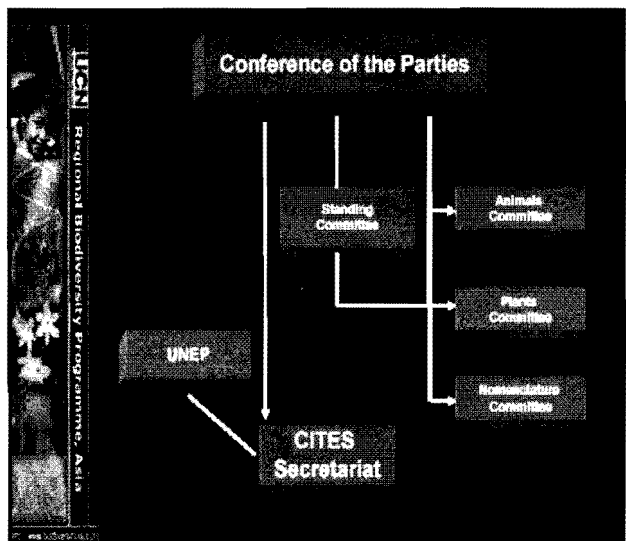
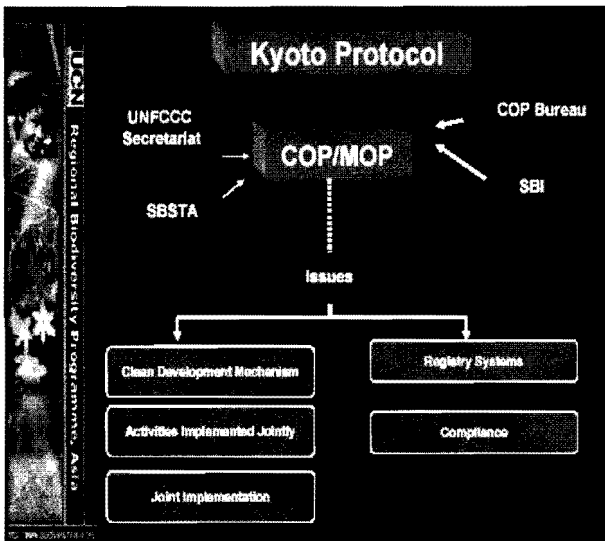
The vulnerability of poor are reduced and capacities to adapt and manage risks enhanced

Environment and Development

People are benefited from systems of local governance




Source: UNFCCC Website



- ### Cost-Benefit Analysis
- Understanding the Goals and Objectives
 - National status, capacities, institutional structures
 - Policy status
 - Funding and management capacities
1. Impact Assessments
 2. Compliance Mechanisms
 3. Monitoring and evaluation options, including reporting
 4. National, regional and global priorities

- ### Cost – Benefit Analysis
- The Issue
 - The Options
 - # Status quo
 - # Status quo plus incremental actions
 - Economics
 - 'Policy Spaces'


- ### Developing National Priorities
- Understand the agenda
 - Assess the background
 - Clarify positions – countries, groups and others
 - National Status
 - National priorities
 - Existing and on-going actions
 - Policy issues



Developing National Priorities


Preparation Phase

- Identify the delegation
- Study the background documentation
- Consult national experts
- Discuss with other agencies and ministries
- Call for a dialogue
- Discuss options
- Prepare national position
- Discuss with like-minded group of countries
- Strategise interventions
- Prepare statements
- Anticipate dead-locks and compromise options
- Clear background material for the meeting, including documentation



National Priorities


- ✓ Existing commitments
- ✓ Available capacities and resources
- ✓ Options for future work



Building Institutional Structures - Issues


Information

- Where is it available ?
- How is it available ?
- What analyses is needed to make the information be transformed into knowledge ?
- When to use it ?
- Who are the intended audience ?




Institutional Arrangements

- Local
 - Empowerment
 - Information
 - Awareness
- National
 - Governance
 - Partnerships
 - Policies
- Sub-regional
 - Mandates
 - Networks
- Regional
 - Visibility
 - Influence



Processes and tools to achieve these

- NBSAPs
- NatComs
- NAPAs
- NAPs
- NCS
- NSSDs
- MDGs
- PRSPs
- NEAP etc....

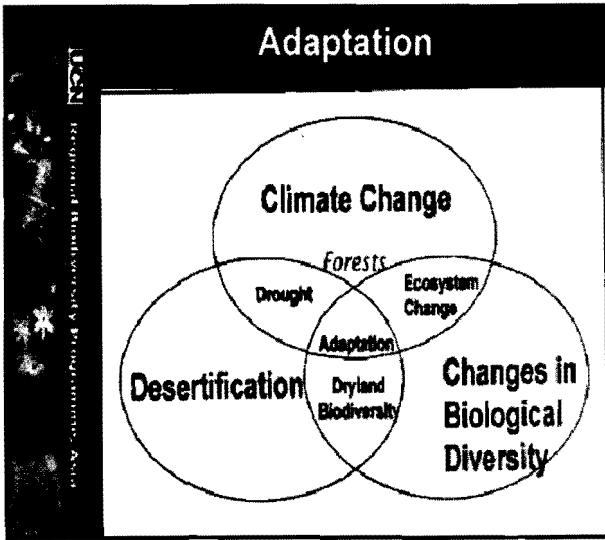


Synergies

Climate Change affects drylands, threatens biodiversity and disrupts ecosystems and species;

Desertification and land degradation influences local climate and global carbon cycle;

Biodiversity loss affects natural ecosystems making them more vulnerable to human and natural pressures



Making the links

- Vertical and horizontal
- Between Agencies
- With local communities
- Between countries

Sense of Links

- Talking the language
- Relating Policies and Actions
- Mainstreaming Impacts
- Assessing outcomes

Translation to Action(s)

- Preparing for negotiations
- Pre-Negotiation meetings
- Negotiations
- Post-Negotiations

NATIONAL RESPONSES


Strategies for Consultation

Key Questions

- What
- Why
- When
- Who
- How

MEA Negotiations & IUCN RBP

- Preparatory Exercises
 - Background Documents
 - Policy Recommendations
 - AGENDA BRIEFS
 - National and regional priorities
 - National and regional consultations
- During Negotiations
 - Support to delegations
 - Networking
 - Interventions and regional positions



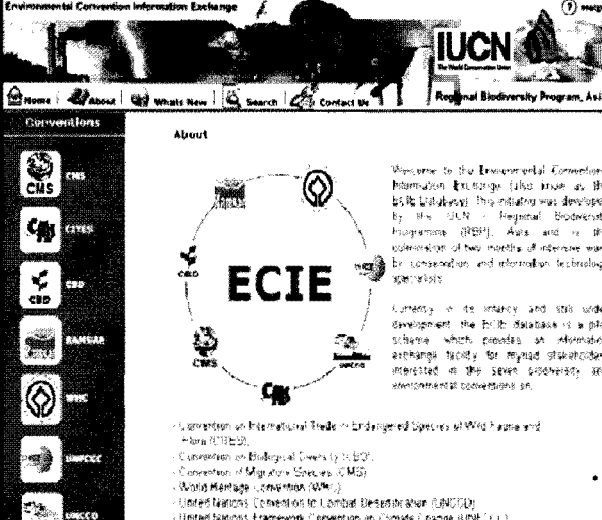
MEA Negotiations & IUCN RBP

After Negotiations
Assessment of outcomes
Outcomes and Impact Assessments

SYNERGIES' ACTIONS
CBD – JLG on Biodiversity and Climate Change and Expert Groups

UNFCCC – NAPA and capacity building actions

UNCCD – Technical Support Agency for South Asia Regional Programme of Action



Environmental Convention Information Exchange

IUCN Regional Biodiversity Programme, Asia

Home About What's New Search Contact Us

Conventions

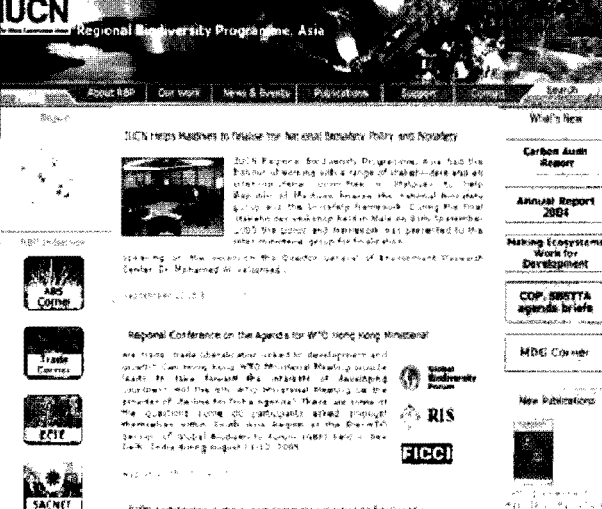
- CMS
- CITES
- CBD
- BAMBAR
- WBC
- UNFCCC
- UNCCD

About

Welcome to the Environmental Convention Information Exchange (also known as the ECIE Database). This initiative was developed by the IUCN - Regional Biodiversity Programme (RBP), Asia and is the culmination of two months of intensive work by consultation and information technology specialists.

Currently in its infancy and still under development, the ECIE Database is a pilot scheme which provides an interactive exchange facility for regional stakeholders interested in the seven biodiversity and environmental conventions in:

- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
- Convention on Biological Diversity (CBD)
- Convention on Migratory Species (CMS)
- World Heritage Convention (WHC)
- United Nations Convention to Combat Desertification (UNCCD)
- United Nations Framework Convention on Climate Change (UNFCCC)



IUCN Regional Biodiversity Programme, Asia

About RBP Our work News & Events Publications Support Contact Search

Home

IUCN helps Maldives to Release the National Biodiversity Policy and Strategy

2005 Regional Biodiversity Programme, Asia had the honour of working with a range of stakeholders and organisations across Maldives to help develop the National Biodiversity Policy and Strategy Framework. During the final workshop on 24th September 2005, the policy and framework was presented to the cabinet members for their approval.

Speaking at the event, the Director General of the National Research Center Dr. Mohamed Ali welcomed:

September 2005

Regional Conference on the agenda for WFO Hong Kong Ministerial

Are there trade opportunities linked to development and growth in Hong Kong WFO Ministerial? It is possible. Let's find out. The Minister of Advancing Partnership with the region, Mr. Michael Sze, said that the success of the Hong Kong WFO Ministerial depends on the quality of the regional agenda. There are three of the countries in the region that are particularly strong partners with South Asia Region at the WFO Ministerial: India, Thailand and Singapore. The Director General of WFO, Mr. Michael Sze, said that the WFO Ministerial is a key platform for the region to discuss and coordinate their efforts.

November 2005

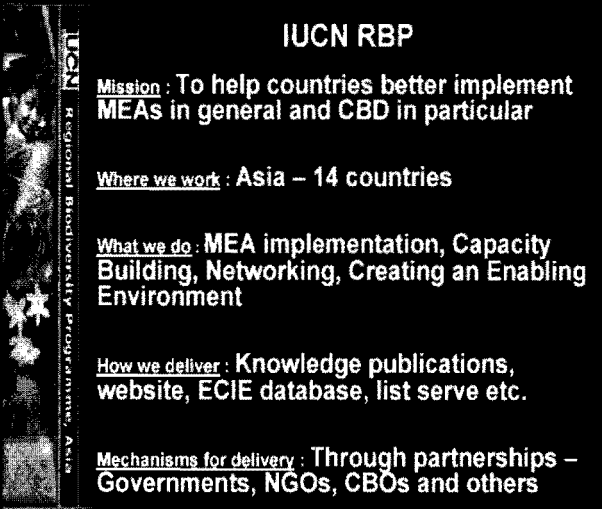
IUCN participates in the expert committee meeting to finalise the

What's New

- Carbon Asset Report
- Annual Report 2004
- Making Ecosystems Work for Development
- COP, EBERTTA agenda briefs
- MDG Cover
- New Publications

Partners:

- World Biodiversity Programme
- RIS
- FICCI



IUCN RBP

Mission: To help countries better implement MEAs in general and CBD in particular

Where we work: Asia – 14 countries

What we do: MEA implementation, Capacity Building, Networking, Creating an Enabling Environment

How we deliver: Knowledge publications, website, ECIE database, list serve etc.

Mechanisms for delivery: Through partnerships – Governments, NGOs, CBOs and others



THANK YOU!

URL: www.biodiversityasia.org

OVERVIEW OF THE INTERNATIONAL SYSTEM FOR NEGOTIATING MEAs

Lal Kurukulasuriya
UNEP Consultant

(Former Senior Adviser and Chief, Environmental Law Branch,
UNEP)

OVERVIEW OF THE INTERNATIONAL SYSTEM FOR NEGOTIATING MEAs

- The UN system;
- MEA life cycle
- key provisions;
- institutional structure;
- MEA texts and subsequent governing bodies' decisions –
- Implementation and enforcement
- Overview of MEAs relevant to South Asia;

United Nations System

- United Nations
- United Nations Environment Programme
- Commission on Sustainable Development
- International Law Commission
- UN Economic Commission for Europe
- United Nations Educational, Social and Cultural Organisation (UNESCO)
- Food and Agricultural Organisation (FAO)
- World Health Organisation (WHO)
- World Meteorological Organisation (WMO)
- International Atomic Energy Organisation (IAEA)
- International Maritime Organisation (IMO)
- International Labour Organisation (ILO)
- International Civil Aviation Organisation (ICAO)
- World Trade Organisation (WTO)

United Nations

- Charter provisions
- General Assembly
 - Declaration of Principles of International Law concerning Friendly Relations and Cooperation
 - Creating UNEP (2997/ XXVII)
 - UNGA 242/53 Implementation of SG's Report
 - Convening Stockholm, Rio and Johannesburg Conferences
 - Adopting Conventions
 - World Charter for Nature
 - UN Convention on Non-navigational Uses of International Watercourses
- Security Council
 - Resolution 687 (1991)- State liability for environmental damage and depletion of natural resources
 - UN Compensation Commission
- Major UN Conferences
 - Stockholm- Stockholm Declaration
 - Rio- Rio Declaration
 - Johannesburg
 - Millennium Summit- Millennium Declaration

UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP)

- Role of Governing Council and Secretariat
- Montevideo Programmes I-III
- Development of Multilateral Environmental Agreements (MEAs)
 - Global (CITES, CMS, Basel, Ozone, Biodiversity, Climate Change, Desertification, Rotterdam, Stockholm,
 - Regional (Lusaka, ASEAN Haze Agreement, South Asian Environmental Agreement)
- Development of "soft law" instruments
- Capacity Building
 - Bali Declaration
 - Technical legal assistance
 - Training and information
 - Judges Programme

Commission on Sustainable Development

- Implementing Agenda 21
- Integrating environmental, social and development dimensions
- Programme of work

International Law Commission

- Draft Code of Crimes Against Peace and Security
- Draft Convention on Non-navigational Uses of International Watercourses
- Responsibility of States for Internationally Wrongful Acts
- International liability for injurious consequences arising out of acts not prohibited by international law
- Prevention of Transboundary Harm from Hazardous Activities

UN Economic Commission for Europe

- UNLRTAP and Protocols
- Convention on Environmental Impact Assessment
- Convention of Transboundary Effects of Industrial Accidents
- Convention on Transboundary Effects of Industrial Accidents.
- Convention on the Protection and Use of Transboundary Watercourses and International Lakes.
- Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
- Carpathian Mountain Agreement

United Nations Educational, Social and Cultural Organisation (UNESCO)

- Man and Biosphere Programme
- Ramsar Convention on Wetlands of International Importance
- World Cultural and Natural Heritage Convention.
- Convention on Underwater Cultural Heritage
- Convention for the Protection of Cultural Property in the Event of Armed Conflict

Food and Agricultural Organisation (FAO)

- World Soil Charter
- International Code of Conduct on the Distribution and Use of Pesticides.
- Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas
- International Treaty on Plant Genetic Resources for Food and Agriculture.
- Convention on the Prior Informed Consent Procedure for certain Hazardous Chemicals and Pesticides in International Trade.
- Draft agreement on water utilization and conservation in the Lake Chad Basin

World Health Organisation (WHO)

- Binding and non-binding health standards.
- European Charter on the Environment and Health.
- Anti-Tobacco Convention

World Meteorological Organisation (WMO)

- Climate Change
- Artificial weather modification,
- Protection of the ozone layer,
- Long range atmospheric pollution.

International Atomic Energy Organisation (IAEA)

- Early Notification of a Nuclear Accident,
- Assistance in the Case of Nuclear Accident or Radiological Emergency

International Maritime Organisation (IMO)

- Convention for the Prevention of Pollution of the Sea by Oil (OILPOL);
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter;
- Convention for the Prevention of Pollution by Ships (MARPOL);
- Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties;
- Convention on Oil Pollution Preparedness, Responses and Co-operation;
- Convention on Civil Liability for Oil Pollution Damages;
- Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
- Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Materials (Nuclear);
- Convention on Limitation of Liability for Maritime Claims;
- Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea.

International Labour Organisation (ILO)

- Working Environment (Air Pollution, Noise and Vibration) Convention (No. 148)
- Safety and Health in Construction Convention (No. 167)
- conventions on indigenous peoples
- Convention on chemicals in the workplace
- Convention on agricultural work

International Civil Aviation Organisation (ICAO)

- Protocols to Convention on International Civil Aviation on emission standards,

World Trade Organisation (WTO)

- Agreement on Technical Barriers to Trade,
- Agreement on Sanitary and Phytosanitary Measures,
- Agreement on Subsidies and Countervailing Measures,
- Agreement on Trade-Related Aspects of Intellectual Property, and General Agreement on Trade in Services.
- WTO Dispute Settlement Understanding
- Committee on Trade and the Environment (CTE)

LIFE CYCLE OF NEGOTIATION OF MEAS

- Problem identification
- Soft law
- Mandate for negotiation
- Proposal
- Emerging Group positions
- Searching for options
- Negotiation
- Agreement
- Implementation

KEY EVENTS IN AN MEA

- Negotiation
- Adoption
- Depositing text with Secretary General of the UN
- Circulation of Depository Notification
- Treaty opened for signature/ratification
- Treaty closes for signature
- Entry into force
- Accession to treaty

KEY PROVISIONS

- Preamble
- Definitions/Use of Terms
- Objectives
- Principles
- General obligations
- Research and systematic observation
- Capacity building
- Institutional arrangements
 - Conference of Parties
 - Secretariat
 - Subsidiary bodies
- Financial Mechanisms
- Compliance/ Non-compliance procedures
- Settlement of disputes
- Protocols/Amendments / Adjustments/ adoption
- Procedures
- Final clauses

Key Issues- ASEAN Haze Agreement

- A. Preamble
- B. General Provisions
 - A. Object of Treaty
 - B. Objectives
 - C. Principles
 - D. General Obligations
- C. Monitoring, Assessment, Prevention and Response
 - A. ASEAN Co-ordinating Centre
 - B. Compliance notification
 - C. Reporting
 - D. Assessment
 - E. Prevention
 - F. Preparedness
 - G. National Emergency response
 - H. Joint emergency response
 - I. Detection and control of emissions
 - J. Research and technical meeting assistance
 - K. Transfer of personnel and equipment
- D. Technical Cooperation and scientific research
 - A. Technical Cooperation
 - B. Scientific research
- E. Institutional arrangements
 - A. Conference of Parties
 - B. Secretariat
- F. Financial arrangements
- G. Procedures
 - A. Protocols
 - B. Amendments
 - C. Adjustment of procedures of process
 - D. Rules of Procedure and Procedural rules
 - E. Dispute settlement and other arrangements
 - F. Final clauses
- H. Final Clauses

Role of Conference of Parties and subsidiary bodies

- Conferences of Parties
- Meetings of Parties
- Subsidiary bodies
 - Ad hoc Open-ended Working Group on access and benefit sharing (CBD)
 - Subsidiary Body on Scientific, Technical and Technological Advice (CBD)
 - Scientific Council (CITES)
 - Executive Committee of
 - Financial Mechanism- Montreal Protocol
 - Executive Board of CDM (Kyoto Protocol)

Implementation and enforcement

- A. Non-compliance procedure
- B. Reporting
- C. Financial support
- D. Capacity building
- E. Sanctions

South Asian Environmental Agreement

- A. Male Declaration on Control and Prevention of Air Pollution and its Likely Transboundary Effects for South Asia
- B. Other regional agreements
 - A. ASEAN Haze agreement
 - B. UNLRTP

FOLLOWING UP ON NEGOTIATION OF MEAS

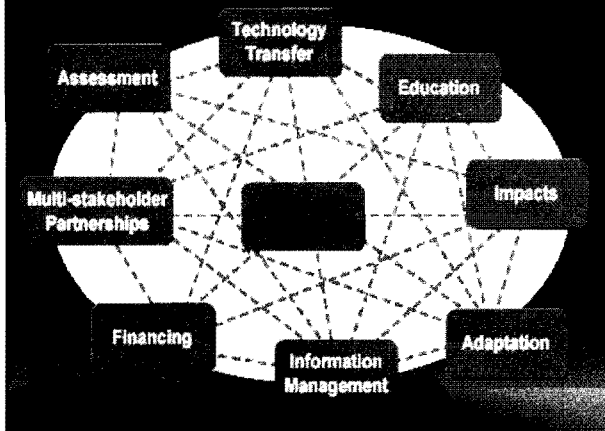
Lal Kurukulasuriya
UNEP Consultant

(Former Senior Adviser and Chief, Environmental
Law Branch, UNEP)

STRUCTURE OF PRESENTATION

- Reporting on outcomes, including briefing relevant ministries/agencies;
- Evaluation of financial and human resources for implementation;
- Identification of responsibilities for follow up;
- National measures/plans to implement MEAs and COP/MOP decisions, including options for clustering implementation of decisions of various MEAs which touch upon a same issue; and
- Consultations among countries between negotiating sessions

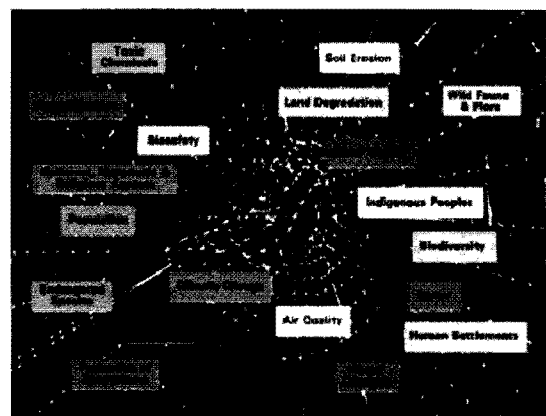
FOLLOW-UP TO NEGOTIATION OF MEAS

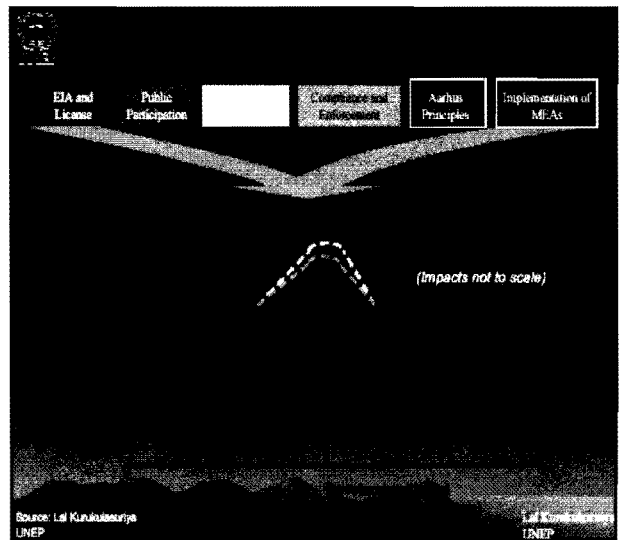
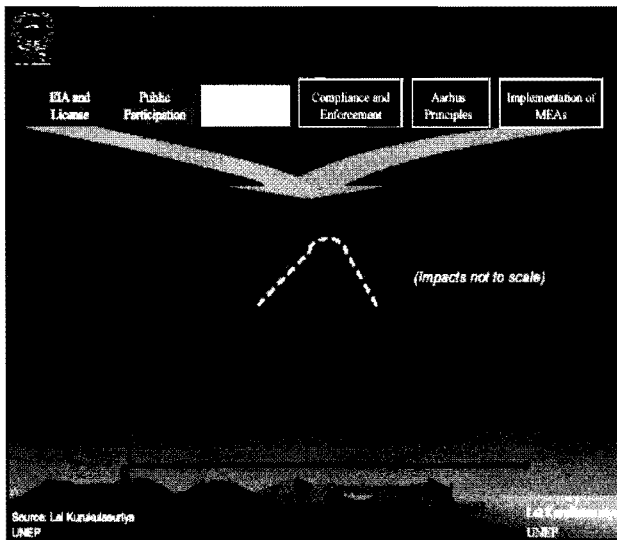
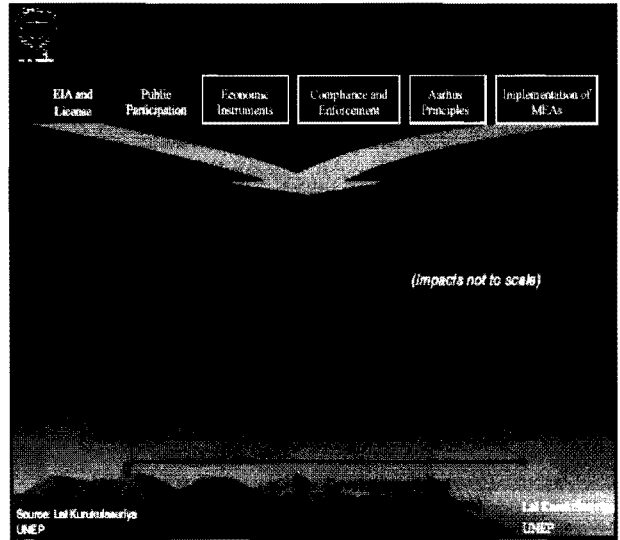
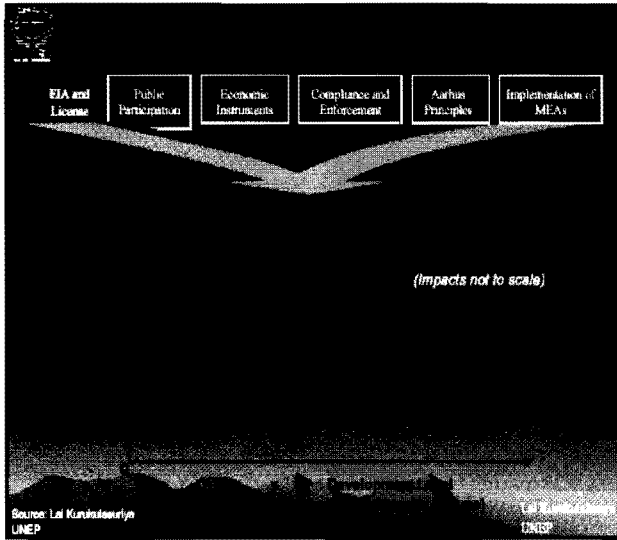
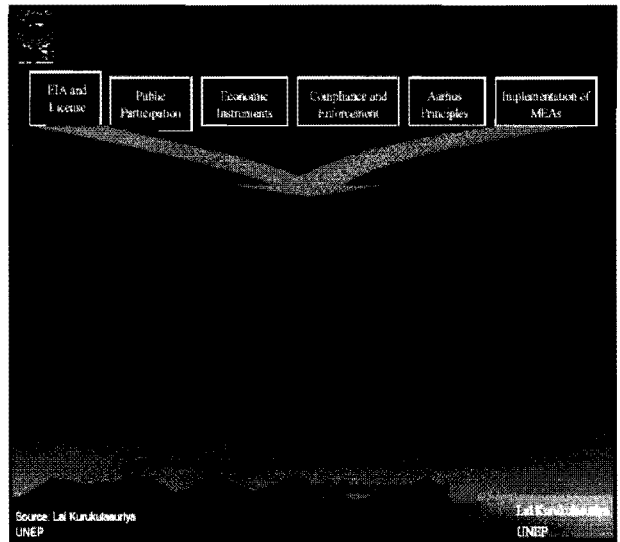
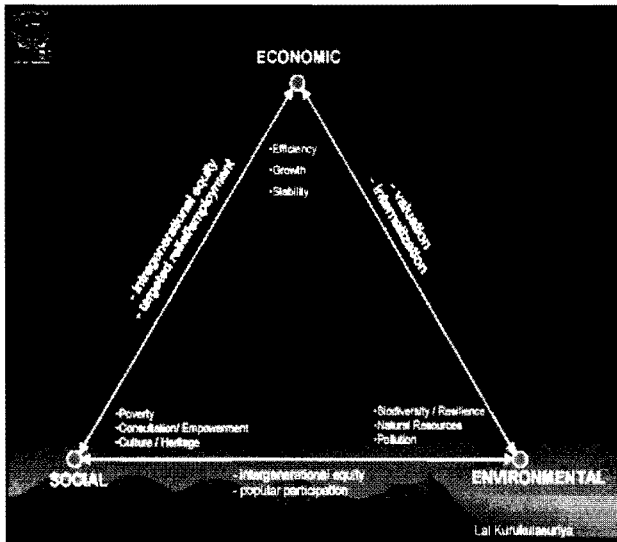


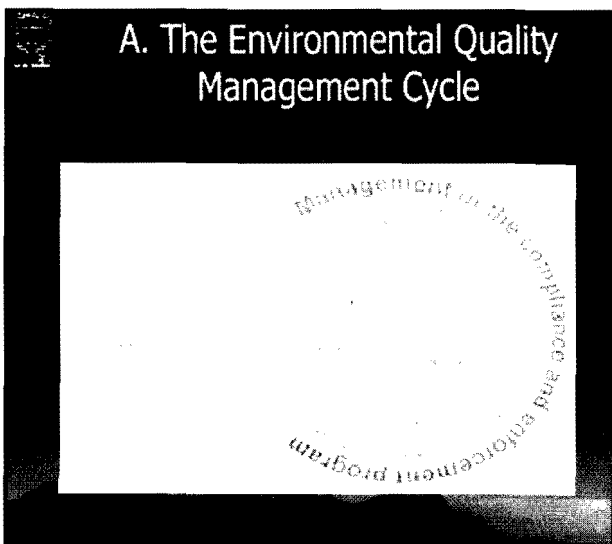
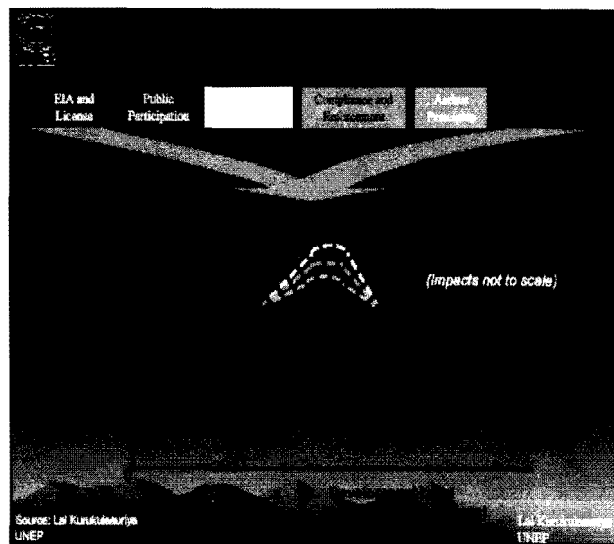
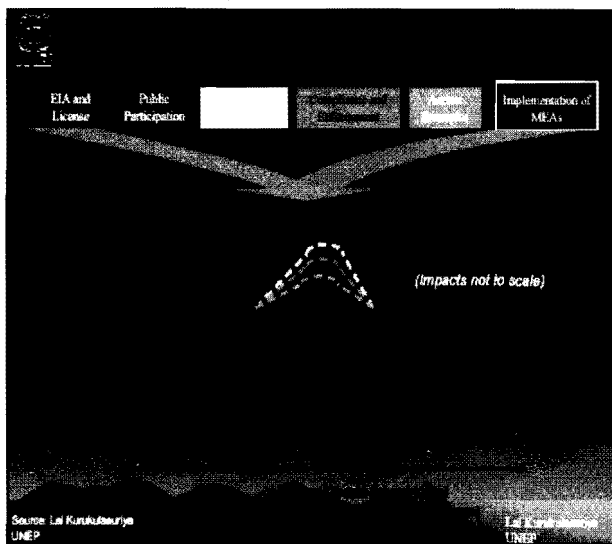
NATIONAL CONSULTATIONS

- Inter- Ministerial consultative body
- Participation of relevant stakeholders
- National needs assessment
- National response plan
- Financial, technical and human resources
- Monitoring
- Regional cooperation
- Follow-up at global level

ENVIRONMENTAL INTERDEPENDENCE







- ### Creating an atmosphere of compliance
- An effective educational programme.
 - A system of incentives for those who comply.
 - A credible likelihood of detection of violations.
 - A swift and sure response.
 - Appropriate consequences
 - Effective perception of each of these elements

- ### KEY FUNCTIONS OF A COMPLIANCE AND ENFORCEMENT PROGRAMME
- Developing laws and regulations that can be enforced
 - Identifying the regulated community
 - Promoting compliance
 - Permitting or licensing facilities
 - Monitoring compliance
 - Responding to violations
 - Role of negotiation
- Lal Kulkarni/UNEP

- ### CRITICAL ELEMENTS OF SUCCESS
- Balance among programme functions
 - Balance between incentives and penalties
 - Techno-economic compatibility
 - A few strong rather than many weak regulations
 - National standards, regional applicability
 - Permitting compatible with monitoring capability
 - Alternative inspection approaches
 - Adequate emphasis on education and public outreach.
- Lal Kulkarni/UNEP

INTERACTION AMONG GOVERNMENT, INDUSTRY, AND THE PUBLIC

- Target industries (regulated communities)
- Non-government institutions
- Financial institutions
- Public participation

Lal Kurnoolawanya

EVALUATING SUCCESS

- Environmental results
- Compliance rates
- Progress in returning significant violators to compliance
- Measures of compliance monitoring
- Number and timelines of enforcement responses
- Total of monetary penalties
- Measures of technical assistance

Lal Kurnoolawanya

OPTOINS WHEN RESOURCES ARE LIMITED

Establishing Priorities

- **Who?** Identification of regulated communities, based on target groups (industrial sectors or sub-sectors)
- **Where?** Identification of the most affected geographic areas (for example, river basins, catchment areas, hotspots, and metropolitan areas)
- **How?** Identification of the most affected polluted medium for example, soil, water, or air
- **What?** Identification of the wastes and substances that cause the greatest health risks

Lal Kurnoolawanya

THE MONITORING AND RESPONSE TRIANGLE

- Compliance self-monitoring: the regulated facility regularly checks its own compliance with permit requirements and records and/or reports them to authorities as required.
- Inspections: government-assigned body makes official on-site inspection or file review
- Enforcement responses: the legal measures (fines, closure orders, law suites) taken in response to violations.

