

PREPARATION FOR THE VILM WORKSHOP ON TRADITIONAL KNOWLEDGE: Submissions by Natural Justice (Lawyers for Communities and the Environment)

Note: We have attempted answers to all the questions posed except Q4 under Compliance. This question was unclear in its relevance. We have however provided text only for two bricks D/2/4, D/1/6 and D/1/4. We feel that the provisions under the current OT cover most of the other bricks with certain minor changes.

Fair and Equitable Benefit Sharing:

Annex on TK associated with GR:

- Measures to ensure the fair and equitable sharing with TK holders of benefits arising out of the utilization of TK in accordance with Art 8(j) of the CBD (brick D/1/1)
- Measures to address the use of TK in the context of benefit-sharing arrangement (brick D/1/3)
- Incorporation of TK in the development of model clauses for material transfer agreements (brick D/1/5)
- Community- level distribution of benefits arising out of TK (bullet D/2/4)

Questions:

- 1. Does the fair and equitable sharing of benefits component as developed at ABS 7, particularly in Sections 1 and 9 effectively address the measures envisaged in Brick D1/1, D1/3 and D2/4? If not, what further measures are required?**

While brick D1/1 addresses the issue of sharing benefits arising from the use of TK with ILCs providing such TK, brick D1/3 deals with incorporating in ABS agreements benefit sharing provisions for the use of TK when TK is used for commercial or research purposes. Section 1 (b) of the OT currently being negotiated under the 'Fair and Equitable Benefit Sharing Component' states that:

- b) Subject to the national legislation[, regulations and/or requirements] of the country where these [indigenous and local] communities are located, [international law, [indigenous and local] community protocols and relevant customary laws of indigenous peoples and local communities] where access is sought to traditional knowledge, innovations and practices associated to [genetic resources] [biological resources][, their derivatives][and products], users [shall][should] obtain the prior informed consent of [indigenous] and/or local communities holding such traditional knowledge, innovations and practices, in accordance with Article 8(j) of the Convention. [Such consent should also be obtained with regard to indigenous peoples and local communities rights to [genetic resources][biological resources][, their derivatives][and products].]

and Section 3 under the same component states that:

3. Each Contracting Party [shall][should] take [appropriate] 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][biological resources][, their derivatives][and products] with the [Contracting Party] [and/or indigenous peoples and local communities] [providing such resources][, their derivatives][and products] [country of origin or Party that has acquired the genetic resources in accordance with the Convention]. [Such sharing [shall][should] be subject to prior informed consent] of the [Contracting Party] [and/or indigenous peoples and local communities] [providing such resources][, their derivatives][and products]

[country of origin or Party that has acquired the genetic resources in accordance with the Convention], unless otherwise determined by that Party and on mutually agreed terms.

Again under section 9:

9) Measures to ensure participation and involvement of indigenous and local communities in mutually agreed terms and sharing of benefits with traditional knowledge holders

[1. The elements of the International Regime on Access and Benefit-sharing [shall][should] be developed and implemented in accordance with Article 8(j) of the Convention:

(a) [In consultation with the relevant indigenous and local communities,] Parties [may][shall][should] consider developing, adopting and/or recognizing, as appropriate, [community protocols and/or other] sui generis systems for the [protection][and/or promotion] of traditional knowledge, innovations and practices associated to [genetic resources][biological resources][, their derivatives][and products];

(b) Parties [shall][should] [respect,] recognize and protect the rights of indigenous and local communities to their knowledge, innovations and practices and ensure the equitable sharing of benefits arising from the utilization of the knowledge, innovations and practices associated with [genetic resources][biological resources][, their derivatives][and products], subject to the national legislation[, regulations and requirements] of the countries where these communities are located;

(c) [When access to traditional knowledge associated with [genetic resources][biological resources][, their derivatives][and products] is sought,] Users [shall][should] obtain the prior informed consent of indigenous and local communities holding [that] traditional knowledge associated with [genetic resources] in accordance with Article 8(j) of the Convention, [subject to][in accordance with] national legislation[, regulations and requirements] of the country where these communities are located[, community protocols and relevant international law].]

And finally under section 9 (3) (4) and (5)

[3. Indigenous peoples and local communities [shall][should] be consulted by the appropriate national authorities, and their views taken into consideration, when their rights are associated with the [genetic resources][biological resources][, their derivatives][and products] being accessed or where traditional knowledge associated with these [genetic resources][biological resources][, their derivatives] [and products] is being accessed, including:

(a) When determining access, prior informed consent, and when 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;

(c) Appropriate consultative arrangements, such as national consultative committees, comprising relevant stakeholder representatives, [shall][should] be established;

(d) Providing information in order for them to be able to participate effectively;

(e) Prior informed consent of indigenous peoples and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices, in accordance with their traditional practices, national access policies and subject to national legislation;

(f) Documentation of traditional knowledge, innovations and practices, [shall][should] be subject to the prior informed consent of indigenous peoples and local communities;

(g) 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.]

