



Dr. Ahmed Djoghlaif
Executive Secretary
Convention on Biological Diversity
413, Saint Jacques Street, Suite 800
Montreal, Quebec, Canada
H2Y 1N9

Bonn / Brussels, XX June 2007

Subject: EU submission on standardising choices in Material Transfer Agreements

Dear Dr. Djoghlaif,

Enhancing the prospects for the fair and equitable sharing of benefits arising from the utilisation of genetic resources is a key objective of the future international ABS regime.

According to Article 15.7 CBD, benefit-sharing shall be on "mutually agreed terms" that are established between the provider and user of a specific genetic resource. The terms of reference of the ABS Working Group mention model contractual arrangements among the elements that shall be considered by the ABS Working Group.

In preparing for ABS WG5 and WG6, the EU has identified sectoral work on standardising choices in Material Transfer Agreements as a way to enhance legal certainty and compliance with ABS requirements and thus add to a conducive environment for the fair and equitable sharing of benefits arising from utilisation of genetic resources. Therefore, sectoral work on standardising choices in Material Transfer Agreements should in the EU's view be considered in the negotiations on an international ABS regime.

Recalling paragraph A.2 lit (c) of COP Decision VIII/4 which calls upon Parties to submit additional inputs relating to access and benefit sharing, the EU herewith submits the attached summary of an expert meeting on standardising Material Transfer Agreements as an input for the further elaboration and negotiation of an international ABS regime during the Fifth and Sixth Meetings of Ad Hoc Open-ended Working Group on Access and Benefit-sharing.

We hope this document can still be considered in the preparation of the background material for these meetings and would also suggest it to be included among the INF documents for ABS WG5.

The EU intends to raise the issue of standardising choices in Material Transfer Agreements in discussions on the fair and equitable sharing of benefits at either ABS WG5 and/or WG6.

We copy this letter and the submission to the co-chairs of the ABS Working Group as well as to the members of the CBD Bureau.

Sincerely yours,

[SIGNED]

Nicola Breier

Head of Division– CBD Focal Point
Ministry of the Environment,
Nature Conservation and Nuclear Safety
GERMANY

[SIGNED]

Hugo-Maria Schally

Head of Unit – CBD Focal Point
Environment Directorate-General
European Commission

Enclosed: Summary of Results from the Commission Expert Meeting on "Standardising" Material Transfer Agreements, Brussels, 12 February 2007

**Commission Expert Meeting on "Standardising" Material Transfer Agreements
Brussels, 12 February 2007
Summary of Results**

I. Introduction

It is likely that work on standardising Material Transfer Agreements (MTAs) will play a role in the ongoing negotiations of an international regime on access and benefit-sharing (ABS). So far, however, there has been little systematic discussion on this issue and how it could fit into the emerging framework of international ABS governance.

An expert meeting organised by the European Commission on 12 February 2007 in Brussels aimed to facilitate such discussion. The meeting focussed on three aspects:

- lessons that can be learned from the negotiations of a standard MTA under the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (IT-PGRFA);
- implications for standardisation of MTAs if best use is made of latest IT-based technologies that allow for the low-cost tracking of genetic resources, associated user conditions and traditional knowledge;
- the potential role of private international law for the enforcement of rights and obligations set out in MTAs.

This document summarises the main results from this meeting.

II. Legal and Political Context

According to *Article 15.7* of the Convention on Biological Diversity (CBD), 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."

The *Bonn Guidelines* explicitly mention the development of standardised Material Transfer Agreements (MTAs) and benefit-sharing arrangements for similar resources and similar uses as a means to provide legal certainty and clarity and to minimise transaction costs. Appendix I of the Bonn Guidelines suggests some elements for inclusion in MTAs.

The *terms of reference for the ABS negotiations* in the Annex to Section D of Decision COP VII/19 mention the Bonn Guidelines, the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (IT-PGRFA) as well as codes of conduct, and other approaches developed by specific user groups or for specific genetic resources, including model contractual arrangements among the elements that shall be considered by the ABS Working Group.

Prior to ABS WG4, some *parties suggested* considering the standardisation of MTAs, resp. the development of model or standard provisions for MTAs as a means to address gaps in international ABS governance.¹

CBD COP8 confirmed the *COP7* mandate of the ABS negotiations but did not undertake substantive considerations on the issue of standardisation of MTAs.

III. Aspects of relevance to discussions on "standardising" MTAs

1. Usage of terms

In the context of the CBD ABS negotiations, it might be misleading to use the term "standardisation" of MTAs. Different than in the case of the IT-PGRFA, where one compulsory standardised MTA was adopted in June 2006, it does not seem feasible to replicate this approach within the CBD framework. The standard MTA adopted under the IT-PGRFA will be used for transactions of specific genetic resources that are generally known

¹ See eg. Doc. UNEP/CBD/WG-ABS/4/3 "Matrix on the Analysis of Gaps".

and maintained under ex-situ or in-situ conditions and only when these genetic resources are accessed for research, breeding or training for the purpose for food and agriculture. MTAs in the CBD ABS context, in contrast, apply to transactions of all types of genetic resources within the scope of the CBD, whether these are already known or are yet to be discovered and identified through bioprospecting, and for all possible uses of genetic resources. Speaking of "standardisation" of MTAs in the CBD context should therefore be understood to refer to the development of a menu of standardised choices of MTA-text for issues of a more general nature and for specific uses/ user chains of genetic resources.