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KEY ISSUES TO ADDRESS

- Self-monitoring: Who should be required to self-monitor what, how and when?
Integrated self-monitoring.
- Inspections: Who should inspect what and how? Converting to integrated inspections.
- Enforcement responses: What enforcement actions to take and who should take them?

Lal Kurnoolawanya

COMPLIANCE SELF-MONITORING

- Who? All facilities? Specified (size, risk, processes, chemicals, etc.)
- What? Measurable parameters and indicators.
- How? Requirements for record-keeping and reporting.
- When? Frequency of monitoring and reporting.

Lal Kurnoolawanya

C. INSPECTIONS

Developing the inspection strategy

- Estimate the numbers and types of facilities
- Prioritize inspections at facilities that pose the greatest risks
- Estimate the number of violations

Guidance to inspectors

- Selection of Facilities.
- Item to be inspected and information required for inspections
- Rules of conduct.
- Inspection equipment and sampling procedures
- Health and safety of inspectors
- Preparation of the inspection report

Lal Kumaramangalam

SOURCES OF FUNDING

- General Revenue
- Special Taxes
- Emission and Product Charges
- User fees and charges
- Violation-related charges (fines, penalties, other monetary measures)
- Foreign investments and grants

Lal Kumaramangalam

TYPES OF USER FEES

- Permitting fees
- Inspection fees
- Other direct charges
- Indirect charges

Lal Kumaramangalam

HOW ARE USER FEES APPLIED

- One-time charge for each initial permit application by a facility
- One-time charge for each new permit application by a facility
- Annual charges for each permitted process at a facility
- Annual charge for the continuation of a permit for an entire facility
- Recurring charge for conducting inspections at a facility

Lal Kumaramangalam

SYNERGY AND LINKAGES AMONG MEAS- AREAS OF SYNERGY

- Underlying causes
- Scientific assessment
- Trade-related provisions
- Monitoring
- Reporting
- Consequences of non-compliance
- Civil society participation
- Information dissemination
- Collective implementation
- Capacity building
- Impact assessment & risk assessment
- Dispute avoidance & settlement
- Participatory approaches in policy and decision-making
- Protected areas management and land use planning
- Ecosystems management
- Common technology
- Progressive development of Environmental Law

Lal Kumaramangalam

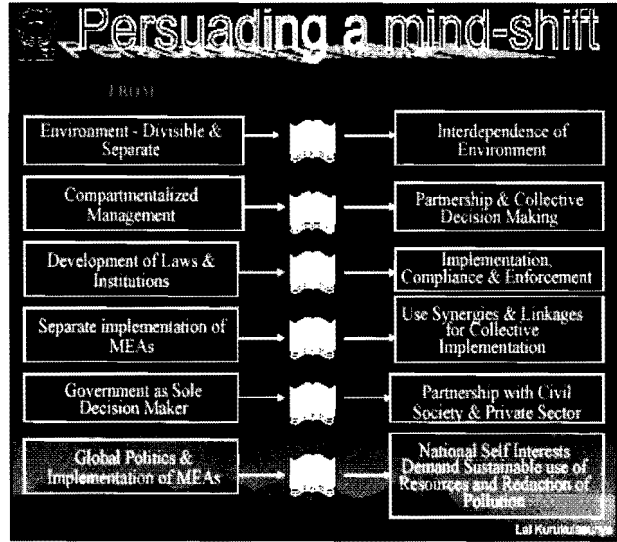
SYNERGIES AND INTERLINKAGES BETWEEN FIVE BIODIVERSITY RELATED MEAS

- Convention on Biological Diversity (CBD)
- Convention on International Trade on Endangered Species of Wild Fauna and Flora (CITES)
- Convention on Migratory Species (CMS)
- Ramsar Convention on Wetlands of International Importance
- World Heritage Convention (WHC).

Also consider: Man and the Biosphere Programme (MAB).

SYNERGIES AND INTERLINKAGES AS BASIS FOR COLLECTIVE ACTION

- Planning
- Legislative measures
- Institutional framework
- Information exchange
- Reporting
- Public education and awareness
- Public participation



South Asia Workshop for MEA Negotiators
Colombo, Sri Lanka, 5-7 October 2005

Follow-up on Negotiations

Lessons Learnt from the Inter-linkages Case Studies

Makiko Yashiro
United Nations University

UNITED NATIONS
UNIVERSITY

Outline

What is the Inter-linkages Approach?

Lessons Learnt from Inter-linkages
Case Studies: Effective Approaches to
Follow-up on MEA Negotiations

Possible Future Directions

Section 1: What is the Inter-linkages Approach?

Background

- Environmental problems are complex and interlinked, while solutions sometimes overlap, conflict, and contradict
- Limited resources to deal with increasing issues, increasing number of MEAs
- Lack of interest in environmental issues by decision makers
- Too much focus on rule making, not implementation
- Much focus on the global level, and not regional and national levels

Responses at the International Level

- UN Reform Plan notes the need for better coordination among UN agencies (SG's Plans, 97, 98, 02)
- WSSD and CSD processes call for cross-sectoral work and multi-stakeholder cooperation
- GEF considers capacity development and cross-sectoral aspects as important
- Rio Convention secretariats (CCC, CBD, CGD) established Joint Liaison Group (JLG)
- Efforts on harmonization and synergies receiving support at various international meetings (e.g. Environmental Management Group, WSSD Plan of Implementation, COPs)
- Various efforts made by MEA secretariats to promote synergies (joint work plans, MoUs, harmonization of national reporting, etc.)

The Importance of the National and Regional Levels

- National level
 - Country priorities are best voiced
 - Implementation takes place here
- Regional level
 - Ecosystems beyond national borders
 - Many MEAs have regional focus
 - Regional institutions key in support national implementation

What is Inter-linkages Approach?

- synergies: activities that aim at enhanced collaboration of MEAs, especially through linking processes in a way that increases the effects of joint activities beyond the sum of individual activities, and thus making efforts more effective and efficient

(UNEP-WCMC, May 2004)

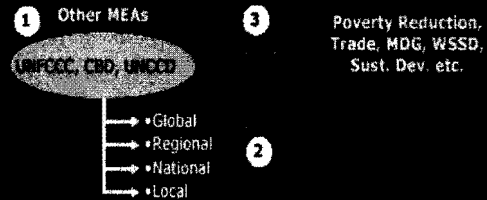
Inter-linkages approach: ways in which individuals, organizations and countries coordinate activities and increase synergies, in order to avoid duplication, to become more efficient and effective, and to improve implementation of MEAs

Levels of Synergies

Among MEAs (e.g. UNFCCC, CBD, UNCCD)

At different levels of governance (e.g. global to local)

Across regimes (cross-sectoral between MEAs/ environment and other development areas)



UNU Inter-linkages Initiative

Explore gaps and opportunities for effective and efficient implementation of agreements

Improving implementation does not require new instruments but greater coherence in tools already available

Integrated approach to develop synergistic frameworks for environmental management at all levels

Contribute to Agenda 21 goals

Activities

- Research
- Case studies
- Capacity development
- Regional partnership platforms

Framework of Inter-linkages Activities

Region	ASEAN	Pacific	South Asia
National Case Studies ⇒ GEF NCSA process	10 countries Philippines, Vietnam, Laos, Myanmar, Malaysia, Brunei, Singapore, Thailand, Indonesia	4 countries Palau, Vanuatu, Cook Islands, Papua New Guinea	3 countries Bhutan, Sri Lanka, Pakistan
Regional Workshops	2003	2004	2004 & 2005
Regional partnerships	Launched June 2003	Launched April 2004	Launched June 2004
Follow-up activities	Ongoing	Ongoing	Ongoing

Areas of Focus

Management Phases

- Planning, Negotiation, Ratification, Implementation

Functional issues

- Capacity Development, Information Management, Resourcing, Coordination, Education and Awareness, etc.

Stakeholders

- Government, Civil Society, Private Sector, Etc.

Section 2: Lessons Learnt from Inter-linkages Case Studies:

Effective Follow-up to Negotiations Requires:

Proper debriefing after negotiations
Strategic planning and management
Appropriate legal framework
Coordinated implementation

Key Findings 1: Debriefing

- ❖ Lack of clear procedures for debriefing on outcomes of negotiations to relevant stakeholders involved in negotiations, ratification processes and ensuing implementation
- ❖ Lack of effective information management systems (e.g. information gained during negotiations often regarded as a personal asset, and kept among limited individuals)
- ❖ Lack of capacity within the lead agency to conduct debriefing

Key Findings 1: Debriefing

Recommendations

Develop appropriate systems and procedures for the lead agency to conduct debriefing (clear understanding on roles and responsibilities and information flows)
Establish an information management system to ensure that information gained during negotiations is stored and disseminated to appropriate departments in a timely manner (e.g. guidelines, ministerial memos, departmental directives, centralized information repository within relevant departments, etc.)
Develop culture of information sharing and management
Address capacity issues during the planning stage

Key Findings 2: Strategic Planning

- ❖ Lack of communication and coordination between negotiators and technical focal points in charge of implementation
- ❖ Lack of long-term planning and appropriate estimation of necessary capacity and resources for the follow-up activities
- ❖ Lack of integration of MEA related issues and sustainable development issues into overall national development strategies
- ❖ Decentralization processes often devolve responsibilities but not necessarily capacity and personnel / budgetary resources
- ❖ Conflicts and overlaps in central policies
- ❖ Lack of cross sectoral planning

Key Findings 2: Strategic Planning

Recommendations

Joint planning and management (e.g. involving all the relevant agencies and stakeholders in the strategic planning process, promote communication between political and technical focal points, involve agencies in charge of implementation in negotiation processes, etc.)
Long-term planning and appropriate allocation of capacity and resources for follow-up activities (e.g. cost benefit analysis of MEAs, HRD strategies)
Cross sectoral assessment and planning (e.g. utilization of NCSA task force, strengthening of NSDS)
Integration of sustainable development strategies into overall national development strategies

Key Findings 3: Legal Framework

- ❖ Conflicts within national legal frameworks
- ❖ Weak compliance and enforcement mechanisms
- ❖ Monitoring and enforcement requires inter-agency cooperation
- ❖ Gap between national level (policies) and provinces/local level (implementation and enforcement)
- ❖ Lack of national standards, technical equipment and civic involvement
- ❖ Conflicting sectoral laws

Key Findings 3: Legal Framework

Recommendations:

- Careful analysis of long-term implication of acceding to MEAs and its relation to already acceded MEAs
- Secure funding not only for development of legal frameworks but also for implementation of legislations
- Well-established procedures for consultation among relevant agencies and multi-stakeholder partnership and participation
- A system to disseminate information related to the legislative changes to all the relevant personnel and agencies
- Eliminate overlaps and inconsistency among sectoral legislations, and synchronize relevant legislations under broader national sustainable development strategies
- Awareness building for stakeholder involved in compliance and enforcement processes
- Develop technical and legal expertise of officers involved in environmental compliance and monitoring, especially at the local government level

Key Findings 4: Implementation

- Weak inter-agency cooperation, including national focal points
- Weak partnership and participation processes
- Information exchange and knowledge management often poor
- Weak or non-existent awareness raising and public education
- Challenges in accessing external funds

Key Findings 4: Implementation

Recommendations (1/2):

- An improved system of cooperation between agencies and focal points through utilization of existing cross-sectoral and inter-agency committees and groups
- Clarify specific roles and coordination tasks of national focal points
- National information strategy (e.g. standardized format for data collection and storage, national environmental database network, etc.)
- Further focus on funding opportunities for multipurpose projects and programmes, covering multiple MEAs
- Provide sufficient resources (technical, legal and policy related capacity development, institutional support and facilities) to the local level for MEA implementation
- Promote economic independence of the local level through corporatization of implementation activities
- Institutionalized system for multi-stakeholder partnership in implementation activities
- Ensure sustainability of implementation activities at the local level

Key Findings 4: Implementation

Recommendations (2/2):

- Provide training opportunities covering all aspects of project management, including administrative and organizational management
- Ensure continuity of training programmes
- Provide sufficient financial and human resources to conduct awareness raising activities, and develop locally appropriate materials on MEAs
- Greater role of private sector and NGOs in awareness raising campaigns, esp. at the local level
- Strengthen consultation and cooperation with neighboring countries to identify shared priorities and develop common strategies at the regional level to assist MEA negotiations and the implementation at the national level

Example 1 - Joint National Action Programmes

UNFCCC: NAPA - For LDCs to address their urgent needs in respect of vulnerability and adaptation to the adverse effects of climate change

UNCCD: NAP - Identify factors contributing to desertification and practical measures necessary to combat it and/or mitigate the effects of drought

UNCBD: NBSAP - Develop national strategies, or plans for the sustainable use of biological diversity

Example 1 - Joint National Action Programmes

Joint components	Linked approach	Possible outcomes
Stocktaking, assessment of existing data, documents, strategies and policies	Data and information management	Collaborative data collection, storage, management and exchange
Steering committees, coordination bodies (NFP and the agencies)	Information exchange, inter-agency collaboration, joint planning	Inter-agency committees, NCSD/NSDS
Prioritization of activities, complementarity linking to existing policies	Strategic planning and knowledge management	Policy coordination, joint preparation for negotiation, ratification Integrated implementation strategies
Multi-stakeholder participation	Participatory assessments, joint planning procedures	Strengthened ownership, information and experience sharing across levels (national to local and vice versa)
Awareness raising	Targeting high-level decision makers and the general public	CCC, CCD and CBD linked to sustainable development strategies for politicians and in curricula
Outreach	Joint outreach programmes	Linking Rio-conventions to sustainable development strategy in public awareness

Example 2 - National Conventions Coordination Centers (NCCC)

Palau - Office of Environmental Response and Coordination (OERC)

Cook Islands - International Environmental Advisory Unit (IEAU)

Philippines - Department of Environment and Natural Resources (DENR) plus the National Council for Sustainable Development (NCSD)

Sri Lanka - Environmental Treaties Reference Center (ETRC)

Pakistan - MEA Resource Centre

Section 3: Possible Future Directions

Key Capacity Challenges Related to Negotiations and Management of MEAs

- High staff turn-over and sudden changes in responsibilities among public service officers
- Need for translating individual expertise and experience into institutional capacity or institutional memory
- Poor information exchange (both intra- and inter-agency) compounds existing challenges
- Environment departments/agencies usually are under-resourced (budget and staff), without substantial mandates (e.g. ministries without portfolio = policy development without implementation/enforcement responsibility)
- MEAs and sustainable development issues insufficiently reflected in national development planning processes

Proposed Future Activities for the Region

- Sustainable training activities at the regional level that aim at:
 - Strengthening skills related to negotiations and management of MEAs
 - Promoting coordination and partnership between negotiators and implementers of MEAs
 - Promoting an integrated approach to MEA management
 - Promoting exchange and sharing of experiences, knowledge and best practices among countries in the region
 - Strengthening regional positions and capacity in negotiating and managing MEAs
- Modalities
 - Facilitated by key regional institutions (SACEP, IUCN?), in partnership with other international and regional partners
 - Countries pool minimum funds to participate in training sessions
 - ???

For further information, please visit:

www.qeic.or.jp

www.unu.edu/inter-linkages

ANNEX 4A



Working Group Access to Genetic Resources and Benefit-sharing

A Simulation Exercise (Colombo, Sri Lanka, 5-7 October 2005)

Process guidance

OBJECTIVES OF THE EXERCISE

The Working Group on Access to Genetic Resources and Benefit-Sharing (ABSWG) is a multilateral negotiation exercise that exposes participants to the reality of contemporary multilateral environmental negotiations.

The exercise places participants in the context of the on-going negotiations on an international regime on ABS, and simulates the complexities and dynamics of negotiations taking place in the context of an informal, multilateral working group meeting. In addition to increasing awareness on the ABS issue, the exercise attempts to develop understanding on the dynamics and etiquette of multilateral environmental negotiations.

ORGANIZATIONAL MATTERS

Participants

Each participant in the simulation exercise will be allocated a Party or observer, the views of which they should defend during the exercise. Since the exercise is purely fictitious, participants will not represent their country's views. For example, a participant from Sri Lanka may be assigned the task of representing the views of the United States, for the purposes of the exercise.

Approximately 25 representatives from Parties and observers to the Convention on Biological Diversity (CBD) as well as from inter-governmental and non-governmental organizations (IGOs and NGOs) have been invited to take part in the Working Group on Access and Benefit Sharing.

Parties include: Australia, Brazil, Germany, India, Mexico, South Africa, Switzerland and Tanzania.

Observers, IGOs and NGOs include: the United States, the International Indigenous Forum on Biodiversity (IIFB), the Food and Agriculture Organization (FAO), the International Organization of Biotechnology Industries (IOBI), and Greenpeace International.

Schedule

The Working Group will meet in plenary and contact group sessions. Between these sessions time will be arranged for participants to enter into caucuses/regional groups to coordinate positions.



Plenary will meet on: Thursday 6th October from 14:00 to 16:00
Friday 7th October from 10:30 to 13:00

Contact groups will meet on: Thursday 6th October from 16:30 to 18:00
Friday 7th October from 9:00 to 10:30

EXPECTED OUTCOMES OF THE NEGOTIATIONS

Recommendations

The outcome of the Working Group's deliberations should include a document providing recommendations to the Conference of the Parties regarding the nature, scope, and possible elements of an international regime on ABS.

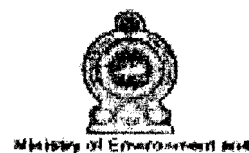
Debriefing

A debriefing session will be held following the adoption of recommendations and discussion on ways to follow up on negotiations.

INSTRUCTIONS AND DOCUMENTS

For your preparations and the proceedings of the negotiations, the following documents will be provided to you at different stages of the exercise:

- (1) Background Note on the history of ABS negotiations under the CBD (Doc.1)
 - (2) Provisional Agenda (Doc. 2) and Annotated Provisional Agenda (Doc.3)
 - (3) Note prepared by the Secretariat (Doc.4)
 - (4) Non-paper by India (Doc.5)
 - (5) Proposed Draft Recommendation (Doc.6)
- Individual Role Assignment Instructions (Doc.7 to 20)



Working Group on Access to Genetic Resources and Benefit-sharing

Simulation Exercise¹
(Colombo, Sri Lanka, 5-7 October 2005)

Background Note

1. Introduction

Access to genetic resources and benefit-sharing (ABS) concerns a broad range of stakeholders, including governments, intergovernmental organizations (IGOs), non-governmental organizations (NGOs), manufacturers, research and development firms, investors, and indigenous and local communities. The issue has evolved slowly over the past decade to become the subject of a significant international policy debate involving a number of organizations and institutional forums. This background note traces the development and evolution of the ABS issue within the context of the intergovernmental negotiating process within the Convention on Biological Diversity (CBD).

1. 2. ABS in the Convention on Biological Diversity

The issue of access to genetic resources and benefit sharing was originally addressed within the framework of the CBD, which was negotiated under the auspices of UNEP, adopted in 1992 and entered into force on 29 December 1993. To date, 188 countries are Parties to the Convention.

The Convention has three objectives (Article 1), including that of ensuring the:

“fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding”.

In addition to Article 1, two provisions in the CBD also make reference to ABS: Article 15 provides a framework for implementing the Convention’s third objective by recognizing *sovereign rights of states over their natural resources, access on mutually agreed term and prior informed consent, and the development of legislative, administrative or policy measures by each party*; and Article 8(j) contains a provision to encourage the equitable sharing of the benefits arising from the utilization of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for conservation and sustainable

¹ The views and positions expressed in this background note do not represent the official policy of the Convention on Biological Diversity, its Parties, the United Nations or any of the other organizations mentioned. This note was prepared by the Division of Environmental Conventions of UNEP on the basis of a previous simulation exercise prepared and run by UNITAR, and for the sole purposes of the simulation exercise developed for the South Asia Training Workshop for MEA Negotiators, held in Colombo, Sri Lanka, 5-7 October 2005. Please do not cite or refer to it without explicit written approval from UNEP.

use of biological diversity.¹ A number of crosscutting issues in the Convention also relate to the issue of access and benefit-sharing, including capacity building, information exchange, transfer of technology, and financial resources.

Initial Discussions on ABS

Subsequent to the entry into force of the Convention, the issue of genetic resources arose for the first time at the second meeting of the Conference of the Parties (COP) in 1995, where Parties considered the compilation of “*existing legislation, administrative and policy information on access to genetic resources and the equitable sharing of benefits derived from their use*” (UNEP/CBD/COP/2/13). The COP adopted decision II/11, requesting the CBD Secretariat to further elaborate a survey of measures taken by governments to implement Article 15 of the Convention, including any national interpretations of key terms used in the article.

At its third meeting in 1996, the COP considered a compilation of views of the Parties on possible options for developing the implementation of Article 15 (UNEP/CBD/COP/3/20). In decision III/15, the COP urged governments to submit relevant information on possible elements for guidelines and other measures for the implementation of Article 15. Based on this and other COP-3 decisions, the CBD Executive Secretary called on Parties to submit case studies on ABS mechanisms.

In 1998, at COP-4, Parties discussed issues related to benefit-sharing, particularly measures to promote and advance the distribution of benefits from biotechnology, fair and equitable sharing of benefits arising out of genetic resources and options for measures to implement Article 15 on access to genetic resources. This was the first time in the COP process that benefit-sharing was addressed as a separate agenda item.

At COP-4, a proposal to establish a working group to create an international code of conduct, containing minimum standards for provisions and use of genetic resources was made by Switzerland and supported by France, while the African Group, Russia, Germany and other delegates favored the development of guidelines.²

In decision IV/8, the COP established a regionally balanced Panel of Experts on access to genetic resources and benefit-sharing composed of governments, representatives from public and private sectors and indigenous and local communities. The Panel was instructed to draw upon all relevant sources in the development of a common understanding of basic concepts, and to explore all options for access and benefit-sharing on mutually agreed terms, including guiding principles, guidelines, and codes of best practice for access and benefit-sharing arrangements.

The Panel of Experts on Access and Benefit-sharing

At its first meeting, in October 1999, the Panel of Experts considered access to genetic resources for scientific and commercial purposes; legislative, administrative and policy measures at the national and regional levels; regulatory procedures and incentive measures; and capacity building.

¹ Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, and forestry. ABS, traditional knowledge, and folklore are often examined together.

² Summary of the fourth meeting of the COP to the CBD; *Earth Negotiations Bulletin*; Vol. 09 No. 96, 1998.

When discussing access legislation, experts agreed that it might be best to limit it only to genetic resources and not take into consideration derivatives. The Panel endorsed the importance of preparing national strategies on ABS as part of national biodiversity strategies prior to developing legislative, administrative and policy measures.¹

The Panel developed general conclusions, which, among other issues, identified the concepts of prior informed consent (PIC)² and mutually agreed terms (MAT) as the core requirements of effective ABS measures. Contractual arrangements, which should include provisions for benefit-sharing, information needs and capacity building, were considered to be the principal mechanisms for concluding access agreements. The Panel of Experts also discussed at length issues of intellectual property rights (IPRs) and, in particular, the role of IPRs in PIC, traditional knowledge, and their integration in contractual agreements.

The Fifth Conference of the Parties

At its fifth meeting in May 2000, the COP established an Open-ended *Ad Hoc* Working Group on ABS to develop guidelines and other approaches on PIC; MAT; roles, responsibilities and participation of stakeholders; aspects of *in situ* and *ex situ* conservation and sustainable use; mechanisms for benefit-sharing; and the preservation and maintenance of traditional knowledge. Decision V/26 of the COP also addressed *ex situ* collections³ acquired prior to the CBD's entry into force, IPR and relevant provisions of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

During the High-Level Segment at COP-5, Malaysia expressed concern that the provisions of the CBD and national efforts to safeguard biological resources would be adversely affected by the implementation of the TRIPS Agreement, and particularly by Article 27.3(b), which allows patenting of certain biological resources. Malaysia's position was supported by the African Group, which called for patenting of life forms, including plants, animals, microorganisms and biological processes to be prohibited.⁴

One outstanding issue that did not receive sufficient discussion during COP-5 was the relationship between intellectual property rights (IPRs) and access and benefit-sharing arrangements. A number of developing country delegates expressed disappointment that COP-5 did not take the debate on IPRs any further.

The Second Panel of Experts on Access and Benefit-sharing

The second Panel of Experts on ABS met in March 2001. The Panel produced a report and conclusions on user and provider experience in ABS processes, approaches for stakeholder involvement in ABS processes and complementary options to address ABS within the CBD's framework, including possible elements for the guidelines. The Panel's report and conclusions were forwarded as an input into the first meeting of the *Ad hoc* Open-ended Working Group on ABS.

¹ Summary report of the Experts' Panel on Access and Benefit-sharing; *Earth Negotiations Bulletin*; Vol. 9 No. 131, 1999.

² See discussion in the Glossary at the end of this Note.

³ Article 2 of the CBD identifies *ex situ conservation* as the conservation of components of biological diversity outside their natural habitats. However *ex situ collection* is not defined by the CBD.

⁴ UN biodiversity meeting fails to address key outstanding issues, Third World Network.

The Sixth Conference of the Parties

One of the achievements of COP-6 in April 2002 was the adoption of the Bonn Guidelines on ABS. While discussing the access and benefit sharing, Ethiopia and the Philippines, joined by many other developing countries, supported an internationally binding instrument on ABS, while other Parties, particularly the developed ones, emphasized the voluntary nature of the guidelines and non substitution for national legislation.¹

Box 1: The Bonn Guidelines

The “Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization” (Decision VI/24A) are voluntary and designed to assist governments and other shareholders to develop legislative, administrative or policy measures on access and benefit-sharing and/or in negotiating contractual agreements for access and benefit-sharing. The guidelines cover a range of subjects, including the role of national focal points and competent authorities, participation of stakeholders, the process of access and benefit including prior informed consent and mutually agreed terms, and an illustrative list of monetary and non-monetary benefits.

In the course of the discussions during COP VI, several countries – including India, Colombia, Jamaica and Peru – stressed that the guidelines should encourage countries to require the disclosure of the country of origin of the genetic resources and provide evidence of benefit-sharing and prior informed consent of traditional knowledge holders in patent applications, in the line with their position in the WTO TRIPS Council. In the end, requirements for IPRs were only included in the Guidelines as possible measures to support compliance with PIC and MAT provisions along with, *inter alia*, voluntary certification schemes and measures discouraging unfair trade practices.

Some civil society groups were critical of the Guidelines. The Third World Network stated that the Guidelines failed to define the rights of indigenous peoples, local communities and farmers, and to address conflict with the TRIPS Agreement. While pointing out that the Guidelines recognize the need to prevent biopiracy practices, Friends of the Earth International criticized Parties for failing to agree on the need for legally binding measures.

World Summit on Sustainable Development

In September 2002, the World Summit on Sustainable Development (WSSD) underlined the unprecedented rate at which biodiversity is being depleted and acknowledged that this trend can only be reversed if the local communities benefit from the conservation and sustainable use of biological diversity, particularly in countries of origin of genetic resources, in accordance with Article 15 of the CBD.

The WSSD Plan of Implementation calls for actions to “negotiate, within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources”.

Second Meeting of the Ad hoc Open-ended Working Group on Access and Benefit-Sharing

The ABS Working Group convened for the second time in December 2003 and began discussions on the process, nature, scope, elements and modalities for an international ABS regime, as a follow-up to the recommendations of the Inter-Sessional Meeting of the Multi-Year Programme of Work (MYPOW), convened in March 2003.

¹ Sixth meeting of the COP to the CBD, *Earth Negotiations Bulletin*, Vol. 09 No. 239, 2002.

Most of the issues proved to be highly controversial and tended to reinforce cleavages between the developing countries, particularly those representing the African Group and the Group of Like-minded Megadiverse Countries (LMMC), and developed countries, notably those of the European Union (EU), Australia, Switzerland and Canada. On virtually all agenda items, these two blocs held opposing views. The LMMC and the African Group favored accelerating discussions on an international legally binding ABS regime designed to redress the balance between access and benefit-sharing. They stressed that the ABS regime should ensure respect for national sovereignty, promote compliance with PIC and be in conformity with MAT, address certification of the provenance of genetic resources, include the issue of derivatives and balance the regulatory burden on user and provider countries.¹ The African Group also underlined that the regime should promote technology transfer.

On the other hand, the EU, Australia, Canada, Switzerland and the Republic of Korea placed emphasis on the implementation of the Bonn Guidelines before entertaining discussions on the negotiation of an ABS international regime. Moreover, these countries stressed that discussions should build on the results and experiences of implementing the Guidelines. They also emphasized that ABS policies should be discussed in close coordination with existing policies in multilateral institutions, such as the WTO (the TRIPS Agreement), WIPO and International Treaty on Plant and Genetic Resources (ITPGR), rather than establish a new and separate legal instrument. Japan insisted against excessive ABS regulation.

The Working Group concluded with the adoption of a heavily bracketed draft recommendation on an international regime, which was submitted to COP-7 for consideration.

Seventh Meeting of the Conference of the Parties

Discussions continued at COP-7 to review and finalize the bracketed text forwarded from the second Meeting of the ABS Working Group. The LMMC urged Parties to reconvene the ABS Working Group, and the EU, Australia, Canada and Switzerland again focused attention on problems and gaps with implementing the Bonn Guidelines.

At the conclusion of the meeting, in decision VII/19 (see Annex II to the present document), the COP agreed to mandate the ABS Working Group to negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement provisions in Article 15 and Article 8(j) of the Convention. The mandate included terms of reference on the process, nature, scope and elements for consideration in the elaboration of an international regime.

¹ ENB, 8/25/2004.

ANNEX 4A.1

BONN GUIDELINES ON ACCESS TO GENETIC RESOURCES AND FAIR AND EQUITABLE SHARING OF THE BENEFITS ARISING OUT OF THEIR UTILIZATION

I. GENERAL PROVISIONS

A. Key features

1. These Guidelines may serve as inputs when developing and drafting legislative, administrative or policy measures on access and benefit-sharing with particular reference to provisions under Articles 8(j), 10 (c), 15, 16 and 19; and contracts and other arrangements under mutually agreed terms for access and benefit-sharing.
2. Nothing in these Guidelines shall be construed as changing the rights and obligations of Parties under the Convention on Biological Diversity.
3. Nothing in these Guidelines is intended to substitute for relevant national legislation.
4. Nothing in these Guidelines should be interpreted to affect the sovereign rights of States over their natural resources;
5. Nothing in these Guidelines, including the use of terms such as “provider”, “user”, and “stakeholder”, should be interpreted to assign any rights over genetic resources beyond those provided in accordance with the Convention;
6. Nothing in these Guidelines should be interpreted as affecting the rights and obligations relating to genetic resources arising out of the mutually agreed terms under which the resources were obtained from the country of origin.
7. The present Guidelines are voluntary and were prepared with a view to ensuring their:
 - a. Voluntary nature: they are intended to guide both users and providers of genetic resources on a voluntary basis;
 - b. Ease of use: to maximize their utility and to accommodate a range of applications, the Guidelines are simple;
 - c. Practicality: the elements contained in the guidelines are practical and are aimed at reducing transaction costs;
 - d. Acceptability: the Guidelines are intended to gain the support of users and providers;
 - e. Complementarity: the Guidelines and other international instruments are mutually supportive;
 - f. Evolutionary approach: the Guidelines are intended to be reviewed and accordingly revised and improved as experience is gained in access and benefit-sharing;
 - g. Flexibility: to be useful across a range of sectors, users and national circumstances and jurisdictions, guidelines should be flexible;
 - h. Transparency: they are intended to promote transparency in the negotiation and implementation of access and benefit-sharing arrangements.

B. Use of terms

8. The terms as defined in Article 2 of the Convention shall apply to these Guidelines. These include: biological diversity, biological resources, biotechnology, country of origin of genetic resources, country providing genetic resources, *ex situ* conservation, *in situ* conservation, genetic material, genetic resources, and *in situ* conditions.

C. Scope

9. All genetic resources and associated traditional knowledge, innovations and practices covered by the Convention on Biological Diversity and benefits arising from the commercial and other utilization of such resources should be covered by the guidelines, with the exclusion of human genetic resources.

D. Relationship with relevant international regimes

10. The guidelines should be applied in a manner that is coherent and mutually supportive of the work of relevant international agreements and institutions. The guidelines are without prejudice to the access and benefit-sharing provisions of the FAO International Treaty for Plant Genetic Resources for Food and Agriculture. Furthermore, the work of the World Intellectual Property Organization (WIPO) on issues of relevance to access and benefit-sharing should be taken into account. The application of the guidelines should also take into account existing regional legislation and agreements on access and benefit-sharing.