[4. Contracting Parties which are countries of origin of [genetic resources][biological resources][, their derivatives][and products] or other Parties which have acquired the [genetic resources]

[biological resources][, their derivatives][and products] in accordance with the Convention, [shall] [should]:

(a) Take measures to ensure appropriate participation by relevant indigenous peoples and local communities in access procedures where their rights are associated with the [genetic resources] [biological resources][, their derivatives][and products] being accessed or where traditional knowledge associated with these [genetic resources][biological resources][, their derivatives][and products] is being accessed;

(b) Establish mechanisms to ensure that decisions are made available to relevant indigenous peoples and local communities and relevant stakeholders.]

5. Parties shall provide timely guidance, legal representation, monitoring, information and assistance in prior informed consent and mutually agreed terms of traditional knowledge of indigenous and local communities at the request of indigenous and local communities seeking the recognition and/or enforcement of their rights.]

While the concerns under brick D/1/1 and D/1/3 seem to have been addressed to some extent, the concerns under brick D/2/4 have been inadequately addressed. Brick D/2/4 seeks to deal with community level distribution of benefits of use of TK. This issue was raised in the OT submitted to ABSWG 7 by the African Group under heading 'Definitions' where it attempted to define what would constitute 'Fair and Equitable Benefit Sharing'. The African Group relied on a September 1999 report by the Swedish Scientific Council on Biological Diversity produced by Marie Byström and others titled "Fair and Equitable- Sharing the Benefits from the use of GR and TK". This was later included in ABSWG7 negotiations under section 11 of Fair and Equitable Sharing of Benefits Section titled:

11) Development of international minimum conditions and standards

[1. Parties [shall][should] take measures and establish minimum conditions and standards for ensuring fair and equitable sharing of results of research, and of benefits arising from every commercial and other form of utilization of [genetic resources][biological resources][, their derivatives][and products] and/or associated traditional knowledge, upon mutually agreed terms.]

[2./ The definition of "fair and equitable benefit-sharing" is non-exhaustive and inclusive. It [shall][should] however encompass the following minimum conditions. Fair and equitable benefit-sharing [shall][should]:

(a) Contribute to strengthening the situation of the less powerful party/parties at all levels in the sharing relation, including by enabling:

Equal access to information;

Effective participation by all relevant stakeholders;

Capacity building;

Preferential access to markets, new technology and products;

(b) Contribute toward, or as a minimum not counteract, the two other objectives of the Convention: conservation of biological diversity and the sustainable use of its components;

(c) Not interfere with existing forms of fair and equitable benefit-sharing, including customary benefit-sharing mechanisms;

(d) Respect value and legal systems across cultural borders, including customary laws and practices and indigenous intellectual property systems;

- (e) Allow democratic and meaningful participation in policy decisions and contract negotiation by all stakeholders, including stakeholders at the local level;
- (f) Be transparent enough that all parties understand the process equally well, especially indigenous and local communities, and have time and opportunity to make informed decisions (effective prior informed consent);
- (g) Include provisions for independent third party review to ensure that all transactions are on mutually agreed terms and preceded by effective prior informed consent;
- (h) Provide for identification of the origin of [genetic resources][biological resources][, their derivatives][and products] and/or associated traditional knowledge;
- (i) Make information about agreed terms publicly available.]

The rationale behind the African Group's submission was that it was important to ensure that the community level distribution of TK contributes to fairness and equity within the ILC and not counteract it. The main concern was regarding community processes prior to and after an ABS agreement has been negotiated with the community. The African concerns were prompted by experiences of ABS agreements in Africa where inadequate discussions within communities in a manner that is inclusive and takes into consideration the interests of the different community stakeholders such as women, harvesters, elders, traditional healers etc. before negotiating an ABS agreement is likely to lead to results counter productive to fairness and equity within the community. In a few cases, the lack of genuine participation of community stakeholders in outlining their values, the kind of benefits they seek, their long term vision for conservation and sustainable use led to unrepresentative ABS agreements negotiated by community leaders that community members neither knew about nor supported. Some of these agreements caused strife between two different communities that shared TK with one community feeling that their interests were not considered in negotiating the ABS agreement, thereby affecting relations of sharing and exchange between communities that contributed to the development of the TK in the first place.

The African submission was also concerned with how benefits would be shared within the community after the ABS agreement was completed. Once again there are examples wherein the benefits generated by an ABS agreement tended to be monopolized by an elite within the community, causing rifts within the community. The challenge was to prevent the problem of 'resource curse' wherein newly generated benefits without adequate systems in place to ensure their fair and equitable distribution has negative consequences for the community. In some of the interviews done post ABS agreements with community members, many of them especially women felt that they would have preferred visible non-monetary benefits such as sustainable livelihoods, schools, clinics etc. rather than monetary benefits that could be abused by unaccountable community leaders.