2. Rationale for the standardisation/ limitation of choices

- Limiting choices of participants in MTA negotiations sets boundaries to the available negotiation space and thus lowers transaction costs for the negotiation and conclusion of MTAs;
- Limiting choices to a set of tested/ workable options, raises legal certainty for providers and users of genetic resources that a contract is valid and can be executed;
- Limiting choices constrains the use of power in MTA negotiations and thus protects the weaker party;
- Offering a menu of standardised choices facilitates the establishment of direct links to electronic networks to exchange information on genetic resources and associated user conditions.

3. Contextual preconditions for successful standardisation of MTAs

- Efforts to standardise MTAs are much more likely to succeed if stakeholders in a specific user chain have practical experience with transactions of specified materials and related negotiations of MTAs. Such experience creates a common background and understanding amongst stakeholders that should make use of standardised choices of MTA text.
- Further discussions and reflections on practical cases are needed to determine whether it is feasible and useful to standardise choices for the conclusion of MTAs when genetic resources to be accessed are not yet known or whether such efforts are only useful when accessing clearly identified genetic resources.
- Another issue for further reflection is whether there is potential value in distinguishing between MTAs that apply to non-commercial, basic research activities on the one hand side and MTAs applying to commercial uses of genetic resources further downstream in the value chain on the other hand side.

4. Elements to consider for inclusion in a menu of standardised choices for MTAs

As a starting point, it seems useful to distinguish between elements of general importance/ relevance and elements of contextual/ sectoral relevance.

a) General elements to consider for inclusion

- Model clauses may stipulate that access for non-commercial or basic research purposes could be linked to an obligation to make the resulting knowledge publicly available²;
- Model clauses on the settlement of disputes arising between parties of a MTA;

Example

"Parties to this contract agree that (only) the court X/ the courts of country Y shall have jurisdiction to settle any disputes arising from this contract."

(If the 2005 Convention on Choice of Court Agreements is not applicable and/ or there is not other legal guarantee that the choice of court clause will be honoured and the resulting judgment will be

² This leaves room for properly negotiated agreements with a different content. An MTA could, for instance, grant exclusive access to research material for a limited time-span.

capable of recognition and enforcement in the State of the other party to a contract, an arbitration clause may be opted for instead):

"Disputes arising from this contract shall be settled by arbitration under the arbitration rules of an international body as agreed by the parties to this contract in a separate provision of this contract."

b) elements of contextual/ sectoral importance

- Specifying notions of what constitutes an "utilisation" of genetic resources in the sense of Article 15.7 CBD in specific user chains.
- Identification of sectoral trigger points that are characteristic for research and product development based on genetic resources in specific user chains. E.g., identifying the typical boundary between non-commercial and commercial research.
- Specifying sectoral notions of non-monetary and monetary benefit-sharing for specific user chains.

5. Complementary aspects to consider

- Efforts to modularise and limit choices in MTAs for specific sectoral uses of genetic resources should consider the low-cost, advanced communication opportunities of modern electronic networks as part and parcel of the standardisation process.
- Key considerations during the process of standardisation on chosen and excluded options should be documented in a clearly understandable manual to support potential users. This should also include identification of cases in which use of the standard MTA is advisable and cases in which it should not be used.
- Confidential elements will generally be negotiated for individual contracts and do not seem to lend themselves to standardisation. Modern communication networks, including the internet, do, however, allow for adequate protection of confidential information through graduated access to information on genetic resources and associated user conditions.
- In the case of the IT-PGRFA governments have eventually opted for a compulsory standard MTA. In the context of the CBD ABS negotiations, standardised choices for MTAs for specific user sectors should remain optional. If proposed choices are regarded as useful by both providers and users of genetic resources they will be used even if their use is not compulsory, simply because it makes practical sense to do so. Mandatory choices for MTAs would lack the necessary flexibility to negotiate individual conditions for special cases and also to adapt MTAs to the widely differing uses of genetic resources in specific user chains. Parties to the CBD could, however, consider establishing a mechanism/ procedure to formally identify those sectoral standard MTAs that are regarded as fully in line with the CBD, the Bonn Guidelines and the requirements of the international ABS regime.

6. Consideration on the process of standardisation

- It does not seem useful in the CBD ABS context that governments themselves negotiate menus of standardised choices of MTA-text for specific user chains. Nevertheless, governments have important contributions to make to processes of standardisation. This might include identifying some sectors that seem ripe for standardisation, spelling out minimum process requirements (openness, transparency etc), providing financial support to sectoral processes developing standard MTAs/ modularised choices for MTAs, suggesting general elements that should be taken into account (see above) and formally identifying those standardised MTAs that are regarded as fully in line with the CBD, the Bonn Guidelines and the requirements of the international ABS regime.