E. Objectives

11. The objectives of the Guidelines are the following:
 - a. To contribute to the conservation and sustainable use of biological diversity;
 - b. To provide Parties and stakeholders with a transparent framework to facilitate access to genetic resources and ensure fair and equitable sharing of benefits;
 - c. To provide guidance to Parties in the development of access and benefit-sharing regimes;
 - d. To inform the practices and approaches of stakeholders (users and providers) in access and benefit-sharing arrangements;
 - e. To provide capacity-building to guarantee the effective negotiation and implementation of access and benefit-sharing arrangements, especially to developing countries, in particular least developed countries and small island developing States among them;
 - f. To promote awareness on implementation of relevant provisions of the Convention on Biological Diversity;
 - g. To promote the adequate and effective transfer of appropriate technology to providing Parties, especially developing countries, in particular least developed countries and small island developing States among them, stakeholders and indigenous and local communities;
 - h. To promote the provision of necessary financial resources to providing countries that are developing countries, in particular least developed countries and small island developing States among them, or countries with economies in transition with a view to contributing to the achievement of the objectives mentioned above;
 - i. To strengthen the clearing-house mechanism as a mechanism for cooperation among Parties in access and benefit-sharing;

- j. To contribute to the development by Parties of mechanisms and access and benefit-sharing regimes that recognize the protection of traditional knowledge, innovations and practices of indigenous and local communities, in accordance with domestic laws and relevant international instruments;
 - k. To contribute to poverty alleviation and be supportive to the realization of human food security, health and cultural integrity, especially in developing countries, in particular least developed countries and small island developing States among them;
 - l. Taxonomic research, as specified in the Global Taxonomy Initiative, should not be prevented, and providers should facilitate acquisition of material for systematic use and users should make available all information associated with the specimens thus obtained.
12. The Guidelines are intended to assist Parties in developing an overall access and benefit-sharing strategy, which may be part of their national biodiversity strategy and action plan, and in identifying the steps involved in the process of obtaining access to genetic resources and sharing benefits.

II. ROLES AND RESPONSIBILITIES IN ACCESS AND BENEFIT-SHARING PURSUANT TO ARTICLE 15 OF THE CONVENTION ON BIOLOGICAL DIVERSITY

A. National focal point

13. Each Party should designate one national focal point for access and benefit-sharing and make such information available through the clearing-house mechanism. The national focal point should inform applicants for access to genetic resources on procedures for acquiring prior informed consent and mutually agreed terms, including benefit-sharing, and on competent national authorities, relevant indigenous and local communities and relevant stakeholders, through the clearing-house mechanism.

B. Competent national authority(ies)

14. Competent national authorities, where they are established, may, in accordance with applicable national legislative, administrative or policy measures, be responsible for granting access and be responsible for advising on:
- a. The negotiating process;
 - b. Requirements for obtaining prior informed consent and entering into mutually agreed terms;
 - c. Monitoring and evaluation of access and benefit-sharing agreements;
 - d. Implementation/enforcement of access and benefit-sharing agreements;
 - e. Processing of applications and approval of agreements;
 - f. The conservation and sustainable use of the genetic resources accessed;
 - g. Mechanisms for the effective participation of different stakeholders, as appropriate for the different steps in the process of access and benefit-sharing, in particular, indigenous and local communities;
 - h. Mechanisms for the effective participation of indigenous and local communities while promoting the objective of having decisions and processes available in a language understandable to relevant indigenous and local communities.

15. The competent national authority(ies) that have the legal power to grant prior informed consent may delegate this power to other entities, as appropriate.

C. Responsibilities

16. Recognizing that Parties and stakeholders may be both users and providers, the following balanced list of roles and responsibilities provides key elements to be acted upon:

- a. Contracting Parties which are countries of origin of genetic resources, or other Parties which have acquired the genetic resources in accordance with the Convention, should:
 - i. Be encouraged to review their policy, administrative and legislative measures to ensure they are fully complying with Article 15 of the Convention;
 - ii. Be encouraged to report on access applications through the clearing-house mechanism and other reporting channels of the Convention;
 - iii. Seek to ensure that the commercialization and any other use of genetic resources should not prevent traditional use of genetic resources;
 - iv. Ensure that they fulfill their roles and responsibilities in a clear, objective and transparent manner;
 - v. Ensure that all stakeholders take into consideration the environmental consequences of the access activities;
 - vi. Establish mechanisms to ensure that their decisions are made available to relevant indigenous and local communities and relevant stakeholders, particularly indigenous and local communities;
 - vii. Support measures, as appropriate, to enhance indigenous and local communities' capacity to represent their interests fully at negotiations;
- b. In the implementation of mutually agreed terms, users should:
 - i. Seek informed consent prior to access to genetic resources, in conformity with Article 15, paragraph 5, of the Convention;
 - ii. Respect customs, traditions, values and customary practices of indigenous and local communities,
 - iii. Respond to requests for information from indigenous and local communities;
 - iv. Only use genetic resources for purposes consistent with the terms and conditions under which they were acquired;
 - v. Ensure that uses of genetic resources for purposes other than those for which they were acquired, only take place after new prior informed consent and mutually agreed terms are given;
 - vi. Maintain all relevant data regarding the genetic resources, especially documentary evidence of the prior informed consent and information concerning the origin and the use of genetic resources and the benefits arising from such use;
 - vii. As much as possible endeavour to carry out their use of the genetic resources in, and with the participation of, the providing country;

- viii. When supplying genetic resources to third parties, honour any terms and conditions regarding the acquired material. They should provide this third party with relevant data on their acquisition, including prior informed consent and conditions of use and record and maintain data on their supply to third parties. Special terms and conditions should be established under mutually agreed terms to facilitate taxonomic research for non-commercial purposes;
 - ix. Ensure the fair and equitable sharing of benefits, including technology transfer to providing countries, pursuant to Article 16 of the Convention arising from the commercialization or other use of genetic resources, in conformity with the mutually agreed terms they established with the indigenous and local communities or stakeholders involved;
- c. Providers should:
- i. Only supply genetic resources and/or traditional knowledge when they are entitled to do so;
 - ii. Strive to avoid imposition of arbitrary restrictions on access to genetic resources.
- d. Contracting Parties with users of genetic resources under their jurisdiction should take appropriate legal, administrative, or policy measures, as appropriate, to support compliance with prior informed consent of the Contracting Party providing such resources and mutually agreed terms on which access was granted. These countries could consider, *inter alia*, the following measures:
- i. Mechanisms to provide information to potential users on their obligations regarding access to genetic resources;
 - ii. Measures to encourage the disclosure of the country of origin of the genetic resources and of the origin of traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights;
 - iii. Measures aimed at preventing the use of genetic resources obtained without the prior informed consent of the Contracting Party providing such resources;
 - iv. Cooperation between Contracting Parties to address alleged infringements of access and benefit-sharing agreements;
 - v. Voluntary certification schemes for institutions abiding by rules on access and benefit-sharing;
 - vi. Measures discouraging unfair trade practices;
 - vii. Other measures that encourage users to comply with provisions under subparagraph ?16 (b) above.

III. PARTICIPATION OF STAKEHOLDERS

- 17 Involvement of relevant stakeholders is essential to ensure the adequate development and implementation of access and benefit-sharing arrangements. However, due to the diversity of stakeholders and their diverging interests, their appropriate involvement can only be determined on a case-by-case basis.

18. Relevant stakeholders should be consulted and their views taken into consideration in each step of the process, including:
 - a. When determining access, negotiating and implementing mutually agreed terms, and in the sharing of benefits;
 - b. In the development of a national strategy, policies or regimes on access and benefit-sharing.
19. To facilitate the involvement of relevant stakeholders, including indigenous and local communities, appropriate consultative arrangements, such as national consultative committees, comprising relevant stakeholder representatives, should be made.
20. The involvement of relevant stakeholders should be promoted by:
 - a. Providing information, especially regarding scientific and legal advice, in order for them to be able to participate effectively;
 - b. Providing support for capacity-building, in order for them to be actively engaged in various stages of access and benefit-sharing arrangements, such as in the development and implementation of mutually agreed terms and contractual arrangements.
21. The stakeholders involved in access to genetic resources and benefit-sharing may wish to seek the support of a mediator or facilitator when negotiating mutually agreed terms.

IV. STEPS IN THE ACCESS AND BENEFIT-SHARING PROCESS

A. Overall strategy

22. Access and benefit-sharing systems should be based on an overall access and benefit-sharing strategy at the country or regional level. This access and benefit-sharing strategy should aim at the conservation and sustainable use of biological diversity, and may be part of a national biodiversity strategy and action plan and promote the equitable sharing of benefits.

B. Identification of steps

23. The steps involved in the process of obtaining access to genetic resources and sharing of benefits may include activities prior to access, research and development conducted on the genetic resources, as well as their commercialization and other uses, including benefit-sharing.

C. Prior informed consent

24. As provided for in Article 15 of the Convention on Biological Diversity, which recognizes the sovereign rights of States over their natural resources, each Contracting Party to the Convention shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and fair and equitable sharing of benefits arising from such uses. In accordance with Article 15, paragraph 5, of the Convention on Biological Diversity, access to genetic resources shall be subject to prior informed consent of the contracting Party providing such resources, unless otherwise determined by that Party.
25. Against this background, the Guidelines are intended to assist Parties in the establishment of a system of prior informed consent, in accordance with Article 15, paragraph 5, of the Convention.

1. Basic principles of a prior informed consent system

26. The basic principles of a prior informed consent system should include:
- a. Legal certainty and clarity;
 - b. Access to genetic resources should be facilitated at minimum cost;
 - c. Restrictions on access to genetic resources should be transparent, based on legal grounds, and not run counter to the objectives of the Convention;
 - d. Consent of the relevant competent national authority(ies) in the provider country. The consent of relevant stakeholders, such as indigenous and local communities, as appropriate to the circumstances and subject to domestic law, should also be obtained.

2. Elements of a prior informed consent system

27. Elements of a prior informed consent system may include:
- a. Competent authority(ies) granting or providing for evidence of prior informed consent;
 - b. Timing and deadlines;
 - c. Specification of use;
 - d. Procedures for obtaining prior informed consent;
 - e. Mechanism for consultation of relevant stakeholders;
 - f. Process.

Competent authority(ies) granting prior informed consent

28. Prior informed consent for access to in situ genetic resources shall be obtained from the Contracting Party providing such resources, through its competent national authority(ies), unless otherwise determined by that Party.
29. In accordance with national legislation, prior informed consent may be required from different levels of Government. Requirements for obtaining prior informed consent (national/provincial/local) in the provider country should therefore be specified.
30. National procedures should facilitate the involvement of all relevant stakeholders from the community to the government level, aiming at simplicity and clarity.
31. Respecting established legal rights of indigenous and local communities associated with the genetic resources being accessed or where traditional knowledge associated with these genetic resources is being accessed, the prior informed consent of indigenous and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices should be obtained, in accordance with their traditional practices, national access policies and subject to domestic laws.
32. For *ex situ* collections, prior informed consent should be obtained from the competent national authority(ies) and/or the body governing the *ex situ* collection concerned as appropriate.

Timing and deadlines

33. Prior informed consent is to be sought adequately in advance to be meaningful both for those seeking and for those granting access. Decisions on applications for access to genetic resources should also be taken within a reasonable period of time.

Specification of use

34. Prior informed consent should be based on the specific uses for which consent has been granted. While prior informed consent may be granted initially for specific use(s), any change of use including transfer to third parties may require a new application for prior informed consent. Permitted uses should be clearly stipulated and further prior informed consent for changes or unforeseen uses should be required. Specific needs of taxonomic and systematic research as specified by the Global Taxonomy Initiative should be taken into consideration.
35. Prior informed consent is linked to the requirement of mutually agreed terms.

Procedures for obtaining prior informed consent

36. An application for access could require the following information to be provided, in order for the competent authority to determine whether or not access to a genetic resource should be granted. This list is indicative and should be adapted to national circumstances:
 - a. Legal entity and affiliation of the applicant and/or collector and contact person when the applicant is an institution;
 - b. Type and quantity of genetic resources to which access is sought;
 - c. Starting date and duration of the activity;
 - d. Geographical prospecting area;
 - e. Evaluation of how the access activity may impact on conservation and sustainable use of biodiversity, to determine the relative costs and benefits of granting access;
 - f. Accurate information regarding intended use (e.g.: taxonomy, collection, research, commercialization);
 - g. Identification of where the research and development will take place;
 - h. Information on how the research and development is to be carried out;
 - i. Identification of local bodies for collaboration in research and development;
 - j. Possible third party involvement;
 - k. Purpose of the collection, research and expected results;
 - l. Kinds/types of benefits that could come from obtaining access to the resource, including benefits from derivatives and products arising from the commercial and other utilization of the genetic resource;
 - m. Indication of benefit-sharing arrangements;
 - n. Budget;
 - o. Treatment of confidential information.
37. Permission to access genetic resources does not necessarily imply permission to use associated knowledge and vice versa.

Process

38. Applications for access to genetic resources through prior informed consent and decisions by the competent authority(ies) to grant access to genetic resources or not shall be documented in written form.

39. The competent authority could grant access by issuing a permit or license or following other appropriate procedures. A national registration system could be used to record the issuance of all permits or licenses, on the basis of duly completed application forms.
40. The procedures for obtaining an access permit/license should be transparent and accessible by any interested party.

D. Mutually agreed terms

41. In accordance with Article 15, paragraph 7, of the Convention on Biological Diversity, each Contracting Party shall “take legislative, administrative or policy measures, as appropriate (...) with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms”. Thus, guidelines should assist Parties and stakeholders in the development of mutually agreed terms to ensure the fair and equitable sharing of benefits.

1. Basic requirements for mutually agreed terms

42. The following principles or basic requirements could be considered for the development of mutually agreed terms:
 - a. Legal certainty and clarity;
 - b. Minimization of transaction costs, by, for example:
 - i. Establishing and promoting awareness of the Government’s and relevant stakeholders’ requirements for prior informed consent and contractual arrangements;
 - ii. Ensuring awareness of existing mechanisms for applying for access, entering into arrangements and ensuring the sharing of benefits;
 - iii. Developing framework agreements, under which repeat access under expedited arrangements can be made;
 - iv. Developing standardized material transfer agreements and benefit-sharing arrangements for similar resources and similar uses (see appendix I for suggested elements of such an agreement);
 - c. Inclusion of provisions on user and provider obligations;
 - d. Development of different contractual arrangements for different resources and for different uses and development of model agreements;
 - e. Different uses may include, *inter alia*, taxonomy, collection, research, commercialization;
 - f. Mutually agreed terms should be negotiated efficiently and within a reasonable period of time;
 - g. Mutually agreed terms should be set out in a written agreement.
43. The following elements could be considered as guiding parameters in contractual agreements. These elements could also be considered as basic requirements for mutually agreed terms:
 - a. Regulating the use of resources in order to take into account ethical concerns of the particular Parties and stakeholders, in particular indigenous and local communities concerned;

- b. Making provision to ensure the continued customary use of genetic resources and related knowledge;
- c. Provision for the use of intellectual property rights include joint research, obligation to implement rights on inventions obtained and to provide licenses by common consent;
- d. The possibility of joint ownership of intellectual property rights according to the degree of contribution.

2. Indicative list of typical mutually agreed terms

44. The following provides an indicative list of typical mutually agreed terms:

- a. Type and quantity of genetic resources, and the geographical/ecological area of activity;
- b. Any limitations on the possible use of the material;
- c. Recognition of the sovereign rights of the country of origin;
- d. Capacity-building in various areas to be identified in the agreement;
- e. A clause on whether the terms of the agreement in certain circumstances (e.g. change of use) can be renegotiated;
- f. Whether the genetic resources can be transferred to third parties and conditions to be imposed in such cases, e.g. whether or not to pass genetic resources to third parties without ensuring that the third parties enter into similar agreements except for taxonomic and systematic research that is not related to commercialization;
- g. Whether the knowledge, innovations and practices of indigenous and local communities have been respected, preserved and maintained, and whether the customary use of biological resources in accordance with traditional practices has been protected and encouraged;
- h. Treatment of confidential information;
- i. Provisions regarding the sharing of benefits arising from the commercial and other utilization of genetic resources and their derivatives and products .

3. Benefit-sharing

45. Mutually agreed terms could cover the conditions, obligations, procedures, types, timing, distribution and mechanisms of benefits to be shared. These will vary depending on what is regarded as fair and equitable in light of the circumstances.

Types of benefits

46. Examples of monetary and non-monetary benefits are provided in appendix II to these Guidelines.

Timing of benefits

47. Near-term, medium-term and long-term benefits should be considered, including up-front payments, milestone payments and royalties. The time-frame of benefit-sharing should be definitely stipulated. Furthermore, the balance among near-term, medium-term and long-term benefit should be considered on a case-by-case basis.

Distribution of benefits

48. Pursuant to mutually agreed terms established following prior informed consent, benefits should be shared fairly and equitably with all those who have been identified as having contributed to the resource management, scientific and/or commercial process. The latter may include governmental, non-governmental or academic institutions and indigenous and local communities. Benefits should be directed in such a way as to promote conservation and sustainable use of biological diversity.

Mechanisms for benefit-sharing

49. Mechanisms for benefit-sharing may vary depending upon the type of benefits, the specific conditions in the country and the stakeholders involved. The benefit-sharing mechanism should be flexible as it should be determined by the partners involved in benefit-sharing and will vary on a case-by-case basis.
50. Mechanisms for sharing benefits should include full cooperation in scientific research and technology development, as well as those that derive from commercial products including trust funds, joint ventures and licenses with preferential terms.

V. OTHER PROVISIONS

A. Incentives

51. The following incentive measures exemplify measures which could be used in the implementation of the guidelines:
- a. The identification and mitigation or removal of perverse incentives, that may act as obstacles for conservation and sustainable use of biological diversity through access and benefit-sharing, should be considered;
 - b. The use of well-designed economic and regulatory instruments, directly or indirectly related to access and benefit-sharing, should be considered to foster equitable and efficient allocation of benefits;
 - c. The use of valuation methods should be considered as a tool to inform users and providers involved in access and benefit-sharing;
 - d. The creation and use of markets should be considered as a way of efficiently achieving conservation and sustainable use of biological diversity.

B. Accountability in implementing access and benefit-sharing arrangements

52. Parties should endeavour to establish mechanisms to promote accountability by all stakeholders involved in access and benefit-sharing arrangements.
53. To promote accountability, Parties may consider establishing requirements regarding:
- a. Reporting; and
 - b. Disclosure of information.
54. The individual collector or institution on whose behalf the collector is operating should, where appropriate, be responsible and accountable for the compliance of the collector.

C. National monitoring and reporting

55. Depending on the terms of access and benefit-sharing, national monitoring may include:
- a. Whether the use of genetic resources is in compliance with the terms of access and benefit-sharing;
 - b. Research and development process;
 - c. Applications for intellectual property rights relating to the material supplied.

ANNEX 4A.2

Decision VII/19

Access and benefit-sharing as related to genetic resources (Article 15)

(ABSTRACT)

A. BONN GUIDELINES ON ACCESS TO GENETIC RESOURCES AND FAIR AND EQUITABLE SHARING OF BENEFITS ARISING OUT OF THEIR UTILIZATION

,[...]

B. USE OF TERMS, DEFINITIONS AND/OR GLOSSARY, AS APPROPRIATE

[...]

C. OTHER APPROACHES, AS SET OUT IN DECISION VI/24 B

[...]

D. INTERNATIONAL REGIME ON ACCESS TO GENETIC RESOURCES AND BENEFIT-SHARING

The Conference of the Parties,

Reaffirming that the fair and equitable sharing of the benefits arising out of the utilization of genetic resources is one of the objectives of the Convention on Biological Diversity, in accordance with Article 1 of the Convention,

Reaffirming the sovereign rights of States over their natural resources and that the authority to determine access to genetic resources rests with the national Governments and is subject to national legislation, in accordance with Article 3 and Article 15, paragraph 1, of the Convention,

Reaffirming the commitment of Parties in Article 15, paragraph 2 of the Convention to “endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention”,

Recalling paragraph 44 (o) of the Plan of Implementation of the World Summit on Sustainable Development, which calls for action to “negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources”,

Further recalling resolution 57/260 of 20 December 2002, adopted by the United Nations General Assembly at its fifty-seventh session, inviting the Conference of the Parties to take appropriate steps with regard to the commitment made at the World Summit on Sustainable Development “to negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources”,

Recalling the recommendation of the Inter-Sessional Meeting on the Multi-Year Programme of Work of the Conference of the Parties up to 2010 inviting the Ad Hoc Open-ended Working Group on Access and Benefit-sharing “to consider the process, nature, scope, elements and modalities of an international regime on access to genetic resources and benefit-sharing and to provide advice to the Conference of the Parties at its seventh meeting on this issue”,

Noting the Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, adopted at the sixth meeting of the Conference of the Parties, “as a useful first step of an evolutionary process in the implementation of relevant provisions of the Convention related to access to genetic resources and benefit-sharing”,

Recalling also paragraph 44 (n) of the Plan of Implementation of the World Summit on Sustainable Development which calls for action to promote the wide implementation of and continued work on the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits arising out of their Utilization, as an input to assist the Parties when developing and drafting legislative, administrative or policy measures on access and benefit sharing as well as contract and other arrangements under mutually agreed terms for access and benefit-sharing”,

Recalling further the Millennium Development Goals and the potential role of access and benefit-sharing in poverty eradication and environmental sustainability,

Taking into account Articles 8(j), 15, 16, 17, 18, 19, paragraphs 1 and 2, 20, 21 and 22 of the Convention on Biological Diversity,

Reaffirming the commitment by Parties, subject to national legislation, to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from their utilization,

Noting the work being carried out under the framework of the Convention by the Working Group on Article 8(j) and Related Provisions of the Convention,

Recognizing that the Convention is the key instrument for the conservation, sustainable use and fair and equitable sharing of benefits arising out of the utilization of genetic resources and bearing in mind the work related to access to genetic resources and benefit sharing carried out in other relevant international intergovernmental organizations,

Recognizing also the important contribution of the FAO International Treaty for Plant Genetic Resources for Food and Agriculture that was negotiated in harmony with the Convention on Biological Diversity,

Recognizing that Parties that are countries of origin of genetic resources may be both users and providers and that Parties that have acquired these genetic resources in accordance with the Convention on Biological Diversity may also be both users and providers,

Recalling that the Bonn Guidelines indicate that Parties and stakeholders may be both users and providers, noting that these terms may still need to be examined and clarified,

Recognizing that the regime should be practicable, transparent, and efficient and avoid arbitrary treatment, consistent with the provisions of the Convention,

Recalling that the international regime should recognize and shall respect the rights of indigenous and local communities,

Noting that there is a need for further analysis of existing national, regional and international legal instruments and regimes relating to access and benefit-sharing and experience gained in their implementation, including gaps and their consequences,

Noting that the Ad Hoc Open-ended Working Group on Access and Benefit-sharing has identified possible components of an international regime, without prejudging the outcome,

1. *Decides* to mandate the Ad Hoc Open-ended Working Group on Access and Benefit-sharing with the collaboration of the Ad Hoc Open ended Inter-Sessional Working Group on Article 8(j) and Related Provisions, ensuring the participation of indigenous and local communities, non-governmental organizations, industry and scientific and academic institutions, as well as intergovernmental organizations, to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument\instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention;
2. *Recommends* that the Ad Hoc Open-ended Working Group on Access and Benefit-sharing should operate in accordance with the terms of reference contained in the annex to this decision;
3. *Request* the Executive Secretary to make the necessary arrangements for the Ad Hoc Open-ended Working Group on Access and Benefit-sharing to be convened twice before the eighth meeting of the Conference of the Parties with one meeting from the core budget back to back with the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions and the other from voluntary contributions;
4. *Requests* the Ad Hoc Open-ended Working Group on ABS to report on progress to the Conference of the Parties at its eighth meeting;
5. *Invites* the United Nations Environment Programme, the Food and Agriculture Organization of the United Nations, the World Trade Organization, the World Intellectual Property Organization, the International Union for the Protection of New Varieties of Plants, to cooperate with the Ad Hoc Open-ended Working Group on Access and Benefit-sharing in elaborating the international regime;
6. *Encourages* Parties, Governments, international organizations and all relevant stakeholders to provide the ways and means to allow for sufficient preparation and to facilitate effective participation of indigenous and local communities in the process of the negotiation and elaboration of an international regime;
7. *Recommends* the promotion of the participation of all relevant stakeholders, including non governmental organizations and the private sector, and indigenous and local communities;
8. *Invites* Parties, Governments, international organisations, indigenous and local communities and all relevant stakeholders, to submit to the Executive Secretary their views, information and analysis on the elements of the international regime as soon as possible;
9. *Requests* the Executive Secretary to compile the submissions received and to make them available through the clearing-house mechanism and other means for the Ad Hoc Open-ended Working Group on Access and Benefit-sharing.

E. Measures, including consideration of their feasibility, practicality and costs, to support compliance with prior informed consent of the Contracting Party providing genetic resources and mutually agreed terms on which access was granted in Contracting Parties with users of such resources under their jurisdiction

[...]

F. Needs for capacity-building identified by countries to implement the Bonn Guidelines

[...]

Annex

**TERMS OF REFERENCE FOR THE AD HOC OPEN-ENDED WORKING GROUP ON
ACCESS AND BENEFIT-SHARING**

- (a) **Process:**
- (i) To elaborate and negotiate the nature, scope and elements of an international regime on access and benefit-sharing within the framework of the Convention on Biological Diversity, as contained in paragraphs (b), (c) and (d) below, drawing on *inter alia* an analysis of existing legal and other instruments at national, regional and international levels relating to access and benefit-sharing, including: access contracts; experiences with their implementation; compliance and enforcement mechanisms; and any other options.
 - (ii) As part of the work, the Ad Hoc Open-ended Working Group on Access and Benefit-sharing will examine whether and to what extent possible elements as contained in paragraph (d) below are part of these instruments and determine how to address the gaps.
- (b) **Nature:**
- The international regime could be composed of one or more instruments within a set of principles, norms, rules and decision-making procedures, legally-binding and/or non-binding.
- (c) **Scope:**
- (i) Access to genetic resources and promotion and safeguarding of fair and equitable sharing of the benefits arising out of the utilization of genetic resources in accordance with relevant provisions of the Convention on Biological Diversity;
 - (ii) Traditional knowledge, innovations and practices in accordance with Article 8(j).
- (d) **Elements:** The following elements shall be considered by the Ad Hoc Open ended Working Group on Access and Benefit-sharing for inclusion in the international regime, *inter alia*:
- (i) Measures to promote and encourage collaborative scientific research, as well as research for commercial purposes and commercialization, consistent with Articles 8(j), 10, 15, paragraph 6, paragraph 7 and Articles 16, 18 and 19 of the Convention;
 - (ii) Measures to ensure the fair and equitable sharing of benefits from the results of research and development and the benefits arising from the commercial and other utilization of genetic resources in accordance with Articles 15.7, 16, 19.1, 19.2. of the Convention;
 - (iii) Measures for benefit-sharing including, *inter alia*, monetary and non-monetary benefits, and effective technology transfer and cooperation so as to support the generation of social, economic and environmental benefits;
 - (iv) Measures to promote facilitated access to genetic resources for environmentally sound uses according to Article 15.2 of the Convention on Biological Diversity;
 - (v) Measures to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources;

- (vi) Measures to ensure the sharing of benefits arising from the commercial and other utilization of genetic resources and their derivatives and products, in the context of mutually agreed terms;
- (vii) Measures to promote access and benefit-sharing arrangements that contribute to the achievement of the Millennium Development Goals, in particular on poverty eradication and environmental sustainability;
- (viii) Measures to facilitate the functioning of the regime at the local, national, subregional, regional and international levels, bearing in mind the transboundary nature of the distribution of some *in situ* genetic resources and associated traditional knowledge;
- (ix) Measures to ensure compliance with national legislations on access and benefit-sharing, prior informed consent and mutually agreed terms, consistent with the Convention on Biological Diversity;
- (x) Measures to ensure compliance with prior informed consent of indigenous and local communities holding traditional knowledge associated with genetic resources, in accordance with Article 8(j);
- (xi) Measures to ensure compliance with the mutually agreed terms on which genetic resources were granted and to prevent the unauthorized access and use of genetic resources consistent with the Convention on Biological Diversity;
- (xii) Addressing the issue of derivatives;
- (xiii) Internationally recognized certificate of origin/source/legal provenance of genetic resources and associated traditional knowledge;
- (xiv) Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights;
- (xv) Recognition and protection of the rights of indigenous and local communities over their traditional knowledge associated to genetic resources subject to the national legislation of the countries where these communities are located;
- (xvi) Customary law and traditional cultural practices of indigenous and local communities;
- (xvii) Capacity-building measures based on country needs;
- (xviii) Code of ethics/Code of conduct/Models of prior informed consent or other instruments in order to ensure fair and equitable sharing of benefits with indigenous and local communities;
- (xix) Means to support the implementation of the international regime within the framework of the Convention;
- (xx) Monitoring, compliance and enforcement;
- (xxi) Dispute settlement, and/or arbitration, if and when necessary;

- (xxii) Institutional issues to support the implementation of the international regime within the framework of the Convention;
- (xxiii) Relevant elements of existing instruments and processes, including:
 - § Convention on Biological Diversity;
 - § Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization;
 - § The International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations;
 - § The Commission on Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations;
 - § Current national legislative, administrative and policy measures implementing Article 15 of the Convention on Biological Diversity;
 - § The United Nations Permanent Forum on Indigenous Issues;
 - § Outcomes of Working Group on Article 8(j);
 - § The Agreement on Trade-related Aspects of Intellectual Property Rights and other World Trade Organization agreements;
 - § World Intellectual Property Organization conventions and treaties;
 - § International Convention for the Protection of New Varieties of Plants;
 - § Regional agreements;
 - § Codes of conduct and other approaches developed by specific user groups or for specific genetic resources, including model contractual agreements;
 - § African Model Law on the Rights of Communities, Farmers, Breeders, and on Access to Biological Resources;
 - § Decision 391 of the Andean Community;
 - § Decision 486 of the Andean Community;
 - § United Nations Convention on the Law of the Sea;
 - § Agenda 21;
 - § Rio Declaration;
 - § CITES;
 - § Antarctic Treaty;
 - § The Universal Declaration of Human Rights;
 - § The International Covenant on Civil and Political Rights;
 - § The International Covenant on Economic, Social and Cultural Rights.

ANNEX 4A.3

Glossary of Terms

Biological diversity - the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

Biological resources - genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.

Biopiracy – utilization of genetic material and knowledge from communities of the gene-rich developing countries without paying royalties or other forms of benefits derived from the use of genetic resources and traditional knowledge.

Bioprospecting - the search for wild species with genes that produce better crops and medicines, or the exploration of biodiversity for commercially valuable genetic and biological resources.

Biotechnology - means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.

Derivatives - something extracted from biological and genetic resources such as blood, oils, resins, genes, seeds, spores, pollen and the like as well as the products derived from, patterned on, or incorporating manipulated compounds and/or genes.

Ex-situ conservation - the conservation of components of biological diversity outside their natural habitats.

Genetic material - any material of plant, animal, microbial or other origin containing functional units of heredity.

Genetic resources - genetic material of actual or potential value.

In-situ conservation - the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties. (*Convention on Biological Diversity*)

Prior Informed Consent - procedure by which the State, landowners or local and indigenous communities, as applicable, receive all demanded information prior to consenting to access to their biological resources or associated intangible components thereof, upon mutually agreed terms. (*Biodiversity Law, Costa Rica*)

Sui Generis (Latin) - “of its own kind”. A *sui generis* system is one that is designed specifically to address the needs and concerns of a particular issue. This could mean a system entirely distinct from the current intellectual property (IP) system or, alternatively, a system with new IP or IP-like rights. There are already several examples of *sui generis* IP rights, such as plant breeders’ rights (as reflected in the International Convention on the Protection of New Varieties of Plants, 1991 (“the UPOV Convention”)) and the IP protection of integrated circuits (as reflected in the Treaty on Intellectual Property in respect of Integrated circuits, 1989 (“The Washington Treaty”)).

Traditional Knowledge - knowledge, innovations and practices of indigenous and local communities relating to the use, properties, values and processes of any biological and genetic resources or any part thereof. (*The ASEAN Framework Agreement on Access to Genetic Resources*)

References

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Item 2 of the Agenda

Provisional Agenda

1. Opening of the meeting.
2. Organizational matters:
 - 2.1. Officers;
 - 2.2. Adoption of the agenda;
3. International regime on access and benefit-sharing: nature, scope and elements.
4. Other matters.
5. Adoption of the recommendations.

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Item 2 of the Agenda

ORGANIZATIONAL MATTERS

Annotated provisional agenda

INTRODUCTION

1. In paragraph 1 of decision VII/19 D, the Conference of the Parties decided “to mandate the Working Group on Access and Benefit-sharing, with the collaboration of the Ad Hoc Open ended Inter-sessional Working Group on Article 8(j) and related provisions, ensuring the participation of indigenous and local communities, non-governmental organizations, industry and scientific and academic institutions, as well as intergovernmental organizations, to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention” and, in paragraph 2, recommended that the Working Group on Access and Benefit-sharing “should operate in accordance with the terms of reference contained in the annex to this decision”.
2. The results of the deliberations of the Working Group will be submitted for consideration by the Conference of the Parties at its next meeting.
3. A list of documents for the meeting is contained in the Annex to the present note.

ITEM 1. OPENING OF THE MEETING

4. The meeting will be opened by the President of the Conference of the Parties or his representative. A representative of the host country will address the meeting. The Executive Secretary will make introductory remarks.

ITEM 2. ORGANIZATIONAL MATTERS

2.1. Officers

5. *In keeping with established practice, the Bureau of the Conference of the Parties will serve as the Bureau of the Working Group.*

2.2. Adoption of the agenda

6. *The Working Group may wish to adopt its agenda on the basis of the provisional agenda (ABSWG/1), which has been prepared by the Executive Secretary on the basis of decision VII/19 and in consultation with the Bureau.*

ITEM 3. INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING: NATURE, SCOPE AND ELEMENTS

7. Under item 3, the Working Group is invited to elaborate and negotiate an international regime on access and benefit-sharing, in accordance with the terms of reference for the Working Group included in annex to decision VII/19 D. As set out in the terms of reference, the Working Group is invited to draw, *inter alia*, on an analysis of existing legal and other instruments at national, regional and international levels relating to access and benefit-sharing. It is also invited to examine whether, and to what extent, possible elements contained in paragraph (d) of the terms of reference, are part of these instruments and determine how to address gaps.