It is crucial that the IR on ABS provides clear OT for what constitutes 'fair and equitable' in fair and equitable benefit sharing. While it is important to ensure that ILCs have the autonomy to negotiate their ABS agreements as per their customary laws, values without interference from the state, it is equally important to ensure that the benefit

sharing is fair and equitable not only between the user and the ILC but also within and between ILCs. In many ways the development of community protocols within and between communities can facilitate a participatory process where the different stakeholders within a community are able to meaningfully engage amongst themselves to develop a general value based framework for all future ABS agreements according to their customary laws and values. This will provide community leaders who will negotiate these agreements on behalf of their community with a clear mandate as to the kind of benefits the community seeks and how they will be shared within the community thereby ensuring fairness and equity in benefit sharing.

2. Section 15 of the fair and equitable sharing of benefits component sets out a procedure for developing model clauses for MTAs. Does this OT adequately address issues relating to TK and effectively involve ILCs in the development of model clauses? If not, which additional views should be taken into account?

Section 15 of the fair and equitable benefit sharing component states that:

15) Development of menus of model clauses for potential inclusion in material transfer agreements /

[Option 1

Parties [shall][should][may][, in addition to [promoting][ensuring binding] compliance measures]:

- a) In consultation with users and providers from key sectors, develop sectoral menus of [model] clauses for contracts;
- b) Encourage users and providers to use these sectoral menus of [model] clauses when negotiating mutually agreed terms.]

[Option 2

[Emphasizing that both providers and users of genetic resources benefit from the availability of model clauses for potential inclusion in material transfer agreements and inventories/catalogues of typical utilizations of genetic resources since the use of such clauses and inventories will raise legal certainty, may lower transaction costs and will contribute to creating a level playing field between provider and user when negotiating mutually agreed terms {preambular paragraph}]

1. Parties[, in addition to [promoting][ensuring binding] compliance measures,][shall] [should] [take measures to] encourage providers and users of [genetic resources][biological resources][, their derivatives][and products], when establishing mutually agreed terms, to consider:

- (a) Including in these terms [model] clauses developed in accordance with paragraphs 2 and 3 below[, as appropriate];
- (b) Relevant inventories/catalogues of typical utilizations of [genetic resources][biological resources][, their derivatives][and products] and related monetary and non-monetary benefits.

2. [In order to enhance legal certainty, lower transaction costs and promote equality in negotiations of mutually agreed terms, the] Parties [collectively][shall][should][consider to][may wish to] [establish[, as appropriate,] a procedure] [at the national level] [for the] develop[ment] [menus] of [sectoral] [model] clauses [and inventories/catalogues] of typical utilizations of [genetic resources] [biological resources][, their derivatives][and products] and related monetary or non-monetary benefits. [The procedure [shall][should][may]][In this context, they should]:

(a) Identify sectors[, *inter alia* those] for which [model] clauses and inventories/catalogues of typical utilizations of [genetic resources][biological resources][, their derivatives][and products] and related benefits should be developed [in cooperation with key international sectoral organizations and relevant users and providers] [and reflect best practices];

(b) Identify issues that [should][may] be addressed in [model] clauses [taking account of common elements of various sectors and the particularity of each sector];

(c) Include clear and transparent [rules][suggestions] to facilitate the involvement of stakeholders.

3. The Parties [shall][should][may] [collectively] consider and, where appropriate, [adopt [at the national level] recommendations for][submit a compilation to the clearing house mechanism of menus of] [model] clauses [and inventories/catalogues] of typical uses of [genetic resources][biological resources][, their derivatives][and products]. They [shall][should][may] regularly review and, where appropriate, update such [model] clauses [and inventories/catalogues] of typical uses of [genetic resources][biological resources] [, their derivatives][and products].]

4. Parties [shall][should] take measures to encourage the use of the [model] clauses of Annex {...} of the International Regime on Access and Benefit-sharing to be included into mutually agreed terms between providers and users of [genetic resources][biological resources][, their derivatives] [and products] and/or associated traditional knowledge for the following three categories of utilization of [genetic resources][biological resources][, their derivatives][and products]:

(a) Research not aiming at commercialization;

(b) Research and development aiming at commercialization; and

(c) Commercialization.]

5. Indicators for the identification of these three categories of utilization of [genetic resources][biological resources][, their derivatives][and products] are provided in Annex {...} of the International Regime on Access and Benefit-sharing.]