8. The Working Group should focus on the following issues:

Nature: Should the regime stand alone as an individual instrument, or be part of, or relate to, other legal (e.g. International Treaty on Plant Genetic Resources for Food and Agriculture, TRIPS, WIPO, International Union for the Protection of New Varieties of Plants Convention – UPOV) and/or non-legally binding instruments (e.g. Bonn Guidelines, regional modal laws)? Should the regime be a legally binding or non legally binding international instrument?

Scope: What should be scope of the regime? Should derivatives of genetic resources be included? To what extent, if any, should the regime address access and the equitable sharing of benefits arising out of the utilization of traditional knowledge? To what extent, if any, should the international regime take into consideration links to the other two objectives of the Convention (e.g. conservation and the sustainable use of biodiversity)?

Elements: What should be the key features of *prior informed consent* and *mutually agreed terms*? (consent of local and indigenous communities, role of national authorities and focal points, restrictions to access). Should access agreements include compulsory or voluntary benefit-sharing arrangements? Should the regime provide monitoring and enforcement measures (certification systems, export/import controls, access to justice and dispute settlement)? Other possible elements for inclusion in the regime are listed in paragraph D of the Terms of Reference.

9. In order to assist the Working Group, the Executive Secretary prepared a note entitled “Analysis of existing national, regional and international legal instruments relating to access and benefit-sharing and experience gained in their implementation, including identification of gaps” (ABSWG/2).

ITEM 4. other matters

10. Under this item, the members of the Working Group may wish to raise other matters related to the subject matter of the meeting.

ITEM 5. adoption of recommendations

4. The Working Group will consider and adopt its recommendations.

Annex

**DOCUMENTATION FOR THE MEETING OF THE WORKING GROUP ON ACCESS
AND BENEFIT-SHARING**

<i>Symbol</i>	<i>Title</i>
ABSWG/1	Provisional agenda
ABSWG/1/Add.1	Annotated provisional agenda
ABSWG/2	Analysis of existing national, regional and international legal instruments relating to access and benefit-sharing and experiences gained in their implementation, including identification of gaps

**Distr.
GENERAL**

**WORKING GROUP ON ACCESS AND
BENEFIT-SHARING**

ABSWG/2

ORIGINAL: ENGLISH

Item 2 of the Provisional Agenda

**ANALYSIS OF EXISTING NATIONAL, REGIONAL AND INTERNATIONAL LEGAL
INSTRUMENTS RELATING TO ACCESS AND BENEFIT-SHARING AND
EXPERIENCE GAINED IN THEIR IMPLEMENTATION, INCLUDING
IDENTIFICATION OF GAPS**

Note by the Executive Secretary¹

I. INTRODUCTION

1. In decision VII/19 D, the Conference of the Parties decided to mandate the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention” and recommended that the Working Group on Access and Benefit-sharing “should operate in accordance with the terms of reference contained in the annex to this decision. ^{2/}

2. In the preamble to decision VII/19 D, the Conference of the Parties noted “that there is a need for further analysis of existing national, regional and international legal instruments and regimes relating to access and benefit-sharing and experience gained in their implementation, including gaps and their consequences”. In addition, the terms of reference of the Working Group contained in the annex to the same decision provide that the negotiation of the international regime should draw on “*inter alia*, an analysis of existing legal and other instruments at national, regional and international levels relating to access and benefit-sharing, including: access contracts; experiences with their implementation; compliance and enforcement mechanisms; and any other options”.

3. Accordingly, the present note provides an analysis of existing legal and other instruments at national, regional and international levels relating to access and benefit-sharing, taking into account existing instruments listed in the annex to decision VII/19 D, under section (d) sub-paragraph (xxiii) of the terms of reference as elements for consideration by the Working Group for inclusion in the international regime.

**II. OVERVIEW OF EXISTING INSTRUMENTS RELATED TO ACCESS AND
BENEFIT-SHARING**

A. International legal instruments

4. This section provides a general description of the international instruments identified by the Conference of the Parties to be considered for inclusion in the international regime as well as an examination of their relevance to access and benefit-sharing.

¹ This note is an abstract of the note prepared by the Executive Secretary of the CBD for the Third Meeting of the *Ad Hoc* Working Group on ABS, held in February 2005 in Bangkok, Thailand.

^{2/} Decision VII/19 D, paragraphs 1 and 2.

1. FAO International Treaty on Plant Genetic Resources for Food and Agriculture

General description of the instrument

5. The International Treaty on Plant Genetic Resources for Food and Agriculture was adopted by the Conference of the Food and Agriculture Organization of the United Nations (FAO) in November 2001 and entered into force on 29 June 2004. As of 1 November 2004, 61 countries and the European Community had ratified the Treaty. This legally binding treaty covers all plant genetic resources for food and agriculture. Its objectives are “the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits derived from their use, in harmony with Convention on Biological Diversity, for sustainable agriculture and food security”.

Access and benefit-sharing component

6. One of the main components of this Treaty, the Multilateral System of Facilitated Access and Benefit-sharing addresses access and benefit-sharing and supports the work of breeders and farmers. The Multilateral System applies to more than 60 plant genera, which include 64 major crops and forages. The list of crops covered under the Multilateral System is listed in annex I of the Treaty. The Multilateral System can be seen as a particular application of the principles of Article 15, paragraph 2, of the Convention to the plant genetic resources for food and agriculture covered by the Multilateral System. In its article 10, the Contracting Parties to the Treaty recognize the sovereign rights of States over their own plant genetic resources for food and agriculture and agree to establish a multilateral system to facilitate access to these resources, and to share, in a fair and equitable way, the benefits arising from their utilization. The mechanism for facilitated access and benefit sharing is a standard Material Transfer Agreement (MTA) to be adopted by the Governing Body which will set out the conditions for access to these genetic resources and benefit-sharing. The Treaty establishes a number of mandatory terms and conditions to be included in the MTA but leaves a number of issues for negotiation within the Governing Body. Access will be provided for utilization and conservation in research, breeding and training for food and agriculture. The treaty provides for benefit-sharing through the payment of monetary and other benefits of commercialization; information-exchange; access to and transfer of technology; and capacity building.

7. An Expert Group has been established, pursuant to FAO Conference Resolution 3/2001 that adopted the Treaty, to prepare recommendations for the first meeting of the Governing Body regarding the form and content of a standard Material Transfer Agreement.

2. The WTO Agreement on Trade-related Aspects of Intellectual Property Rights

General description of the instrument ^{1/}

8. The TRIPs Agreement came into force on 1 January 1995 as a result of the Uruguay Round of multilateral trade negotiations. It covers areas of intellectual property such as copyright and related rights, trademarks, geographical indications, patents including the protection of new varieties of plants, the layout designs of integrated circuits and undisclosed information including trade secrets and test data.

9. The Agreement establishes the minimum standards of protection to be provided by Members in each of the main areas of intellectual property covered by the TRIPs Agreement. It also deals with domestic procedures and remedies for the enforcement of intellectual property rights and makes disputes between WTO Members about the respect of the TRIPs obligations subject to the WTO dispute settlement procedures. The Agreement also provides for the applicability of basic GATT principles, such as most favoured nation and national treatment.

10. The main goals of the TRIPs Agreement include the reduction of distortions and impediments to international trade, promotion of effective and adequate protection of intellectual property rights, and ensuring that measures and procedures to enforce intellectual property rights do not themselves become

^{1/} For further details see www.wto.org.

barriers to legitimate trade. Article 7 of the Agreement sets out as one of its objectives that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

11. With respect to patents, article 27(1) of the Agreement defines the formal requirements regarding patentable subject matter and provides that patents shall be available for inventions that are “new, involve an inventive step and are capable of industrial application”.

12. Article 27, paragraph 3 (b) of the Agreement provides that Members may exclude from patentability plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, any country excluding plant varieties from patent protection must provide an effective *sui generis* system of protection. Members may therefore decide whether or not to grant patents for plants, animals or biological processes. The agreement calls for a review of the provisions of Article 27.3 (b) four years after the agreement entered into force. Such a review is ongoing. In addition, it should be noted that paragraph 19 of the 2001 Doha Declaration has broadened the discussion. It provides that the TRIPS Council should also examine the relationship between the TRIPs Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore and other relevant new developments raised by Members pursuant to article 71.1. It also provides that the work of the TRIPs Council on these topics is to be guided by the Agreement’s objectives (Article 7) and principles (Article 8), and must take development issues fully into account.

Relevance to access and benefit-sharing

13. A number of issues have been addressed in the TRIPs Council with respect to the revision of article 27.3(b), the relationship between the Convention on Biological Diversity and the TRIPs Agreement, and the possibility of broadening the criteria for patentability with respect to inventions based on genetic material or associated traditional knowledge.

14. While certain members have expressed the opinion that the TRIPs Agreement and the Convention on Biological Diversity are already compatible, others have argued that the TRIPs Agreement should be amended in order to ensure its compatibility with the Convention on Biological Diversity. More specifically, it has been suggested that the TRIPs Agreement should be amended so that patent applicants are required to disclose the origin of genetic resources and associated traditional knowledge in patent applications where the subject matter of the application is based on genetic resources or related traditional knowledge. It is also suggested that evidence of prior informed consent and benefit-sharing be provided by the applicant. Others are of the opinion that the TRIPs Agreement should prohibit the patenting of all life forms. Other countries have suggested addressing the issue of disclosure of origin of genetic resources and related traditional knowledge as a stand alone requirement and another has suggested to address the issue of disclosure by amending the Patent Cooperation Treaty adopted under the aegis of WIPO. No consensus has been reached, as yet, on this issue. The latest proposal, available as document IP/C/W/429, dated 20 September 2004, was submitted by Brazil, India, Pakistan, Peru, Thailand, and Venezuela and considered at the TRIPs Council meeting on 21 September 2004. The proposal explores disclosure requirements relating to the origin of genetic resources and any traditional knowledge used in an invention. It discusses the rationale for such a requirement and provides suggestions for the form it could take and the consequences of non-compliance. No substantive progress was made at that meeting.

3. WIPO conventions and treaties

15. WIPO administers 23 international treaties dealing with different aspects of intellectual property protection and it counts 180 countries as Member States. Treaties of relevance to the international patent system are those of most relevance to the issue of access to genetic resources and benefit-sharing.

16. In September-October 2001, at the thirty-sixth series of meetings of the Assemblies of the Member States of the WIPO, Member States agreed that WIPO should begin consultations with a view to preparing a strategic blue print for change in the international patent system. ^{1/} Developments of various aspects of the patent system were already being addressed in a number of forums within WIPO, such as those relating to the Patent Law Treaty (PLT), the draft Substantive Patent Law Treaty (SPLT), the reform of the Patent Cooperation Treaty (PCT) and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The WIPO Patent Agenda is to ensure, *inter alia*, the effectiveness of these processes and instruments and their mutual consistency.

17. A Diplomatic Conference adopted the Patent Law Treaty (PLT) on 1 June 2000. The PLT aims at harmonizing formal requirements set by national or regional patent offices for the filing of national or regional patent applications. It was then decided by the WIPO's Standing Committee on the Law of Patents (SCP) to initiate work on harmonization of substantive patent law. At the November 2001 meeting, the SCP agreed on an approach of establishing a seamless interface between the SPLT, the PLT and the Patent Cooperation Treaty (PCT). A draft of the Substantive Patent Law Treaty is now under consideration. In addition, a reform of the Patent Cooperation Treaty began in October 2000 and is ongoing. The Patent Cooperation Treaty is an international instrument that allows for the processing of a single international patent application for patents in multiple member countries of the Patent Cooperation Treaty rather than having to process applications in the national office of each country. An international patent application is subjected to an "international search" carried out by one of the major patent offices appointed by the PCT Assembly with respect to prior art, novelty and inventive step.

18. In addition, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the WIPO General Assembly in October 2000 as a forum for debate and dialogue concerning the relationship between intellectual property (IP), and traditional knowledge, genetic resources and traditional cultural expressions. It was considered that these themes cut across the conventional branches of intellectual property law and therefore did not fit into other WIPO bodies. ^{2/}

Relationship to access and benefit-sharing

19. Issues related to access and benefit-sharing have been addressed essentially by the IGC. However, certain member States have expressed the view that issues related to access and benefit sharing, such as the disclosure of origin of genetic resources and related traditional knowledge should be addressed in the context of the reform of the PCT and the development of the SPLT.

20. Among issues examined by the IGC, the issue of disclosure of origin of genetic resources and related traditional knowledge in patent applications is of particular relevance to the negotiation of an international regime. A technical study on disclosure requirements related to genetic resources and traditional knowledge was carried out by WIPO in response to the invitation of the Conference of the Parties to the Convention on Biological Diversity, ^{3/} and made available to the Conference of the Parties at its seventh meeting (UNEP/CBD/COP/7/INF/17). At this meeting, the Conference of the Parties invited WIPO to carry out additional work on this issue in decision VII/19 E, paragraph 8.

^{1/} For further details see WIPO website regarding WIPO Patent Agenda.

^{2/} For further details see www.wipo.int/tk/en/igc/

^{3/} See decision VI/24 C, paragraph 4.

21. This invitation was considered by the IGC at its sixth session in March 2004. At this meeting, the Committee agreed that the invitation should first be considered by the WIPO General Assembly to be held in September-October 2004 in order to determine which WIPO forum was the most appropriate to address this issue. While certain countries were of the opinion that the IGC was the most appropriate body to respond to such an invitation, other countries expressed the view that the protection of genetic resources and traditional knowledge against misappropriation must be addressed in patent related legal instruments and, in particular, by introducing the necessary changes to those instruments so as to ensure that they provided for the declaration of source of genetic resources or traditional knowledge. These countries therefore suggested that the issue of disclosure should be addressed in the context of the PCT reform and of the discussions regarding the SPLT.

22. At the fourth session of the Working Group on Reform of the Patent Cooperation Treaty (PCT), held from 19 to 23 May 2003, Switzerland submitted proposals regarding transparency measures under patent law in the area of genetic resources and traditional knowledge. ^{1/} The essence of the proposals was to enable the national patent legislation to require the declaration of the source of genetic resources and traditional knowledge in patent applications, if the invention was directly based on such resources and traditional knowledge. Additional comments on these proposals were submitted to the sixth session of this Working Group (3-7 May 2004) with the aim of enabling the Working Group to have a more substantive discussion on its proposals. ^{2/} These comments covered the use of terms, the source of genetic resources and traditional knowledge, the scope of the obligation to declare this source in patent applications, and the possible legal sanctions for failure to disclose or the wrongful disclosure of the source. Divergent views were expressed in response to these proposals and the Working Group agreed to discuss the issue again at its next session, at the end of November 2004. ^{3/} The views expressed at this meeting reflected the lack of consensus among WIPO Member States with regard to the appropriate forum to discuss matters related to the issue of disclosure of source of genetic resources and related traditional knowledge in patent applications.

23. At its fifteenth extraordinary session, in September/October 2004, the WIPO General Assembly considered the invitation of the Conference of the Parties at its seventh meeting, regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications. The General Assembly decided that WIPO should respond positively to the invitation from the Conference of the Parties and established a timetable and modalities for addressing the issue, including the holding of an ad hoc intergovernmental meeting in May 2005 to consider a draft document and the submission of a revised draft thereof to the General Assembly at its ordinary session in September 2005.

4. International Convention for the Protection of New Varieties of Plants

General description

24. The International Convention for the Protection of New Varieties of Plants was signed in Paris in 1961 and entered into force in 1968. It was revised in 1972, 1978 and 1991. The 1991 Act of the UPOV Convention entered into force in 1998. The purpose of the UPOV Convention is “to ensure that the members of the Union acknowledge the achievement of breeders of new varieties of plants, by granting to them an intellectual property right, on the basis of a set of clearly defined principles”. Thus, the Convention provides a *sui generis* form of intellectual protection specifically adapted to the process of plant breeding and developed with the aim of encouraging breeders to develop new

^{1/} WIPO document PCT/R/WG/5/11.

^{2/} These comments were submitted to the SCBD by the Government of Switzerland and are also available as WIPO document PCT/R/WG/6/11.

^{3/} See Report of the meeting in WIPO document PCT/R/WG/6/12.

varieties of plants. To be eligible for protection, varieties have to be: (i) distinct from existing, commonly known varieties; (ii) sufficiently uniform; (iii) stable; and (iv) new in the sense that they must not have been commercialized prior to certain dates established by reference to the date of the application for protection. ^{1/} The Convention offers protection to the breeder, in the form of a “breeder’s right”, if his plant variety satisfies the above conditions. The scope of the breeder’s right is, however, limited by two important exceptions (Article 15). The first exception, known as the “breeder’s exemption” allows the use of the propagating material of the protected variety, without prior authorization, for the purpose of breeding other varieties. The breeder’s exemption optimizes variety improvement by ensuring that germplasm sources remain accessible to all breeders. The second exception concerns the right of farmers to use farm-saved seed for replanting. This is known as the “farmers’ privilege” and seeks to safeguard the common practice of farmers saving their own seed for the purpose of re-sowing. However, the Convention requires that the farmers’ privilege be regulated “within reasonable limits and subject to safeguarding of the legitimate interests of the breeder”. As of 1 August 2004, 55 States were a Party to the UPOV Convention. The mission of UPOV is “to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society”. ^{2/}

Relationship to access and benefit-sharing

25. In response to notifications by the Executive Secretary inviting relevant international organizations to contribute to the work on access and benefit-sharing, the Vice Secretary-General of UPOV provided detailed replies highlighting the access and benefit-sharing aspects of the UPOV Convention. The UPOV submission is included in the compilation of submissions by Parties, international organizations and other relevant stakeholders (UNEP/CBD/WG-ABS/3/INF/1).

26. In these communications, UPOV highlighted the importance of access to genetic resources to ensure progress in plant breeding. It also pointed to the concept of the breeder’s exemption in the UPOV Convention which reflects the view of UPOV that the worldwide community of breeders needs access to all forms of breeding material to sustain progress in plant breeding and hence maximize the use of genetic resources for the benefit of society. The communications also include reference to the inherent benefit sharing principles of the UPOV Convention, in the form of breeder’s exemption and other exceptions to the breeder’s right. Concern is expressed with respect to any other measures for benefit sharing that could introduce unnecessary barriers to progress in breeding and the utilization of genetic resources. Finally, UPOV urges the Working Group on Access and Benefit Sharing to recognize these principles in its work and to ensure that any measures it develops are supportive of these principles and of the UPOV Convention.

5. United Nations Convention on the Law of the Sea

General description

27. The United Nations Convention on the Law of the Sea was adopted in 1982 and entered into force on 16 November 1994. The Convention currently has 145 Parties. As set out in its preamble, the Convention was adopted in order to establish “with due regard to the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment”. The Convention establishes a general framework to govern all activities on the oceans. It establishes specific regimes for living resources in the high seas and mineral resources of the deep seabed beyond the limits of national jurisdiction (“the Area”) as well as for marine scientific research. Part XII of the Convention

^{1/} UPOV Publication No. 437 (E), November 10, 2003 edition.

^{2/} Ibid.

contains general provisions regarding the protection and preservation of the marine environment. It provides for measures to prevent, reduce and control marine pollution; the prevention and control of the introduction of alien species; the global and regional cooperation for the protection and preservation of the marine environment; and the monitoring and assessment of environmental impacts of activities. The regime of the Area established in Part XI is based on the principle that the Area and its resources are the common heritage of mankind. The definition of the term “resources”, however, refers only to mineral resources, thus leaving biological resources outside the ambit of the regulatory regime. Part XIII of the Convention establishes the regime for marine scientific research and affirms the right of all States and competent international organizations to conduct marine scientific research, including in the Area. It provides that such research shall be conducted exclusively for peaceful purposes and in compliance with relevant regulations adopted under the Convention, including those for the protection and preservation of the marine environment.

Relationship to access and benefit-sharing

28. In paragraph 12 of decision II/10, the Conference of the Parties requested the Executive Secretary, in consultation with the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations, to undertake a study of the relationship between the Convention on Biological Diversity and the UNCLOS with regard to conservation and sustainable use of genetic resources on the deep sea bed, to enable SBSTTA to address the scientific, technical and technological issues relating to bioprospecting of genetic resources of the deep seabed. The issue of access to genetic resources on the deep seabed and benefit-sharing was addressed by this study (UNEP/CBD/SBSTTA/8/INF/3/Rev.1). A synthesis of this study, (UNEP/SBSTTA/8/9/Add.3/Rev.1) was considered at the eighth meeting of SBSTTA and provides a useful overview of the relationship between the Convention on Biological Diversity and the UNCLOS with respect to the conservation and sustainable use of deep seabed genetic resources beyond national jurisdiction and also addresses the issue of marine genetic resources in the Area. ^{1/}

29. The study notes that whereas the provisions of the UNCLOS and the Convention on Biological Diversity are complementary and mutually supportive regarding the conservation and sustainable use of marine and coastal biodiversity, an important legal lacuna exists with respect to commercially oriented activities relating to genetic resources in the Area. While UNCLOS contains provisions for marine scientific research, including in areas beyond national jurisdiction, it is unclear about bioprospecting. With respect to the Convention on Biological Diversity, in areas beyond the limits of national jurisdiction, the provisions of the Convention only apply to activities and processes carried out under a Party’s jurisdiction or control which may have adverse impacts on biological diversity. Thus, the provisions of the Convention relating to access to genetic resources and benefit-sharing do not apply to genetic resources in areas beyond national jurisdiction. Article 15 of the Convention on Biological Diversity, which addresses the issue of access to genetic resources and benefit sharing, is based on the principle of State sovereignty over genetic resources. The provisions of Article 15 apply only to genetic resources provided by Contracting Parties that are countries of origin of such resources or by Parties that have acquired them in accordance with the Convention. Genetic resources located in areas beyond the limits of national jurisdiction are therefore outside the scope of Article 15.

30. The study concludes that the two conventions contain useful principles, concepts, measures and mechanisms that could provide the building blocks for a specific legal regime focusing on the conservation and sustainable use of marine genetic resources in the deep seabed beyond the limits of national jurisdiction. The common-heritage-of-mankind principle under the United Nations Convention on the Law of the Sea could provide an important underlying conceptual construct for genetic resources of the deep seabed. In addition, the two conventions share certain principles

^{1/} Where the water column becomes the high seas, the seabed becomes “the Area”.

and concepts, such as the responsibility of States for activities under their jurisdiction and control; the ecosystem approach; the establishment of marine protected areas; information exchange, consultation and notification regarding activities; environmental impact assessment; sustainable use; and fair and equitable sharing of benefits. These principles would provide useful tools in addressing conservation and equity considerations in the management of genetic resources of the deep seabed beyond national jurisdiction.

31. The Conference of the Parties considered issues arising from the study of the relationship between the Convention on Biological Diversity and the UNCLOS in decision VII/5 on marine and coastal biodiversity. ^{1/} The Conference of the Parties recognized that further work was needed on this issue and requested the Executive Secretary in consultation with Parties and relevant organizations to compile information, for consideration by SBSTTA, on the following issues: information on the methods for the identification, assessment and monitoring of genetic resources of the seabed and ocean floor and subsoil thereof, in areas beyond the limits of national jurisdiction; information on the status and trends of these genetic resources including identification of threats and the technical options for their protection.

32. In addition, the Conference of the Parties invited “the Parties to raise their concerns regarding the issue of conservation and sustainable use of genetic resources of the deep seabed beyond limits of national jurisdiction at the next meeting of the General Assembly”. It also invited the “General Assembly to further coordinate work relating to conservation and sustainable use of genetic resources of the deep seabed beyond the limits of national jurisdiction”. Finally, Parties and other States were invited “to identify activities and processes under their jurisdiction or control which may have significant adverse impact on deep seabed ecosystems and species beyond the limits of national jurisdiction, in order to address Article 3 of the Convention”.

6. The Convention on International Trade in Endangered Species of Wild Fauna and Flora

General description ^{2/}

33. The Convention on International Trade in Endangered Species of Wild Fauna and Flora entered into force in 1975 and now has 166 Parties. Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival.

34. In order to do so, CITES regulates international trade in specimens of species of wild fauna and flora, including the export, re-export and import of live and dead animals and plants and of parts and derivatives thereof, based on a system of permits and certificates which can be used if certain conditions are met and that have to be presented before consignments of specimens are allowed to leave or enter a country.

35. Each Party to the Convention is to designate one or more Management Authorities responsible for issuing these permits and certificates, subject to the advice from one or more Scientific Authorities designated for that purpose.

36. The species covered by CITES are listed in three Appendices, according to the degree of protection they need:

(a) Appendix I includes species threatened with extinction. Trade in specimens of these species is permitted only in exceptional circumstances;

(b) Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival;

(c) Appendix III contains species that are protected in at least one country, which has asked other CITES Parties for assistance in controlling the trade.

^{1/} The relevant sections of decision VII/5 are included in paragraphs 54 to 56.

^{2/} CITES Secretariat, information available on www.cites.org.

37. A specimen of a CITES-listed species may be imported into or exported (or re-exported) from a State party to the Convention only if the appropriate document has been obtained and presented for clearance at the port of entry or exit.

Relationship to access and benefit-sharing

38. CITES does not address specifically the issue of access to genetic resources and benefit-sharing. However, in the context of discussions related to access and benefit-sharing, and more specifically of approaches to assist Parties and stakeholders with the implementation of the access and benefit-sharing provisions of the Convention on Biological Diversity, it has been suggested that the permit system established by CITES to regulate the trade of endangered species could provide useful experience to draw from when examining the possibility of developing an international certificate of origin/source/legal provenance and the implications of such a certificate. This issue is examined in document UNEP/CBD/WG-ABS/3/5.

7. The Antarctic Treaty

General description

39. The Antarctic Treaty System is the whole complex of arrangements made for the purpose of regulating relations among States in the Antarctic. At its heart is the Antarctic Treaty itself. The original Parties to the Treaty were the 12 nations active in the Antarctic during the International Geophysical Year of 1957-58. The Treaty was signed in Washington on 1 December 1959 and entered into force on 23 June 1961. The Antarctic Treaty Consultative Parties comprise the original 12 States and a further fourteen States that have become parties by acceding to the Treaty and demonstrating their interest in Antarctica by carrying out substantial scientific activity there.

40. The primary purpose of the Antarctic Treaty is to ensure “in the interests of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.”^{1/} To this end, it prohibits military activity, except in support of science; prohibits nuclear explosions and the disposal of nuclear waste; promotes scientific research and the exchange of data; and holds all territorial claims in abeyance. In furtherance of the principles and objectives of the Treaty, contracting parties undertake to put in place measures regarding the use of Antarctica for peaceful purposes only; the facilitation of scientific research; the facilitation of international cooperation; questions relating to the exercise of jurisdiction in Antarctica; and the preservation and conservation of living resources in Antarctica. The Treaty applies to the area south of 60°S, including all ice shelves and islands. It is, however, affirmed that nothing in the Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area. The Treaty is augmented by recommendations adopted at Consultative Meetings, by the Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 1991), and by two separate conventions dealing with the Conservation of Antarctic Seals (London 1972), and the Conservation of Antarctic Marine Living Resources (Canberra 1980). The Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington 1988), negotiated between 1982 and 1988, will not enter into force.

41. The Convention on the Conservation of the Antarctic Marine Living Resources, 1980, provides a framework for the conservation of marine living resources, including measures to control and regulate the harvesting of such resources. It seeks to ensure that harvesting and associated activities are in compliance with basic conservation principles (Article II). It also establishes a Commission for the Conservation of Antarctic Marine Living Resources (Article VII), whose mandate includes the facilitation of research and studies of Antarctic marine living resources and of the marine ecosystem; the monitoring and assessment of such resources; the identification of conservation needs; and the formulation and adoption of conservation measures (Article IX).

^{1/} Preamble to the Antarctic Treaty.

42. The 1991 Protocol on Environmental Protection to the Antarctic Treaty, establishes a comprehensive regime for the protection of the Antarctic environment and its dependent and associated ecosystems and designates Antarctica as a natural reserve, devoted to peace and science. The Protocol requires that activities in the Antarctic Treaty area shall be planned and conducted so as to limit adverse impacts on the Antarctic environment and dependent and associated ecosystems (Article 3). Adverse impacts are defined to include detrimental changes in the distribution, abundance or productivity of species or populations of species of fauna and flora; further jeopardy to endangered or threatened species or their populations; and degradation of, or substantial risk to areas of biological or wilderness significance. Annex II to the Protocol establishes a permit system regarding harvesting of Antarctic fauna and flora. Permits are to be issued only for the provision of specimens for scientific study or scientific information and for the provision of specimens to museums, herbaria, zoological and botanical gardens, or other educational or cultural institutions or uses.

Relationship to access and benefit-sharing

43. The access and benefit-sharing provisions of the Convention do not apply to the Antarctic region, since this territory is beyond the limits of national jurisdiction. However, bioprospecting is becoming an issue in the Antarctic Region. According to a study carried out by the Institute of Advanced Studies of the United Nations University (UNU/IAS), "An increasing amount of scientific research on the flora and fauna of Antarctic is being done with a view to identifying commercially useful genetic and biochemical resources, and this trend is likely to increase. 1/

44. As noted in this study, bioprospecting was first discussed in the Treaty System in 1999 and has since then received regular attention at meetings of the Scientific Committee on Antarctic Research (SCAR), the Committee for Environmental Protection (CEP) and the Antarctic Treaty Consultative Meeting (ATCM).

45. Unregulated commercial research in Antarctica is now creating concern among researchers that patented products may become unavailable for basic research and that the unregulated harvesting of samples may cause ecological damage. 2/

46. Although the Antarctic Treaty System does not directly regulate bioprospecting activities, provisions relevant to the consideration of the issue exist, as demonstrated above, in the Antarctic Treaty, its Protocol on Environmental Protection and the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR). The Convention on the Regulation of Antarctic Mineral Resources Activities (CRAMRA) may also provide some guidance for developing measures for regulating bioprospecting activities. These provisions are examined in more detail by the UNU/IAS study.

47. It has been suggested by the Scientific Committee on Antarctic Research that the Antarctic Treaty System may need to be revised in order to include the regulation of bioprospecting. It has also been suggested that UNCLOS and the Convention on Biological Diversity should be examined in order to help find solutions to the issue of bioprospecting in the Antarctic.

48. Parties to the Antarctic Treaty System are considering the issue of bioprospecting in the governing body, the Antarctic Treaty Consultative Meeting (ATCM). Biological prospecting in Antarctica was on the agenda of the twenty-seventh ATCM, held in Cape Town, South Africa, from 24 May to 4 June 2004 and the final report of the meeting should be available soon.

8. Human rights instruments

1/ Dagmar Lohan and Sam Johnston, "Bioprospecting in Antarctica: Existing Activities, Policies and Emerging Issues for the Treaty System", United Nations University, Tokyo, p.1.

2/ See the article in *Nature*, 11 August 2004, on the outcome of meeting of the Scientific Committee on Antarctic Research.

General description

49. The Conference of the Parties included in the list of existing international instruments to be examined, the following human rights instruments: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights. The following provides a general description of each of these instruments and others of potential relevance and highlights potential linkages to access and benefit sharing as applicable to genetic resources and traditional knowledge. More importantly, these human rights instruments provide a context for the continuing development of standards by the international system. Copies of these human rights instruments and others are available through the website of the Office of the High Commissioner for Human Rights at <http://www.ohchr.org/english/law/index.htm>

50. The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on 10 December 1948. As set out in its preamble, the General Assembly proclaimed the Universal Declaration of Human Rights “as a common standard of achievement for all peoples and all nations ... to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance”.

51. The International Covenant on Civil and Political Rights (ICCPR) was adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force on 23 March 1976. It details the basic civil and political rights of peoples and individuals. Among the rights of peoples are: the right to self-determination; the right to own, trade, and dispose of their property freely; and not be deprived of their means of subsistence. Among the rights of individuals are: the right to legal recourse when their rights have been violated (even if the violator was acting in an official capacity); the right to life; the right to liberty and freedom of movement; the right to equality before the law; the right to presumption of innocence until proven guilty; the right to appeal a conviction; the right to be recognized as a person before the law; the right to privacy and protection of that privacy by law; freedom of thought, conscience, and religion; freedom of opinion and expression; freedom of assembly and association.

52. The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force on 3 January 1976. Similar to the International Covenant on Civil and Political Rights, articles 1 and 2 (part 1) also focus on the right of self-determination as the right of all peoples and notes that States have an obligation to promote self-determination. It describes the basic economic, social and cultural rights of individuals and nations including the right to: self-determination; equal pay for equal work; equal opportunity for advancement; form trade unions; strike; paid or otherwise compensated maternity leave; free primary education and accessible education at all levels; and copyright, patent, and trademark protection for intellectual property.

Relationship to access and benefit-sharing

53. Whereas there is no direct linkage with access and benefit-sharing, the development and implementation of an access and benefit-sharing regime under the Convention may have a positive or negative impact on the respect for and exercise of the rights embodied in these instruments, particularly as regards the protection of traditional knowledge of indigenous and local communities.

54. The Universal Declaration is underpinned by the principle of non-discrimination (article 7). Given the historic discrimination and social disadvantage that affect indigenous and local communities, non-discrimination (with the exception of positive discrimination measures) should underpin the development of standards established to protect them and/or their property

(i.e. traditional knowledge). It could be further inferred that traditional knowledge should be protected to at least the same standards as other forms of intellectual property, whether it is expressed individually or collectively. Furthermore, article 29 (1) of the Declaration states that “everyone has duties to the community in which alone the free and full development of his personality is possible”. This is supportive of the indigenous concept that individual holders of collective knowledge are responsible to the community for the safe keeping, use of and passing on of that knowledge and, therefore, it is relevant to access and benefit sharing regimes.

55. Article 47 of the International Covenant on Civil and Political Rights states: “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.” This article as well as article 25 of the International Covenant on Civil and Political Rights recognizes one basic principle regarding access to genetic resources, which is the recognition of sovereign rights over natural resources.

56. In addition, the phrase “to enjoy and utilize fully and freely their natural wealth and resources”, would seem to imply that Governments would control and manage their natural resources, which will logically carry with it the establishment of mechanisms in order to avoid misappropriation of natural wealth and resources, regulate access and ensure benefit-sharing arrangements that are fair and equitable.

57. Article 1, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights states:

“All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

Should the concept of “natural wealth and resources” and “mutual benefit” and “means of subsistence” include and be applied to access and benefit sharing regimes, indigenous and local communities should be afforded the right to freely determine the use of their traditional knowledge and genetic resources and that access and benefit sharing regimes should be built upon this principle. Furthermore, the concepts contained within Article 15 of the Covenant, such as the right of everyone to take part in a cultural life, to enjoy the benefits of scientific progress and its applications and to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author may also be taken into account in the context of access and benefit-sharing to ensure a balance between the rights of those providing knowledge and/or genetic resources and the rights of the broader community.

58. It is also worth noting that the International Labour Organization Convention No.169 (ILO 169) remains the only international instrument that deals specifically with indigenous and local communities. Its relevance to the construction of access and benefit sharing regimes is in providing a minimal rights context and in identifying minimal standards for the participation of indigenous and local communities in their own affairs and in its promotion of special measures to ensure the full protection of their rights.

A. Regional agreements

59. The note by the Executive Secretary on use of terms, other approaches and compliance measures (UNEP/CBD/WG-ABS/2/2) prepared for the second meeting of the Working Group on Access and Benefit-sharing, provides an overview of the four regional agreements related to access and benefit sharing: Andean Pact decision 391 on the Common Regime on Access to Genetic Resources; the draft Central American Agreement on Access to Genetic Resources and Bio-chemicals and related Traditional Knowledge, the draft ASEAN Framework Agreement on Access to Biological and Genetic Resources; and the African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources.

60. Out of these four instruments, it should be noted that Andean Pact decision 391 is a legally binding instrument and is more elaborate than the other instruments. Andean Community decisions are binding on the member countries 1/ as of the date of their approval by the Commission. The ASEAN and the Central American agreements are both still in draft form. Finally, the African Model Law provides a model for the development of access and benefit-sharing legislation in African countries and also addresses issues such as Farmers' Rights, plant breeders' rights and, community rights and responsibilities. The following provides a general overview of how these agreements have addressed the establishment of competent national authorities, prior informed consent, mutually agreed terms including benefit-sharing, intellectual property rights and compliance measures. 2/ It should be noted that it is not intended to address the peculiarities of each of these instruments.

61. *Competent national authorities.* Each of the agreements provide for the establishment of a competent national authority by their member States. Their obligations are set out in various degrees of detail. In addition, each of the agreements, with the exception of the African Model Law, provide for the establishment of a regional committee composed of representatives from the national competent authority and, in certain cases, other relevant stakeholders. 3/ Their obligations are also set out by each agreement in more or less detail and generally include regional coordination and exchange of information.

62. *Prior informed consent* is covered by all agreements in a similar way. They provide that the prior informed consent of competent national authorities is to be obtained prior to accessing a resource. They also provide for an application to be filled out which includes similar requirements such as among others: the identification of the applicant, the disclosure of information regarding local collaborators and the specific geographical area where the genetic resource is located. The involvement of indigenous and local communities and/or other relevant stakeholders in prior informed consent procedures are addressed by the draft ASEAN agreement (article 10), the draft Central American agreement (article 13) and the African Model Law (article 5). It is also interesting to note that the draft Central American agreement provides that the competent national authority will deliver a certificate of origin establishing the legality of access to the resource and traditional knowledge (article 21).

63. *Mutually agreed terms, including benefit-sharing.* The regional instruments provide for the development of access and benefit-sharing agreements and include a minimum list of terms which are to be covered by the agreement (Article 11 of the draft ASEAN agreement, decision 391, chapter III, article 17, Central American agreement, article 19, African Model Law, article 8). Decision 391 is distinguishable in that it provides for the signature of both an access contract between the competent national authority and the applicant requesting access (chapter III) and for the signing of an ancillary contract between the applicant and the provider of the genetic resources (title IV, article 41). It is also worth noting that both the African Model Law and the ASEAN agreement provide that indigenous and local communities are to be involved in the negotiation of access and benefit-sharing agreements. 4/ As set out in these regional instruments, access and benefit-sharing contracts are to include non-monetary benefits and monetary benefits, as appropriate (e.g. decision 391, articles 17 and 35).

64. The transfer of biological or genetic resources to third parties is addressed by decision 391 (article 17), the Central American agreement (article 19) and the African Model Law (article 8). Whereas the Andean decision and the Central American agreement provide for the terms of transfer to a third party to be included in the access contract, the African Model Law provides that the transfer to a third party of biological resources, its derivatives, or traditional knowledge, innovations and practices is subject to the authorization of the competent national authority and of the relevant local community.

1/ These include: Bolivia, Colombia, Ecuador, Peru and Venezuela.

2/ The text of these measures is included in the database on ABS measures available at: <http://www.biodiv.org/programmes/socio-eco/benefit/measures.aspx>

3/ See article 51 of decision 391, article 39 of the draft Central American agreement, article 8 of the draft ASEAN agreement.

4/ See article 7 of African Model Law and article 11 of the draft ASEAN agreement for further details.

65. Decision 391 (article 21) and the Central American agreement (article 23) provide for the establishment of registries by competent national authorities to include information related to access applications and access and benefit-sharing agreements.

66. Finally, it is interesting to note that the African Model Law provides for the establishment of a Community Gene Fund, deriving its funds from the sharing of benefits with local farming communities which shall be used to finance projects developed by the farming communities (Part VII, article 66).

67. *Intellectual property rights* are covered by all of the regional agreements with the exception of the ASEAN agreement. The draft Central American Agreement (article 26) provides that the presentation of the legal certificate of origin establishing the legality of access is to be requested by relevant intellectual property authorities prior to the registration of products and processes which may involve the use of genetic resources and traditional knowledge. If the certificate of origin is not presented or access laws or the conditions of the access contract are not respected, the delivery of any approval or registration to the applicant shall be prevented.

68. The Andean Pact decision 391, under the section on “Complementary provisions” provides that “Member countries shall not acknowledge rights, including intellectual property rights, over genetic resources, by- products or synthesized products and associated intangible components, that were obtained or developed through an access activity that does not comply with the provisions of this decision. Furthermore, the Member country affected may request nullification and bring such actions as are appropriate in countries that have conferred rights or granted protective title documents.”^{1/} In addition, “the competent national offices on intellectual property shall require the applicant to give the registration number of the access contract and supply a copy of it as a prerequisite for granting the respective right, when they are certain or there are reasonable indications that the products and processes whose protection is being requested have been obtained or developed on the basis of genetic resources or their by-products which originated in one of the Member Countries”.^{2/} These provisions are reinforced by decision 486 of the Andean Community, 2000, on the common intellectual property regime, which also provides that a patent may be declared null or void if copy of the access contract was not submitted or if the prior informed consent of indigenous and local communities was not obtained, in the case of a product or process based on genetic resources or traditional knowledge (chapter IX, article 75).

69. Finally, the African Model Law does not recognize patents over life forms and biological processes.^{3/}

70. The draft Central American agreement contains a chapter dealing with the protection of traditional knowledge, innovations and practices of indigenous and local communities.

71. *Compliance measures.* The regional instruments generally provide for sanctions in specific circumstances, such as access to genetic resources without authorization or prior informed consent, and the non-respect of the terms of the contract or of the legislation on access and benefit-sharing. Depending on the agreement, sanctions may include the revocation of the authorization to access (article 14 of African Model Law), the termination/nullification of a contract (article 39 of decision 391, article 19 of Central American Agreement), fines and other civil and criminal sanctions.

72. The draft ASEAN agreement provides that disputes between a resource user and a member State shall be settled at the national level in accordance with the provisions of the national access regulation. (article 9)

^{1/} Second provision under “Complementary provisions”.

^{2/} Third provision under “Complementary provisions”.

^{3/} Article 9(1) of the African Model Law.

73. In the draft Central America Agreement, appropriate legal mechanisms to prevent biopiracy of genetic resources, biochemicals and associated traditional knowledge are to be established by member States at the national level to implement administrative, civil and criminal sanctions. (article 27)

1. Experience with implementation

74. Experience with respect to the implementation of regional approaches is limited. As noted above, both the Central American and the ASEAN Framework Agreements are still in draft form. With respect to decision 391 of the Andean Community and the African Model Law, the following paragraphs provide some information on their implementation.

75. Case studies carried out in Pacific Rim countries provide some information with respect to the implementation of decision 391 of the Andean Community. According to the authors of these studies, Andean countries had no access and benefit-sharing policies before decision 391 was adopted in 1996. When adopted, the decision became binding and was automatically integrated into national legislation. Decision 391 did not require the development of any new national law; however, “technical ambiguities, social protest, political concerns, and institutional limitations, among other factors, forced Bolivia, Ecuador, Peru, and recently Colombia to develop national policies to facilitate the implementation of decision 391 into their national context”. ^{1/}

76. According to an analysis of the African Model Law and its implementation, ^{2/} the development and adoption of the African Model Law was critical to the development of access and benefit-sharing legislation in the region. It has been suggested that African countries in the process of developing legislation and adapting the Model Law framework can be generally classified into four categories:

(a) Countries with *sui generis* legislation embodying various components of the Model Law and having internal capacity for their implementation. This group includes Egypt, Namibia, and Zimbabwe;

(b) Countries with draft *sui generis* legislation patterned after the Model Law and pending enactment into law. This group includes, *inter alia*, Ethiopia, Nigeria, South Africa, Uganda and Zambia;

(c) Countries of Francophone West and Central Africa (members of the African Intellectual Property Organisation (OAPI)), which, through revision and ratification of the Bangui Accord, acceded to a UPOV-style *sui generis* system for plant variety protection;

(d) Countries without TRIPs/CBD-compliant legislation that are only now contemplating the possibility of developing a *sui generis* system of protection predicated on the Model Law or other legal instruments. The majority of African countries belong in this category. While most prefer the Model Law, many are under external pressure not to conform to it.”^{3/}

^{1/} Carrizosa, Santiago, Stephen B. Brush, Brian D. Wright, and Patrick E. Mc Guire (eds) 2004.

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. IUCN, Gland, Switzerland and Cambridge, UK, Chapter 1, p. 9.

^{2/} J. A. Epkere, “African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources”, Chapter 19 available in Kent Nnadozie, Robert Lettington, Carl Bruch, Susan Bass, Sarah King (eds), *African Perspectives on Genetic Resources—A Handbook on Laws, Policies and Institutions*, Environmental Law Institute, 2003.

^{3/} Ibid, page 283.

77. According to the same analysis, a number of factors have contributed to the slow response by African countries in developing national legislation, taking into account the Model Law. These include the lack of national capacity, skill, and expertise in legal drafting to transpose the Model Law into national legislation, constraints in implementation capacity, lack of information on the utility of protecting traditional knowledge, and incoherent interpretations of the meaning of the Law among countries.

A. National measures addressing access and benefit-sharing

78. The present section examines access and benefit-sharing measures included in the database established by the Secretariat and highlights lessons learned from country case studies examining access and benefit-sharing developments in some regions.

79. Measures taken by Governments with users under their jurisdiction to ensure compliance with the prior informed consent of the Contracting Party providing genetic resources and mutually agreed terms on which access was granted are examined in a separate note by the Executive Secretary (UNEP/CBD/WG ABS/3/5).

1. *Database from the Convention on Biological Diversity on access and benefit-sharing measures*

80. A database containing administrative, legislative and policy measures to address the access and benefit-sharing provisions of the Convention was established by the Secretariat in response to decision VI/24 D, paragraph 6, by which the Conference of the Parties requested Parties and relevant organizations to make available to the Executive Secretary “detailed information on the measures adopted to implement access and benefit-sharing, including the text of any legislation or other measures developed to regulate access and benefit-sharing”. The purpose of the database is to facilitate access to this information by Parties and relevant stakeholders.

81. Although very few Parties forwarded information to the Secretariat on their national measures related to access and benefit-sharing, research was carried out by the Secretariat to identify measures available from official sources, such as the national websites of Governments Parties to the Convention. These measures ^{1/} were included in the database, which, however, may not be comprehensive.

82. As of 20 October 2004, the database included measures adopted in 26 countries. These countries are at different levels of implementation of access and benefit-sharing and have adopted different approaches to regulating access and benefit-sharing, reflecting their national administrative structures, priorities, cultural and social specificities.

83. In a number of these countries, general laws on environment, sustainable development or biodiversity address access and benefit-sharing in varying degrees of detail and provide for the establishment of guidelines or regulations on access and benefit-sharing. Some of these guidelines or regulations have already been adopted (e.g., Costa Rica, India, Malawi), while others are in draft form (e.g. Australia, Philippines) and others still have not yet been drafted (e.g., Bulgaria, Gambia, Kenya, Peru, Uganda, Venezuela).

84. For the purpose of the following analysis, the countries with national measures included in the database of the Convention on Biological Diversity have been divided into the following three categories:

^{1/} Copies of the measures included in the database were gathered from national governmental websites or official sources such as the FAO FAOLEX computerized legislative database which includes national laws and regulations on food, agriculture, and renewable national resources.

(a) Countries that refer to access and benefit-sharing in their national biodiversity strategy or their environmental or biodiversity legislation but have not yet regulated access and benefit-sharing in any detail. These measures generally provide for the development of access and benefit-sharing regulations and include some general specifications regarding elements to be addressed by the regulation. Countries in this category include: Argentina, Cameroon, Cuba, Gambia, Kenya, Panama and Uganda.

(b) Countries that have a biodiversity or environmental law with some general provisions on access to genetic resources or biological resources, which may include a provision for the establishment of a regulation on access and benefit-sharing. The countries included in this category are: Bulgaria, Ecuador, Mexico and Nicaragua;

(c) Countries which have addressed access and benefit-sharing in greater detail. ^{1/} Based on the examination of the measures adopted by countries in this category, the following provides a comparative analysis of the main provisions of these measures which address the establishment of competent national authorities, prior informed consent, mutually agreed terms including benefit-sharing, intellectual property rights and compliance measures.

85. However, it is difficult to draw general conclusions from the analysis of these measures because countries have adopted different approaches in terms of the types of measures adopted. While some countries have only adopted one measure, others have adopted a package of measures including, for example, a national strategy, a law and guidelines. A number of countries are still in the process of developing their national systems and therefore the package is often incomplete (e.g. a number of countries are in the process of developing guidelines or regulations to complement legislations). In addition, the national procedures and structures established are diverse. Some countries have different levels of government responsible for regulating access and benefit-sharing. For example, countries such as Australia and Brazil, have developed measures both at the national/federal level and at the State level.

2. Overview of measures at national level

86. Against this background, the following paragraphs provide an overview of how elements of access and benefit-sharing regimes, such as competent national authorities, prior informed consent, mutually agreed terms including benefit-sharing, intellectual property rights and compliance measures have been addressed by countries. It is not necessarily exhaustive and is not intended to provide a detailed analysis of the different access and benefit-sharing systems adopted by each country.

87. *Competent national authorities.* These measures each provide for the establishment of one or more competent national authority(ies). In some cases, the competent national authority is an organization already in existence, while in other cases a new organization is created by the access and benefit-sharing measure. A number of these measures also provide indications with respect to the composition and the tasks of the competent national authorities (e.g. India).

88. *Prior informed consent.* In each country, some type of application for access has to be made in order to obtain access to genetic resources. These provisions also provide indications regarding the specific information an application for access should contain and the procedure leading to approval or refusal. In certain countries, application or collection fees are also requested. ^{2/} The approval or the refusal to grant access is determined by the competent national authority. However, a majority of the measures examined also require the prior informed consent of the relevant authority/the resource provider in the geographical area where genetic resources are to be accessed. These resource providers are generally indigenous and local communities or other relevant stakeholders, such as private owners or conservation area authorities. ^{3/}

^{1/} The measures examined were adopted by the following countries: Australia, Bolivia, Brazil, Costa Rica, Guyana, India, Malawi, Philippines, Peru, South Africa, Vanuatu and Venezuela.

^{2/} For example: Malawi, section D(3), India, Chapter X, 41(3); draft Philippines guidelines on bioprospecting Chapter IV, section 10, section 14; Costa Rica, article 76 of legislation, article 4 of the rules; India, section 41(3).

^{3/} For example, see article 63 of Costa Rica Biodiversity Law, Malawi, section E(8), South Africa Biodiversity Act, article 82.

Hence, without the prior informed consent of the relevant stakeholder, the competent national authority cannot grant access to the applicant.

89. In addition, some countries have adopted different requirements for access depending on the type of applicant. For example, the Indian Biological Act provides for different procedures for nationals and foreigners who wish to obtain access to genetic resources. 1/ Other countries, such as Costa Rica and the Philippines, have established different requirements depending on whether access is to be granted for commercial or non-commercial purposes. 2/ Finally, some countries issue a certificate once prior informed consent has been obtained or for permission to export. 3/

90. *Mutually agreed terms including benefit-sharing.* A majority of existing national systems provide that mutually agreed terms for access and benefit-sharing are to be set out in an agreement. Some measures 4/ also provide for different types of agreements, depending on whether the genetic resources are being accessed for research or for commercial purposes. The measures generally provide that the agreement is to be approved by the competent national authority. However, some measures provide that the contract is to be negotiated between indigenous and local communities or any relevant stakeholder and the applicant. 5/ Most of the measures also provide in more or less detail for a minimum number of clauses to be included in the contract. 6/ Standard clauses include: the geographical area where the genetic resources are to be accessed, the quantity to be accessed, the purpose of the access, the duration of the contract. Measures also generally provide for benefit-sharing with the competent national authority, or with indigenous and local communities or other resource providers, and in most cases for both. 7/ Indications regarding the types of benefits to be shared vary depending on the measures. Some measures appear to focus on non-monetary benefits, such as the involvement of a local institution in the research, collection and the technological development of the products derived from the biological and genetic resources, 8/ while others focus on monetary benefits derived from the commercial utilization of the resources accessed, through the sharing of royalties. Some countries 9/ also provide for the establishment of funds, in which the benefits not allocated to stakeholders will be kept. Finally, some measures also establish conditions with respect to the transfer of genetic resources to third parties. 10/

1/ For example, the prior informed consent of the National Biodiversity Authority is requested for foreigners as defined under Chapter II, section 3(2) of the Biological Diversity Act, 2002. Different procedures are established for Indian nationals under Chapter IV of the same act.

2/ For example, see article 71 of the Costa Rica legislation and section 14-15 of the Philippines Republic Act 9147.

3/ For example, the draft Philippines guidelines on bioprospecting, under section 12.2 (C) and Annex IV, provide for the issuance of a PIC certificate once prior informed consent has been obtained. The regulation of Costa Rica, in article 19, provides that a certificate of origin is to be issued by the Technical Office of CONAGEBIO certifying the legality of access and the observance of the terms set out in the access permit. The Guyana regulation, in article 33, provides that a certificate of export has to be obtained from the competent national authority before exporting any specimen from Guyana.

4/ For example, see South Africa National Environmental Management: Biodiversity Act, 2004, articles 83-84.

5/ For example, see Vanuatu Act, article 34 (6) (a), and South-Africa Act, article 82 (3) (b).

6/ For example, see article 37 of the Bolivian regulation and articles 83-84 of the South African Biodiversity act.

7/ Philippines draft guidelines, under section 15, provides for sharing of benefits between the national Government and the resource providers in the case of bioprospecting.

8/ For example, the Malawi guidelines, section H(1), E(2)(3), and the Venezuela legislation, article 74(4) address non-monetary benefits.

9/ For example, India Biological Diversity Act 2002, Chapter V, section 21(3) and Chapter VII, section 27(2) and South Africa National Environmental Management: Biodiversity Act, 2004, article 85.

10/ For example, see India, Chapter V, article 20, the Venezuela Biodiversity Law, article 74-3, the South Africa Biodiversity Act, article 84 VII.

91. *Intellectual property rights* as they relate to access and benefit-sharing are addressed by a majority of the access and benefit-sharing systems examined, in different ways and to various extents. 1/ A number of measures consider intellectual property rights in the context of benefit-sharing through the sharing of royalties. 2/ In addition to Andean Pact countries, through decisions 381 and 486, only few of the measures examined 3/ include specific references to the requirement for the disclosure of origin of genetic resources and associated traditional knowledge in intellectual property applications for products or processes based on genetic resources or associated traditional knowledge. However, it should be noted that certain countries, including some which have not developed specific measures related to access and benefit-sharing, have addressed the issue of disclosure through their patent legislation. 4/

92. In addition, a number of specific requirements related to intellectual property rights have been included in access and benefit-sharing measures. For example, the Costa Rica legislation 5/ provides that the competent authority on intellectual property rights must consult the competent national authority before granting intellectual property protection to innovations involving components of biodiversity to ensure that the proper requirements for access have been met. The Indian Biodiversity Act provides that prior approval of the competent national authority (National Biodiversity Authority) must be obtained before applying for intellectual property rights for an invention based on a biological resource obtained from India. 6/ Other countries, such as Peru 7/ and Venezuela, 8/ provide for relevant authorities to review patents and other intellectual property rights registered outside their respective country, on the basis of national genetic resources or collective knowledge of indigenous community, in order to either claim their nullity or benefits arising from their utilization.

93. *Compliance measures.* The measures examined generally include provisions dealing with compliance. These provisions may cover, depending on the country, monitoring, reporting, enforcement, infractions/offences, penalties/sanctions and dispute resolution.

94. Only few measures address monitoring, reporting and enforcement to ensure compliance with access and benefit-sharing measures. Mechanisms established in certain countries include the appointment of inspectors, the involvement of civil society for monitoring purposes and reporting requirements imposed upon users. 9/

1/ See measures adopted by Brazil, Costa Rica, Guyana, India, Peru, Philippines, Vanuatu and Venezuela. It should be noted that for Andean Pact countries, intellectual property rights related to access and benefit-sharing are addressed by decisions 391 and 486 of the Andean Community.

2/ For example, article 5 of the Costa Rica Rules provide for the obligation to pay up to 50% of royalties.

3/ The Brazilian Provisional Act, in article 31, provides that “the person or institution applying for the property rights must inform the origin of the genetic material and the genetic knowledge and the associated traditional, as appropriate” and the Costa Rican Biodiversity Law, in article 80, states that prior to awarding intellectual property protection for inventions which involve elements of biodiversity, intellectual property authorities must obtain the certificate of origin issued by the ABS competent national authority and prior informed consent. Opposition of the competent national authority will prevent the registration of a patent or protection of the innovation.

4/ For example Denmark, Egypt and Norway.

5/ Article 80 of the Costa Rica Biodiversity Law.

6/ See section 6(1) and 19(2) of the Indian Biological Diversity Act, 2002.

7/ See article 4 c) of the Peruvian Ley de proteccion al acceso a la diversidad biologica peruana y los conocimientos colectivos de los pueblos indigenas

8/ See article 83 of the Venezuela Biodiversity Law.

9/ In Australia, the Biodiversity Act of the State of Queensland Act, in part 8, includes elaborate provisions on monitoring and enforcement. It provides for the appointment of inspectors and details the powers and duties of these inspectors. The Costa Rica Rules, in article 20, provide that the Technical Office will carry out verification and control duties through inspections on the site where access is granted. In the case of the Philippines, the draft bioprospecting guidelines, under section 26, indicate that the Government encourages the role of civil society in monitoring the implementation of bioprospecting undertaking. It also states, under section 22, that the resource user shall submit an Annual Progress report to the implementing agencies concerned.

95. The measures generally indicate that any infraction to the provisions of the legislation, regulation or guidelines and any unauthorized access to genetic or biological resources will be subject to sanctions. Moreover, many measures indicate that the non-respect of the clauses of an agreement related to access and benefit-sharing will also be subject to sanctions. In addition, certain measures, such as the Biodiversity Act of the State of Queensland ^{1/} and the South Africa ^{2/} Biodiversity Act provide for sanctions in the case where a person gives false or misleading documents or information in an application for a collection permit.

96. The sanctions have many similarities from one measure to the other. They range from a written warning, to a fine (in some cases, a scale of fines is included), a seizure of samples, the suspension of the sale of product, the revocation/cancellation of the permission or license of access, the revocation of the agreement, a ban on undertaking prospecting of biological and genetic resources and, finally, imprisonment. Certain provisions also address dispute settlement mechanisms, such as the draft Philippines guidelines. ^{3/}

97. Most of these measures are relatively recent. Therefore, lessons learned or experience gained from their implementation is limited. However, the Philippines provide an interesting case as it was one of the first countries to regulate access and benefit-sharing, with the development and implementation of Executive Order 247 on Access to Genetic Resources, and to have adopted a new legislation to address access and benefit-sharing, the Wildlife Resources Conservation and Protection Act (enacted on 30 July 2001), and developed new draft implementing guidelines on bioprospecting. Provisions of the Executive Order 247, that are clearly contradictory to and irreconcilable with the Wildlife Act, are deemed repealed. ^{4/} One of the main characteristics of the new legislation is that distinct procedures have now been established for genetic resources depending on whether they are to be used for research or for commercial purposes. According to certain authors who have examined the Philippines experience, the following lessons can be drawn: stakeholder participation is essential in developing, enacting and implementing access and benefit-sharing policies, laws, rules and regulations; defining the scope and coverage of a national access and benefit-sharing regulation is a priority concern; the potential impacts on scientific research activities must be carefully considered when designing and implementing national access and benefit-sharing measures; creative approaches to obtaining consent from, and sharing benefits with, local communities, including indigenous peoples, need to be explored and developed; an efficient and effective institutional system should be put in place; and, in regions where countries share genetic resources, regional mechanisms may be required. ^{5/}

98. While a number of countries have adopted measures on access and benefit-sharing, a majority of Parties to the Convention have not yet addressed the issue of access and benefit-sharing through national measures. In certain countries, access and benefit-sharing is being regulated by measures adopted prior to the entry into force of the Convention to regulate the access and management of biological resources, which were not adopted with access and benefit-sharing in mind. These measures have been found to provide useful solutions to address situations of access and benefit-sharing. However, although they generally provide for collection or research permits as conditions for access, they rarely address benefit sharing.

^{1/} See article 52 of the Queensland Biodiversity Act.

^{2/} See article 93 a) of the South Africa Biodiversity Act.

^{3/} Section 30 of the draft Philippines Guidelines covers conflict resolution.

^{4/} For further details see paper by Paz Benavidez entitled "The Challenges in the Implementation of the Philippines ABS Regulations: Monitoring and Enforcement of Bioprospecting Activities in the Philippines" presented at the International Expert Workshop on Access to Genetic Resources and Benefit sharing, held in Cuernavaca, Mexico, from 24 to 27 October 2004.

^{5/} See « Developing and implementing national measures for genetic resources access regulation and benefit-sharing » by Charles V Barber, Lyle Glowka and Antonio G M La Vina, in « Biodiversity and Traditional Knowledge – Equitable Partnerships in Practice », edited by Sarah Laird, Peoples and Plant Conservation Series, Earthscan, 2002, p. 404 et al.

3. Case studies

99. Although experience regarding existing access and benefit-sharing regimes is scarce, recent projects carried out in twelve African countries ^{1/} and in Pacific Rim countries ^{2/} have examined developments in countries that are in the process of or have elaborated frameworks for access and benefit-sharing. The following draws from these case-studies and highlights some of the lessons drawn from them. It illustrates the difficulties faced by a number of countries in the development of access and benefit-sharing regimes and their implementation.

100. It is generally recognized that the development of national access and benefit-sharing measures has proven difficult for many countries due to a number of factors: lack of technical expertise, budgetary constraints, weak government structures and political support, local social conflicts, and conflicts over ownership of genetic resources. ^{3/}

101. According to the case studies carried out in twelve African countries, ^{4/} the current regimes governing access to genetic resources and benefit-sharing in these countries are largely sectoral and patchy. A common approach has been to adapt existing structures and legal frameworks in relevant sectors such as protected areas, forestry and science and technology to address access and benefit-sharing. This approach has led to a lack of coherence and coordination. Access and benefit-sharing policies and regulations, however, seem to be evolving in a number of these countries towards more harmonized centralised structures. Regulatory frameworks developed in Ethiopia, South Africa and Uganda are illustrations of this trend. In the twelve African countries examined, it is interesting to note that agriculture overwhelmingly dominates access and benefit-sharing policies.

102. In the absence of legislation or regulatory measures to address specific circumstances of access and benefit-sharing, contracts for access have been developed to supplement the existing permit and fee structure. In countries, such as Kenya, the Seychelles and South Africa, model or standardized contracts are often used.

103. Authors of these case studies point to strengths and weaknesses highlighted by the studies. ^{5/} Weaknesses include: inadequate or nonexistent legal frameworks and institutions, lack of capacity, awareness and participation. Inadequate or nonexistent legal frameworks and institutions were stressed in all countries with the exception of Ethiopia. Depending on the country, the factors responsible for this weakness were the absence of coordinated and harmonized approaches to access and benefit-sharing, a failure to optimize the use of the capacity and resources of national institutions, limited enforcement capacity and ineffective sanctions, and absence of coordination with broader national policies. Lack of capacity was raised in all countries examined by the project. While the most common lack of capacity is administrative, legal and policy capacity, in certain countries the lack of capacity is isolated to particular skills such as taxonomy or the ability to conduct independent research on genetic resources. With respect to awareness and participation, the study highlights the need to increase the awareness and participation of rural communities as the custodians of genetic resources, in order to effectively implement access and benefit-sharing strategies.

^{1/} For detailed information on the twelve African country case studies, see Kent Nnadozie, Robert Lettington, Carl Bruch, Susan Bass, Sarah King (eds) *African Perspectives on Genetic Resources— A Handbook on Laws, Policies, and Institutions*, Environmental Law Institute, 2003.

^{2/} For detailed information on country case studies carried out in Pacific Rim countries, see Carrizosa, Santiago, Stephen B. Brush, Brian D. Wright, and Patrick E. Mc Guire (eds) 2004. *Accessing Biodiversity and Sharing the Benefits: Lessons from Implementation of the Convention on Biological Diversity*. IUCN, Gland, Switzerland and Cambridge, UK.

^{3/} Conclusions of International Workshop on “Accessing Genetic Resources and Sharing the Benefits: Lessons from Implementing the Convention on Biological Diversity”, held in Davis, California, from 29 to 31 October 2003.

^{4/} For further discussion on the access and benefit-sharing approaches adopted in Cameroon, Egypt, Ethiopia, Ivory Coast, Kenya, Madagascar, Nigeria, Senegal, Seychelles, South Africa, Uganda, and Zambia see publication referred to in footnote 55.

^{5/} See publication referred to in footnote 56, pages 72-73.

104. Strengths relating to genetic resources in these countries include a large diversity of species and capacity through a network of research institutions, particularly in the agricultural sector. It is suggested that non-monetary benefits such as technology transfer, training and infrastructure, could further assist Africa in developing value added products based on their genetic resources.

105. In order to address the challenges faced by neighbouring countries that share genetic resources, it has been suggested that national approaches to access and benefit-sharing may be inadequate and regional mechanisms may be required in order to facilitate enforcement of access and benefit-sharing requirements, cooperation at a technical level and exchange of information. In the absence of a regional framework, the differences in access and benefit-sharing requirements among neighbouring countries could disadvantage certain countries over others. For instance, users of genetic resources will likely be attracted to countries with a system which is considered more flexible or easier to deal with. 1/

106. According to case studies carried out in Pacific Rim countries, of the 41 countries that are party to the Convention on Biological Diversity, only nine (22 per cent) have developed a national access and benefit-sharing law or policy, 26 (63 per cent) are in the process of developing these laws and policies, and six (15 per cent) are not engaged in any process leading to the development of such frameworks. 2/

107. According to the authors, part of the complexity and challenges in addressing access and benefit sharing lies in the diverse social, economic, ethical and political implications of access and benefit-sharing policies and the consequent need to involve a wide variety of stakeholders, such as agricultural research centers, environmental non-governmental organizations, indigenous and farmer communities, government agencies, biotechnology firms and universities. Because of the wide variety of stakeholders involved, there is a danger of advantaging some over others. 3/

108. The conclusions reached by the authors of the Pacific Rim country case studies include the following: 4/

(a) The broad scope of access and benefit-sharing policies has impaired their effective and efficient implementation. Most of them cover genetic (DNA and RNA), biological (specimens or parts of specimens) and biochemical resources (molecules, combination of molecules, and extracts) found in both *in situ* and *ex situ* conditions;

(b) Access to pre or post-Convention on Biological Diversity *ex situ* collections is not clearly defined by the access and benefit-sharing policies developed in the Pacific Rim countries examined;

(c) Most access and benefit-sharing policies promote the conservation of biological diversity, but in practice as demonstrated by the Costa Rican experience, bioprospecting has not been a significant source of funding for biodiversity conservation compared to other sources of funding;

(d) Monitoring of bioprospecting activities has proven to be a difficult, expensive and resource consuming task and no Pacific Rim country has established a monitoring system;

(e) The issue of State intervention in the negotiation of benefit-sharing agreements has proven to be a complex and controversial question, some advocating the need for the direct involvement of the State while others are rather in favour of leaving the negotiation to the direct providers of genetic resources and associated traditional knowledge in order to avoid high transaction costs and burdensome bureaucratic procedures;

1/ For further discussion on the benefits of regional approaches to access and benefit-sharing, see publication referred to in footnote 56, p. 79-80 and "Developing and implementing national measures for genetic resources access regulation and benefit-sharing" by Charles V Barber, Lyle Glowka and Antonio G M La Viña in "Biodiversity and Traditional Knowledge – Equitable Partnerships in Practice", edited by Sarah Laird, People and Plants Conservation Series, Earthscan, 2002.

2/ See publication in footnote 57, Chapter 1, page 1.

3/ See publication in footnote 57, p. 295.

4/ For further details, see publication in footnote 57, Chapter 13, pages 296-297.

(f) The complex nature of access and benefit-sharing policies make it difficult to anticipate problems which may arise from their implementation and explain the need for their improvement over time.