Section 15 refers to utilization of TK only in the subsection 4. The rest of section 15 restricts itself to the utilization of GR and makes no mention of involvement of ILCs in the development of these model clauses. While the development of model clauses can only complement binding enforcement measures and not substitute them, they are nevertheless useful for ILCs in negotiating ABS agreements with potential users from the different sectors. However these model clauses have to be developed with active participation of ILCs. On 12th and 13th of May 2009, representatives of the fragrance and cosmetic industry who are members of the Natural Resources Stewardship Circle and representatives of ILCs met in NY at the UN in a meeting organized by the Stewardship Circle, Tribal Links and the SCBD. The meeting sought to engage ILC representatives to provide their key concerns to representatives of the fragrance and cosmetic sector which would eventually lead to the development of best practice guidelines for this sector.

All the participants in the meeting were aware that this was a preliminary discussion, but it was nevertheless a useful one between users of community resources and TK and communities. The value of this meeting was a growing understanding of the priorities of the fragrance and cosmetic industry and ILCs. It is hoped that this meeting is the beginning of a series of further meetings that would culminate in a set of best practice guidelines for this sector. Any model clauses for biotrade or ABS agreements between the ILCs and the members of the Natural Resources Stewardship Circle would emerge

from these best practice guidelines. The value of this process is that it does not put the cart before the horse by developing model clauses before clarifying what constitutes best practice. The development of model clauses as suggested in Section 15 should be preceded by an understanding of what would constitute best practice in the different sectors bearing in mind the concerns of ILCs.

The aim of the process should be to develop within the framework of an IR on ABS, best practice standards for access and benefit sharing with ILCs in the different user and research sectors. These best practice standards should then be translated into model clauses that can be incorporated into ABS agreements. Without an understanding of what best practice standards would be in each sector resulting from genuine engagement with ILCs, there would be little value in developing model clauses. Just as policy should precede law, a clear understanding of the user challenges and ILC concerns and standard setting based on such an understanding should precede the development of model clauses.

3. What model clauses should be developed to address TK issues?

The development of model clauses so far has focussed on ensuring lowering transaction costs for users and providing legal certainty. While these are important objectives in themselves, they nevertheless do not adequately engage with ILC concerns. Community protocols on the other hand seek to provide a sui generis bottom up approach where communities take the initiative of deciding for themselves what constitutes best practice for them in accordance with their customary and ecological values, thereby providing a mandate for their leaders and legal certainty and lower transaction costs for potential users.

Potential users from any sector that seek to access community resources or TK would derive their legal certainty from community protocols that clarify how FPIC would need to be obtained and the customary laws that would need to be respected. This would also ensure the lowering of transaction costs by providing clear rules to potential users of community resources and TK. Sectoral model clauses to be included in ABS agreements can be developed from these community protocols with input from the different sectors. Such an approach would ensure a genuine parity in how model clauses relevant to ILCs are developed and also provide a value framework within which these model clauses can be located.

Text Options:

In order to make concrete progress at the workshop it would be useful if participants could suggest Text options for the 4 elements in the TK annex linked to fair and equitable sharing of benefits. In doing so it would be useful to take into account operational text developed at the 7th meeting of the ABSWG.

a) Text for bullet D/2/4 to be included in Section 4 under the head of 'Measures to ensure compliance with customary law and local systems of protection' as Section 4.1.i: Contracting Parties shall (chapeau)

“Encourage the inclusion in community protocols clear guidelines in accordance with customary laws and values for the fair and equitable sharing of benefits with and where relevant between communities arising out of the use of TK”

Access to GR:

Annex on TK associated with GR:

- Measures to ensure that access to TK takes place in accordance with community level procedures (brick D/1/2)
- Identification of individual or authority to grant access in accordance with community level procedures (brick D/1/6)
- Access with approval of TK holders (brick D/2/8)
- No engineered or coerced access to TK (brick D/2/8)
- PIC of, and MAT with holders of TK, including ILCs, when TK is accessed (bullet D/2/1)

Questions:

- 1. Many of these bullets concern the correct identification of TK holders to ensure that access is requested to, and considered by, the appropriate person and in accordance with any community procedures. The OT developed at ABS 7 addresses some of these issues (e.g. sections 5.1(a), 1(b), 2 under access; section 9 under fair and equitable sharing of benefits; 2(a) and 4 under compliance). Is this enough? What is missing and which additional views should be taken into account?**

While most of the concerns raised in the above mentioned bricks is dealt with in section 4 of the Compliance section through community protocols, section 5.1.b under Access and section 9 under Fair and Equitable Benefit Sharing provisions for ‘the identification of an individual or authority to grant access in accordance with community level procedures’ as per brick D/1/6 are missing. This brick seeks to provide certainty to users that the person or authority they are negotiating an ABS agreement with is a legitimate representative of the community.

The idea behind community protocols is that they are a participatory outcome of a community process that provides clear rules of access and the individual/authority that can give FPIC on behalf of the community. It would be useful to make an addition to Section 4.1.e under the Compliance section. As it currently stands Section 4.1.e reads:

Encourage and support the development of community protocols that [shall][should] provide potential users of traditional knowledge with clear and transparent rules for access to traditional knowledge where associated traditional knowledge is shared between: (i) indigenous and local communities spread across national boundaries; and (ii) between indigenous and local communities with different values, customary norms, laws and understandings;

The concern under brick D/1/6 can be met by adding to the above provision the words in italics:

Encourage and support the development of community protocols that [shall][should] provide potential users of traditional knowledge with clear and transparent rules for access to traditional knowledge **and the individual or authority designated by the community to provide FPIC on its behalf in accordance with such protocols including** where associated traditional knowledge is shared between: (i) indigenous and local communities spread across national boundaries; and (ii) between indigenous and local communities with different values, customary norms, laws and understandings;

2. What are the options to address the balance between domestic flexibility to ensure any ABS arrangements meet national and local needs and international rules on access? What is the role for ILC competent authorities and community protocols in this regard?

The provision for international rules of access is set out under the head Access to GR under Section 5. This section states that:

5) International access standards (that do not require harmonization of domestic access legislation) to support compliance across jurisdictions

[*Recalling* 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 {*preambular paragraph*}]

[*Further recalling* that each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not impose restrictions that run counter to the objectives of the Convention {*preambular paragraph*}]

[*Recognizing* that each Contracting Party may determine that access to its genetic resources will not be subject to prior informed consent in the context of Article 15 of the Convention on Biological Diversity {*preambular paragraph*}]

[*Further recognizing* that the fair and equitable sharing of benefits can only be realized after access to genetic resources has been granted {*preambular paragraph*}]

1. To create conditions to [facilitate][ensure the sovereign rights of States over their natural resources and their authority to determine] access to [genetic resources][biological resources][, their derivatives][and products] and to support compliance with access and benefit-sharing related obligations across jurisdictions, Parties requiring prior informed consent [shall][should] take [such][the] [necessary] legislative, policy or administrative measures[, as they may determine,] to provide for legal certainty, clarity and transparency of their domestic access and benefit-sharing frameworks. These [shall][should] [may] include[, where possible];]

(General issues)

[(a) [Clear] rules on accessing [genetic resources][biological resources][, their derivatives] [and products] existing in in situ and ex situ conditions [that do not [arbitrarily and unjustifiably] discriminate between users from other Contracting Parties] [and between national and foreign users][, save when it is in its national interest to do so in accordance with its sovereign right over its resources which gives it authority to determine access compatible with the recognition of this right in Article 15(1) of the Convention];]

[(b) A [clear] procedure for applying for prior informed consent [from a competent national authority and, where applicable, from indigenous and local communities];]

[(c) A simplified procedure for access to [genetic resources][biological resources][, their derivatives][and products] for non-commercial research in accordance with [{... }][national law];]

[(d) Making available and easily accessible information on their domestic access and benefit-sharing frameworks, in particular on how to apply for prior informed consent;]

[(e) Providing and regularly updating the information generated under subparagraph (d) to the clearing house mechanism of the Convention, including information on access and benefit-sharing focal points;]

[(f) Requiring the competent national authority to [provide periodically to][register its decision to grant prior informed consent in] the clearing house mechanism of the Convention [up to date information on the number of requests processed];]

[(g) [Appropriate] administrative or judicial appeals procedures in respect of prior informed consent[, including for failure to act and [arbitrary and unjustifiably] discriminatory access practices];]

(Specific aspects for obtaining decisions on prior informed consent from the competent [national] authority)

[(h) Requiring that decisions by competent national authorities granting or refusing prior informed consent are reasoned, set out in writing, and notified to the applicant;]

[(i) Identifying in the domestic access and benefit-sharing framework the grounds upon which prior informed consent may be denied;]

[(j) Requiring competent national authorities to take decisions on prior informed consent within a reasonable period of time as specified in the domestic access and benefit-sharing framework;]

[(k) Ensuring that the costs for obtaining decisions on prior informed consent do not exceed the actual costs of processing the application;]

[(l) Requiring the competent national authority to include in its decision to grant prior informed consent available passport data as well as a reference code of the [genetic resources][biological resources][, their derivatives][and products] covered by this decision;]

(Specific aspects related to mutually agreed terms (normally set out in contracts))

[(m) [Clear] rules, in domestic access and benefit-sharing frameworks, for establishing mutually agreed terms;]

[(n) Requiring the establishment of mutually agreed terms;]

[(o) Requiring that mutually agreed terms be set out in writing;]

[(p) Requiring that mutually agreed terms include a clause on the settlement of disputes;]

[(q) Requiring that mutually agreed terms reflect that consideration has been given to benefit-sharing;]

[(r) Reference to the [model] clauses and inventories/catalogues of utilizations of [genetic resources][biological resources][, their derivatives][and products] and related benefits developed in accordance with {...}.]