109. On the basis of these conclusions, recommendations put forward to assist countries in developing more effective access and benefit-sharing policies include; 1/

(a) Clear ownership rights over genetic, biological and biochemical resources as a condition to the development of access and benefit-sharing policies;

(b) Clearly established competent national authorities to process access applications;

(c) The type of activities that constitute utilization of genetic resources, biological and biochemical resources and are to be regulated by ABS policies should be clearly established to avoid confusion;

(d) Differentiated access procedures for low-tech and small commercial users may be worth considering. Although some access and benefit-sharing policies have differentiated between access for commercial and non commercial purposes, no distinction has been established depending on the potential users of genetic resources (e.g. biotechnology, pharmaceutical, seed, agrochemical, ornamental, botanical medicine, the food industry);

(e) Access procedures for resources available in *ex situ* conditions deserve clarification;

(f) Prior informed consent procedures are to be clearly delineated in order to avoid time consuming and costly procedures and should be simplified for non-commercial users;

(g) With respect to benefit-sharing standards, rather than applying minimum standards, it is suggested that a range of standards may be more appropriate in order to adapt to the variety of bioprospecting activities;

(h) Regional access and benefit-sharing policies could clarify access rules for bioprospectors and in countries sharing the same genetic resources avoid favouring one country over another on the basis of their access procedures.

110. Finally, with respect to the implementation of access and benefit-sharing laws and policies, according to the authors, five following lessons can be drawn from the review of Pacific Rim countries: 2/

(a) Agreements are most likely to succeed when the number of parties to the agreement is kept to a minimum;

(b) The determination of a competent authority or local focal point in granting access is critical, and ambiguity in this respect can create problems;

(c) The determination of clear access procedures and particularly prior informed consent requirements are essential to expedite the approval of applications and the negotiation of benefits;

(d) Governments need to build local capacity to facilitate the effective and efficient implementation of access and benefit-sharing laws and policies;

(e) Creating a forum for balanced discussion of controversial access and benefit-sharing concepts and implications may facilitate the application process and accomplishment of bioprospecting projects.

1/ For further details regarding recommendations, see publication in footnote 57, pages 297-298.

2/ For further details see publication referred to in footnote 57, Chapter 3, pages 73-74.

III. Issues for consideration based on the review of existing national, regional and international instruments

A. The role of international instruments

111. In essence, the relationship of existing international instruments with access and benefit-sharing can be synthesized as follows:

(a) Apart from the Convention on Biological Diversity, the FAO International Treaty on Plant Genetic Resources for Food and Agriculture is the only international instrument to directly address access and benefit-sharing by establishing a Multilateral System of Facilitated Access and Benefit-sharing for a list of crops contained in annex 1 to the Treaty;

(b) Although instruments, such as some WIPO treaties, the WTO TRIPs agreement and the UPOV Convention, do not address access and benefit-sharing directly, they are of relevance to specific aspects of access and benefit-sharing such as intellectual property issues related to access and benefit sharing;

(c) The United Nations Conventions on the Law of the Sea and the Antarctic Treaty are relevant international instruments when examining access to genetic resources beyond areas of national jurisdiction;

(d) Other instruments not directly related to access and benefit-sharing, such as CITES, may provide useful lessons in the elaboration of the international regime. For example, useful lessons could be drawn from the international permit system established by CITES to regulate international trade in endangered species;

(e) Finally, human rights instruments provide broad political, economic and social rights for indigenous and local communities and establish an overarching framework under which the preservation, maintenance and protection of traditional knowledge, innovations and practices associated to biological resources should be considered.

B. Challenges at the national level

112. As demonstrated above, on the basis of the information available, it appears that a majority of Parties to the Convention on Biological Diversity have yet to adopt specific access and benefit-sharing measures. Some countries have adapted existing frameworks while others have either adopted or are in the process of adopting measures. In a number of these countries the national systems are therefore incomplete.

113. In the absence of specific access and benefit-sharing provisions, the scope of resources and activities regulated by law are often unclear. Certain legislations adopted for other purposes, prior to the Convention on Biological Diversity may apply to access to genetic resources. Consequently the body of law within a country may be incomplete, difficult to identify and national competent authorities may vary depending on the location of the resource and property rights within a specific country. ^{1/}

114. In those countries that have adopted access and benefit-sharing measures, the approaches in terms of the types of measures adopted, the actual procedures set up, including the sequence of procedures to follow, and the institutional frameworks established are diverse.

115. According to some experts, the lack of clear national access regimes and the lack of harmonization between countries which have developed access and benefit-sharing regimes raises serious concerns among users. They find it difficult to comply with legal requirements in different provider countries, because such requirements differ from one country to the other.

^{1/} Kerry ten Kate & Sarah A Laird, "The Commercial Use of Biodiversity— Access to Genetic Resources and Benefit-sharing", Earthscan, 1999.

116. With respect to compliance measures, it is worth noting that few countries have set up monitoring and verification systems to ensure that access and benefit-sharing arrangements are being respected, such as inspections or reporting systems. While sanctions or penalties are generally established to address situations of infraction or breach of contract, it is not clear how these in practice will be applied once the genetic resources have left the country.

117. Finally, the lack of experience with implementation makes it difficult to draw conclusions at this stage. It is generally recognized that the development of national measures has proven difficult for many countries due to a number of factors: lack of technical expertise, budgetary constraints, weak government structures, and political support, local social conflict, conflict over ownership of genetic resources. ^{1/}

118. Challenges faced by countries are often due to a lack of capacity in various areas, ^{2/} including in negotiations at the international and bilateral levels, in the formulation and implementation of national access and benefit-sharing policies and legislations. Also due to the lack of scientific and technical capacity, a number of countries are limited to providing raw materials. Strengthened capacity could hence assist in adding value to genetic resources in the provider country. The lack of awareness to access and benefit-sharing issues among national stakeholders, such as local communities, has also been an obstacle.

C. The value of regional approaches

119. As suggested above, regional approaches to access and benefit-sharing may provide a useful response to some of the current challenges, such as the issue of transboundary genetic resources. Regional approaches would facilitate both cooperation among countries at the technical level and the exchange of information. In addition, the harmonization of requirements for access and benefit-sharing at the regional level would have the benefit of creating similar conditions for access and benefit-sharing in countries across the region. This would prevent countries within the region from competing with neighbouring countries to attract foreign investments on prejudicial terms. It would also provide users with greater predictability through streamlined processes for obtaining access to genetic resources. Finally, regional institutions could play an important role in enabling countries with no specific expertise at the national level to benefit from expertise in the region.

D. The role of intermediaries

120. According to a recent publication, "Almost without exception, every biodiversity-prospecting collection effort undertaken on behalf of companies is done through intermediaries". ^{3/} A number of guidelines, codes of conduct and codes of ethics have been developed by associations of botanic gardens, microbial collections and professionals, to provide guidance to their constituents in implementing the objectives of the Convention on Biological Diversity and more specifically its access and benefit-sharing provisions. However, taking into account the role played by these intermediaries in access and benefit sharing arrangements, consideration may need to be given to the need for Governments to regulate these activities.

121. Although in most cases intermediaries are research institutions, botanic gardens and universities with expertise in collection techniques, taxonomy and other relevant fields, firms specialized in providing genetic resources to the private sector have also appeared in recent years. These intermediary institutions provide a valuable service and could possibly contribute to ensuring that access and benefit-sharing is carried out under terms beneficial to both providers and end-users of genetic resources, in accordance with the Convention. Therefore, it has been suggested that the importance of such intermediaries may need to be considered by Governments in the development of their access and benefit-sharing regimes.^{4/} Awareness raising efforts with respect to access and benefit-sharing requirements could also be targeted towards intermediaries with a view to ensuring that their actions are in compliance with access and benefit-sharing requirements.

^{1/} See footnote 58.

^{2/} See reference of publication in footnote 56, p.81.

^{3/} S. Laird, "Biodiversity and Traditional Knowledge– Equitable Partnerships in Practice", Peoples and Plants Conservation Series, Earthscan, 2002, chapter 13, p. 422-423.

^{4/} For further discussion see the publication referred to in footnote 70 above.

Non-paper submitted by India¹

Elements for discussion and possible inclusion in an international regime on ABS

This non-paper provides elements for the consideration of the Working Group for possible inclusion in an international regime on access to genetic resources and benefit sharing (ABS) and for further consideration by the Parties at the next COP.

Prior informed consent (PIC)

The concept of prior informed consent should apply to government authorities (including national, provincial and local authorities) and to indigenous and local communities. Provisions on mechanisms for the involvement of relevant stakeholders, reasonable time and deadlines, specification of the type of uses, direct linkage with mutually agreed terms, and detailed procedures for obtaining the consent should be included in an international regime.

Mutually agreed terms (MAT)

Mutually agreed terms should be based on the principles of legal certainty and minimization of costs. Contractual agreements, which are the core element of MAT, include regulation of uses in the light of ethical concerns, the continuation of customary uses of genetic resources, the possibility of joint ownership of intellectual property rights according to contributions, and the existence of confidentiality clauses and benefit sharing from commercial and other utilization of genetic resources including derivatives.

Benefit sharing

In order to create a more predictable atmosphere for government, potential commercial or non-commercial users, and stakeholders, sharing of benefits must be considered. The type of potential benefits that Parties might expect from legal access should include both monetary and non-monetary benefits.

Traditional knowledge

Prior informed consent should be obtained in accordance with traditional practices, national policies governing access and other national laws and legislation. Where traditional knowledge has been used, contractual agreements must indicate whether this knowledge has been respected, preserved, and maintained.

Intellectual property

This element is intrinsically linked to the disclosure and certification of the origin of the genetic resources and traditional knowledge in patent applications.

¹ This non-paper is purely fictitious.

The views expressed in this non-paper do not represent the official policy or position of the Government of India.

This non-paper was prepared by the Division of Environmental Conventions of UNEP, on the basis of a simulation exercise prepared and run by UNITAR, for the sole purpose of the simulation exercise developed for the South Asia Training Workshop for MEA Negotiators, held in Colombo, Sri Lanka, 5-7 October 2005. Do not circulate, cite or make reference to it without explicit approval from UNEP.

Monitoring and enforcement measures

Monitoring and enforcement measures should include reporting on activities, following up on whether access to genetic resources is in line with the terms of the contract, verifying research and development activities, and the application of IPRs.

Work in other international organizations

Establishing synergies between CBD, WTO, and WIPO is vitally important to expedite the process of developing an international regime on ABS. Amending Article 27.3 (b) of the TRIPS Agreement is particularly necessary in order to clarify and overcome potential conflicts between the CBD and the TRIPS Agreement.

WORKING GROUP ON ACCESS AND BENEFIT-SHARING

ORIGINAL: ENGLISH

Item 3 of the provisional agenda

Proposed draft recommendation¹

International regime on access and benefit-sharing

In accordance with the terms of reference set out in the annex to decision VII/19 D of the Conference of the Parties,

The Ad Hoc Open-ended Working Group on Access and Benefit-sharing,

Having undertaken an initial review of the process, scope, nature, potential objectives and elements of an international regime on access and benefit-sharing,

Having compiled views and proposals on the international regime in the attached annex I,

1. *Reaffirms* that it will continue working in accordance with the terms of reference set out in the annex to decision VII/19 D of the Conference of the Parties;
2. *Agrees* to transmit annex I to the present recommendation, including further options submitted by the Parties, to its fourth meeting as a basis, together with any other items set out in the annex to decision VII/19 D of the Conference of the Parties, for further elaboration and negotiation by Parties;
3. *Invites* Parties, Governments, indigenous and local communities, international organizations and all relevant stakeholders to submit to the Executive Secretary written comments and proposals on the items in annex I attached hereto as soon as possible and, in any case, no later than three months prior to the next meeting of the Working Group;
4. *Requests* the Executive Secretary to prepare a compilation and a consolidated text of the comments and proposals submitted by Parties, Governments, indigenous and local communities, international organizations and all relevant stakeholders for consideration by the fourth meetings of the Working Group on Access and Benefit-sharing and the Working Group on Article 8(j), pursuant to decisions VII/19 D and VII/16;
5. In order to facilitate further analysis of gaps in existing national, regional and international legal and other instruments relating to access and benefit-sharing, *invites* Parties, Governments, indigenous and local communities, international organizations and all relevant stakeholders to provide information and views to the Executive Secretary on the potential additional elements and options three months before the fourth meeting of the Working Group;
6. *Encourages* Parties to hold regional and other meetings as well as participate in electronic forums in order to exchange views, including on experience with relevant instruments, on the process, nature, scope, objectives and elements of an international regime and transmit the outcomes to the Secretariat, and requests the Executive Secretary to disseminate these outcomes through the clearing-house mechanism of the Convention;
7. *Encourages* countries and donor organizations to provide funding to assist in the holding of the above mentioned regional meetings and electronic forums.

¹ This draft decision is based on the recommendation adopted at the Third Meeting of the *Ad Hoc* Working Group on ABS, held in February 2005 in Bangkok, Thailand.

Annex I

INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING ^{1/}

1. Nature

The international regime could be composed of one or more instruments within a set of principles, norms, rules and decision-making procedures legally-binding and/or non-binding.

2. Scope

Access to genetic resources and promotion and safeguarding of fair and equitable sharing of the benefits arising out of the utilization of genetic resources in accordance with relevant provisions of the Convention on Biological Diversity; (i)

Traditional knowledge, innovations and practices in accordance with Article 8(j). (ii)

Option 1:

The legally binding instrument should apply to:

- (a) Access to genetic resources;
- (b) Fair and equitable sharing of the benefits arising out of the utilization of genetic resources and their derivatives and products in the context of mutually agreed terms;
- (c) Protection of traditional knowledge, innovations and practices associated with genetic resources and their derivatives.

Option 2:

The legally binding and/or non-binding instrument(s) should apply to:

- (a) Facilitate access to genetic resources in a non-discriminatory fashion;
- (b) Fair and equitable sharing of the benefits arising out of the utilization of genetic resources in the context of mutually agreed terms;
- (c) Protection of traditional knowledge, innovations and practices associated with genetic resources.

Option 3:

The legally binding instrument should apply to:

- (a) Access to genetic resources;
- (b) Fair and equitable sharing of the benefits arising out of the utilization of genetic resources and their derivatives and products in the context of mutually agreed terms;
- (c) Protection of traditional knowledge, innovations and practices associated with genetic resources, their derivatives and products.

Option 4:

Facilitation of access to genetic resources in a non-discriminatory fashion and the promotion and safeguarding of fair and equitable sharing of the benefits arising out of the utilization of genetic resources and associated traditional knowledge in accordance with relevant provisions of the Convention on Biological Diversity and in harmony with the International Treaty on Plant Genetic Resources and other relevant international instruments.

^{1/} Italicized text, excluding side-headings, indicates text reproduced without change from the terms of reference of the Working Group in the annex to decision VII/19 D. The Roman numerals in parenthesis at the end of an entry refer to its numbering under the corresponding heading in those terms of reference.

Option 5:

The international regime should apply to:

- (a) Access to genetic resources;
- (b) Fair and equitable sharing of the benefits arising out of the utilization of genetic resources in the context of mutually agreed terms;
- (c) Protection of traditional knowledge, innovations and practices associated with genetic resources.

Option 6:

Subject to further refinement, the international regime could be composed of one or more instruments at different levels of implementation (national, regional and international) and of a different nature (including intergovernmental agreements, codes of conduct, national legislation, contracts, ethics, commissions) within a set of principles, norms, rules and decision-making procedures within the framework of the Convention on Biological Diversity that apply to:

- (a) Access to genetic resources;
- (b) Fair and equitable sharing of the benefits arising out of the utilization of genetic resources in the context of mutually agreed terms;
- (c) Protection of traditional knowledge, innovations and practices associated with genetic resources.

3. Potential objectives

Option 1:

- (i) To prevent the unauthorized access and use of genetic resources to ensure that fair and equitable sharing of benefits flow to the providers of the genetic resources and to reinforce national legislations.
- (ii) To provide effective protection for the traditional knowledge of indigenous and local communities associated with genetic resources, subject to the national legislation of the countries where these communities are located.
- (iii) Create conditions to facilitate access to genetic resources for environmentally sound uses.
- (iv) Ensure compliance with prior informed consent of providers and of indigenous and local communities, and mutually agreed terms and support the implementation of and compliance with national legislation.

Option 2:

- (i) To prevent the continued misappropriation and misuse of genetic resources and their derivatives to ensure that fair and equitable sharing of benefits flow to the countries of origin of the genetic resources and to reinforce national legislations.

(ii) To provide effective protection for the rights of indigenous and/or local communities in relation to their traditional knowledge associated with genetic resources and derivatives, subject to the national legislation of the countries where these communities are located.

(iii) To establish international measures to support the aforementioned objective.

Option 3:

(i) To prevent the continued misappropriation and misuse of genetic resources, their derivatives and products to ensure that fair and equitable sharing of benefits flow to the countries of origin of the genetic resources and to reinforce national legislations.

(ii) To provide effective protection for the traditional knowledge of indigenous and local communities associated with genetic resources, their derivatives and products, subject to the national legislation of the countries where these communities are located.

(iii) To create conditions to facilitate access to genetic resources for environmentally sound uses.

(iv) To ensure compliance with prior informed consent of countries of origin and of indigenous and local communities, and mutually agreed terms and support the implementation of and compliance with national legislation.

Option 4:

The objective of the international regime is:

(i) The conservation and sustainable use of biological diversity;

(ii) Facilitated access to genetic resources;

(iii) The fair and equitable sharing of the benefits arising out of the utilization of genetic resources and associated traditional knowledge.

Option 5:

(i) Contribute to the effective implementation of Articles 15 and 8(j) and the three objectives of the Convention.

(ii) Facilitate access to genetic resources.

(iii) Support the implementation of and compliance with national legislation and international law.

(iv) Promote compliance with prior informed consent of the providing countries and of indigenous and local communities and mutually agreed terms.

(v) Promote and safeguard the fair and equitable sharing of benefits.

(vi) Ensure and enforce the rights and obligations of users of genetic resources.

(vii) Protect the rights of indigenous and local communities to their traditional knowledge related to genetic resources consistent with international human rights obligations.

Option 6:

- (i) Contribute to the effective implementation of Articles 15 and 8(j) and the three objectives of the Convention
- (ii) Ensure compliance with the prior informed consent and mutually agreed terms of provider countries, including of indigenous and local communities
- (iii) Ensure mutual supportiveness with relevant existing international instruments and processes

4. Elements to be considered for inclusion in the international regime, clustered by subject matter

Access

Measures to promote facilitated access to genetic resources for environmentally sound uses according to Article 15, paragraph 2, of the Convention on Biological Diversity; (iv)

Ensuring benefit-sharing

Measures to ensure the fair and equitable sharing of benefits from the results of research and development and the benefits arising from the commercial and other utilization of genetic resources in accordance with Articles 15, paragraph 7, 16, and 19 paragraphs 1 and 2 of the Convention. (ii)

Measures to ensure the sharing of benefits arising from the commercial and other utilization of genetic resources and their derivatives and products, in the context of mutually agreed terms. (vi)

Measures for benefit-sharing including, *inter alia*, monetary and non-monetary benefits, and effective technology transfer and cooperation so as to support the generation of social, economic and environmental benefits. (iii)

Promoting benefit-sharing

Measures to promote and encourage collaborative scientific research, as well as research for commercial purposes and commercialization, consistent with Articles 8(j), 10, 15, paragraph 6, paragraph 7 and Articles 16, 18 and 19 of the Convention. (i)

Measures to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources. (v)

Recognition and protection of rights of indigenous and local communities

Recognition and protection of the rights of indigenous and local communities over their traditional knowledge associated to genetic resources subject to the national legislation of the countries where these communities are located. (xv)

Customary law and traditional cultural practices of indigenous and local communities. (xvi)

Code of ethics/Code of conduct/Models of prior informed consent or other instruments in order to ensure fair and equitable sharing of benefits with indigenous and local communities. (xviii)

Measures to ensure compliance with prior informed consent of indigenous and local communities holding traditional knowledge associated with genetic resources, in accordance with Article 8(j). (x)

Derivatives

Addressing the issue of derivatives. (xii)

Promotion and enforcement mechanisms of the international regime and compliance with PIC and MAT

Monitoring, compliance and enforcement. (xx)

Dispute settlement, and/or arbitration, if and when necessary. (xxi)

Measures to ensure compliance with the mutually agreed terms on which genetic resources were granted and to prevent the unauthorized access and use of genetic resources consistent with the Convention on Biological Diversity. (xi)

Measures to ensure compliance with national legislations on access and benefit-sharing, prior informed consent and mutually agreed terms, consistent with the Convention on Biological Diversity. (ix)

Functioning of the international regime

Measures to facilitate the functioning of the regime at the local, national, subregional, regional and international levels, bearing in mind the transboundary nature of the distribution of some in situ genetic resources and associated traditional knowledge. (viii)

Means to support the implementation of the international regime within the framework of the Convention. (xix)

Institutional issues to support the implementation of the international regime within the framework of the Convention. (xxii)

Internationally recognized certificate of origin/source/legal provenance of genetic resources and associated traditional knowledge. (xiii)

Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights. (xiv)

Capacity-building measures based on country needs. (xvii)

Poverty eradication

Measures to promote access and benefit-sharing arrangements that contribute to the achievement of the Millennium Development Goals, in particular on poverty eradication and environmental sustainability. (vii)

Relevant elements of existing instruments and processes, including: (xxiii)

- Convention on Biological Diversity;
- Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization;
- The International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations;
- The Commission on Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations;

- Current national legislative, administrative and policy measures implementing Article 15 of the Convention on Biological Diversity;
- The United Nations Permanent Forum on Indigenous Issues;
- Outcomes of the Working Group on Article 8(j);
- The Agreement on Trade-related Aspects of Intellectual Property Rights and other World Trade Organization agreements;
- World Intellectual Property Organization conventions and treaties;
- International Convention for the Protection of New Varieties of Plants;
- Regional agreements;
- Codes of conduct and other approaches developed by specific user groups or for specific genetic resources, including model contractual agreements;
- African Model Law on the Rights of Communities, Farmers, Breeders, and on Access to Biological Resources;
- Decision 391 of the Andean Community;
- Decision 486 of the Andean Community;
- United Nations Convention on the Law of the Sea;
- Agenda 21;
- Rio Declaration on Environment and Development;
- Convention on International Trade in Endangered Species of Wild Fauna and Flora;
- Antarctic Treaty;
- The Universal Declaration of Human Rights;
- The International Covenant on Civil and Political Rights;
- The International Covenant on Economic, Social and Cultural Rights.

5. Potential additional elements and options identified

Members of the Working Group also suggested a number of additional elements and options. These are reproduced hereunder as part of the process for elaborating and negotiating the international regime for the consideration of the Working Group within the framework of the Convention on Biological Diversity and the terms of reference adopted by the Conference of the Parties, at its next meeting:

A. Option 1

Among the elements listed in the annex to decision VII/19 D of the Conference of the Parties, the legally-binding instrument should **primarily** focus on the following:

- I. Measures to ensure compliance by users with national legislations of the countries of origin or countries providing genetic resources where that country has satisfied conditions which qualify it to be considered as country of origin on access and benefit-sharing, prior informed consent and mutually agreed terms;
- II. Measures to ensure compliance with prior informed consent of, either:
 - a. Indigenous and / or local communities for the access to their traditional knowledge, innovations and practices associated with genetic resources and/or associated knowledge and their derivatives; and/or,
 - b. Country(s) of origin for the access to genetic resources associated to traditional knowledge.

- III. Measures to ensure compliance with mutually agreed terms on which genetic resources were granted.
- IV. Measures to prevent unauthorized access and use of genetic resources, their derivatives and associated traditional knowledge, innovations and practices.
- V. Measures to ensure and guarantee monitoring, compliance and enforcement of rights of countries of origin of genetic resources and their derivatives, whether established by national legislations or otherwise, by users and their countries through the international regime.
- VI. Disclosure of legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights;
- VII. Internationally recognized certificate of legal provenance of genetic resources that should include evidence of compliance with access legislation (including prior informed consent and mutually agreed terms);
- VIII. The requirements to obtain the certificate will be nationally defined, considering the provisions in the Convention on Biological Diversity;
- IX. Vision of the certificate: a standardized code that accompanies the biological material and is passed to all extracts, derivatives or information, through the least expensive channels, in a way that it can be shown at specific and relevant checkpoints in the research and development process (including product approval and intellectual property). There should be high cost of non-disclosure in order to induce users to behave legally. The specific conditions for access should be included in a clearinghouse, so that users/authorities/interested parties can check the conditions;
- X. Criteria for international recognition of the certificate shall be established in the legally-binding instrument;
- XI. Measures to ensure the fair and equitable sharing of benefits from the results of research and development and the benefits arising from the commercial and other utilization of genetic resources in accordance with Articles 15 paragraph 7, 16 and 19 paragraph 1 and 2 of the Convention;
- XII. Recognition and protection of the rights of indigenous and/or local communities over their traditional knowledge associated to genetic resources, subject to the national legislation of the countries where these communities are located;
- XIII. Monitoring, compliance and enforcement;
- XIV. Rules for access to and transfer of technology on the basis of Article 16 of the Convention;
- XV. Measures for benefit sharing including *inter alia*, monetary and non-monetary benefits and effective technology transfer and cooperation so as to support the generation of social, economic and environmental benefits;
- XVI. Rules to strengthen the international cooperation in particular South – South cooperation;
- XVII. Building of human, institutional and scientific capacities including for putting in place the legal mechanism, taking into account Articles 18 and 19 of the Convention;
- XVIII. An institutional mechanism for implementation of the legally-binding instrument.

B. Option 2

Benefit-sharing

- (i) Measures to ensure the fair and equitable sharing of benefits arising from the use of traditional knowledge, innovations and practices of indigenous and local communities associated with genetic resources and their derivatives and ensure that those benefits flow to those communities.
- (ii) Measures to guarantee the transfer of technology to the countries of origin of the genetic resources and their derivatives under fair and most favourable terms, including on concessional and preferential terms.
- (iii) Relevant measures for communication, education and public awareness.

Compliance with the national legislation

- (i) Measures to prevent the unauthorized use of genetic resources, their derivatives and associated traditional knowledge, innovations and practices at the international level.
- (ii) Measures to ensure the compliance of national legislation on access from countries of origin of genetic resources and their derivatives beyond their national jurisdiction.
- (iii) Legislative, administrative and policy measures in developed country users of genetic resources and their derivatives to guarantee the respect of the rights of developing countries of origin over those resources.

Implementation of the international regime

- (i) Financial mechanisms and other ways and means to guarantee the effective implementation of the international regime.

Compliance and dispute settlement

- (i) Measures related to repatriation and compensation.
- (ii) Measures to ensure access to justice.

C. Additional elements

- Measures that support the development of national administrative, legislative and regulatory regimes.
- Establish international minimum standards for compliance with national legislations.
- Promote the establishment of appropriate measures by Parties with users under their jurisdiction.
- Measures to ensure recognition and protection of the rights of indigenous women as holders and protectors of traditional knowledge and genetic resources.
- Measures to protect the rights of indigenous peoples to the genetic resources originating in indigenous lands and territories.
- Measures to clarify national access laws.
- Measures to prevent misappropriation of genetic resources, their derivatives and products as well as traditional knowledge.

- Measures to ensure non-discriminatory access.
- Measures to ensure communication, information and awareness raising.
- Measures to ensure access to information in regulating access on access and benefit-sharing of genetic resources and associated traditional knowledge.
- Measures to ensure access to justice.
- Measures to ensure that intellectual property rights do not undermine the international regime.
- Measures to ensure mutual supportiveness between the Convention on Biological Diversity and intellectual property rights-related treaties.
- Measures to promote the carrying out of research and development and joint ventures in the country of origin as provided for in Article 15, paragraph 6, of the Convention.
- Measures to promote the carrying out of research and development and joint ventures in the providing countries as provided for in Article 15, paragraph 6, of the Convention.
- Relationship with other international legal instruments.
- Nationally recognised certificate of origin/source/legal provenance of genetic resources and their derivatives and associated traditional knowledge as well as rules of customary law.
- Measures to prevent the unauthorised access and use of genetic resources and traditional knowledge.
- Measures to ensure disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge as a precondition for the registration and commercialization of new products based on genetic resources and/or associated traditional knowledge.
- Measures to ensure the effective provision of technical assistance and technology transfer, especially to developing countries.

6. Analysis of gaps

Process

- (i) *To elaborate and negotiate the nature, scope and elements of an international regime on access and benefit-sharing within the framework of the Convention on Biological Diversity, as contained in paragraphs (b), (c) and (d) below drawing on, inter alia, an analysis of existing legal and other instruments at national, regional and international levels relating to access and benefit-sharing, including: access contracts; experiences with their implementation; compliance and enforcement mechanisms; and any other options.*
- (ii) *As part of the work, the Ad Hoc Open-ended Working Group on Access and Benefit-sharing will examine whether and to what extent possible elements as contained in paragraph (d) of the terms of reference are part of these instruments and determine how to address the gaps*

The Working Group recognizes the utility of the matrix contained in annex II below to identify gaps and determine how to address them.

Further to the consideration of the potential additional elements and options identified contained in section 5, the Working Group decides to carry out the same analysis with respect to any of these elements and options without prejudice to the inclusion of these elements and options in the elaboration and negotiation of the international regime.

--- FOR WIDE CIRCULATION ---

INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹

Dear Brother,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

You will defend and make known to all the interests of our communities. Outlined below you will find a summary of the most important interests you must defend during the meeting. This briefing touches upon the proposed international regime on ABS as well as on related crucial issues.

I encourage you to lobby closely such delegations as Australia, the EU, and Brazil, to ensure that they take our concerns into account. You should also consult closely with countries that have important local communities and indigenous populations, and try and get our views reflected in their statements and positions. You should of course closely work with NGOS, particularly Greenpeace International, which is very experienced in these negotiations and should be able to give you support and guidance.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

The International Indigenous Forum on Biodiversity (IIFB) is a non-profit organization, which was formed by indigenous peoples at COP-3 in order to create a forum to meet collectively, strategize and work to influence the important international meetings on environmental issues. Since then, IIFB has remained an active body and continues organizing meetings in conjunction with environmental forums most relevant to indigenous peoples, particularly the CBD Working Group on Article 8(j) and the Working Group on ABS.

IIFB will strive to get Parties acknowledge that indigenous peoples are rights-holders and not merely stakeholders, and that indigenous peoples have the collective rights to self-determination, lands and territories, cultural heritage, and free, prior informed consent to all activities affecting their territories, natural resources and traditional knowledge.

INTERNATIONAL REGIME ON ABS

IIFB is surprised that the agenda of this meeting does not include reference to the process of elaborating and negotiating an international regime, since the COP included this item in the terms of reference of the ABS Working Group. IIFB thus requests that the provisional agenda be modified before adoption to include a sub-item on process. IIFB wishes to underscore the importance of participation of indigenous and local communities in the elaboration and negotiation process of a regime, and purports that the informal working group take this matter up for discussion.

¹ These instructions are purely fictitious and do not reflect the official position of the IIFB on the issue of an international regime on access and benefit sharing and related issues. These instructions were prepared by the Division of Environmental Conventions of UNEP, on the basis of a simulation exercise prepared and run by UNITAR, for the sole purpose of the simulation exercise of the South Asia Training Workshop for MEA Negotiators, held in Colombo, Sri Lanka, from 5-7 October 2005. Please do not cite, circulate or make reference to this document without the prior explicit approval of UNEP.

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IIFB welcomes the non-paper submitted by India and calls upon all Parties to give it their full support. The key elements mentioned in the non-paper are necessary for regulation of access to genetic resources and sharing of benefits at the national, regional, and international levels.

You should ensure that close collaboration between the Working Group on Art. 8(j) and the Working group on ABS is secured in the recommendations of the meeting that relate to the process of developing an international regime on ABS.

PRIOR INFORMED CONSENT/MUTUALLY AGREED TERMS

In the context of the indigenous peoples' rights to self-determination, free, prior and informed consent means:

- All members of the communities affected consent to the decision;
- Consent is determined in accordance with customary laws, rights and practices;
- Freedom from external manipulation, interference or coercion;
- Full disclosure of the intent and scope of the activity; and
- Decisions are made in a language and process understandable to the communities.
- Indigenous peoples' customary institutions and representative organizations must be involved at all stages of the consent process
- Respect for the right of indigenous peoples to say "no".

You should stress the following needs:

- The need for capacity-building among Parties with respect to existing and emerging international standards on the rights of Indigenous Peoples
- The need to identify examples of best practice in the development of national legislation and *sui generis* systems in accordance with the standards proposed by indigenous peoples
- The need to promote direct engagement with representative indigenous peoples' organizations to secure practical recognition of the rights of indigenous peoples as set out in existing and emerging international instruments.

IIFB also emphasizes that legal recognition of the rights of indigenous peoples is the most effective measure to ensure respect, preservation and maintenance of the knowledge, innovations and practices of indigenous peoples and local communities. Clarifying the legal status of indigenous peoples is considered to be the most effective way of reducing transaction costs and delays due to conflicts with communities.

INTELLECTUAL PROPERTY RIGHTS

IIFB welcomes the suggestion made by Tanzania to introduce *sui generis* communitarian intellectual rights in the international regime on ABS.

We also call for a legally enforceable disclosure requirement to be included in the regime.

You should remind parties that the protection of traditional knowledge is intrinsically linked to human rights concerns.

--- FOR WIDE CIRCULATION ---

INTERNATIONAL ORGANIZATION OF BIOTECHNOLOGY INDUSTRIES

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹

Dear Colleague,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

You will defend the interests and make known to all the position of the business sector. Outlined below you will find a summary of the most important interests you must defend during the meeting, not only with regard to the international regime but also with regard to related issues.

I encourage you to lobby closely such delegations as Australia, the EU and Switzerland to ensure that they take our concerns into account. You should also approach mega-diverse countries to explain to them the advantages of our position, as these represent a great investment potential. The US, albeit an observer, is always a good ally to us in these negotiations.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

IOBI is one of the largest biotechnology industry organizations worldwide. Strongly dependent on genetic resources for research and processing, IOBI's primary objective is to keep access to genetic resources as simple and unfettered as possible.