[2. The additional measures set out in {...} to support compliance in cases of misappropriation will [have no relationship whatsoever with][be applicable if] the domestic access and benefit-sharing framework of a Contracting Party providing a genetic resource [is in conformity with paragraph 1].]

While this section primarily focuses on access to GR at its core it requires clear rules of access that provide potential users with certainty and predictability. Leaving aside issues of non-discrimination between users for the time being, the idea of legal certainty and predictability for potential users does not conflict with the principle of domestic flexibility as long as users are made aware as to what the national requirements or laws for access are and how they can go about getting PIC. This is amply evidenced by Section 3 under Access to GR which states that:

3) Legal certainty, clarity and transparency of access rules

[1. To create conditions to [facilitate][ensure the sovereign rights of States of their natural resources and their authority to determine] access to [genetic resources][biological resources][, their derivatives][and products] and to support compliance with access and benefit-sharing related obligations across jurisdictions, Parties requiring prior informed consent [shall][should] take [the] necessary legislative, policy or administrative measures [referred to in {...}] to provide for legal certainty, clarity and transparency of their domestic access and benefit-sharing frameworks.]

[2. Contracting Parties [shall][should] create conditions of legal certainty, clarity and transparency to [facilitate][ensure the sovereign rights of States over their natural resources and their authority to determine] access to [genetic resources][biological resources][, their derivatives][and products] and not impose any restrictions that run counter to objectives of the Convention in accordance with Article 1 of the Convention. [Access [may][shall][should] however be denied if it is required for uses that are not environmentally sound. Countries of origin [shall][should] have the authority to determine the environmental soundness of a particular use. [The notion of 'use' [shall][should] be understood as including restrictions to use by third parties and countries of origin [shall][should] have the authority to determine whether the restriction of the use of [genetic resources][biological resources][, their derivatives][and products] through patents and other intellectual property rights are environmentally sound and whether such restrictions negatively impact the conservation and sustainable use of biological diversity.]]]

[3. Contracting Parties which are countries of origin of [genetic resources][biological resources][, their derivatives][and products], or other Parties which have acquired the [genetic resources][biological resources][, their derivatives][and products] in accordance with the Convention, [shall][should]:

[Review their policy, administrative and legislative measures to ensure they are fully complying with Article 15 of the Convention in order to ensure clarity, legal certainty and transparency;]

[Report on access applications through the clearing-house mechanism][Provide information on the process for obtaining access in accordance with national legislation and regulations];

[Require providers only to supply [genetic resources][biological resources][, their derivatives][and products] and/or associated traditional knowledge when they are entitled to do so;]

The Contracting Parties [shall][should][may] use elements of an access application referred to in paragraph 36 of the Bonn Guidelines, while bearing in mind that the list is indicative and may be adapted to national circumstances.]

Community protocols play a clear role in ensuring user certainty and predictability by providing clear rules of access in accordance with the customary laws and values of communities while also identifying community authorities that will provide FPIC.

Currently it is extremely difficult for potential users to identify communities procedures for access or legitimate authority who will give PIC. Many communities themselves haven't been through an internal discussion on commodifying aspects of their TK and providing a clear mandate to their leaders. The commodification of TK is a relatively new legal phenomena with no clear historical precedent. This makes it all the more important for communities to develop community protocols that ensure internal and external certainty in accordance with their laws and values. Community protocols allows communities the flexibility to develop sui generis systems for the protection of their TK while at the same time meeting international standards of legal certainty , clarity and transparency of access rules.

3. How should national PIC decisions and FPIC decisions, along with other aspects of the IR , respect transboundary indigenous communities? Does the OT in section 3 under fair and equitable benefit sharing assist?

The section in the OT that addresses the issue of FPIC in the context of transboundary indigenous communities is Section 4.1.e under Compliance. The section states that Parties shall:

Encourage and support the development of community protocols that [shall][should] provide potential users of traditional knowledge with clear and transparent rules for access to traditional knowledge where associated traditional knowledge is shared between: (i) indigenous and local communities spread across national boundaries; and (ii) between indigenous and local communities with different values, customary norms, laws and understandings;

This section deals not only with transboundary indigenous communities but also different communities within the same country that share TK. The real issue here is that communities that share TK should be supported to decide for themselves how they would want to give consent in such a case. Transboundary ILCs should be supported to develop protocols between themselves to prevent potential users from cherry picking those communities in states that may not recognize the customary laws of the community.

Text Options:

In order to make concrete progress at the workshop, it would be useful if participants could suggest Text Options for the 5 elements in the TK annex linked to access. In doing so, it would be useful to take into account the OT developed at the 7th meeting of the ABSWG.

See text under answer to Q1 for brick D/1/6

COMPLIANCE:

Annex on TK associated with GR

- Identification of best practices to ensure respect for TK in ABS related research (brick D/1/4)
- Declaration to be made on the internationally recognized certificate as to whether there is any associated TK and who owners of TK are (bullet D/2/3)

Questions:

- 1. What do you consider to be the best practices to ensure that ABS related research respects existing TK? Is D/1/4 limited to non commercial research and dealt with under section 5 under access or is it a broader issue. If the latter- how does this interact with the general rules on access?**

Section 8 of the OT under Access to GR provides for:

- 8) Simplified access rules for non-commercial research**

Option 1

[1. Parties requiring prior informed consent [shall][should] provide for a simplified administrative procedure for access to [genetic resources][biological resources][, their derivatives][and products] for non-commercial research.]

[2. The classification of research as “non-commercial” [may][shall][should] be determined based on its nature, form and objective, particularly on the non-commercial intent at the time of access.]

[3. To preserve the integrity of the simplified procedure, Contracting Parties [shall][should] take measures aimed at:

(a) Ensuring that obligations in relation to access and benefit-sharing are passed on to subsequent users;

(b) Addressing potential changes in intent by non-commercial users, including through identification of clear reference points for such changes;

(c) Ensuring the renegotiation of mutually agreed terms with the provider of the [genetic resources][biological resources][, their derivatives][and products] in cases of changes in intent by non-commercial users where appropriate;

(d) Avoiding that users of [genetic resources][biological resources][, their derivatives][and products] without obligations vis-à-vis the provider make use of generated information if such use is restricted, for example, through publication policies;

(e) Giving recognition to the commitment of users of [genetic resources][biological resources][, their derivatives][and products] to access and benefit-sharing best practice codes of conduct applicable to the research community.]

[4. Parties [shall][should] take measures to encourage providers and users of [genetic resources][biological resources][, their derivatives][and products], when establishing mutually agreed terms, to consider including in these terms [model] clauses [and relevant inventories/catalogues of typical utilizations of [genetic resources][biological resources][, their derivatives][and products] developed in accordance with {...}].]

5. Parties [shall][should] collaborate in the exchange of experience in the use of and the development of electronic tools for the tracking of [genetic resources][biological resources][, their derivatives][and products].

6. Parties [shall][should] exchange information on best practices[, as appropriate,] in the application of simplified administrative procedures for access [and benefit-sharing] to [genetic resources][biological resources][, their derivatives][and products] for non-commercial research.

Option 2

Contracting Parties which are countries of origin of [genetic resources][biological resources][, their derivatives][and products], or other Parties which have acquired the [genetic resources][biological resources][, their derivatives][and products] in accordance with the Convention, [shall][should]:

(a) Consider simplified access rules [to][for] [genetic resources][biological resources][, their derivatives][and products] to be used for taxonomy [and other non-commercial] purposes;

(b) [Require that [substantially] new or changed uses of a [genetic resource][biological resource] beyond [the scope of] what has been consented to under mutually agreed terms, [shall][should] be subject to new prior informed consent and mutually agreed terms from the providing country and/or the indigenous peoples and local communities concerned.][Parties shall encourage users and providers to consider, when establishing mutually agreed terms, including in these terms obligations to renegotiate mutually agreed terms should the use of the genetic resources change.]

While Section 8 is fairly comprehensive regarding access to GR for non-commercial research and was generally agreed to by Parties at ABSWG 7, it does not deal with

access to TK for non-commercial research. Section 8 while providing for simplified access rules also under Section 8.3 requires Parties to undertake certain steps that could form best practice standards when dealing with access for non-commercial research. Brick D/1/4 is wider to the extent that it does not require simplified access to non-commercial research but the outlining of best practice standards when non-commercial research users access TK.

Access to TK where possible should be based on community protocols developed by ILCs. Regarding access to TK for non commercial purposes community protocols where necessary could provide for clear guidelines. Efforts in this regard have already been undertaken in Australia through the Desert Knowledge CRC Indigenous Intellectual Property Protocol and the Aboriginal Rain Forest Council Cultural Knowledge Kit and the San Councils in Southern Africa where there is a standard agreement that all researchers sign. The challenge however lies in monitoring and compliance which ILCs would require Parties to the IRABS to ensure.

2. How could the scope of an internationally recognized certificate of compliance include TK associated with GR? Is a declaration, as indicated in the D2/3 be sufficient? If so, who would make the declaration and on what basis?