Of course, the organization attaches great importance to a strong protection of patents obtained for innovations based on genetic resources.

INTERNATIONAL REGIME ON ABS

IOBI is very reluctant to the further elaboration of an international regime on ABS, and strongly opposes the adoption of any internationally binding instrument.

The World Summit on Sustainable Development (WSSD) deliberately left out the term 'internationally binding' from the Plan on Implementation, which suggests that any regime to be elaborated would be voluntary.

Moreover, our fear is that the prospect of initiating negotiation of a new regime at this time may actually discourage countries from initiating any domestic programs under the Bonn Guidelines. We hope that Parties will choose to allow countries time to work with those Guidelines and sort out the strengths and weaknesses of the various options that they lay out, rather than immediately embarking on another round of negotiation on those very same topics. The Convention should be

¹ These instructions are purely fictitious and do not reflect the official position of the private sector on the issue of an international regime on access and benefit sharing and related issues. These instructions were prepared by the Division of Environmental Conventions of UNEP, on the basis of a simulation exercise prepared and run by UNITAR, for the sole purpose of the simulation exercise of the South Asia Training Workshop for MEA Negotiators, held in Colombo, Sri Lanka, from 5-7 October 2005. Please do not cite, circulate or make reference to this document without the prior explicit approval of UNEP.

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encouraging countries to utilize the Guidelines and develop and apply domestic programs first. By doing so, we would all gain valuable experience in implementing access and benefiting-sharing systems before making even more commitments in broad, new international agreements.

PRIOR INFORMED CONSENT/MUTUALLY AGREED TERMS

Elements of prior informed consent and mutually agreed terms should be addressed under contractual arrangements between users and providers of genetic resources. Legal certainty, transparency of regulations, and minimization of cost should be the principles governing access-frameworks. In order to speed up procedures, IOBI would like to have prior informed consent limited to the consent of one national authority centralizing ABS issues. Restrictions should be reduced to a minimum, be based on legal grounds and non-discriminatory.

IOBI does not support any means for verification, institutional guarantees for compliance, sanctions, and remedies for breach of terms.

Benefit-sharing arrangements should be made on a voluntary basis only. We are reluctant to the transfer of technology since, to a large extent, knowledge coming out of gene or biotech research is published in scientific papers or made available free of cost in databases. Thus, in the long run, both providers and users would benefit from research and innovation related to genetic resources.

INTELLECTUAL PROPERTY RIGHTS

We advocate strong intellectual property protection for biotechnology inventions.

For this reason, we oppose any amendment to the TRIPS Agreement, especially Art. 27.3(b), or any other judicial effort that would add further patentability criteria to the existing criteria or limit the scope and protections a patent affords.

For the same reason, we strongly oppose mandatory requirement of disclosure of origin, prior informed consent and the incorporation of traditional knowledge in patent applications. Such a requirement would have negative impacts, such as impeding research and innovation, as well as entail the strong burden of revising patent applications to ensure compliance. However, we are ready to consider the possibility of elaborating further voluntary codes of conduct related to intellectual property issues of access to genetic resources.

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THE COMMONWEALTH OF AUSTRALIA

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹

Dear Esteemed Colleague,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

You will be representing the Australian interests. Outlined below you will find a summary of the most important interests you must represent during the meeting. The briefing includes our position not only on the proposed international regime, but also regarding related issues.

I encourage you to work closely with the US and the EU, as well as consult with India and Tanzania and other members of the Like-minded Megadiverse Countries (LMMC) group to ensure that we understand their concerns, as well as that our concerns as a country extremely rich in biodiversity are reflected in their position. These countries represent a major potential for investment considering the richness of their biodiversity.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

Although Australia is not a member of the Group of LMMC, it has a unique biodiversity as well as gathers a great wealth of traditional knowledge from the aboriginal population.

INTERNATIONAL REGIME ON ABS

Australia welcomes the decision to negotiate an international regime on access to genetic resources and benefit sharing. However, the negotiation process must not move forward without fully considering the lessons learned from implementing the Bonn Guidelines, which has yet to be undertaken in most countries.

Moreover, Australia thinks there are possible conflicts with existing international commitments, and that an ABS international regime must fully take into consideration any existing provisions currently in force, including the WTO TRIPS Agreement, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) and any work under the auspices of WIPO.

Australia feels that to effectively address the third objective of the Convention and Article 15, it is important that the regime does not prejudice the other two objectives of the Convention, namely, conservation and the sustainable use of biodiversity.

Indigenous and local communities should be involved in the process of negotiating the regime.

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You should maintain an open position regarding the nature of the regime as we think that benefit-sharing can be addressed by a range of instruments at different levels.

PRIOR INFORMED CONSENT/MUTUALLY AGREED TERMS

With respect to prior informed consent (PIC) and mutually agreed terms (MAT), it is vital that access agreements guarantee the participation of indigenous communities in each step of the ABS process. Moreover, mutually agreed terms should ensure the continued customary use of traditional knowledge by indigenous communities and foresee the possibility of joint ownership of intellectual property rights. Benefit sharing arrangements should be a key provision of access regulations.

INTELLECTUAL PROPERTY RIGHTS

Australia supports the protection of traditional knowledge. In patent applications, information on traditional knowledge should be included on a mandatory basis. Where patents are granted for inventions involving traditional knowledge, such as customary use of genetic resources, the patent should be nullified. Australia supports the establishment of a system to collect and publish traditional knowledge in international databases, which would be managed by the CBD clearinghouse and made available to the public.

We are of the view that the TRIPS and the CBD are mutually supportive.

--- CONFIDENTIAL ---

THE FEDERATIVE REPUBLIC OF BRAZIL

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹

Dear Esteemed Colleague,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

You will be defending the Brazilian interests. Outlined below you will find a summary of the most important interests you must represent during the meeting. This briefing does not only include our views on the international regime, but also on related issues.

I encourage you to work closely with Mexico, India, and South Africa as fellow mega-diverse countries, as well as closely keep under review the position of the EU and Australia as these are opposed to a legally binding regime and are also the countries of origin of many bioprospecting companies.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

Brazil is among the world's richest biodiversity countries with an estimated 15-20% of the Earth's plant and animal life.

As such, the Brazilian Congress has taken up the drafting of legislation to protect its biodiversity richness from exploitation by researchers from developed countries. In addition, Brazil plays an active role in and supports the Group of Like-Minded Megadiverse Countries (LMMC).

You should remind Parties that addressing Article 15 of the CBD and, in particular, the provisions for access to genetic resources, should not substitute for national legislation of countries of origin of genetic material.

With this in mind, several bills are currently being discussed in the Brazilian Congress. Two of the bills have been crafted with public input and participation. The third bill, introduced by the Executive branch, was formulated by governmental officials.

The bills call for the creation of a Genetic Resource Commission comprised of representatives from the numerous stakeholders involved, such as the scientific community, local communities and indigenous populations, non-governmental organizations (NGOs), in addition to federal, state and local government representatives. The Executive bill aims for a less bureaucratic process, allowing the Executive to establish a deliberative council and a technical assessment committee.

A number of states have also begun to pass their own legislation. The Amazon states of Acre and Amapa, for example, have both approved ABS legislation. In the case of Acre, the act was passed in response to a particular case of biopiracy involving an NGO that was illegally cataloguing native

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use of medicinal plants. The Amapa legislation arose out of a larger program aimed at sustainable development that includes a police force focused exclusively on environmental protection and education (the Environmental Battalion). While there is a question of jurisdiction regarding genetic resources, there has been no federal challenge to the state laws.

INTERNATIONAL REGIME ON ABS

Nature

Brazil attaches great importance to the development of a far-reaching and legally binding regime that effectively protects and guarantees the rights of countries of origin of genetic resources, in addition to the rights of indigenous and local communities in relation to their traditional knowledge.

Scope

The ABS regime must therefore promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of traditional knowledge. In order to safeguard such rights, the regime must incorporate a mechanism to monitor its implementation and compliance, as well as provide for dispute settlement, if required.

The international regime on benefit-sharing could also address the issue of access to genetic resources. However, in accordance with Article 15 (1) of the Convention, provisions related to access to genetic resources should not be a substitute for the national legislation of countries of origin of those resources, but rather serve as a mean to reinforce the implementation of this legislation.

Elements

Among the elements listed in the annex to decision VII/19 D of the COP, the Brazilian Government suggests that the discussions on the international regime focus on the following ones:

- Measures to ensure compliance with national legislations on access and benefit-sharing, prior informed consent and mutually agreed terms, consistent with the Convention on Biological Diversity;
- Measures to ensure compliance with prior informed consent of indigenous and local communities holding traditional knowledge associated with genetic resources, in accordance with Article 8(j);
- Measures to ensure compliance with the mutually agreed terms on which genetic resources were granted and to prevent the unauthorized access and use of genetic resources consistent with the Convention on Biological Diversity;
- Addressing the issue of derivatives;
- Internationally recognized certificate of origin/source/legal provenance of genetic resources and associated traditional knowledge;
- Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights;
- Recognition and protection of the rights of indigenous and local communities over their traditional knowledge associated to genetic resources subject to the national legislation of the countries where these communities are located;
- Monitoring, compliance and enforcement.

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Any effective international regime must also take into consideration crosscutting elements such as measures to ensure financing, technology transfer, and capacity building.

INTELLECTUAL PROPERTY RIGHTS

Brazil supports the mandatory disclosure of the country of origin in patent applications. This element is necessary to ensure that a biologically rich heritage is not accessed and used without consent or without due benefit sharing arrangements.

As the Brazilian representative, you should invite the LMMC group and other developing countries to bring up the issue of ABS to the TRIPS Council as an alternative forum to CBD. We are convinced that TRIPS and CBD should be mutually supportive and ensure sustainable use of genetic resources. To avoid conflicts, Art 27.3(b) should be amended to include the requirements of (a) identification of sources of the genetic material, (b) related traditional knowledge used to obtain that material, (c) evidence of fair and equitable benefit sharing, and (d) evidence of prior informed consent from the government or the indigenous community for the exploitation of the subject matter of the patent.

--- FOR WIDE CIRCULATION ---

FOOD AND AGRICULTURE ORGANIZATION

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹

Dear Colleague,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

You will represent and make known to all the position of our organization. Outlined below you will find a summary of the most important interests you must defend during the meeting.

I encourage you to work closely and consult with all Parties involved, particularly developing mega-diverse countries to ensure that we understand their respective positions and concerns.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

The Food and Agriculture Organization of the United Nations (FAO) has a range of activities related to access to genetic resources and their sustainable use as well as the promotion, protection, and sustainable use of associated traditional knowledge. Activities in the Forestry Department, including the programmes on non-wood forest products and community forestry deserve special mention.

In recent years, the most significant development was the adoption of the *International Treaty on Plant Genetic Resources for Food and Agriculture* in November 2001. The Treaty is a new, legally-binding instrument which seeks to ensure the conservation and sustainable management of plant genetic resources for food and agriculture, as well as the fair and equitable sharing of the benefits arising from their use (Article 1.1). Being at the crossroads between agriculture, commerce, and the environment, the Treaty also aims at promoting synergy among these areas.

The International Treaty:

- Covers all plant genetic resources relevant to food and agriculture. Its objectives should be achieved in harmony with the Convention on Biological Diversity.
- Provides for benefit-sharing through information exchange, technology transfer, and capacity-building. It also requires the mandatory sharing of the monetary (and other) benefits of commercialization of products incorporating material accessed from the Multilateral System. The primary focus is on farmers in the developing world who embody traditional lifestyles relevant for the conservation of genetic resource diversity.
- Provides for the realization of Farmers' Rights by national governments through: the protection of relevant traditional knowledge, equitable participation in sharing benefits derived from the use of plant genetic resources for food and agriculture, participation in national decision-making related to their conservation and sustainable use.

¹ These instructions are purely fictitious and do not reflect the official position of the FAO on the issue of an international regime on access and benefit sharing and related issues. These instructions were prepared by the Division of Environmental Conventions of UNEP, on the basis of a simulation exercise prepared and run by UNITAR, for the sole purpose of the simulation exercise of the South Asia Training Workshop for MEA Negotiators, held in Colombo, Sri Lanka, from 5-7 October 2005. Please do not cite, circulate or make reference to this document without the prior explicit approval of UNEP.

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INTERNATIONAL REGIME ON ABS

An international regime on access and benefit-sharing should take full account of existing instruments and of the on-going work of the FAO's Commission on Genetic Resources for Food and Agriculture.

In particular, it should:

- Recognize the role and status of the International Treaty on Plant Genetic Resources for Food and Agriculture and its Multilateral System of Access and Benefit-Sharing and, if appropriate, exclude it from the scope of the international regime;
- Not contain language that may appear to define the scope and coverage of the Treaty and its Multilateral System, which is the sole prerogative of the Contracting Parties to the Treaty; and
- Provide space for the possible development of a regulatory framework for farm animal genetic resources and other genetic resources of interest to food and agriculture, including on access and benefit-sharing, which takes account of the special needs of agriculture, should the FAO Commission consider this appropriate.

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GREENPEACE INTERNATIONAL

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹

Dear Colleague,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

Remember that will not only represent the concerns of Greenpeace International but more broadly the views of civil society as a whole. Outlined below you will find a summary of the most important interests you must represent during the meeting. The briefing includes our views on the international regime as well as other related issues.

I encourage you to lobby closely such delegations as Australia, the EU, Brazil, as well as consult with India and other members of the LMMC group to ensure that we understand their concerns, as well as that our concerns are reflected in their position. You should of course closely work with and support the International Indigenous Forum on Biodiversity (IIFB), the views of which are similar to ours.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

Greenpeace International is a global non-profit organization with a presence in more than 40 countries across Europe, the Americas, Asia, and the Pacific. To maintain its independence, Greenpeace does not accept donations from governments or corporations but relies on contributions from individual supporters and foundation grants. As a global organization, Greenpeace focuses on the most crucial worldwide threats to our planet's biodiversity and environment.

Transnational companies and research institutes are increasingly engaging in practices of biopiracy and bioprospecting in developing countries. Once these companies have discovered the genetic composition of these resources or have modified them in laboratories, they apply for patents and claim protection under national copyright and intellectual property laws. Patents deprive poor countries of access to public genetic resources, and define these resources as private property. Greenpeace recalls that large and medium-sized businesses and research institutes are only dedicated to reproducing those plants having potential market value and which also contribute to considerable loss in biodiversity.

INTERNATIONAL REGIME ON ABS

Greenpeace stresses the importance of developing a far-reaching international legally binding regime on ABS.

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The need for an international regime on access and benefit sharing is based on the necessity of fighting biopiracy. This activity ensures the control of genetic resources for private and commercial uses and is therefore considered to be not only theft or pillage but also a practice that increases ecological debt.

We would therefore affirm that combating biopiracy is to fight against such appropriation and privatization of genetic resources and for the strengthening of the collective rights enunciated in the CBD. Nevertheless, after reviewing what has been agreed so far, we think that the fight against biopiracy has not only been delayed, it is not even beginning; rather, it is a step toward its legalization. It reinforces the tendency see nature and natural resources as marketable goods, as is the case when our resources are privatized.

Therefore we support the proposal in India's non-paper as a first step and you should call upon all Parties to give it their full support. Key elements mentioned in the non-paper are necessary for the regulation of access to genetic resources and sharing of benefits at the national, regional, and international levels.

We also think that indigenous peoples should be closely involved in the process to develop and international regime on ABS.

INTELLECTUAL PROPERTY RIGHTS

The primary concern of Greenpeace and other environmental NGOs is to abolish IPRs that limit access to genetic resources and patents on seeds and plants. Currently, Greenpeace is working to block an approval of a maize patent at the European Patent Office. Once the patent is granted, farmers of Mexico growing maize with high oil and oleic acid content could be forced to plant different seeds or to pay for licenses to use the patent rights on their harvests.

You should urge Parties to develop an internationally accepted solution. Greenpeace will continue to fight biopiracy practices on case-by-case basis by urging Parties to divert national resources to revise patents granted on illegally acquired genetic resources.

Greenpeace also shares the view of some developing countries to initiate the review of Article 27.3(b) of the WTO TRIPS Agreement.

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THE FEDERAL REPUBLIC OF GERMANY

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹

Dear Esteemed Colleague,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

You will be representing not only Germany's interests, but also those of the European Union (EU). Over the last six months, we have been in close consultations with other EU members to ensure that we understand what interests we are to promote at this meeting. Outlined below you will find a summary of the most important interests you must represent during the meeting, not only with regard to the international regime but also with regard to related issues.

We encourage you to work closely with other EU Member States, as well as Switzerland. You are also advised to consult closely with South Africa and Mexico to better understand their interests. It is very important for Germany and the EU to maintain strong relations with these countries given their status as mega-diverse countries and the investment potential that they represent.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

Europe is both a user and provider of genetic resources. Commercial demand for access to genetic resources covers a wide range of sectors including biotechnology, pharmaceuticals, medicines, and cosmetics. A number of EC legislative and policy measures could contribute to the implementation of the CBD's provisions on benefit sharing in EU Member states.

Access to genetic resources is particularly important for Germany as a result of the great potential for pharmaceutical and cosmetic industries. As a previous host country of the Working Group on Access and Benefit-Sharing, Germany has shown strong commitment to the elaboration of the 'Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization'.

Bearing in mind the provider countries' legitimate interests and their sovereign right over genetic resources, as well as the interests of research and the private sector, Germany considers the global conservation of biological diversity to be the most important objective that should govern ABS. The sustainable and environment-friendly use of genetic resources is not considered to be a contradiction to, but a means for, the protection of biological diversity. Benefit sharing and transfer of knowledge as a part of mutually agreed terms should primarily be a means to achieve the above-mentioned objective.

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INTERNATIONAL REGIME ON ABS

Germany welcomes the efforts to further elaborate international regulations on ABS. However, we and our fellow EU partners consider the Bonn Guidelines as voluntary in nature and as a basis for bilateral co-operation.

We therefore do not support a legally binding instrument on ABS as suggested by several developing countries. However, the EU supports the implementation of institutional policies and codes of conduct (non-legally binding instruments) by stakeholder groups, stressing the evolutionary character of ABS regulations. The EU strongly supports the full implementation of the Guidelines as a prerequisite to the elaboration and negotiation of an international ABS regime, particularly since important components of the Guidelines may serve as an important foundation for the regime.

Discussions should focus on an analysis of gaps to clarify the regime's objectives, as well as issues pertaining to measures to facilitate access and a certificate of origin/source/legal provenance. The EU is of the view that there is a need to analyze the relationship with other relevant international instruments and processes.

The international regime should consist of a number of mutually supportive instruments, including existing instruments. Indigenous communities should be fully involved in the process of negotiating the regime.

The international regime should ensure or guarantee the fair and equitable sharing of benefits arising out of the use of genetic resources, rather than prevent their appropriation or misuse.

Nature

You will need to keep as open a position as possible since benefit sharing can be addressed under various instruments at different levels.

The EU believes that neither paragraph 44 (o) of the Plan of Implementation of the World Summit on Sustainable Development nor Decision VII/19 provide any specific indication on the nature of an international regime on access and benefit sharing. This is understandable as a sound choice of the appropriate instrument/s which could further develop the international regime on access and benefit-sharing will only be possible when an analysis of the possible gaps in the current international regime on access and benefit-sharing, and of their consequences, has taken place.

The EU is committed to working towards a transparent, effective and comprehensive international regime on access and benefit-sharing. However, the EU does not intend to pre-judge, at this stage, the nature of the instrument/s which may be put in place to further develop the present international regime on access and benefit-sharing.

The regime should not be legally binding.

Scope

The regime should comprise multiple instruments. However, before defining the exact scope of the regime, a gap analysis is required to ensure complementarity and avoid duplication and conflict with existing instruments. The gap analysis should be completed prior to the next meeting of the Working Group.

Derivatives of genetic resources should not be considered under the international regime.

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Elements

The annex to decision VII/19 D, contains under (d) a long list of elements to be considered by the Working Group. This list also contains some redundancies. Particular importance is attached by the EU to the following:

“(i) Measures to promote and encourage collaborative scientific research, as well as research for commercial purposes and commercialization, consistent with Articles 8(j), 10, 15, paragraph 6, paragraph 7 and Articles 16 18 and 19 of the Convention;

This element comprises two important issues. First, that of differentiation between scientific research and research for commercial purposes. In some instances it may be desirable to encourage collaborative scientific research through a range of measures including, for example, differentiated and simpler procedures such as non-commercial material transfer agreements.

Second, among the measures to promote research consistent with the CBD, there is a need to highlight the importance of identifying best practice and its dissemination among sectors and across sectors. In this context, the Action Plan for Capacity Building in decision VII/19 F, calls repeatedly for the identification of practices, in particular best practice and its dissemination along with case studies (see paragraph 9 (e) of the Action Plan on actions at the regional and sub-regional levels and at the international level).

In our view, elements (ii), (iv), (xiii) and (xiv) of paragraph (d) of the terms of reference, as reported below, deserve particular attention. They express the two sides of the access and benefit sharing debate by highlighting the need to facilitate access to genetic resources for environmentally sound uses and the need to ensure that the fair and equitable sharing of the benefits arising from the use of these resources takes place:

“(ii) Measures to ensure the fair and equitable sharing of benefits from the results of research and development and the benefits arising from the commercial and other utilization of genetic resources in accordance with Articles 15.7, 16, 19.1, 19.2 of the Convention;

“(iv) Measures to promote facilitated access to genetic resources for environmentally sound uses according to Article 15.2 of the Convention on Biological Diversity;

“(xiii) Internationally recognized certificate of origin/source/legal provenance of genetic resources and associated traditional knowledge;

“(xiv) Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights;

The European Union also attaches great importance to three other elements outlined in paragraph (d):

“(xv) Recognition and protection of the rights of indigenous and local communities over their traditional knowledge associated to genetic resources subject to the national legislation of the countries where these communities are located;

“(xvi) Customary law and traditional cultural practices of indigenous and local communities;

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“(xvii) Capacity-building measures based on country needs.

In the further development of the international regime on access and benefit sharing, it will be essential to protect the rights of indigenous and local communities over their traditional knowledge. The EU is supportive of the development of an international *sui generis* model for the legal protection of traditional knowledge and is hopeful that progress will be made on this in the framework of WIPO’s Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore and in the Working Group on Article 8(j) of the Convention on Biological Diversity. Any such system shall be compatible with the customary law and traditional cultural practices of indigenous and local communities and be developed with their approval and involvement.

The EU also considers it essential for a functioning international regime to address capacity building needs. The annex to decision VII/19 F of the Conference of the Parties contains an Action Plan on Capacity Building for Access and Benefit Sharing, which provides a framework for identifying country, indigenous and local community and all relevant stakeholder needs, priorities, mechanisms of implementation and sources of funding. The implementation of this Action Plan will greatly contribute to build the capacities of Parties to manage and develop their genetic resources and should contribute to the conservation and sustainable use of biological diversity.

With regard to paragraph (xxiii) of the terms of reference, on ‘Relevant elements of existing instruments and processes’, the European Union is pleased to note that the terms of reference reflect the European Union view that a number of elements of an international regime on access and benefit-sharing already exist, including measures taken in application of Article 15 of the Convention on Biological Diversity, and should be the starting point for any discussion on further developments. Among them we recall the following to which we attach particular importance:

- The Bonn Guidelines represent a central element of the international regime on Access and Benefit Sharing under the Convention on Biological Diversity. In this respect, present and future reports by Parties on the use they have made of the *Bonn Guidelines* at national and regional level provide essential information in order to review and revise the Guidelines if necessary.
- In addition, the developments of “*other approaches*” also provide further elements for the international regime.
- Similarly, possible outcomes of the work of the *Working Group on Article 8(j) of the Convention on Biological Diversity* and of the *United Nations Permanent Forum on Indigenous Issues* could provide valuable inputs, in particular in relation to traditional knowledge.
- The European Union also recognizes the fundamental importance of the *International Treaty on Plant Genetic Resources for Food and Agriculture*. The recent entry into force and the implementation of this Treaty, in particular through its standard material transfer agreement, will make it an important element of the international regime on ABS.
- Other existing elements include relevant provisions of the *TRIPs Agreement*; different intellectual property instruments administered by *WIPO*, and relevant provisions of the *UPOV Conventions*. Further developments in these fora may be of great importance for the international regime on Access and Benefit Sharing and the European Union is committed to playing a constructive and coordinated role in them. This is true for instance for the issue of ‘disclosure of origin’ in intellectual property rights applications.

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PRIOR INFORMED CONSENT/MUTUALLY AGREED TERMS

Germany fully agrees on the notion of prior informed consent, including that of local communities.

Mutually agreed terms should provide for transparency, legal certainty, and a minimum of administrative costs and procedures in order to facilitate access to genetic resources. Furthermore, provisions should ensure possibilities for benefit sharing with provider countries. Germany is of the view that access to genetic resources should be as simple and unfettered as possible.

Prior informed consent should include the consent from the national authority, as well as that of indigenous and local communities. The EU stresses the need for transparent and non-discriminatory access regulations, keeping restrictions to a minimum.

Mutually agreed terms should be based on the principle of legal certainty for both providers and users, and include the participation of all stakeholders (providers and users) in the drafting, implementation and review of ABS arrangements. Furthermore, they should ensure the minimization of cost. While acknowledging the sovereign right of each state over its genetic resources, the EU is convinced that ABS should always be designed in a manner to ensure that the three overall objectives of the CBD are respected. Thus, restrictions on access should be reduced to a minimum.

Disputes arising in mutually agreed arrangements should be solved in accordance with contractual arrangements. Means for verification and institutional guarantees for compliance could be integrated in contractual arrangements on a voluntary basis, but should exclude sanctions and remedies for breach of terms.

INTELLECTUAL PROPERTY RIGHTS

Concerning disclosures of origin, the EU sees merits in a system that would ensure transparency and would allow the authorities of countries granting access to their resources to keep track of patent applications linked to the use of these resources. Such a system could be established either under WIPO or under the TRIPs, and could include mandatory elements. However, these disclosures should be limited to the geographic origin instead of the country of origin and should not act as a further patentability criterion – *de facto* or *de iure* – under the TRIPs Agreement. Furthermore, legal consequences to non-respect should lie outside the ambit of patent law, but, for instance, may be regulated by civil or administrative law.¹ The EU rejects the call for a ban on patenting on life forms, as proposed by some developing countries.

The EU views possible synergy, and not necessary conflict, between the CBD and the TRIPs Agreement, which should be applied simultaneously. However, the EU has indicated recently that it would consider the possibility of amending Art. 27.3(b) of the TRIPs.

Aspects such as misappropriation of, and sharing of benefits arising from, traditional knowledge should not be dealt with by the TRIPs Council. Nevertheless, the EU supports further work towards the development of an international *sui generis* model for legal protection of traditional

¹ See Communication from the European Communities and their Member States to the WTO TRIPs Council regarding the Review of Art.

27.3(b) of the TRIPs Agreement, and the Relationship between the TRIPs Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge and Folklore (IP/C/W/383), paragraphs 53-55.

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knowledge as undertaken by the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore.¹

As stated in the 2001 EC Biodiversity Action Plan for Economic and Development Cooperation, the EU is firmly committed to capacity building in developing countries so as to enable them to share the benefits arising from utilization of their genetic resources. We will also encourage the use of the CBD's financial mechanism to promote the voluntary transfer of IPRs held by European operators. This includes the granting of licenses through normal commercial mechanisms and decisions, while also ensuring adequate and effective protection of property rights.

Germany largely supports the position of the EU on these matters, but opposes an amendment of the existing legislation under Art. 27.3 TRIPs at present.

¹ See *ibid*, paragraphs 61-71 as well as the submission by the EC to the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore, dated 14 June 2002: *Traditional Knowledge and Intellectual Property Rights* (WIPO/GRTKF/IC/3/16).

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THE REPUBLIC OF INDIA

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹

Dear Esteemed Colleague,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

You will be defending the Indian interests. Outlined below you will find a summary of the most important interests you must represent during the meeting. This briefing addresses the international regime on ABS as well as related issues.

I encourage you to work closely with Brazil, Mexico, and South Africa as fellow mega-diverse countries, as well as closely keep under review the position of the EU and Australia as these are opposed to a legally binding regime and are also the countries of origin of many bioprospecting companies.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

India's biological richness and wealth of indigenous knowledge is recognized worldwide. One of the major policy challenges in India was the adoption of an instrument that helped promote the objectives of equitable benefit sharing enshrined in the CBD. After an extensive consultative process, the Biological Diversity Bill was adopted in 2002. This legislation aims to protect India's rich biodiversity and associated knowledge against their use or abuse by foreign individuals and/or organizations without sharing the benefits arising out of such use.

Features of the Biological Diversity Bill which address access to genetic resources by foreign individuals and/or companies include: approval from the National Biodiversity Authority, deposition of monetary benefits in a Biodiversity Fund, and requirements for pre-approval before applying for IPR for an invention based on a resource obtained from India.

India's patent legislation incorporates the disclosure of country's origin in patent applications. Section 10 of the Patents Act 1970, as amended by the Patents Second Amendment Act 2002, provides that the applicant must disclose the source and geographical origin of any biological material deposited instead of a description. Section 25 (opposition to grant of patent) is also amended to allow opposition to be filed on the ground that "the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention".

Unfortunately, India has already faced cases of biopiracy by multinational corporations from developed countries regarding its genetic resources. One vivid example is described in the background note, where the neem seed, known for its excellent value as a pesticide, was recently patented by R.W. Grace Company, a US chemical corporation. It is thus in India's direct interest to develop an international regime on ABS.

¹ These instructions are purely fictitious and do not reflect the official position of India on the issue of an international regime on access and benefit sharing and related issues. These instructions were prepared by the Division of Environmental Conventions of UNEP, on the basis of a simulation exercise prepared and run by UNITAR, for the sole purpose of the simulation exercise of the South Asia Training Workshop for MEA Negotiators, held in Colombo, Sri Lanka, from 5-7 October 2005. Please do not cite, circulate or make reference to this document without the prior explicit approval of UNEP.

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India has been actively contributing to the intergovernmental negotiation process in the context of the CBD Conferences of the Parties (COP), where India has insisted and succeeded to keep ABS at the center of the policymaking debate.

INTERNATIONAL REGIME ON ABS

In preparation for the Informal Working Group convened by the Government of Thailand, India, with support from the Group of Like-Minded Megadiverse Countries, has submitted a non-paper on elements for discussion and possible inclusion in an international regime. India proposes to develop a regime, which would provide a transparent framework to facilitate access and ensure benefit sharing at national and regional level.

Being rich in traditional knowledge, India emphasizes in its non-paper the need to protect traditional knowledge associated with genetic resources, particularly recommending provisions that ensure that where relevant, traditional knowledge has been respected and maintained in contractual arrangements.

The regime should have an added value for both users and providers of genetic resources.

INTELLECTUAL PROPERTY RIGHTS

Given the close relationship between the CBD and the WTO TRIPS Agreement, India thinks there is a need for these instruments to be mutually supportive and aim to ensure the sustainable use of genetic resources. To avoid conflicts between the two instruments and to meet the overall objectives enshrined in the principles of sustainable development, Article 27,3(b) of TRIPS should be amended to include the requirements of (a) the identification of sources of the genetic material, (b) related traditional knowledge used to obtain that material, (c) evidence of fair and equitable benefit sharing, and (d) evidence of prior informed consent from the government or the indigenous community for the exploitation of the subject matter of the patent.

Finally, India wishes to indicate the limited progress that has so far been made in WIPO's Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, and notes the limitations of national laws and contracts to prevent biopiracy at the international level. India believes that it would be less cost-effective to establish an internationally accepted solution to prevent biopiracy than to divert national resources to expensive judicial processes for revocation of patents that includes illegal genetic resources. Developing countries do not have the resources to follow each and every patent outside their territories on the use of their resources.

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THE UNITED MEXICAN STATES

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹

Dear Esteemed Colleague,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

You will be representing the Mexican interests. Outlined below you will find a summary of the most important interests you must represent during the meeting.

I encourage you to work closely with Brazil, Tanzania, and South Africa as fellow mega-diverse countries, as well as closely keep under review the position of the EU, Switzerland and Australia as these are opposed to a legally binding regime and are also the countries of origin of many bioprospecting companies.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

We welcome the decision by the Conference of the Parties to mandate the ABS Working Group with the task of elaborating and negotiating an international regime on access and benefit sharing.

Mexico is part of the Group of like-minded Megadiverse Countries (LMMC).

INTERNATIONAL REGIME ON ABS

We are of the view that an international regime should complement, not substitute, national legislation on access.

Nature

Mexico attaches great importance in accelerating discussions on an international legally binding regime.

Scope

The international regime must adequately address the protection and guarantee the rights of countries of origin of genetic resources, as well as the rights of indigenous peoples in relation to their traditional knowledge.

The regime should also be based on a certificate of legal provenance.

Elements

Mexico supports the non-paper submitted by India on elements for discussion and possible inclusion in a draft agreement on ABS.

¹ These instructions are purely fictitious and do not reflect the official position of Mexico on the issue of an international regime on access and benefit sharing and related issues. These instructions were prepared by the Division of Environmental Conventions of UNEP, on the basis of a simulation exercise prepared and run by UNITAR, for the sole purpose of the simulation exercise of the South Asia Training Workshop for MEA Negotiators, held in Colombo, Sri Lanka, from 5-7 October 2005. Please do not cite, circulate or make reference to this document without the prior explicit approval of UNEP.

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THE REPUBLIC OF SOUTH AFRICA

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹
Dear Esteemed Colleague,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

You will not only defend the South African interests but also those of the Like-Minded Mega-diverse Countries (LMMC). Outlined below you will find a summary of the most important interests you must represent during the meeting. This briefing addresses our views on the international regime on ABS and also on related issues.

I encourage you to work closely with your colleagues from other mega-diverse countries to ensure that their position is fully reflected in any of your statements. A coordination meeting was held earlier this year with all member countries of the group to identify a common position on the issue.