Section 2(b)4 Option 1 under the head of Compliance provides:

Option 1

[[The International Regime on Access and Benefit-sharing [shall][should] establish a system [of an internationally recognized certificate of [origin][source][legal provenance][compliance]][of certification][Each Party shall issue a certificate of compliance with international legal effectiveness and applicability] which [shall][should] [establish the origin of the [genetic resources][biological resources][, their derivatives][and products] and associated traditional knowledge and] [certify the compliance of a user] of [such] [genetic resources][biological resources][, their derivatives][and products] [and/or associated traditional knowledge] with the relevant [requirements and/or] laws [or regulations] of the [provider country][country of origin][countries of origin of such resources or of the Parties that have acquired the [genetic resources][biological resources][, their derivatives][and products] in accordance with the Convention][, community protocols and relevant customary laws of indigenous and local communities]]. [Genetic resources][Biological resources][, their derivatives][and products] being provided by a Contracting Party are only those that are provided by Contracting Parties that are countries of origin of such resources or of the Parties that have acquired the genetic resources in accordance with the Convention.] The certificate [shall][should] be a public document to be issued by a competent national authority appointed in accordance with national law and [shall][should] be required to be presented at specific checkpoints in user and provider countries established to monitor compliance in relation to a range of possible uses.]

[Parties may, on a voluntary basis, make available to users a certificate of compliance with domestic access and benefit-sharing legislation issued by a relevant national authority, allowing users to demonstrate compliance with national access and benefit-sharing legislation.]

The [voluntary] certificate [shall][should][may] include the following [minimum] information:

- (i) Issuing national authority;
- (ii) Details of the provider;
- (iii) A codified unique alpha numeric identifier;

- (iv) Details of the rights holders of [genetic resources][biological resources][, their derivatives][and products] and/or [associated traditional knowledge], as appropriate;
- (v) Details of the user;
- (vi) Subject matter ([genetic resources][biological resources][, their derivatives] [and products] [and/or associated traditional knowledge]) covered by the certificate[, subject to confidential information as identified in national requirements or by indigenous and local communities providing associated traditional knowledge];
- [(vii) Geographic location of the [access][collection] activity][Source of [genetic resources][biological resources][, their derivatives][and products]];
- [(viii) Prior informed consent granted by [countries of origin][provider countries][or the Parties which have acquired the [genetic resources][biological resources][, their derivatives][and products] in accordance with the Convention] or indigenous and local communities and mutually agreed terms;]
- [(ix) Uses permitted and restrictions of use;]
- [(x) Conditions of transfer to third parties;]
- (xi) Date of issuance;
- [(xii) Confirmation of compliance with domestic access requirements].

The OT identifies in the Certificate the providers of the TK and provides evidence of their FPIC. The declaration as to whether FPIC has been taken would be provided by the legitimate authority of the ILC from whom the TK has been accessed in accordance with the community protocol. In most cases this would provide the competent national authority in charge of monitoring and compliance proof that the PIC has been granted by the community from whom TK is accessed through a legitimate process outlined in the community protocol.

3. How could the concept of misappropriation include TK? How could this concept be operationalized in the text?

Section 4.1.c in the OT under the head of ‘Measures to Ensure Compliance with Customary Laws and Local Systems of Protection’ requires Contracting Parties to ‘Ensure that any acquisition, appropriation or utilization of TK in contravention of the relevant community protocols constitutes an act of misappropriation’. Therefore potential users would have to know that legitimate access to TK can only be done in compliance with community protocols. In situations where community protocols are absent, it is crucial that Contracting Parties support communities to develop such protocols prior to negotiating any ABS agreement. This would prevent the possible concerns by potential users that the ABS agreement they are negotiating with the representatives of a community may not have the support of the community. It would also allay user fears of subsequent accusations of misappropriation by members of the community who do not recognize the authority of individuals who negotiated the agreement on behalf of the community.

4. How could the draft ethical code of conduct contribute to the effective implementation of the CBDs ABS related obligations? How could this relationship/interaction be operationalized in the text?

Text Options:

In order to make concrete progress at the workshop, it would be useful if participants could suggest text options for the 2 elements in the TK annex linked to compliance. In doing so, it would be useful to take into account the operational text developed at the 7th meeting of the ABSWG.

Text for brick D/1/4 involves amending Section 4.1.e under Compliance:

Encourage and support the development of community protocols that [shall][should] provide potential users of traditional knowledge with clear and transparent rules for access to traditional knowledge ***and the individual or authority designated by the community to provide FPIC on its behalf in accordance with such protocols including*** where associated traditional knowledge is shared between: (i) indigenous and local communities spread across national boundaries; and (ii) between indigenous and local communities with different values, customary norms, laws and understandings; ***Where necessary a community protocol can provide special rules for access to traditional knowledge for non-commercial purposes.***