You should also closely keep under review the position of the EU and Australia as these are opposed to a legally binding regime and are also the countries of origin of many bioprospecting companies.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

The LMMC is a group of seventeen countries representing over 70% of the world's biodiversity and 45% of the world's population. Formed in Cancun in February 2002, the LMMC group seeks to further their common interests and priorities to present a common stance in intergovernmental negotiations, promote *in situ* and *ex situ* conservation of biodiversity, and seek a strong international regime to effectively promote and safeguard fair and equitable sharing of benefits arising from biodiversity and its components.

Bolivia, Brazil, China, Colombia, Costa Rica, Democratic Republic of Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, the Philippines, South Africa and Venezuela are the members of the LMMC group.

The LMMC group continues to present a common and far-reaching stance on many items under consideration, including essential conditions, such as PIC, MAT, the certification of origin of genetic materials, and ensuring that derivatives of genetic resources are included in any agreement.

As a mega-diverse country, South Africa is actively engaged in the LMMC. It has also played an active role in the intergovernmental negotiating forums related to the issues of ABS.

The LMMC think that sustainable use of bio-diversity can only be accomplished by establishing a system of access that requires agreements to preserve genetic resources, measures environmental impact, provides evidence of prior and informed consent by host governments and local communities and ensures fair and equitable sharing of benefits deriving from genetic resources and traditional knowledge

¹ These instructions are purely fictitious and do not reflect the official position of South Africa or the LMMC Group on the issue of an international regime on access and benefit sharing and related issues. These instructions were prepared by the Division of Environmental Conventions of UNEP, on the basis of a simulation exercise prepared and run by UNITAR, for the sole purpose of the simulation exercise of the South Asia Training Workshop for MEA Negotiators, held in Colombo, Sri Lanka, from 5-7 October 2005. Please do not cite, circulate or make reference to this document without the prior explicit approval of UNEP.

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INTERNATIONAL REGIME ON ABS

South Africa stresses the importance of accelerating negotiations on an international ABS regime, since the Bonn Guidelines have not created an enabling environment to ensure compliance with prior informed consent and benefit sharing.

The objectives should be to: prevent the continued misappropriation and misuse genetic resources and their derivatives; ensure that benefits flow to countries of origin; protect the rights of indigenous and local communities over traditional knowledge; and reinforce national legislation.

Nature

The LMMC feel that a binding international legal regime should be developed to prevent illegal access and use of genetic resources and associated knowledge, Intellectual Property Rights in relation to biological resources and traditional knowledge. Such a binding regime could also include non-binding elements in the interest of compromise.

Scope

The LMMC does not think that a gap analysis is required. The scope of the regime is clearly established under Decision VII/19. The regime should apply to access, fair and equitable sharing of benefits arising not only from the use of genetic resources but also from their derivatives, as well as to the protection of associated traditional knowledge.

Elements

The LMMC thinks that the regime should include PIC of the country of origin and MAT between the country of origin and the user country, as well as mandatory disclosure of origin of genetic resources in IPR applications, including appropriate sanctions.

South Africa supports the non-paper submitted by the Government of India, although the international community should take a stronger stance on combating biopiracy. As such, you should propose the following additions to the non-paper:

- Insertion of language stating that any intended change of use, including transfer to third parties, shall require a new agreement on prior informed consent;
- Consideration of a provision providing for a financial mechanism to developing countries for the purposes of developing technological and human resources;
- Explicit recognition of the conflict between CBD and WTO TRIPS provisions. Article 27.3 (b) of the TRIPS Agreement should be revised to prohibit the patenting of life forms, including plants, animals and biological processes.

You should insist that the issue of repatriation of Africa's genetic resources, the need for capacity development and poverty alleviation, public awareness, participation of local communities in decision making, and protection of farmers' rights are all included in the regime.

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PRIOR INFORMED CONSENT/MUTUALLY AGREED TERMS

The LMMC laud India's Biological Diversity Act of 2002 and its provision that prior approval from a National Biodiversity Authority is necessary before applying for any kind of intellectual property rights based on any research or information on a biological resource obtained from India. Other member countries in the Group are considering enactment of a similar legislation.

INTELLECTUAL PROPERTY RIGHTS

You should try and garner support among Parties and observer States to cooperate in the WTO with regard to the harmonization of the provisions of the TRIPS Agreement with those of the CBD.

Countries should examine carefully existing and proposed laws on IPRs, especially those aimed at implementing the TRIPS Agreement.

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THE CONFEDERATION OF SWITZERLAND

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹

Dear Esteemed Colleague,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

You will be representing the Swiss interests. Outlined below you will find a summary of the most important interests you must represent during the meeting. This briefing summarizes our position on the proposed international regime as well as on related issues.

I encourage you to work closely with EU Member States. You are also advised to consult closely with Brazil and India to better understand their interests. It is very important for Switzerland to maintain strong relations with these countries given their status as mega-diverse countries and the investment potential that they represent.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

From the early beginning, Switzerland has been actively involved in discussions under the CBD regarding access to genetic resources and the sharing of benefits arising from their utilization. At the fifth Conference of the Parties (COP-5) held in May 2000, Switzerland presented the "Draft Guidelines on Access and Benefit-Sharing Regarding the Utilization of Genetic Resources". These guidelines formed an important basis in the discussions that eventually resulted in the "Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization".

INTERNATIONAL REGIME ON ABS

We think there is a need to analyze the relationship of an international regime on ABS with other relevant international instruments and processes, particularly with the International Treaty on Plant Genetic Resources and the World Intellectual Property Organization.

Priority should be given to national implementation of the Bonn Guidelines. Switzerland supports a voluntary access and benefit-sharing approach based on the rapid implementation of the Bonn Guidelines. Indeed, in our view such an approach presents the following advantages:

- Quick and easy participation of all the stakeholders involved in the use of genetic resources;
- Fast implementation, allowing considerable pertinent experience to be gained over a relatively short period of time;
- Flexibility, which allows specific measures adapted to the needs of each group of users.

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National and international measures should be established to promote the declaration of the source of genetic resources and traditional knowledge.

If relevant gaps are identified by providing countries, Switzerland is ready to actively discuss any proposal to improve the implementation of the CBD within the negotiation of an international regime on access and benefit-sharing.

The first step should be to identify the gaps that would require additional action at the international level. This should be made in close coordination with relevant ongoing activities under the International Treaty on Plant Genetic Resources for Food and Agriculture and WIPO.

On this basis, Switzerland suggests work on applying and assessing the implementation of the Bonn Guidelines at the national level prior to negotiations on the international level. However, in order to guarantee monitoring of implementation, Switzerland would support an international certification system.

Decision VII/19 does not contain any specific reference to the objectives of the international regime. The aim, set out in general terms in the first operational paragraph, is “of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention.”

In our opinion, one of the first priorities of the Working Group will be to clarify in a concrete and operational manner the objectives of the international regime. This work will need to be carried out according to a process defined by the terms of reference, that is on the basis of an analysis of national, regional and international legal instruments and other instruments related to access and benefit-sharing.

The following approach is suggested:

- To initiate a reflexion based on the following seven potential objectives, clustered thematically on the basis of the elements to consider, which are included in the terms of reference (roman numerals included in parenthesis correspond to the elements listed in the terms of reference):
 - Ensure the fair and equitable sharing of benefits (ii, iii, v, vi, vii, xii);
 - Facilitate access for environmentally sound uses (iv, vii);
 - Ensure the compliance with prior informed consent and mutually agreed terms (ix, x, xi, xiii, xiv, xx) including dispute settlement (xxi);
 - Recognize and protect traditional knowledge (xv, xvi, xviii);
 - Support capacity-building (xvii, xix);
 - Promote and encourage collaborative scientific research (i) including technology transfer;
 - Address the fact that some genetic resources may be located in more than one State, across national boundaries or beyond limits of jurisdiction (viii);
- To complete, if needed, this first outline, by reviewing the twelve objectives, listed under chapter I, section E of the Bonn Guidelines;
- To tackle the analysis of the needs and gaps, taking into consideration namely the following elements:

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- Specificity, priority, practicability;
- A balance between rights and obligations as user and provider countries of genetic resources;
- Clarification between what falls under national legislation and what necessitates a legal basis at the international level

The setting out of the objectives will facilitate later discussions on the elements, scope and nature of the international regime.

We are of the view that indigenous and local communities should be involved in the process of developing the regime.

Nature

In our view, the nature of the international regime will depend on its scope and modalities.

Scope

An international regime should address both access to genetic resources and benefit and should focus only on issues that are not properly covered by the Bonn Guidelines.

Elements

Elements for consideration have already been established in the terms of reference included in annex to decision VII/19 D. Switzerland puts forward a proposal to address these elements by clustering them in view of identifying the objectives of the international regime (see remarks above).

PRIOR INFORMED CONSENT/MUTUALLY AGREED TERMS

In order to provide a clear and simple framework and to facilitate access to genetic resources, prior informed consent should be limited to the consent of one national authority centralizing ABS issues. Decisions on access to genetic resources should be taken within a reasonable period of time.

Mutually Agreed Terms should be negotiated efficiently and noted in a written form. Switzerland calls for restrictions on access to genetic resources to be non-discriminatory, based on legal grounds and on objective criteria in order to conserve biological diversity. Switzerland is strongly committed to monetary and non-monetary benefit sharing, including joint research and joint ownership of intellectual property rights.

INTELLECTUAL PROPERTY RIGHTS

On intellectual property rights issues, Switzerland holds the view that a fair and balanced approach must be taken. Therefore, it has submitted a proposal to WIPO to amend the Patent Cooperation Treaty to require patent applicants to declare the source of genetic resources in international patent applications; otherwise, patent application might not be processed any further at the national level. These amendments could be introduced in a timely manner and would not require extensive changes to the provisions of relevant international agreements, such as Art. 27.3(b) of the TRIPs Agreement.¹

¹ See Proposal by Switzerland regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications to the WIPO Working Group on Reform on the Patent Corporation Treaty (PCT/R/WG/4/13).

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On traditional knowledge, the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore is considered to be the primary international forum to deal with the intellectual property-related issues of the protection of traditional knowledge. In its submission to the TRIPS Council, Switzerland stresses the need for a clearer definition of the term traditional knowledge and to determine objectives of this protection prior to integrating this notion in prior informed consent rules. It proposes the creation of a database to increase understanding of traditional knowledge and benefit sharing resulting from its use.²

² See Communication from Switzerland to the WTO TRIPS Council regarding the Review of Art. 27.3(b) of the TRIPS Agreement, and the Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD), and the Protection of Traditional Knowledge and Folklore (IP/C/W/400).

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THE UNITED REPUBLIC OF TANZANIA

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹
Dear Esteemed Colleague,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

You will be representing the Tanzanian interests. Outlined below you will find a summary of the most important interests you must represent during the meeting. This briefing not only addresses the proposed international regime on ABS but also related issues.

I encourage you to work closely with South Africa, India, and Mexico as fellow mega-diverse countries, as well as closely keep under review the position of Switzerland and Australia as these are opposed to a legally binding regime and are also the countries of origin of many bioprospecting companies.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

The Republic of Tanzania is in the process of finalizing its policy and legislation to implement the CBD. Current national policies, namely National Environmental Policy of 1997, the National Land Policy of 1995, and the National Agricultural and Livestock Policy of 1997, do not contain any reference to ABS. Legislation to address ABS is currently being drafting.

Tanzania is also very rich in indigenous knowledge and practices, and its farmers already expressed concern that this knowledge and genetic resources are being exploited in the absence of control measures. Tanzania is a member of the Group of Like-Minded Megadiverse Countries (LMMC).

INTERNATIONAL REGIME ON ABS

Nature and scope

Playing an active role in the international multilateral negotiations Tanzania stresses the importance of developing an international regime on ABS, particularly a legally binding instrument that guarantees the rights of countries of origin and reinforces, rather than substitutes, any national legislation that may be in place.

Elements

Tanzania supports the non-paper submitted by India, stating that prior informed consent, mutually agreed terms, mandatory disclosure of country's origin and other related issues are necessary measures to prevent biopiracy and to provide adequate protection for genetic resources in developing countries that are rich in biodiversity. In spite of support for the non-paper, Tanzania wishes to suggest several items for consideration:

¹ These instructions are purely fictitious and do not reflect the official position of Tanzania on the issue of an international regime on access and benefit sharing and related issues. These instructions were prepared by the Division of Environmental Conventions of UNEP, on the basis of a simulation exercise prepared and run by UNITAR, for the sole purpose of the simulation exercise of the South Asia Training Workshop for MEA Negotiators, held in Colombo, Sri Lanka, from 5-7 October 2005. Please do not cite, circulate or make reference to this document without the prior explicit approval of UNEP.

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- Reference needs to be given to poverty alleviation through the benefit sharing arrangements;
- Non-monetary benefits should be clarified in the draft agreement;
- A provision providing for a financial mechanism to developing countries for technological and human resource development should be considered;

PRIOR INFORMED CONSENT/ MUTUALLY AGREED TERMS

Tanzania attaches great importance to the prior informed consent of indigenous and local communities and their right to refuse access to genetic resources for economic, social and other reasons.

INTELLECTUAL PROPERTY RIGHTS

We think that there is clearly a conflict between the CBD and the WTO TRIPS Agreement. While this policy conflict needs to be urgently addressed and resolved, Tanzania does not support a proposed ban on patentability of life forms as has been suggested in the past by several developing countries. Tanzania suggests revising the TRIPS Agreement and calling on Parties to support this initiative within the WTO TRIPS Council.

Indigenous knowledge and practices must be protected to the fullest. To this end, we see the advanced Biodiversity Law adopted in Costa Rica, introducing *sui generis* communitarian intellectual rights as a very useful tool. Tanzania proposes to include a similar provision in the international regime.

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THE UNITED STATES OF AMERICA

Subject: Your instructions for the upcoming Working Group on Access and Benefit Sharing¹
Dear Esteemed Colleague,

I am happy to inform you of your appointment as Head of our delegation to the upcoming Working Group on Access and Benefit-Sharing (ABS).

You will be representing the US interests and make sure that no recommendation is adopted that may be contrary to our interests. Outlined below you will find a summary of the most important interests you must represent during the meeting.

Since the US is not a party to the Convention on Biological Diversity (CBD), you should closely work with delegations that have similar interests to ours. In particular, I encourage you to work closely with the Australian delegation. You are also advised to consult closely with India and other mega-diverse developing countries to better understand their interests. It is very important for the US to maintain strong relations with these countries given their status as mega-diverse countries and the investment potential that they represent.

I look forward to reading your regular reports on the proceedings and getting your final briefing and assessment when you return.

GENERAL

The United States is a user country of genetic resources. Most of the largest transnational corporations seeking access to genetic resources and claiming patents for inventions related to them are based in the US; several among them have only recently been accused by provider countries of biopiracy.

The US has signed but not ratified the CBD and has thus observer status at the COPs. The adoption of the 'Bonn guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization' was not supported by the US delegation.

INTERNATIONAL REGIME ON ABS

We are very reluctant to the further elaboration of an international regime on ABS. The US considers contracts between providers and users, on a voluntary basis, to be the most appropriate way to provide for fair and equitable benefit-sharing.

The US strongly opposes the adoption of an internationally binding instrument on ABS, as we think that the World Summit on Sustainable Development (WSSD) deliberately left out the term 'internationally binding' from the Plan on Implementation, which suggests that any regime to be elaborated would be voluntary.

In accordance with its position in negotiating the Bonn guidelines, the US does not support the inclusion of any means for verification, institutional guarantees for compliance, sanctions, and remedies for breach of terms in the document to be adopted by the working group.

¹ These instructions are purely fictitious and do not reflect the official position of the US on the issue of an international regime on access and benefit sharing and related issues. These instructions were prepared by the Division of Environmental Conventions of UNEP, on the basis of a simulation exercise prepared and run by UNITAR, for the sole purpose of the simulation exercise of the South Asia Training Workshop for MEA Negotiators, held in Colombo, Sri Lanka, from 5-7 October 2005. Please do not cite, circulate or make reference to this document without the prior explicit approval of UNEP.

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PRIOR INFORMED CONSENT/MUTUALLY AGREED TERMS

Access frameworks on a contractual basis should be based on the principles of transparency, non-discrimination, and minimization of cost. Overall, they should aim to facilitate access to genetic resources. Moreover, restrictions on access should be limited to a minimum, be based on legal grounds and be transparent. Prior informed consent should be limited to the consent of one national authority centralizing ABS issues. Information regarding the intended use of the resource should be included on a voluntary basis.

INTELLECTUAL PROPERTY RIGHTS

We acknowledge that benefit sharing and access are worthy goals. However, the US holds the view that they will not be achieved by a disclosure requirement in patent law. Thus, we oppose the inclusion of mandatory disclosure requirements (both on country or region) in patent applications, which are considered to be incompatible with the TRIPs Agreement since they add another substantive condition on patentability beyond those already provided.

We do not see any conflict between the CBD and the TRIPs Agreement. Their relationship is considered to be complementary, not contrary. On no account should TRIPs Art. 27.3 be amended. The TRIPs Agreement establishes appropriate levels of protection for IPRs, including patents that can be supportive of the CBD. Furthermore, it warns against any weakening of patent laws, such as a ban on patenting of life forms, which would result in less incentive for the protection of biodiversity.

The US considers contractual arrangements between users and providers to be an adequate mechanism of protection of intellectual property issues such as traditional knowledge. We think that there potential negative effects of making such commitments mandatory under the TRIPs as well as on the burden on patent examiners to revise any patent application for compliance.

However, we are ready to accept mechanisms for re-examination of inappropriately granted patents and to create traditional knowledge databases to assist in the identification of prior art.

For your information we do not support the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore.

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THE DISTINGUISHED CHAIR OF THE WORKING GROUP ON ABS

Subject: Brief guidance to act as a Chair of the Working Group on Access and Benefit Sharing¹

Dear Ambassador,

I wish to congratulate you on your election as Chair of the Working Group on Access to Genetic Resources and Benefit-Sharing (ABS). I am confident that your experience in chairing such negotiations as well as your strong knowledge of the issues will strengthen and enrich the process and allow the Working Group to make progress on some of the many complex and difficult issues on the agenda. Your standing in both industrialized and developing countries should enable you to effectively facilitate the discussions of this Working Group.

This note is designed to guide you in the process of chairing this meeting, the agenda of which may give rise to controversies and complicated discussions, in order to ensure that this Working Group is a success.

GENERAL GUIDANCE

It is my hope that under your leadership, the Working Group will be able to yield recommendations that will lay the foundations for a strong international regime on ABS, whichever nature and form is adopted. Our goal and that of the international community should be, at all times, to facilitate a meaningful and open discussion on this and related issues and to enhance each Partie's and observer's understanding of the concerns and interests of the others. At the same time, discussions should remain focused on the particular issue on the agenda, i.e. that of an international regime on ABS.

The role of the Chair in any international multi-party negotiation is always important. Given the complexity of the negotiations within the Working Group on ABS, the success of the endeavor will require a Chair who commands the respect of the participants and can manage the proceedings in a timely and efficient manner.

RUNNING THE MEETING

As an experienced negotiator, Your Excellency, you are best qualified to decide how to run this meeting. However, it is suggested that you begin with a brief round of introductory general statements from Parties and observers on the issue. This could then be followed by a set of small group caucus meetings, if you or the participants so desire in order to allow them to coordinate positions and/or create alliances.

In order to keep discussions focused, it is recommended that you regularly summarize the key points made by Parties, as well as identify areas of convergence or divergence of views. As a Chair you are also tasked with the difficult work of guiding discussions by identifying concrete options and alternatives for each issue in order to try and reconcile views or identify areas for compromises. In any event, at the end of each session, you should outline a brief summary of the proceedings of the session, identifying these aspects, if it was not possible to do so during the discussions.

¹ This guidance is purely fictitious and does not reflect the official position of either the CBD Secretariat or any of its Parties and observers on the issue of an international regime on access and benefit sharing and related issues. This guidance was prepared by the Division of Environmental Conventions of UNEP, on the basis of a simulation exercise prepared and run by UNITAR, for the sole purpose of the simulation exercise of the South Asia Training Workshop for MEA Negotiators, held in Colombo, Sri Lanka, from 5-7 October 2005. Please do not cite, circulate or make reference to this document without the prior explicit approval of UNEP.

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For this purpose, you may find it useful to list of possible options for each area that can then be used to create an overall package. This may happen through building upon the proposals of various Parties, through a merger of several proposals, or through your own efforts at crafting a new package that would be acceptable to all parties. Since Parties are likely to value issues differently, there will be a rich scope for trading on issues and compromises.

All participants will come to the table with well-developed positions and explicit instructions from capital about what they can and cannot say. Many Parties might be very reluctant to compromise their formal positions and will attempt to wrest control of the meeting in order to avoid having to brainstorm or improvise in any way. Caucuses/regional meetings amongst Parties can be very helpful to generate consensus and avoid deadlocks and lengthy discussions during negotiations. In case deadlocks occur, it is recommended that you break down discussions in various working groups/contact groups/Friends of the Chair group to get small numbers of participants to discuss specific various thorny issues.

It would also be useful to meet the delegates before the negotiations begin to make them more aware of what your role as Chair will entail. While you should remain open to all proposals, I would strongly encourage you to assert your leadership as a Chair as early as possible during the negotiations, e.g. in your opening/welcoming speech.

I hope that the above suggestions are of use. I wish you the very best of luck in facilitating these discussions and reaching a strong compromised text.

ANNEX 4B

Simulation Exercise
Country Representations

	NAME	Country Represented
Afghanistan		
1	Ms. Leeda Oria	Switzerland
2	Mr. Samiullah Nuristani	FAO
3	Mr. Faquirulla	Australia
Bangladesh		
4	Mrs. Shahnaj Rab	Greenpeace
5	Mr. Solaman Haider	South Africa
6	Mr. Fayyaz Murshid Kazi	Brazil
Bhutan		
7	Mr. Ugen Tenzin	USA
8	Mr. Shera Lhendup	India
India		
	Mr. S.K. Srivastava	
	Mr. P.B. Rastogi	
9	Mr. Dammu Ravi	Germany
Iran		
10	Ms. Pegah AmirDivani	India
11	Ms. Narguess Saffar	Mexico
12	Mr. Mohammad Hashemi	Tanzania
Maldives		
13	Mr. Abdulla Shibau	Tanzania
14	Ms. Aishath Aileen Niyaz	Germany
15	Mr. Ahmed Hassan Zuhair	USA
Nepal		
16	Mr. Sitaram Timsina	Mexico
17	Mr. Durga Prasad Khatiwada	Brazil
Pakistan		
18	Mr. Fazal Hakeem	IOBI
19	Mr. Raja Muhammad Akhtar Iqbal	Australia
20	Mr. Jamil Ahmad	CHAIR
Sri Lanka		
21	Mr. Anura Jayatilake	Switzerland
22	Mr. Gamini Gamage	USA
23	Padmini Batuwitage	IIFB
24	R. Semasighe	Brazil
25	Mr. Sarath Fernando	Mexico
26	Mr. Dayananda Kaariyawasam	Green Peace
27	Ms. Anoja Herath	India
28	Samanta Jayasuriya	South Africa

ANNEX 5



SOUTH ASIA WORKSHOP FOR MEA NEGOTIATORS

COLOMBO, SRI LANKA

5-7 OCTOBER 2005

EVALUATION

Workshop Evaluation Questionnaire

This questionnaire contains items related to some aspects of this Workshop. We would like to solicit your input in order to organize a better Workshop in the future as well as to positively revise and refine the Draft Simple Guide for Negotiators of MEAs. Please share with us your comments on each aspect giving your honest evaluation and provide us additional comments, if any, not covered in the questionnaire.

SECTION A: General Evaluation of the Workshop

Please use the following scoring scale for this question as a way to comment on general logistics of this Course.

1 = Poor; 2 = Fair 3 = Good; 4 = Very Good; 5 = Excellent

Q1. Time provided for you to prepare for the Workshop

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

Q2. Overall benefits of the Workshop to your work

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

**Q3. Relevance of the Workshop
to your work**

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

**Q4. Quality of the discussions and
materials provided**

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

**Q5. Venue and organization
of the Workshop**

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

**Q6. Workshop facilities and
administration**

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

**Q7. Relevance of the Draft Guide
Simple for Negotiators of MEAs**

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

**Q8. How useful would it be to you
and your work?**

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

**Q9. Have the objectives of the
Workshop been achieved?**

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

**Q10. Have you achieved the
Expected output from the Workshop?**

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

SECTION B: Specific Aspects of the Workshop

Please give your brief comment/ opinions on each of the following

1. The value of the Workshop to you.

2. Was the duration of the Workshop adequate? If not, what would you propose as adequate period?

3. Was there a topic on negotiation really important to you but missed?

4. Did you think the scope of the Draft Simple Guide for Negotiators of MEAs was sufficient?

5. Are there additional issues you would like to be addressed in the Draft Simple Guide? What issues or topics?

6. Were there topics in the Draft Simple Guide that you did not find useful? Which ones?

7. Were there sections in the Draft Simple Guide you found confusing? Which ones?

8. Are there sections in the Draft Simple Guide you think could be deleted? Which ones?

9. Are topics you would like to see covered in additional Annexes? Which ones?

10. Do you think the Workshop will enhance your negotiation capacity and improve your participation as an individual or delegation to any future negotiation? If it did, how and if it did not, what should be considered in the future Workshops?

11. Were the topics selected for oral presentations useful to enhance your negotiation skills and capability?

12. Were the oral presentations made useful for the simulation exercise done during the Workshop?

13. What would be your comments on the simulation exercise done? Was it useful to expose you to negotiation skills? If so, how or if not, what would you have liked to see done?

14. Are there any other comments you wish to make or observations that you feel should be brought to our attention? If yes, please write these additional comments not covered in this questionnaire (you may continue on the back of this page).

ANNEX 6

ANALYSIS OF WORKSHOP EVALUATION

UNEP's representative circulated the evaluation form (Annex 5) to all the participants (Annex 2) at the workshop and requested their attention to the evaluation to consider the response for follow up to the workshop and regional capacity building activities.

There were 32 participants at the workshop and 19 participants responded to the request and returned the evaluation form to the secretariat. Responses received are tabulated below with response for each of the ten questions indicated as a separate row with record head indicating the Question number (Q1 to Q10), while each of the columns indicating the number of the respondent sequenced from 1 to 19.

SECTION A : GENERAL EVALUATION OF THE WORKSHOP

Individual Responses to the Evaluation Form (Annex 5):

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	◀◀◀	RESPONDENT #
Q1	5	2	3	3	3	4	3	1	1	4	3	2	2	2	2	1	2	5	5	Q1	workshop duration
Q2	5	5	5	4	5	4	4	3	5	4	5	4	4	5	4	4	5	5	5	Q2	overall benefit
Q3	3	5	5	4	5	4	4	3	5	3	5	4	4	5	5	3	5	5	5	Q3	relevance quality of discussions and material
Q4	5	5	5	5	5	5	4	3	5	4	4	5	4	4	4	3	5	3	5	Q4	venue and organization of the w/s
Q5	5	5	5	5	5	5	5	3	5	4	5	5	4	4	3	4	5	3	5	Q5	w/s facilities and administration
Q6	5	4	4	5	5	4	4	3	5	3	5	5	3	3	3	4	4	3	5	Q6	Relevance of the Draft Primer
Q7	5	4	5	5	3	4	3	3	5	5	5	5	4	4	3	4	5	4	5	Q7	Usefulness to the work?
Q8	5	5	4	5	5	4	4	3	5	4	5	4	4	5	5	3	5	4	5	Q8	Objectives have been met?
Q9	5	4	5	5	5	4	3	2	5	4	5	4	3	4	4	4	3	4	5	Q9	Expectations met?
Q10	4	4	5	5	5	4	3	3	5	4	4	4	3	4	4	3	4	4	5	Q10	

RATING CODE:

1 = Poor; 2 = Fair; 3 = Good; 4 = Very Good; 5 = Excellent

The responses are grouped to aid the analysis as indicated below:

		WORKSHOP EVALUATION ANALYSIS 32 PARTICIPANTS, 19 RESPONDENTS																			PARTICIPANTS RATING 1: POOR - 5: EXCELLENT					
		RESPONSES GROUPED ACCORDING TO RATING (1 TO 5)																			1	2	3	4	5	
Q1	1	1	1	2	2	2	2	2	2	2	3	3	3	3	3	4	4	5	5	Q1	16	32	26	11	16	Q1
Q2	3	4	4	4	4	4	4	4	4	4	5	5	5	5	5	5	5	5	5	Q2	0	0	5	42	53	Q2
Q3	3	3	3	3	4	4	4	4	4	4	5	5	5	5	5	5	5	5	5	Q3	0	0	21	26	53	Q3
Q4	3	3	3	4	4	4	4	4	4	5	5	5	5	5	5	5	5	5	5	Q4	0	0	16	32	53	Q4
Q5	3	3	3	4	4	4	4	5	5	5	5	5	5	5	5	5	5	5	5	Q5	0	0	16	21	63	Q5
Q6	3	3	3	3	3	3	4	4	4	4	4	4	4	4	4	4	4	4	4	Q6	0	0	32	32	37	Q6
Q7	3	3	3	3	4	4	4	4	4	4	5	5	5	5	5	5	5	5	5	Q7	0	0	21	32	47	Q7
Q8	3	3	4	4	4	4	4	4	4	5	5	5	5	5	5	5	5	5	5	Q8	0	0	11	37	53	Q8
Q9	2	3	3	3	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	Q9	0	5	16	42	37	Q9
Q10	3	3	3	3	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	Q10	0	0	21	53	26	Q10
																					PERCENTAGE RATING					

SECTION A : GENERAL EVALUATION OF THE WORKSHOP

Percentage Rankings / Responses:

1 = Poor 2 = Fair 3 = Good 4 = Very Good 5 = Excellent

	1	2	3	4	5
Q1. Time provided for you to prepare for the Workshop	16	32	26	11	16
Q2. Overall benefits of the Workshop to your work	0	0	5	42	53
Q3. Relevance of the Workshop to your work	0	0	21	26	53
Q4. Quality of the discussions and materials provided	0	0	16	32	53
Q5. Venue and organization of the Workshop	0	0	16	21	63
Q6. Workshop facilities and administration	0	0	32	32	37
Q7. Relevance of the Draft Guide Simple for Negotiators of MEAs	0	0	21	32	47
Q8. How useful would it be to you and your work?	0	0	11	37	53
Q9. Have the objectives of the Workshop been achieved?	0	5	16	42	37
Q10. Have you achieved the Expected output from the Workshop?	0	0	21	53	26

SECTION A – GENERAL EVALUATION OF THE WORKSHOP

1. Time provided for workshop preparation

The participants indicated that there should be much longer lead time for the preparation time. Some of the participants received their clearance or nomination confirmed only 3 or 4 days prior to the workshop.

2. Overall Benefits of the Workshop to your work

Major proportion (95%) of the responses indicated a valuable time spent at the workshop and the relevance to their future follow up and benefits to the work.

3. Relevance of the Workshop

Approximately 80% of the responses indicated that the workshop is quite relevant to the work.

4. Quality of the discussions and materials provided

While 85% of the responses indicate a high rating on the workshop documents and the background / reference materials provided, 15% of the responses rated the information material as “Good”.

5. Venue and organization of the Workshop

The venue and organization of the workshop received a good note from the responses with none of them indicating a negation and with 85% rating the organization very good to excellent.

6. Workshop facilities and administration

The facilities and administration received a positive note with the responses equally ranging from good to excellent

7. Relevance of the Draft Guide Simple for Negotiators of MEAs

About 80% of the responses indicated the Draft Guide as highly relevant and the remaining rating the draft guide as relevant (none indicated not relevant)

8. How useful would it be to you and your work

90% of the responses indicate very useful and beneficial to the work and the rest indicated “Good”. None indicated “not useful”

9. Have the objectives of the Workshop been achieved?

At least 5% of the participants felt that the workshop could be more focused to address the objectives. With 16% of the responses indicating a balanced opinion that the objectives were achieved, about 80% of the responses indicated a highly effective conduct of the workshop in addressing the objectives.

10. Have you achieved the Expected output from the Workshop?

About 80% indicate a highly rated response to the query and 20% indicated positively to the query.

SECTION B –SPECIFIC ASPECTS OF THE WORKSHOP

Specific comments / recommendations:

1. Selection of the participants should include individuals who will be directly involved in the negotiating process.
2. Continuity on the trainees should be observed.
3. Negotiation simulation exercise materials should be made available much in advance, prior to the actual training workshop.
4. The workshop should be considered for longer duration, for example five to seven days. The present schedule and time frame was short and the sessions through the day were rather long (0900hrs.-1800hrs.).
5. The workshop documents may include more information related to other MEAs additional case studies, and critical reviews for example, on success and failures of earlier CBD and UNFCCC negotiations that should be considered in-country preparatory meetings.
6. The technical sessions (simulation exercises) must ensure mandatory participation from all the participants and get everyone speaking during the sessions.
7. The simulation exercise should also ensure clearer mandate for NGOs, so that they have ideas on how to interject their ideas.
8. NGOs should be encouraged towards more involvement at the simulation exercises.
9. More frequent country workshops, and sub-regional meetings should be considered. Such consideration would also ensure continuity in skills.
10. The organisers should consider continuity in participants – to develop human resources.
11. Training workshops should be conducted prior to the COPs events and be targeted to focus on upcoming issues.
12. Regional training workshops organised prior to the COPs events will also help in regional consensus on the issues.
13. The training workshops may address Environment and Trade related issues and specific areas such as Sustainable Production and Consumption to maintain SD or UNFCCC/ Kyoto Protocol and further focus on inter-linkages.
14. Where possible the regional workshops may be conducted away from the main city to ensure participation full-time from the local participants.

A general and unanimous feeling from the group was observed to the high quality of the technical sessions. Feedback at the conclusion of this workshop was extremely positive with the respondents overall rating to the workshop as 44% excellent; 33% very good; 18% Average and 5% Below Average indicating necessary attention to the status. Regional participants found the workshop to have been very timely and requested further and more intense training workshops of this type.



